Public Hearing

March 31, 2000
State Capitol, Room 4203
Sacramento, California

PARTICIPANTS

GOLDEN STATE REPORTING
P.O. BOX 5848
Monterey, CA 93944-0848
(831) 663-8851
Industrial Welfare Commission

DOUG BOSCO
BARRY BROAD
LESLEE COLEMAN
BILL DOMBROWSKI

Staff

ANDREW R. BARON, Executive Officer
MARGUERITE C. STRICKLIN, Legal Counsel
MICHAEL MORENO, Principal Analyst
CHRISTINE MORSE, Analyst
DONNA SCOTTI, Administrative Analyst
Proceedings 6
Approval of Minutes 7
Amendment - Stable Employees 8
Outside Salespersons - Public Testimony 9
JULIANNE BROYLES, California Chamber of Commerce 10
BOB ACHERMAN, California and Nevada Soft Drink Association 10
SCOTT WETCH, State Building and Construction Trades Council 10
PATRICIA GATES, Van Bourg, Weinfeld, Roger & Rosenfeld 12
TOM RANKIN, California Labor Federation 13
ROBERT TOLLEN, Seyfarth, Shaw, Fairweather & Geraldson 13
TOM RANKIN, California Labor Federation 15
PATRICIA GATES, Van Bourg, Weinfeld, Roger & Rosenfeld 15
RON McKUNE, The Employers Group 16
Executive, Administrative, Professional Exemption - Public Testimony 18
BILL REICH, Staff Counsel, Division of Labor Standards Enforcement 19
BRUCE YOUNG, California Retailers Association 30
BRUCE LAIDLAW, Landels, Ripley & Diamond 34
NED FINE, management attorney 47
JULIANNE BROYLES, California Chamber of Commerce 58
INDEX (Continued) 59
JON ROSS, California Restaurant Association 59
JAMES ABRAMS, California Hotel and Motel Association 60

ART PULASKI, California Labor Federation 61

SCOTT WETCH, State Building and Construction Trades Council 69

BRUCE HARTFORD, National Writers Union (UAW) 71

MICHAEL ZAKOS, nurse 75

SONIA MOSELEY, California Labor Federation, United Nurses Associations of California/AFSCME 76

ROSALINA GARCIA, building maintenance worker 78

MATT McKINNON, California Conference of Machinists 79

KEITH LAGDEN, former manager, Taco Bell and Wendy’s 83

JOHN GETZ, grocery clerk 88

DAN KITTREDGE, grocery clerk 90

EDWARD POWELL, California Labor Federation, California State Theatrical Federation, International Association of Theatrical Stage Employees (IATSE) 91

UWE GUNNERSON, Operating Engineers Local 3 94

JUDY PEREZ, Communication Workers of America, Local 9400 95

KEITH HUNTER, District Council of Ironworkers 96

BILL KOSNIK, restaurant manager 97

KEN LINDEMAN, former employee, Taco Bell and Wendy’s 100

INDEX (Continued) 101

TOM RANKIN, California Labor Federation 101

JOHN BENNETT, former IWC member and chair 101
Appointment of Wage Board Members - Computer Professionals

TOM RANKIN, California Labor Federation

Wage Board - Minimum Wage

TOM RANKIN, California Labor Federation

TRACEY BRIDGES, Association for Community Reform Now (ACORN)

ESPERANZA BER, garment workers union

Appointment of Wage Board Members - Construction, Mining, Drilling, and Logging

Further Business

EMIL AYAD, Guard Vision Private Security, Inc.

BOB ULREICH, International Union of Security Officers

NICK DELTE, Californians for Justice

DEE CUNEY, childcare worker

Adjournment

Certification of Reporter/Transcriber
COMMISSIONER DOMBROWSKI: Given the overflow of the crowd, you should be aware that there are some closed circuit television opportunities, if you don’t wish to stand in the aisles. There’s the sixth floor cafeteria that will have the telecast on up there, on their TVs. And there’s also, on the third floor, outside of Room -- I believe it’s 3030 -- there’s the television in the corridor, for some of you. It’s not a very big area there. But if you wish to take advantage of those opportunities, you can.

I’d like to call the meeting to order, and I’d like to have a call of the roll.

MR. BARON: Bosco.

COMMISSIONER BOSCO: Here.

MR. BARON: Broad.

COMMISSIONER BROAD: Here.

MR. BARON: Coleman.

COMMISSIONER COLEMAN: Here.

MR. BARON: Dombrowski.

COMMISSIONER DOMBROWSKI: Here.

MR. BARON: And I guess it should be noted for the record that we at present have a vacancy on the Commission due to the, I guess, resignation of Chuck Center, the present -- who had been the chair, I guess, for -- let’s say
for health reasons.

COMMISSIONER DOMBROWSKI: I’d like to make a motion for the commissioners to recognize Chuck for his service and wish him well.

COMMISSIONER COLEMAN: So moved.

COMMISSIONER DOMBROWSKI: All in favor?

(Chorus of “ayes”)

COMMISSIONER DOMBROWSKI: Okay. The first item of the agenda is the approval of the minutes. Can I have a motion?

COMMISSIONER BOSCO: I move the minutes be approved.

COMMISSIONER DOMBROWSKI: Second?

COMMISSIONER COLEMAN: Second.

COMMISSIONER DOMBROWSKI: All in favor?

(Chorus of “ayes”)

COMMISSIONER DOMBROWSKI: A housekeeping item, for the audience: Agenda Item Number 5, “Consideration and public comment on the issue of whether employees who receive a certain base wage that is higher than the current minimum wage, as well as additional compensation, should be exempt from overtime pay requirements,” is being removed from the agenda.

(Applause and cheering)

COMMISSIONER DOMBROWSKI: Do I hear a motion to adjourn?
COMMISSIONER DOMBROWSKI: Okay. The second item on the agenda is consideration of and public comment on the amendment to replace language in Section 5(M) of the Interim Wage Order, regarding stable employees.

COMMISSIONER BROAD: Mr. Chairman, we have received communication from the Department of Labor regarding coverage of the Fair Labor Standards Act for these employees, that they may be covered for overtime after 40 hours in a week. The proposal before us today would continue a provision of state law that requires overtime to be paid after 56 hours in a week. And as a result of that conflict, I think it would be prudent at this point to remove this matter from the agenda and to consider it perhaps, if necessary, at a later date.

AUDIENCE MEMBER: We’ll be back!

(Laughter)

COMMISSIONER DOMBROWSKI: Does he represent the stable employees?

COMMISSIONER BROAD: No. He’s just having a good time.

AUDIENCE MEMBER: (Not using microphone) No, I represent working people. We’ll be back.

COMMISSIONER DOMBROWSKI: I would ask that we do not have comments shouted from the audience, that we would take testimony appropriate.
Is that a motion, Barry?

COMMISSIONER BROAD: Yes.

COMMISSIONER DOMBROWSKI: Do I have a second?

COMMISSIONER COLEMAN: Second.

COMMISSIONER DOMBROWSKI: All in favor?

(Chorus of "ayes")

(Applause)

COMMISSIONER DOMBROWSKI: All right. Item Number 3, consideration of and public comment on the amendment to Section 1 of Interim Wage Order 2000 to include a revised definition of an "outside salesperson."

COMMISSIONER BROAD: Mr. Chairman?

COMMISSIONER DOMBROWSKI: Commissioner Broad.

COMMISSIONER BROAD: Perhaps to shorten this matter, I'm inclined to make a motion that this investigation be closed on this matter, which would, of course, result in the existing IWC provision regarding outside salespersons to remain as it is. And perhaps you could inquire, in the audience, that in light of that, if there's anyone who would still wish to testify on this matter.

COMMISSIONER DOMBROWSKI: Yeah. I would like to at least have those people interested in this issue come forward and give us their opinion on that.

MS. BROYLES: Good morning, commissioners.

Julianne Broyles, from the California Chamber of Commerce.
In a rare moment of accord, Barry -- Commissioner Broad and I find ourselves in agreement. The California Chamber does believe that the outside salesperson exemption, as it currently exists in IWC and in different case law, is the appropriate way to leave it at the moment, particularly in light of the recent decision, U.S. -- or, pardon me -- California Supreme Court decision in Ramirez v. Yosemite Water. We think adding any additional definitional changes at this time would just muddy the water, so to speak, and make it more difficult for employers to legally comply.

So, for those reasons, we certainly would approve of removing this from the agenda today.

MR. ACHERMAN: Mr. Chairman, members. Bob Acherman, representing the California and Nevada Soft Drink Association. At the risk of breaking a string of standing ovations, we are willing to acquiesce in the continuation of the current exemption. There were issues with the proposed amendments, and I think we’re willing to stick with existing law.

MR. WETCH: Scott Wetch, with the State Building and Construction Trades Council. And for the first time in my memory, I’d like to concur with the Chamber of Commerce on their motion to remove that.

(Laughter and applause)

COMMISSIONER DOMBROWSKI: We’re on a roll today!

MR. WETCH: Our concern with the proposed
language, the redefinition of outside salesperson, is that it could easily be construed to be applied to workers in the construction service and repair industry, such as the plumbing, refrigeration, and electrical repair industries. In the construction service and repair industry, one function of a service repair person is to go on calls and provide estimates before obtaining an order or a contract for work to be performed. In most instances, the repair work is then performed at the time the estimate is provided. Despite the fact that the primary function of the repair person is to provide the plumbing, electrical, or refrigeration repair work, under the proposed definition, they could easily be declared by their employer as an outside salesperson, merely by paying them on a commission basis.

We believe that this would not only deprive these tradespeople of their legitimate right to overtime pay, but it would have the unintended and the unfortunate consequence of making every service repair person a commissioned employee, which would only serve to hurt consumers. And for those reasons, we would urge you to reject the proposed amendment.

MS. GATES: My name is Patricia Gates, and I’m an attorney with the Van Bourg Law Office. And I originally proposed the definition to be expanded to include a definition of delivery. The response
from the industry has been to offer language which would muddy the waters. And for that reason, I am willing to accept the current definition because we have a favorable interpretation from the California Supreme Court.

I would urge the Commission, when final orders are published, however, to make reference to appropriate law, because I think, for all of the people trying to follow the law, when there is a landmark case that has been decided that interprets a definition of the Industrial Welfare Commission, I think it assists people in complying with the law.

And my interest in being here is that our office, right now, currently represents 1,000 workers in an unfair competition action against their employers because the employers are giving them lofty titles but no overtime. And this is against the law. These employers are violating the law. And I think anything that this Commission can do to clarify the law and make the law enforced is a positive thing.

I would support leaving the definition as is now. I would ask you to consider a reference to the Ramirez decision in final orders that are issued later in 2000 or 2001.

MR. RANKIN: Tom Rankin, California Labor Federation.

As one of the interested parties in this issue, we
concur with Commissioner Broad’s suggestion that things be left as they are, given the Supreme Court decision.

COMMISSIONER DOMBROWSKI: Thank you.

Do we need a motion?

COMMISSIONER BROAD: Yeah. I’d like to move that we close the investigation on the matter of outside salespersons.

Oh, I’m sorry.

COMMISSIONER DOMBROWSKI: I’m sorry.

MR. TOLLEN: Yeah. I’m sorry. I’d like to be heard too.

I’m Bob Tollen, with Seyfarth, Shaw, Fairweather & Geraldson.

Obviously, this issue has -- this question of the outside sales exemption has become embroiled in all kinds of tinkering with the language that effects the Ramirez decision. And it sounds like the commissioners would like to get it off the table and be done with it.

But we proposed a change to the language that has nothing to do with any of the -- of that kind of tinkering. It has nothing to do with trying to expand or contract the kinds of activities that delivery men and shelf-stockers and what-have-you engage in. We have proposed language that is related solely to the activities of a legitimate outside salesperson.

Our concern is that, given the Supreme Court’s
conclusion that we have a strictly quantitative approach under the law, and that’s the law, it does not make sense to say that when a legitimate outside salesperson goes back to his office to write up his orders, or to make a telephone call to an outside sales prospect to say, “I want to come and sell to you,” it does not make sense that that time back in the office cannot count as part of the outside sales activities and be included within the 50 percent. If that salesperson were to go home and do the same thing, it would count. If he were to sit in his car and do the same thing, it would count. And all we’ve asked is to say that if he merely goes back to his office and does the same thing, it would count within the 50 percent.

It is the language which we’ve submitted to you that says that, regardless of location, if he “engages in activities closely related,” but even more strongly, “and supporting his or her outside selling activities,” such as writing up orders, writing sales reports, revising the salesperson’s catalog, contacting prospective customers to arrange meetings away from the employer’s place of business, planning itineraries, attending sales meetings, and so forth, this is all legitimate activity of a legitimate outside salesperson and ought to be included within that activity.

COMMISSIONER DOMBROWSKI: Mr. Rankin?

MR. RANKIN: Yeah. I’m sorry that the proponents
of that position aren’t interested in the status quo compromise.

But what that position does, basically, is it expands the ability of management to misclassify more people as outside salespersons and thereby deprive them of overtime. And as you heard before, we’re strongly opposed to that proposal.

COMMISSIONER DOMBROWSKI: Any other comments?

MS. GATES: Just in rebuttal, I would say that location is a critical part of this definition. And if work that is done inside is to be considered exempt under outside, it would change the standard critically. And my written testimony addresses that, and I would refer the commissioners to that.

But I would urge, again, that the status quo remain and that no amendments be accepted at this time.

COMMISSIONER DOMBROWSKI: Any other comments from the audience?

MR. McKUNE: Yes, please.

Good morning. Ron McKune.

COMMISSIONER DOMBROWSKI: Is your microphone on there?

MR. McKUNE: Thanks.

Good morning. Ron McKune, from The Employers Group.

We feel that compromise is possible and we accept
the Ramirez v. Yosemite Water decision. We feel that inclusion of that language would be appropriate. We also feel that the language which Mr. Tollen has introduced would be of value and that all -- and that both language which talks about what is not sales activity, as well as language which talks about what is outside sales activity, would help give complete guidance to the public.

Thank you very much.

COMMISSIONER DOMBROWSKI: Thank you.

Any other comments?

(No response)

COMMISSIONER DOMBROWSKI: Okay. Do I hear a motion?

COMMISSIONER BROAD: Well, there’s a motion. I made a motion, so --

COMMISSIONER DOMBROWSKI: Oh, I’m sorry. Do I have a second?

COMMISSIONER COLEMAN: Second.

COMMISSIONER DOMBROWSKI: All in favor of closing out the investigation, say “aye.”

(Chorus of “ayes”)

COMMISSIONER BOSCO: Mr. Chairman, I have a motion. And obviously, from the way we began this meeting, it’s kind of a sad motion to have to make, since all of us have the greatest respect and admiration for Chuck Center. I personally have known him for many, many years. And we
all wish him well and are sorry that he isn’t here as chairman of our commission.

But having said that, since you have managed to dispose of several controversial items without the slightest bit of problem this morning, I’m going to move that you be—you, Bill Dombrowski, be made permanent chairman of the Commission.

COMMISSIONER BROAD: And I’d like to second that motion.

COMMISSIONER DOMBROWSKI: I think I want to call a roll call vote.

(Laughter)

COMMISSIONER BOSCO: You did draw the short straw, didn’t you?

COMMISSIONER DOMBROWSKI: I must have left the room.

All in favor, say “aye.”

(Chorus of “ayes”)

COMMISSIONER DOMBROWSKI: All opposed?

(No response)

COMMISSIONER DOMBROWSKI: Okay. Thanks.

Item Number 4, pursuant to Labor Code Section 515(a), consideration of and public comment on amendment to Section 3 of the Interim Wage Order regarding the duties that meet the test of the exemption for executive, administrative, and professional employees. Language has
been distributed.

We have agendaed this item to have one hour of comment. We are going to start it off with comments from Mr. Bill Reich, who’s the staff counsel for the Division of Labor Standards Enforcement, Ventura Office, to give us an overview of how the Department enforces this policy. We are then going to have the proponents come up and discuss what they are trying to do and what the problem is from their viewpoint. We will then have the opponents come up and talk for approximately thirty minutes or whatever time is needed to discuss theirs. And then we will have a kind of general discussion at the end where we can discuss some of the issues that have been thrown on the table.

I would say that there is not going to be a vote on this item today. We are simply taking information.

So, with that, Mr. Reich, would you proceed?

MR. REICH: Yes. Good morning, commissioners.

I’m here to basically discuss the practice that has been followed by the Division of Labor Standards Enforcement in enforcing this particular exemption, the executive exemption.

We’ve had an extensive development of the law in this area, and it’s -- the focus of our protection has been based on an acceptance over the years of the federal standard, of defining the various duties that qualify --
you move the mike closer?

MR. REICH: Is this better?

AUDIENCE MEMBER: Yeah.

MR. REICH: Okay. Sorry.

Our focus has been to adopt the federal standard
that defines the components of what constitutes executive as
the floor upon which the greater protections of California
law have been based. And historically, the Commission has
indicated its preference for -- or, actually, its acceptance
of our focus on “primarily engaged” as the definitive
standard providing greater protection to California workers
than the “primary duties” standard which has become the core
protection under federal law. And in the “Statement of
Basis,” the prior Commission has emphasized the recognition
that the emphasis on “primarily engaged” is the standard
which provides the greatest protection to California
workers, and that the “primary duties” standard provides
less protection and also presents problems of enforcement.

Now, of course, the AB 60 provisions have codified
“primarily engaged.” So, I guess, to spell out what the
Division has done over the years has been focusing on
ensuring that the protections, the greater protections
provided workers, do not furnish employers with an
opportunity to classify or misclassify workers in a way
which diminishes the protections which the IWC historically
intended to apply in this area.
So, with this in mind, the criteria that has been followed is to, in particular, emphasize that “primarily engaged” is the standard that defines what the executive must do in order to be exempt. And that means to be primarily engaged in -- from our point of view, historically, it’s been to be primarily engaged in the management of the enterprise. And to the extent that that means spending more than 50 percent of their time performing the managerial duties, that has been a way of acting as a buffer against attempts of employers to attempt to treat employees who actually have a primary duty of management as exempt when, in fact, they’re primarily engaged in work that’s non-exempt.

And this is a constant tension here in the enforcement area, and many of the cases that we end up litigating involve attempts to say that the duties are, in fact, what these individuals are doing, and when, in fact, that it’s really their duty that is maybe primarily -- they may have a primary duty of management, but their actual time is primarily spent in non-exempt work. And to the extent that that’s an issue that is being -- going to be focused on that the commissioners need to deal with in terms of this new language, this is the background problem of enforcement that the Commission may want to take into account, realizing that the choice of what -- of, obviously, the choice of the proper way to implement these protections is for the
Commission to make, but simply understanding that if we --
to the extent that the issue is blurred or clouded, we will be confronting additional enforcement problems where
employers may again view particular provisions of language as an opportunity to misclassify or improperly classify workers who the Commission does not intend to be exempt as exempt, and forcing additional litigation, additional disputes, and possibly lawsuits filed to clarify the scope of the protections.

So, these are matters that, obviously, the Commission wants to be aware of.

Basically, there are a couple of elements that -- the commissioners are aware, I’m sure, that there are a couple of elements in the executive exemption which are prerequisites under federal law and under -- we always follow this under state law -- one is the element of supervising at least two employees, and the other one being the exercise or current exercise of discretionary powers.

With regard to the specific itemized duties that are part of what constitutes an exempt employee, many of those listed in the proposed language coincide with the standards that we’ve followed in the past. What we -- what we’ve also included in our manual have been provisions identifying the types of activities that constitute non-exempt work. And again, those are -- provide an opportunity for those who are reading the exemption to understand the
two different types of duties. And so, that’s something the
commissioners may want to be aware of, that we -- that
that’s in front of the workers. And to the extent that we
are -- and the employers as well. And to the extent that
the language classifies duties as managerial, it may want to
specify some of the duties that are non-managerial as well.
From the standpoint of enforcement, that would assist us, if
that -- if that comes up.

In addition, again, the critical and difficult
area is -- there are two different types of situations that
I think also may need to be some clarification. In some
situations, the executive versus non-executive situation is
a manager who has two distinct functions that are -- excuse
me -- an employee who has two distinct functions. At times,
he’s specifically performing management functions; at other
times, specifically performing non-management functions.
Those are the simple cases of counting the ledger on one
side and counting the ledger on the other side. And we just
look at the hours, and if you spend more than 50 percent of
the time doing the non-exempt work, you’re out, you’re not
exempt. If you spend more than 50 -- if you spend less than
50 percent and you spend more than 50 percent performing the
management duties, you’re exempt.

The tough area, the difficult area, the
enforcement problem area, the tension area, is where you’ve
got individuals who perform both types of functions and
those types of functions overlap. They’re not fragmentized, they’re not bifurcated. And that’s the tension area, and that’s the area that one might want to be concerned about, from our point of view, the enforcement, when we have to draw those lines between “primary duty” and “primarily engaged."

Experientially, under our policies as set forth in our manual, we have succeeded to date in drawing a fairly clear line as to what is exempt and what’s not exempt. And that’s set forth in our manual. And we have excluded -- under our practice, working managers have not been considered exempt employees, working foremen have not been considered exempt employees, because they spend their primary -- primarily spend their time performing the same functions as those who are their subordinates.

Equally, we have not adopted the sole exempt -- the sole establishment exemption in the past because we have -- that has not been part of California’s exceptions, because, under “primarily engaged,” a person could be in sole charge and still be spending the bulk of their time performing non-exempt duties.

So, again, those are things to consider in terms of as the Commission evaluates a change or clarification here, that we’re going to be facing possible challenges to the scope of who is to be exempt or is not exempt. And I’d like to just have the Commission be aware that this is what
we’ve found in the past, and these are potential issues that
the Commission might want to address in the future.

If there are no other questions from the
commissioners, I think that sort of covers the background
that we’ve followed in the past.

COMMISSIONER DOMBROWSKI: Questions?

COMMISSIONER BROAD: I have some questions.

Do you run across cases where you have a defense
on the part of the employer that -- and let me give you an
example. Let’s say you have someone who is designated a
manager at a fast-food restaurant, and the employer says,
“Well, you know, while the person was flipping hamburgers,
they were thinking about managerial things,” like, let’s
say, a real bona fide managerial thing, like hiring and
firing someone. Does that sort of issue come up?

MR. REICH: Yes. This sort of issue comes up
frequently. And under our current enforcement policy, under
the Commission’s existing language, that has been -- that
has been an area where we have taken the position
consistently that if the person is actually performing non-
managerial work, the fact that they may have occasional
responsibilities as a manager of the particular
establishment, that that goes to their “primary duty,” but
not to what they’re “primarily engaged” in doing. They’re
primarily engaged in doing the same work as their
subordinates, so therefore they are exempt (sic). So, that
goes to the working manager or working foreman.

But there is that constant attempt to focus on mental process, and that mental process has been consistently viewed as not taking away from the fact that the individual is actually engaged in non-exempt work. And that’s where that person’s energy is being put.

And we have -- that goes to the distinction, again, between “primary duty” and “primarily engaged.” The person might have the duty to manage, and maybe monitoring in the context of managing, under the “primary duties” standard, but, in fact, in terms of the activity that they’re engaged in, they’re “primarily engaged” in non-exempt work, from our -- that’s under the current approach that we follow.

COMMISSIONER BROAD: So, I take it there’s difficulty measuring or gauging what is a mental function while you’re doing something else. I mean, how -- I guess that’s my question. If someone is sitting there thinking, I mean, we all think all day long, and someone is thinking a managerial thought, I take it they don’t think that managerial thought for, say, four hours straight, right?

They --

MR. REICH: Right.

COMMISSIONER BROAD: They think other thoughts, like, “I’m hungry,” “My feet hurt,” “I want to go home,” whatever they’re thinking. So, how is it that those -- how
would you, from an enforcement point of view, were we to adopt a rule that allowed us to say that if you’re flipping burgers and thinking about management, how would we measure what people’s thoughts were, how much time they took?

Mr. Reich: Well, you’ve identified, certainly, what would be a tremendously onerous enforcement problem, trying to -- trying to -- trying to actually pin down what portions of mental process should be treated as time spent performing an executive function and what portions of that time should be treated as physical or routine functioning, or mental functioning related to routine functioning, or mental time having absolutely nothing to do with either one, would be a very esoteric challenge for us in an enforcement context.

Commissioner Broad: Thank you.

Commissioner Bosco: In your enforcement work, do you find that in these kind of close call areas that the wage differential between a manager, whether that’s just a so-called manager, a burger-flipper manager or whatever, is in general significant?

Mr. Reich: In general, I would say that the individuals who are involved in this sort of misclassification, under our prior -- under the current enforcement situation, are generally paid a higher wage than the persons over whom they are supervising, or their subordinates.
When you say “significant,” it varies. In some cases, there could be a significant difference. In others, there’s not much of a significant difference. It varies.

COMMISSIONER BOSCO: Do you ever try to quantify, if that person were paid overtime such as everyone else would have to be, if their differential in wage would be greater or lesser than what their overtime would be?

MR. REICH: Well, we don’t do that because it’s not our -- it’s not an issue for us, it’s not a criteria of making the differentiation. But we do find employers doing that and pointing that out. And occasionally we do look at that, in terms of our preparation of a case. And I would say that -- I would say it’s probably about 50 percent of the time that they would make considerably more than -- they make considerably more in their salary -- or, not necessarily considerably, but make more -- sometimes considerably more -- in their salary than they would even if they were paid overtime at a lower rate. And then, about 50 percent of the time, if they were paid at an overtime, they would be making more than their salary. So, it varies. It depends also on how much they work, how many hours they’re being worked, and so forth.

COMMISSIONER BOSCO: So, in this gray area, there really are no -- there is no language or any experiential criteria that could definitively guide us in writing all this out into a regulation.
MR. REICH: But focusing on the issue that you raise, one point to be made on that is that the -- while it is -- it would be very difficult to write anything that would address that point, it is also important to note that the -- once you accept the flat salary, one of the problems with a flat salary when you accept the exemption, is that it places no limit on the number of hours that can be worked. And in contrast, where you apply the non-exempt status, it implies the policy that there has to be some sort of incremental payment when you work the person overtime.

So that -- so that, when you allow the -- expand the salary -- the persons who can come under a flat salary exemption, you expand the possibilities for persons not to be paid, regardless of how many hours they’re required to work. And that’s -- that’s what the heart of the exemption is, from our enforcement perspective.

COMMISSIONER BOSCO: Thank you.

COMMISSIONER DOMBROWSKI: Any other questions?

(No response)

COMMISSIONER DOMBROWSKI: I’d like to call up -- MR. REICH: Thank you very much, commissioners.

COMMISSIONER DOMBROWSKI: Thank you.

I’d like to call up Mr. Bruce Young and Mr. Bruce Laidlaw.

Before you begin -- Juli Broyles, why don’t you come up and take a seat? I think there are some other
parties who wanted to testify in support. If they could
come up to the table, we’ll fill the seats. At least it
will save a little time that way.

MR. YOUNG: Mr. Chairman and members -- is your
name pronounced “Dombrowski” or “Dumbrowski”?

(Laughter)

MR. YOUNG: All right. I just -- I’ll work on
that. Sorry. I was thinking “Bosco” or “Broad,” I can
pronounce those -- oh, well, I’ll try anyway.

Bruce Young, on behalf of the California Retailers
Association.

And I’d like to begin to speak -- a little
background about how we got to where we are today. I mean,
it really started with shortly after Governor Davis took
office and AB 60 was introduced, along with several other
pieces of legislation by organized labor, which
traditionally, frankly, for the last sixteen years, we’ve
all been in our trenches. I mean, the employer community
has been on one side, labor has been on the other, and
there’s been no harmony or dialogue. This governor asked
the employers in the state, and certainly the retailers who
were supportive of this governor and administration took it
to heart, about that we needed to, I mean, get out of the
trenches and try to work cooperatively. So, we worked
cooperatively on several bills with organized labor,
including one, SB 651, where we are one of the few states
that now requires overtime be paid for retail pharmacists, that one that’s, again, for our -- for retail employers, a significant economic impact to it. But we felt it was the right approach to doing -- to working with -- in a cooperative fashion, to try to strike some accord.

We did the same thing with AB 60 and literally broke ranks with the employers because we felt that what the governor was trying to achieve was worthwhile and worthy to put into statute. At the same time, the language that’s before you now is not -- I think, for anyone to argue that it was not the intent of AB 60, that it was not the direction, or it was put in there by anything other than a cooperative dialogue between -- that was ultimately -- ultimately concluded with the representative of organized labor and the employer community in one of -- a legislative office, I think, begs the truth and the background about what we tried to do.

One of the things that we’ve struggled with as employers in California is the definition of managerial duties, not in any way arguing with the federal standards, because we believe that should be the threshold. We’ve long argued that. Our difficulty is, in the retail setting especially, is that the manager in a retail setting has to respond to the public. And when he or she grabs a register in a frantic pace because there are seven people lined up at a checkstand and all of a sudden starts checking people, I
think it’s too -- that person does not become any less the
manager of that store because he or she is, again, trying to
respond to the public and trying to provide a service so
those people come back.

And I think, for -- I frankly think it dismisses
what their duties and responsibilities -- to simply say that
we are arguing that people are thinking about being a
manager, that’s not the case. The literal point is, when
that’s person’s running the register, people are coming up
to them and saying, “I’ve got a problem on Aisle 3,” “You’ve
got to open the safe.” They’ve got many duties they’re
doing. They’re not simply idly thinking about who they
should hire and fire. They’re actively managing that store,
dealing with a crisis with the public.

Now, with that said, I think that we’re -- and I
should -- let me just finish that thought, which would be
novel to begin with. But -- and that’s what we’re trying to
deal with, is the concurrent -- that head and hands, that
concurrent activity that -- and I think the Legislature, the
state senator gave the best example when he -- he said when
he worked at the United Parcel Service, that when -- during
the holiday season, the chairman of the board of UPS came
down and worked the assembly line or the sorting line with
the employees. And as the senator said, that person wasn’t
any less the chairman of UPS than when he was on the line or
when he was up in his corporate office. The bottom line is
we agreed. And for the first time codified the 50 percent. We codified the duties, and we codified the two and a half times -- which was a substantial increase -- the two and a half times minimum wage.

But at the same time, we asked, and it was inserted in there, an obligation or a request of this Commission that there be some recognition of the concurrent activities -- not thinking, but the concurrent activities that a person, when they -- does not surrender their role, responsibility, or duties of a manager when they have to perform some of these tasks. And we felt that that language needed to be defined by this Commission.

Now, that said, the language before you -- and we would urge the Commission, again, not to take action today -- is not -- is probably not as artfully drawn as it should be. We would ask that we could work with representatives of organized labor and other opponents of it to try to come up with some narrow language to accomplish our goals and, we think, the goals of AB 60, to allow, again, for the recognition of that concurrent activities, and the person isn’t -- does not become any less of a manager.

I know one of the things that my good friend, Tim Crimmons, said, that this would in some way jeopardize the relationship in the construction industry of the journeymen and their relationship, all of a sudden they could be recategorized as managers, that’s not our intent. And if it
needs to have specific language to do that, we’ll be glad to
work with Tim and other representatives of the building
trades to clarify that.

But at the same time, we think there’s a special
recognition, especially for the service industry, to be able
to have that ability to recognize the responsibilities and
duties continue when that person does what it takes to keep
a service -- a business going.

With that said, I will yield to Mr. Bruce Laidlaw
who can perhaps talk more specifically about our proposal.

MR. LAIDLAW: My name is Bruce Laidlaw. I’m here
-- I’m with the law firm of Landels, Ripley, and Diamond, in
San Francisco, here on behalf of the retailers in support of
the IWC proposal.

I think I’m going to focus mainly on certain
objections that I have heard and provide a little commentary
on them.

One of the primary arguments seems to be that the
floodgates are going to be opened because the language is
ambiguous, and that people, wide ranges of people, who never
before would have been viewed as managers and not entitled
to overtime will suddenly be put into the managerial
category. And I think that it’s -- the problem is, by
focusing just on the duty element and forgetting that there
are several other aspects of the test for an executive
employee, perhaps the one that’ll keep the floodgates closed
the most is simply the fact that these employees have to be
paid twice the state minimum wage. So, right there, I think
there’s a lot of people who aren’t going to pass that test.

And working your way down, the exercise of
discretion and independent judgment is still in the wage
orders. That’s not being tossed out. It’s my understanding
that there’s no effort to eliminate the requirement that
someone who’s categorized as exempt has to be supervising
two people, or the equivalent of two people, and that that
individual has to have hiring and firing authority. And
then, you also have the quantitative test of taking out your
ledger and finding out whether they’re devoting 50 percent
of their time to managerial duties, as defined in the
proposed regulations.

So, I think that anybody who proposes some sort of
hypothetical employee who’s suddenly going to find
themselves a manager should be asked to run through all of
these elements of the test and not focus on the duties,
because, otherwise, you get sort of a misleading impression
of what’s trying to be accomplished here.

Opponents also argue that this is an attempt to
sort of junk the quantitative test of California law in
favor of the more lenient, if you will, “primary duty” test
of federal law. And I think that’s clearly not the intent.
You still have to get out the ledger. You still have to
look and see what these employees are doing. You decide
whether that is an exempt duty or a non-exempt duty. You total up the time, and you see where you come out. There is nothing in the language that suggests that that counting up is disappearing. It appears to me that all that has been done is -- and this is exactly what the Legislature asked be done -- is to define what duties go on the exempt side of the ledger. That’s what the IWC was asked to do, and I think that’s what the current language does. It defines the duties that go on the exempt side of the ledger. But it doesn’t eliminate the counting.

There is obviously considerable attention being focused on the heads and hands aspect of this, that is, to the time where somebody who is in a managerial position is both doing some sort of managerial work, be it directing an employee to clean up something that’s fallen on the floor or whatever, and doing some sort of work that is -- would be deemed non-exempt, some sort of production work. And I think that this is reality. As Mr. Young says, this happens all the time. The case law in this area recognizes that this is reality, that this happens all the time. And really, the question is simply which -- when that is happening, how is that going to be characterized for purposes of applying the exemption? Is it going to be characterized as exempt time or non-exempt time in this simultaneous situation?

It appears to me that the IWC has simply made the
judgment that when you’re talking about the kind of employee who has a wide range of managerial duties, is supervising employees and the other things I mentioned as part of the test, and who has this higher level of compensation, because they’re supposed to be thinking, because this is their job, is to use their head, that in the event that one of those employees is both using their head and their hands, that it’s consistent -- I think it’s fair and reasonable, and it’s consistent with the legitimate expectations of employers, that that time be put on the managerial side of the ledger. That is what -- as I understand it, what the IWC proposal does.

Now, I think it’s important to recognize that there’s going to be times when some -- the manager is not using his head, if you will, where the work is going to be strictly non-exempt. This is not an effort to create some sort of situation or belief that because somebody’s a manager, they’ll automatically be spending all their time thinking about management and so there will never be any inquiry into -- any need for an inquiry.

And I think that gets to the point of how do you enforce this. Well, this is -- this is not going to make the enforcement any more difficult. I do -- I’ve been involved in these kinds of cases, I do this kind of stuff, and I can tell you that current California law is very complicated. It’s a big pain. What you need to do is to
sit down, if it’s a litigated context, you take the
deposition of the person who’s saying they’re misclassified,
and you run them through their entire day and you find out
what they were doing during their entire day, for an entire
week. You know, you’ve got your ledger, you’ve got your
minutes devoted to this kind of work, and you come up with
an answer. That is exactly the same process that’s going to
be gone through under the current proposal.

In fact, it may be that the process will be made
somewhat easier, at least, by the fact that there are
guidelines, that you now know that when somebody is devoting
time both to managerial work and to non-managerial work, you
know, based on the regulation, which side of the ledger it
goes on. It’s -- that’s the answer. And I think it’s a
perfectly legitimate answer to come down with.

The final point I wanted to mention just briefly
is that the language with respect to the presumption for
people who are in charge is not a categorical exemption. I
just -- I don’t read it that way. I don’t understand that
to be the intent. It’s just a presumption. Like many other
presumptions, it’s covered by the Evidence Code. But it
does not, as I understand it, change any burden of proof and
it will not create a categorical group of people with
respect to whom there would be no further inquiry. So, I
think any indication that that is what this language would
do is just wrong.
And with that, I’d be happy to answer any
questions or turn over the microphone.

COMMISSIONER DOMBROWSKI: Sure.

COMMISSIONER BOSCO: Mr. Laidlaw, I have one
question. I’ve received a variety of letters from what you
might call class action plaintiff lawyers. And of course,
all of them are against any sort of language such as we’re
considering today. In your looking at the language and also
having had a lot of experience in litigating these matters,
would you say that this language or any part of it is
tailored to end some of those lawsuits or undermine them, or
would this language, if we enacted it, change the decisions
in existing suits?

MR. LAIDLAW: Well, as I say, I mean, you still
will have the lawsuits. You will still have the same
inquiry in the lawsuit, that is, you know, totaling up the
ledger and seeing where it comes down.

As I understand this, all it does is provide some
clarification and some guidance with respect to the kinds of
duties that are to be managerial by recognizing that mental
work is a legitimate component of managerial work. I would
hope there’s no dispute about that concept. But this makes
that absolutely clear. And it also provides clear guidance
as to what to do when somebody is legitimately doing
managerial work and doing non-exempt type work at the same
time.
COMMISSIONER BOSCO: But my question’s a little more -- I understand what the intent of it -- I’m talking about cases in existence now, major class action cases. Would this language, if we enact it, change the outcome of those cases, in your opinion?

MR. LAIDLAW: Well, the truth is that the law on the heads and hands is unsettled in California. There are policies that the Division of Labor Standards Enforcement follows, but that is not the law. So, there’s no statutes and there’s no regulations that address that directly.

COMMISSIONER BOSCO: Well, then, I guess my question is, would -- if we enacted this legislation, would they become more settled?

MR. LAIDLAW: Yes.

COMMISSIONER BOSCO: Thank you.

COMMISSIONER DOMBROWSKI: Commissioner Broad?

MR. YOUNG: But -- excuse me. Commissioner Bosco, it would be my contention it would be prospective, I mean, in the sense that we’re acting today. I mean, those cases were -- again, whenever the action or if this Commission decided to act, at that point, prospectively, certainly it would put clarification. But what’s occurred prior to that is -- would be under what is, again, I mean, a somewhat ambiguous set of circumstances that would be left to the court to decide. And this action would define future -- would deal with future action and give clarity. Hopefully,
there wouldn’t be cases because both sides would then have a
definite -- a clearer definition of what is a manager and
what isn’t.

COMMISSIONER BOSCO: Well, Mr. Young, as much as I
have admired your advice for over thirty years --

MR. YOUNG: I thought I’d try.

COMMISSIONER BOSCO: -- are you trying to say that
a court today wouldn’t -- that has a case before it wouldn’t
take into account a decision that this Commission made, and
even with a case before it?

MR. YOUNG: Again, I guess that’s ultimately left
to the trier of fact. But I would think that -- but I do --
I do believe -- and certainly, that’s not our intention with
proposing this. It is to do prospective and make a
definition to go forward and not, certainly, try to deal
with ongoing lawsuits. And that’s the -- if that’s the --
if a court decides to take that into consideration, I think
it also speaks for the fact that this Commission really
hasn’t acted prior to that and would -- and in the absence
of that, the courts have had to make what -- either case --
by case law, their own decisions.

COMMISSIONER BOSCO: Well, I wasn’t trying to
imply that you had even an eye toward the existing lawsuits,
but I just wanted to make that point.

MR. YOUNG: Right. And I -- I mean, I --

COMMISSIONER BOSCO: Thanks.
COMMISSIONER DOMBROWSKI: Commissioner Broad.

COMMISSIONER BROAD: Yes, sir. I have several questions.

You’re familiar with the enforcement manual of the Division of Labor Standards Enforcement?

MR. LAIDLAW: Yes, I am.

COMMISSIONER BROAD: Okay. What’s wrong with this list that, on Page 106 and 107, describes exempt duties? “Interviewing, selecting, training employees, setting and adjusting pay rates and work hours, directing the work of subordinates, keeping production records,” et cetera, et cetera. Then it lists a set of things that aren’t exempt duties: “performing the same kind of work that a subordinate is performing; any production service work, even though not like that performed by subordinates, which is not part of a supervisory function; making sales; replenishing stock; returning stock to shelves; except for supervisory training or demonstration purposes, performing routine clerical duties,” et cetera, et cetera, et cetera. It’s all very well defined. What’s wrong with what we have there?

MR. LAIDLAW: Well, I think it doesn’t address the question of whether somebody who is doing those things is also doing managerial work. This -- I don’t believe that that --

(Laughter)

MR. LAIDLAW: -- and that -- and there may be
times, as I said, where they’re -- may be lots of times when
somebody who is engaged in those activities does not have
any, you know, head component to what’s going on. And that
time will remain non-exempt time, as I understand it.
There’s no effort to say that when somebody’s doing those
things and there is no exempt or managerial component to
their work, that that time would be treated as exempt. It’s
going to be non-exempt time.

So, there’s nothing wrong with the list.

COMMISSIONER BROAD: Okay. Well, I’ll tell you,
I’m confused, but not that confused, by what you’re saying.
What do you mean by doing work with your head and
your hands at the same time? Are we talking about the same
moment, the same moment in time, like I’m reaching for this
mike and I’m talking? That’s what you’re talking about?

MR. LAIDLAW: Let’s say that I’m wiping a counter
and I’m telling an employee that there is -- a Coke got
spilled on the floor and can they please get a mop and wipe
it up.

COMMISSIONER BROAD: Okay. And that takes --

MR. LAIDLAW: And I am simultaneously doing -- you
know, I guess someone would say I’m doing non-exempt work by
wiping the counter, but I’m simultaneously attending to the
management of the business by asking an employee to do
something.

COMMISSIONER BROAD: Now, how long did it take you
to say that?

MR. LAIDLAW: How long did it take to wipe the counter? I mean --

COMMISSIONER BROAD: Five seconds, right? Now, what if you’re -- now, we’re talking about someone who’s flipping burgers now for 60 percent of the day, not -- we’re not talking about someone who’s flipping burgers for 15 minutes of an eight-hour day, we’re talking -- and firing people the rest of the time.

(Laughter)

COMMISSIONER BROAD: We’re talking about somebody who’s flipping burgers for 60 percent of the day, right?

(Applause)

COMMISSIONER BROAD: Are we not? I mean, that’s who we’re talking about. You’re saying during that portion of time, they’re doing something simultaneously that’s managerial, correct?

MR. LAIDLAW: They may be or they may not be.

COMMISSIONER BROAD: Okay. How do you demonstrate that they are?

MR. LAIDLAW: The same way you do it in any one of these kinds of situations. You have to take their deposition and ask them.

COMMISSIONER BROAD: Okay. So, you determine the length of their thoughts.

MR. LAIDLAW: Well, you --
COMMISSIONER BROAD: No, I’m deadly serious about this. You determine the length of their thoughts and you add them up over the course of a day, while they’re flipping a burger. In other words, you said -- you said, “Clean up -- clean up the shelves,” and then had a series of other thoughts, like, “I have to go to the bathroom,” “I need to go home soon,” “I miss my wife,” whatever. Those are not managerial thoughts, correct?

MR. LAIDLAW: What you’re -- if that person, for example, is watching -- now, there will be hamburger cooks who are back, you know, in some obscure place where they can’t see anything, they are completely, you know, isolated, they are in no position to be watching what’s going on in the store, they can’t see the register, they can’t see the customers. And under those circumstances, there may not be any opportunity to be engaging in anything that qualifies as managerial work. But other managers who are in that position, at the stove or the grill or whatever, will be keeping an eye on what’s going on, will be watching and monitoring the operations of the store. That’s what they’re being compensated to do. And if they’re managers, exempt managers, they’re being compensated at twice the minimum wage.

Well, how long does it take --

COMMISSIONER BROAD: But that’s not the thought
that they’re having. They’re not having a thought, “I’m monitoring the store.” They’re looking around. That takes two seconds. And then they spend the next fifteen seconds thinking about a whole bunch of other things, right, because they’re -- these are human beings we’re talking about, with a physiology of their brains that has them engage in a succession of thoughts. We don’t engage in managerial thoughts eight hours a day, do we?

MR. LAIDLAW: I would assume that’s accurate. But I --

COMMISSIONER BROAD: Okay. So, how would we enforce this rule?

MR. LAIDLAW: The same way that the rule is enforced now when there’s a dispute. You have to -- it’s a fact-intensive inquiry. The California Supreme Court has recognized that. All the courts recognize that this is not something where there’s a bright-line test and it’s a piece of cake. This is not a piece of cake. You have to go person by person, under current law and, I assume, under any newly enacted law.

MR. FINE: Why don’t we look --

MR. LAIDLAW: Yeah, go ahead.

MR. FINE: Let me try to answer that.

My name is Ned Fine. I’m a management attorney here in the state. I’ve been practicing in this arena for thirty years.
What we’re arguing about, Mr. Broad, you well know, is essentially the Burger King rationale. Burger King was a case under the federal law that deemed a Burger King manager still managing the store -- that was his primary duty even if he’s flipping burgers, as long as he’s keeping an eye on the store. You talk to all the other workers in the store, “Who’s the boss?” “That’s him, over there.” “Where is he? Oh, he’s flipping burgers.” “Yeah, but he’s keeping an eye on all of us.” They know he’s the boss.

That’s his primary duty.

The short answer as to how you interpret this, how you apply this, is it a quagmire you’re now jumping into? No. You would be finally -- and I commend you for having these regulations that basically make --

COMMISSIONER BROAD: They’re not -- they’re not -- they’re not mine.

MR. FINE: I know they’re not yours. I know that well, they’re not yours. But I commend you for making the California test now closer to the federal test.

COMMISSIONER BROAD: Oh. So, wait. So, what you’re saying is we’re going to resolve the Burger King case. We’re going to fix this and establish a “primary duty” test in California. is that what you’re saying?

MR. FINE: Not quite. This makes it --

COMMISSIONER BROAD: Not quite?

MR. FINE: You have a 51 percent test that AB 60
mandates.

COMMISSIONER BROAD: Yes.

MR. FINE: You have the 2x of minimum wage for compensation which AB 60 mandates.

COMMISSIONER BROAD: Uh-huh.

MR. FINE: But the whole point is, of this Commission proposal, is that it, in my view, tracks better federal law than up to now.

The Labor Commissioner loves to follow federal law when it’s helpful and appropriate. I commend you every time you try to bring the IWC rules to track the federal law. We have national employers here with fifty states with operations, and they go crazy with what happens in California. It’s a major impediment. I don’t see why, in this situation, that there is an absolute compelling need for the IWC to have a special rule for California managers.

COMMISSIONER BROAD: Because the Legislature enacted the rule.

MR. FINE: They enacted a rule providing the 51 percent test and the 2x minimum wage, which is fine.

COMMISSIONER BROAD: Which is the difference between it and federal law, as has been the case in California for fifty years.

MR. FINE: That’s right, except I would also suggest, whenever the IWC goes beyond the federal law and provides more protection, there is now a new opportunity for
the lawyers of the State of California to, thankfully, find
the federal law preempts. The federal law clearly permits a
state to be tougher with respect to having a higher minimum
wage, and it permits the states to be tougher with respect
to having a higher maximum hours. That’s exactly the words
from the statute. As soon as you start tinkering with all
the other rules, it opens itself up to a major federal
challenge.

COMMISSIONER BROAD: So, your view -- your view,
then, is that when we’re defining the nature of the duties -
- let’s leave aside trying to bring back in the “primary
duty” test through some clever little exercise here, because
I think that’s what you’re doing -- but anyway, you think
that we should follow what the federal criteria are for
duties. Is that correct?

MR. FINE: Whenever possible, except -- unless
there’s a compelling business reason or purpose.

COMMISSIONER BROAD: Then perhaps I can lead you
through and ask you why you left so many of them out in this
proposal.

(Applause)

COMMISSIONER BROAD: Okay. Now, let’s go -- let’s
go through that and let’s talk about it, and you can tell me
why you left each one of these out.

MR. YOUNG: Commissioner Broad, with all due
respect, we’ve indicated that the language that’s before the
Commission, we ask, before -- we ask the Commission to withdraw that because it was -- I -- to say it’s inartful, perhaps, again, it’s a work in progress that needs more consideration, and we hope to have a dialogue with, again, organized labor. As I said, it wasn’t our intention -- intent to in any way disturb the relationship of a journeyperson.

And with all due respect to Mr. Fine, he wasn’t in the work in developing that. And rather than go through that, we’ll present back to the Commission language that does mirror closer to the federal duties. Rather than leave them to interpretation by the Labor Commissioner, we will enumerate them.

COMMISSIONER BROAD: Okay. Well, let’s assume that you’ll bring something back that’s closer to the federal set of duties, which -- my understanding, it cites the Code of Federal Regulations in the DLSE manual, so those are the federal duties. So, maybe we can dispense with this by just agreeing to what we have, which are the federal duties.

MR. YOUNG: But -- well, okay. All right.

COMMISSIONER BROAD: Now, let’s go on to the presumptions, because I’d like to ask some questions about those.

I’m reading from AB 60, Section 515(e): “For the purposes of this section, ‘primarily’ means more than one
half of the employee’s work time.” Then we have not one, but two Supreme Court decisions in the last six months, of the California Supreme Court, talking about the “primarily engaged” rule. Where in this bill does it give the Commission authority to create a presumption that someone that’s working more than 50 percent time on non-exempt duties can be presumed to be engaged in exempt duties? Where is there authority for that presumption?

MR. LAIDLAW: It’s in 515(a), where it says that
the IWC can adopt or modify regulations that pertain to the duties. This is a regulation, and it pertains to the duties. It indicates that when somebody’s in charge, it creates a rebuttable presumption that they are performing certain kinds of --

COMMISSIONER BROAD: So, in fact, there is a presumption that they’re performing those duties irrespective of how much time they’re actually engaged in duties. That’s the presumption. I mean, you want me to read it to you?

MR. LAIDLAW: It is a presumption, but you asked what the authority was. And I’m saying that’s the authority.

COMMISSIONER BROAD: Well, it seems, in my view, to flat-out contradict the statute.

MR. LAIDLAW: But you don’t -- but the statute is not thrown out. You still -- if it comes to a litigated
situation, you still -- the employer still has to demonstrate that the employee is spending more than 50 percent of their time in managerial work.

COMMISSIONER BROAD: Yes, but it would be us giving employers the legal right to presume something when they have no legal right to categorize anyone as exempt unless they work more than 50 percent of their time in exempt duties. So, it’s handing a litigation opportunity to a lot of people that make the grand sum of nineteen hundred bucks a month. That’s -- that’s what you’re doing, right? Or wrong?

MR. LAIDLAW: This is -- it’s just an evidentiary presumption. It doesn’t change the burden of proof. I don’t understand -- I don’t believe that this would even come into play in 99 percent of litigated cases. And I think it’s within the scope of 515(a).

COMMISSIONER BROAD: Okay. All right.

Now, the paragraph above says:

“The time devoted by an employee to these and any other managerial duties is exempt time for the purposes of determining whether the employee is primarily engaged in managerial work, even if that employee is simultaneously performing other tasks, such as production work, that might be characterized as non-exempt.”

Now, does that -- does that language not ask us to simply
throw away and disregard conduct which is non-exempt and categorize it as exempt? I mean, at that moment, they’re flipping burgers, right?


MR. FINE: But you’ve come to the conclusion that flipping burgers is his primary duty, when, in fact, he’s keeping an eye on the store. You’re --

COMMISSIONER BROAD: No, we have no -- we have no “primary duty” test in California, period.

MR. FINE: I know, but what is he really doing? Are you paying him $30,000 a year to flip burgers? No, you’re paying him $30,000 to watch the store. And meanwhile, at times, he has to flip burgers.

COMMISSIONER BROAD: No, that is the -- that is a description, again, of a “primary duty” test. We have a time-based test in California, not a “primary duty” test. It doesn’t matter what the employer is -- is in the employer’s mind; it only matters what the worker is doing.

MR. YOUNG: Commissioner Broad, listen. I think you’ve pointed out areas that -- where, again, we need to come back and redraft this language and be cognizant of them. And we will do that. And --

(Audience murmuring)

MR. YOUNG: I’ll stop talking while they’re interrupting. But let me just finish my thought on this.

But the point is, is that the difference, I think,
where we depart is that we believe that you can do those
activities on a concurrent basis, that you don’t become less
of a manager. Certainly, again, you must be primarily
engaged in the duty of management. But the problem is that
under the Department of Labor current interpretation, the
minute the manager grabs a cash register, he or she ceases
to become a manager. And that’s the point where we
disagree.

And we believe -- again, as I said, we have to
come back with language that better expresses that -- but
it’s that concurrent hand and mind, not the substitution
effect, I mean, that, again, somebody can work at a register
24 hours -- or eight hours a day, and that person becomes a
manager. The bottom line is we -- what we’re trying to get
at is the fact that when that person, as the exception, not
the rule, takes those duties that you enumerated, that
person continues to be the supervisory person in charge of
that, with the same responsibilities.

And that’s -- and again, we -- the language in
front of you needs to be rewritten. We will rewrite that
and address the things you’ve pointed out.

COMMISSIONER BROAD: Okay. Let me -- and I think
that’s a good idea. Let me also just make some points here
about this that I’m concerned with.

While you’re rewriting this, you might consider
the differences between the Fair Labor Standards Act lists
of duties and the -- some of the concepts you’ve thrown in here, like “ensuring customer satisfaction,” which is found nowhere that I can find. And every worker in the whole state that deals with the public ensures customer satisfaction. So, that was like grabbing a little too much.

And this stuff where it says, “Examples of duties include, without limitation,” and then there’s a list of duties, so it’s all those duties plus everything else that anyone could think of possibly doing.

MR. YOUNG: Right.

COMMISSIONER BROAD: So, that, obviously, is pretty far out there.

And there are also subtle things that were done here, but don’t believe that people have missed them, which is the federal test requires that you work -- that the work “consists” of those duties, not that they’re “performed for the purpose of or in connection with” the duties, because that starts to get it off in very vague areas.

There’s also language in federal law that requires that the employee be supervising or be managing, rather, a customarily or recognized department of two or more people, that they cannot be doing the same work as their subordinates, a matter which is quite critical here that is in federal law. And I think if you were to reintroduce that concept, they can’t be doing the same work as their subordinates, then maybe we’d take about 99 percent of the
problem away and resolve the thing quite clearly for you.

So, as you’re rethinking this proposal, perhaps you should rethink it along the lines of what the federal law does, in fact, say about the description of duties.

Be mindful that we can’t repeal the “primarily engaged” test. We can only look at the definitions of the duties.

COMMISSIONER DOMBROWSKI: Barry --

COMMISSIONER BROAD: Thank you.

MR. LAIDLAW: Commissioner, may I just point out that the duties that are actually listed in the federal regulations are only relevant to the long test, which is for individuals who are making less than $250 a week. If they’re making -- people are making more than $250 a week, the lists in the regulations aren’t relevant. Then you revert to the “primary duty” test. Because the California statute is -- obviously requires two times the minimum wage, that’s going to get somebody well above $250 a week. And as a result, the lists of exempt and non-exempt duties set forth in the federal regulations simply aren’t applicable to somebody with that level of pay.

MR. YOUNG: Mr. Chairman, again, I think we appreciate Commissioner Broad’s comments. We’re going to take them under advisement, and we’ll be mindful of that when we bring this back. In the interests of time, perhaps we could have the rest of our witnesses.
COMMISSIONER DOMBROWSKI: That’s what I was going
to suggest. Let’s -- the other three witnesses, identify
yourselves.

MS. BROYLES: Good morning, Mr. Chairman -- the
new Mr. Chairman, Mr. Dombrowski -- and members of the
Commission.

Julianne Broyles, from the California Chamber of
Commerce.

Certainly, listening to the debate this morning on
the issue of the managerial duties has been one that I think
is very necessary, especially in light of the Labor Code
permitting the Commission to examine managerial duties and
to modify, change, or in some way amend the list of duties.
And certainly, the points that Commissioner Broad brought up
are very important ones.

I don’t believe that the California Chamber or the
other members of our California Employers Coalition would
have any problem with continuing this discussion, as the
Commission has brought new language and new definitions, and
possibly new lists of duties, and would be very happy to be
part of that discussion.

The language that was on the agenda today,
certainly, we believed, would have clarified the list of
duties and provided some assurance for employers when
they’re classifying their workers. We think that a broader
definition, closer or mirroring the federal definition,
certainly would be helpful for employers and maybe avoid the litigation in the first place, if there’s some certainty or established list, on both sides, Mr. -- Commissioner Broad, where the DLSE, you correctly pointed out, has a list of both the duties and those duties that are not considered exempt duties. I don’t think either one would be inappropriate to examine by the Industrial Welfare Commission.

I would like to make sure that several specific organizations also are acknowledged as being interested, as part of this discussion. And that is, besides the California Chamber of Commerce, it’s the California League of Food Processors, the California Landscape Contractors, Associated General Contractors, the Lumber Association of California and Nevada, and the California Hotel and Motel Association have also indicated that they are strongly interested in this issue and would like to be part of the ongoing dialogue.

COMMISSIONER DOMBROWSKI: Thank you.

MR. ROSS: Jon Ross, on behalf of the California Restaurant Association.

Our members, obviously, fall squarely in the middle of this debate. We’re among those whose managers’ work often doesn’t fit neatly into the two boxes that were described earlier this morning by the DLSE witness. We welcome this debate and welcome the opportunity to work with
you more as this goes forward.

MR. ABRAMS: Jim Abrams, the California Hotel and Motel Association.

A suggestion: I think the key here is that people are trying to find a way to take all of the types of cases which, right now, for the DLSE and/or the courts, are creating real problems because the tests and criteria are very hard to define. And the more that this Commission can give people guidance, both employers and employees and the enforcement agencies, the better off we’re going to be.

For example, we have, in the lodging industry, just as an example, executive chefs, executive housekeepers. And I think there needs to be some kind of a consideration given to the whole issue of trying to provide bright-line tests.

I would like to suggest, though, that the Commission give some consideration, first of all, to coming up with some general language, not necessarily the language that’s been presented to you, because I think we all agree that there are some issues that need to be addressed, but then going and looking at specific wage orders. For example, one of the most contentious situations involving the lodging industry has to do with an individual, or perhaps a husband and a wife, who are managing a motel and trying to decide at what point might they arguably be truly exempt managers and at what point not. And I’d like to
suggest that there are probably, in the retail industry and
others, some very specific situations where those particular
wage orders could be crafted with some additional clarity
that would make it easier for people to understand exactly
how the test is to be applied.

   Thank you.

COMMISSIONER DOMBROWSKI: I assume there’s no
questions.

   Mr. Pulaski, if you could bring up your witnesses.

We’ve obviously run over time. We try to be generous.

(Pause)

COMMISSIONER DOMBROWSKI: Go ahead, Art. Go
ahead.

MR. PULASKI: Chairman Dombrowski, members of the
Commission, thank you for the opportunity to address you
today. My name is Art Pulaski, from the California Labor
Federation.

   I first must acknowledge and thank, through the
chair, the many working people who join us today in this
hall behind me, who took the day off to express their -- the
depth of their concern about the attempts to take away their
daily overtime pay. I also want to acknowledge and thank
the people who I think can view us through these monitors,
who, because this room reached overflow capacity, have
filled up the room next door, and, as I wandered into the
hall a few minutes ago, are wandering out of that room into
the hallway. I want to thank and acknowledge you all for coming today too and taking time off of work to do it.

We have a panel of people representing various interests of workers, which we will introduce to you. I will go through the names very quickly right now for you.

The first is Scott Wetch, political director of the State Building and Construction Trades Council; Bruce Hartford, secretary treasurer of the Writers -- National Writers Union of the UAW; Michael Zakos, a nurse at Kaiser Mental Health in Los Angeles, a member of UNAC and AFSCME; and Sonia Moseley, a California Labor Federation vice president and executive vice president of UNAC and AFSSME, the nurses; Rosalina -- Rosalina Garcia, from Sutter Building Maintenance, nonunion worker, she is part of a class action lawsuit against that company for violating daily overtime provisions; Matt McKinnon, who is the executive secretary of the California Conference of Machinists; John Getz, a grocery store clerk at Albertson’s in Buena Park, southern California, member of IBEW -- I beg your pardon -- member of UFCW Local 324; and also from that local, Dan Kittredge, also a grocery clerk, from Ralph’s grocery store in Buena Park; Edward Powell, secretary treasurer of the California State Theatrical Federation; Uwe Gunnerson, from the Operating Engineers Local 3; Judy Perez, vice president of the Communication Workers, Local 9400; Ken Lindeman, former -- former Taco Bell and Wendy’s worker, and
also part of a class action lawsuit on unpaid overtime wages; Allen Davenport, legislative director of the California State Council of Service Employees; and my partner, Tom Rankin, president of the California Labor Federation.

I will, if you would, please, open with a few comments of my own.

If I heard Mr. Young correctly, what seems now like hours ago, the representative of the Retailers Association claimed that the language proposal before you on management definitions for the purposes of exemption of daily overtime, that that language is the result of some kind of cooperative effort between the labor movement and them as -- during the process of negotiations over AB 60, the daily overtime law, I have to say that if I heard him correctly, and if you can go to jail for lying before this committee, then we ought to call the posse, slap on the cuffs, and throw him in the slammer.

COMMISSIONER DOMBROWSKI: Art, I will agree with you that that is not language that you have -- that is not language that you have participated in crafting or agreed to or anything else.

MR. PULASKI: Thank you.

And further, let me say that we had no participation whatsoever in the discussion around the language before you. And I only wish that there was an
opportunity for us to have done that, because we should always attempt to work things out amicably in ways that work for everybody. But sadly, we had no opportunity for participation or discussion or input whatsoever in the proposals, these and the proposals, others which you set aside, in terms of stock options that were now before the Commission.

Barely three months ago, I appeared before this Commission to testify on what I think is a most urgent need for the people of California, and that is the raising of the minimum wage from the poverty level of $5.75 per hour. The proposals that now come before this Commission and distract this body are proposals that will not result in an increase in the poverty wages of workers of California, but, in fact, unfair pay cuts to hard-working Californians. And we see attempts to redefine what is management, which is an extraordinary attempt to redefine management, in a way that will simply dismantle the ability of workers to earn daily overtime pay in California.

Also, the stock option bonus plan, profit-sharing plan, which you have set aside, the exemptions on that are wholesale deprivation of daily overtime to workers of California. And we expect that there will be long discussions about those as they come up before you again.

I want to share with you, if I may, my own experience. You see, I started work as a 16-year-old as a
stock clerk in a supermarket. And my job duties as a stock
clerk in that supermarket were to take charge of the dog
food and cat food aisle -- it was really a quarter of an
aisle of the supermarket store -- and also the ketchup.
Now, my responsibilities included, every Friday, to assess
how much ketchup and dog food was sold, and then to order
next week’s ketchup and dog food. And so, I had, I guess,
management responsibilities there, although I was the
youngest and the least senior of all the people that worked
in the A&P supermarket, and there were some 65 of them. I
was the lowest person on the totem pole.

    Now, the other thing I had was a very, very
important duty. And when something happened like this, I
had to stop everything and drop it. When we -- when, in my
quarter of the aisle that I had responsibility, when a
bottle of ketchup dropped on that floor, my job was to stop
everything and get a mop and clean up that ketchup, because
we wanted to be sure that no customers fell down on that
ketchup. We wanted to be sure that the company wasn’t sued.

    Now, being the low man on the totem pole, I
realized that this would -- if you read these proposals
before the Commission -- would define me as a manager,
because I ordered merchandise and I protected the safety of
those customers from the ketchup.

    Now, if I had known I was a manager, I would have
asked for a big raise, or at least, members of the
Commission --

(Laughter and applause)

MR. PULASKI: At least, members of the Commission, I would have requested some stock options in my company.

(Laughter)

MR. PULASKI: Now, sadly for me at the time, I didn’t get them. Good for me now, because that company was the A&P supermarkets chain, one of the largest chains in the country for selling groceries, and that chain, seven years later, went out of business, and I would have lost my shirt if I had got stock options instead of my overtime pay.

And if you look at the companies now in this state that want to get rid of daily overtime for stock options, there -- and the supermarket was a basic industry, right? It provided the staples for people in the community. We thought that would be the last store to close down. And now you’ve got dot coms dropping like flies. But yet, they’re claiming that they want to protect those workers by giving them those stock options.

So, California has, for a long time, provided a strong standard for determining who is a manager and who is not a manager. Assembly Bill 60, our bill to re-establish daily overtime, has affirmed that emphatically. And I’m going to take the liberty here to read you merely one sentence of that new law, signed by Governor Gray Davis. And I quote from Chapter 134 of that law, that says: “The
Legislature affirms the importance of the eight-hour workday
and” -- this is all one sentence -- “and declares that it
should be protected, and reaffirms the state’s unwavering
commitment to upholding the eight-hour workday as a
fundamental protection for working people.”

(Applause)

MR. PULASKI: California law -- California law
says that workers who are primarily engaged in non-
management tasks for more than half of their work hours are
not managers. We apply a strict quantitative test, which
this Commission reaffirmed in 1988 and has lasted through a
Republican administration and Democratic administration,
through Pete Wilson, through George Deukmejian, and many
others. Workers who spend less than 50 percent of their
time on management tasks are eligible for overtime pay.

The proposal before you today would weaken that
standard dramatically and cut paychecks for hundreds of
thousands of California workers. I dare say that the way I
heard these managers, representatives of labor, speak -- of
management, speak earlier, it may be millions. It would
allow employers to reclassify workers who perform weakly
defined management tasks, and merely a few of them, such as
ordering ketchup, cleaning up ketchup, ensuring customer
satisfaction -- make sure they know where to find the
ketchup, and the ordering of merchandise. That’s being a
“manager,” but we can never let that and we won’t let that
happen in the State of California.

You know, employers have been skirting the law all over the place already. In recent years, they have been misclassifying employees as independent contractors. The state has spent a lot of money defending those workers in that case. The proposal before you today presents the same opportunities for companies to engage in a new kind of abuse. It would cut the pay of hard-working Californians.

And let me say this. We should make sure that we use the language properly. Instead of calling this “re-classification,” instead of calling this “exempt status,” we ought to call the words what they are, and that is, we are denying, denying, denying workers daily overtime pay. We’re not exempting them, we’re denying them. And we’re cheating them. So, let’s be sure that we use the language properly.

I’m going to not do this because of time, but I would refer you, and hope you read it, an article last Friday in the newspaper, *San Francisco Chronicle*, that talks about the experience of one person in the dot com industry, who is now one of many, many who are suing their companies because they are skirting the law and trying to get around from paying them their rightful daily overtime.

Let me conclude by this. These proposals would dramatically cut the pay of hard-working Californians in almost every industry in this state. And appallingly, it comes at a time of record profits for companies and salaries
for chief officers. The booming economy is a bust for too
many workers in this state whose wages are not keeping up
with the cost of housing, childcare, transportation, and
much more. And we vigorously urge you to reject and deny
the concept of this and get on with the business of raising
the wages of minimum wage for the workers, hundreds of
thousands of them, in the State of California, to do
something good for the people of this state.

I thank you very much.

(Applause)

MR. PULASKI: Mr. Chairman, next we have Scott Wetch.

MR. WETCH: Mr. Chairman, Scott Wetch, of the
State Building and Construction Trades Council.

First, I’d like to disagree with my friend, Bruce Young. I think that this language was artfully drawn.
Unfortunately, it reads like a Picasso. And therein lies
the problem.

The legal points in regard to the broadening of
the definition of managerial duties were well covered in the
last panel by Commissioner Broad. However, what I’d like to
do is provide a practical perspective on what this
amendment, if adopted, would mean in the construction
industry. And we believe that it would provide an
opportunity to undermine the rich tradition of the
construction industry, whereby the skills and the knowledge
of various crafts is literally handed down from one
generation to the next on the job site. Moreover, this
amendment has the opportunity to have a chilling effect on
workplace safety and would cripple California’s nationally
recognized system of apprenticeship training as we know it.

Make no mistake, this new definition provides a
clear path, a clear avenue, for construction employers to
reclassify rank-and-file journeymen as managers. Every day,
on every construction job site in California, lead
journeymen direct and monitor the work of apprentices and
younger, less experienced employees. As a matter of daily
activity, journeymen decide what types of materials,
supplies, or tools to be used, and determine and demonstrate
the techniques to be used, all of which would classify them
as managers and exempt them from daily overtime under this
proposal.

The practical consequence of this new definition
is that employers in the construction industry will re-
classify as many journeymen as they can to managers, paying
them under the salary provision, and then journeymen who
aren’t reclassified will be reluctant to take the leadership
roles that are needed on a job site. They will refuse to
pass on the skills of the trade to apprentices and less
experienced workers for fear of being converted to
management status. As a result, substandard construction
will proliferate, job safety will be severely compromised,
and the construction -- the construction job site hierarchy
as we know it will be thrown into confusion.

For these reasons, the State Building and
Construction Trades Council urges you to reaffirm this
Commission’s statutory responsibility to protect the rights
of workers and reject this ill advised and harmful proposal.

MR. PULASKI: Bruce.

(Applause)

MR. HARTFORD: Mr. Chairman, my name is Bruce
Hartford. I’m secretary treasurer of the National Writers
Union. We represent technical writers and hourly paid
technical writers, primarily in the computer industry.

My position -- my union position, however, is
unpaid volunteer. I myself make my living as a full-time
technical writer in the Silicon Valley computer industry.

Over the past nineteen years, I worked for companies like
Digital Microsystems, Apple Computer, Relational Technology,
Sun Microsystems, Netscape Communications -- essentially all
the usual suspects.

As everybody knows, long, long hours are the norm
in the computer industry. And that’s what we’re primarily
concerned with. Until computer professionals were brought
under protection, overtime protection, by AB 60, there was
no economic incentive for computer industry employers to
have any concern with how many hours they were requiring
their people to work.
As soon as your Commission issued the wage order, or the ruling, that overtime had to be paid for hourly professionals, immediately companies began to say, "Wait a minute. How many hours?" Hewlett Packard, for example, issued an order to their managers that said no overtime unless specifically authorized in writing. So, it had an immediate beneficial effect.

Now, I’m not here -- we’re not here as computer professionals because we want more money. We’re here because we want less required overtime. The whole point of the eight-hour day and the 40-hour week was to protect the health and safety of the workers and to provide and ensure that we have time to spend with our families. And the need to spend time with families and to have a human life does not -- it applies to anybody, no matter how much we’re paid. I have as much right to spend time with my family and with children and have a social life as somebody who makes half of what I make.

The other -- the other issue is the question of health and safety. Now, when people think about health and safety, the natural thing to do is you think of jobs that are dramatically unsafe, like firefighter or coal miner or longshoreman. But there are serious health problems in the computer industry at the professional level. Repetitive stress injuries are endemic in our industry, carpal tunnel syndrome, for example. A number of our members are crippled
for life and can no longer work because of carpal tunnel syndrome. These injuries are directly related to the number of hours you’re keyboarding at your computer terminal.

I don’t know how many of you have had a chance to visit a large computer company, but, basically, they’re set up where they have these huge rooms that are divided into thousands of little cubicles, with -- and it’s easy to get lost as to where you are among the cubicles. But I always -- I never have any trouble finding the tech writers section because all I have to do is look for the cubicles where people are wearing lace-up leather braces on their wrists because they -- because of carpal tunnel syndrome and RSI, and I know I’m in the technical writers section.

COMMISSIONER DOMBROWSKI: Excuse me. Excuse me. I’ll let you continue, but I -- we wanted to talk about the manager duties, and I’m trying to --

MR. HARTFORD: Oh. Well --

COMMISSIONER DOMBROWSKI: -- figure out where you’re going on this.

MR. HARTFORD: Basically, I came here to talk about protecting computer professionals, overtime.

Let me just say one thing about -- about -- and this does affect managers. Most of the people at the professional level in the computer industry are salaried employees. But more and more of us are now -- are now finding ourselves working as hourlies through temp agencies.
And this has now gone from technical writers, programmers, and engineers into managers. There are managers of departments who I work for who are themselves hourly temps. In fact, I heard of a case this morning where the vice president of a company is an hourly temp.

Now, these temp agencies that we work for take a third to a half of everything that is paid for our work. So, for example, if I’m getting $100 an hour, I actually -- that is, if $100 an hour is being paid for my work, I only get $55, for example. The agency gets $45. That would apply also to a temp manager. But the agencies do not provide health benefits, pension benefits, vacation pay, paid holidays, any of the kinds of benefits that normally a worker has a right to expect. And this applies to managers as well.

So, it seems to me that, from what we’ve seen, it’s the temp agencies who’ve been the primary movers to try and exclude computer professionals from overtime protection, because they get a huge amount for every hour we work. They want us to work as much overtime as they can force us to do. We want to be protected. We want to have the eight-hour day defended for us.

And basically, I guess maybe I apologize if I’m on the wrong speakers list here. I came up when I heard this. It was in the newspapers. I apologize if I wasted your time.
COMMISSIONER DOMBROWSKI: No, no. It’s perfectly fine. You have a right to speak. I just wanted just to point out again we’re talking about the manager duties.

Next speaker.

MR. PULASKI: Michael.

MR. ZAKOS: Good morning, Mr. Chairman. My name is Michael Zakos. I live in West Covina, California, and I’m a staff nurse at Kaiser Permanente in Los Angeles. I’ve been a nurse for 22 years, and I’m also a member of the United Nurses Association of California.

In regards to today’s proposal, speaking for myself and fellow nurses, we, on a daily basis, are expected to train other employees, direct, monitor, schedule, and plan work for subordinates. We provide for the safety of patients, we resolve patient complaints, and ensure patient satisfaction. Not only do nurses perform these duties, but all employees are expected to perform most of these above duties. The mission and goals of Kaiser Permanente and other hospitals is that all employees are to ensure that patients are safe and satisfied at all times.

How can anyone say time spent performing these duties will be exempt, when we are doing this constantly throughout our shift? I can just see the industry saying, “Good, we don’t have to pay them any more overtime any longer.”

In conclusion, this proposal not only erodes
monetary compensation, but then it would also erode the
principle of autonomy, leadership, and the personal
investment in doing a job well done. I ask you to reject
and not use these duties to exempt payment of overtime.

MS. MOSELEY: Good morning, Mr. Chairman and
commissioners. My name is Sonia Moseley, and I’m a
registered nurse practitioner and the executive vice
president of the United Nurses Associations of
California/AFSCME. We represent approximately 11,000
registered nurses, registered nurse practitioners, and
physician assistants in southern California.

We are very concerned about this proposal. As
Michael just said, all nurses and most hospital employees
could be considered managerial based upon some of the
following items outlined in your proposal, such as training
employees, directing and monitoring the work of
subordinates, resolving customer complaints, ensuring
customer satisfaction, and providing for the safety of
customers.

For healthcare workers, it’s very difficult to say
how much time is devoted to these duties. And I know there
was a whole diatribe, I guess, on how much is mental and how
much is actually spent doing this, but I can tell you, as a
nurse, when I worked as a nurse, most of my time, even
though I was delivering patient care, I always thought about
the safety of the patients. If the family came in and
wanted to know what’s going on, I had to address those
issues. I didn’t say, “Go to the supervisor and find out.”
I myself had to do that. So, I really think that this is a
dangerous area to go into, especially for healthcare.

I really ask that you take a careful look at this
proposed exemption. I know the healthcare industry
employers have been looking for ways to exempt nurses,
especially, from the payment of overtime, and I find this
proposal, along with the proposal that was taken off the
table, as certainly an avenue for the healthcare industry to
start looking again at, “Oh, good, another way to get out of
paying overtime.” And we, as professional nurses and all
healthcare employees, deserve to be paid overtime for
delivering the care to some of you, if you’re patients, and
your families.

We worked very hard to get AB 60 passed to protect
the working men and women of California. And it just seems
to us that at every opportunity possible, efforts are being
made to avoid the intent of the law. So, again, we ask you
to look at not making changes in this proposal and the
proposal that you postponed a decision today.

Thank you.

(Applause)

MS. GARCIA: (Through Interpreter) Good morning.
My name is Rosalina Garcia. I work for the Sutter Company.
We’re suing the company because they didn’t
provide us lunch breaks or rest breaks.
We already have a tremendous workload. And with this idea of taking away the right to overtime, if we had to fill in for other people, then we have an even higher increased workload and we wouldn’t get paid.
But these are some papers from the lawsuits we filed on the company.
It’s hard enough for us, as parents, to be able to provide for our children with the wages that we earn, to pay bills and utilities and rent and so forth -- such as if our children don’t have the right to enjoy themselves.
The main question, as Art was saying, it would be crazy to say that a janitor is a manager -- -- because a new worker comes into the building and you tell them how to tie the garbage bags so that they can throw out the garbage -- (Laughter)
-- or because I have to think about whether or not there are enough garbage bags to take out the trash for the rest of the week.
Then we’d all be managers.
And the owner would take that excuse to classify all of us as managers -- -- and make us work more hours for the same low wage.
That’s all for right now.

(Applause)

MR. McKINNON: My name is Matt McKinnon, and it’s my honor to represent the machinists union members of the State of California here at this hearing today.

I have to -- I have to tell you that the machinists union represents workers in aircraft maintenance, aircraft repair, making airplanes, making defense planes, missiles, rockets, electronics, forest products. We maintain the trucks on the road, we maintain the railroads, we maintain the longshore offloading equipment. If there’s anybody that fixes something or makes something or manufactures something, it’s likely you’re going to run into a manufacturing unionist and, in California, very often that’ll be a machinist.

And I really -- I really have to tell you that as I look at this proposal, I have to tell you that if my members out in the rank and file and out in the shops that use their brains and their hands together -- they’re often supervised by people who don’t know how to do the skilled work -- if they found out for a moment that their craft and that their skill and that their thinking were something that someone was going to leverage to take away their overtime pay, they would go crazy.

And I think that there has to be an understanding here of how much anger that this kind of proposal has
brought. I’ve been trying to calm people down over these
last -- the proposal you dropped earlier today, 90 percent
of our members get stock and bonuses and incentives. I
mean, we half own United Airlines -- come on -- Boeing, and
all of our members make more than two times the minimum
wage. So, we are affected by this.

Clearly, when the Wilson administration’s IWC
tried to unravel the eight-hour day, and successfully did,
in 31 places in California employers came to the bargaining
table to try to take the eight-hour day away from our
members, 31 places. So, I think it’s really, really
important for this Commission to understand that when you
make industrial policy in this state, even if people will
argue, “Well, it doesn’t affect union members,” it does, and
it affects collective bargaining, and it affects things like
labor peace, and it affects things like how we think about
doing manufacturing in this state.

And part of the motion of what we need to be doing
in manufacturing in this state is having workers involved
more and more and more in making the decisions on how to
move manufacturing, how to make it happen. We’re doing lean
manufacturing, we’re doing high-performance work
organizations, we’re doing stock incentives, we’re doing all
sorts of things to make companies work more efficiently.
You cannot play with people’s overtime pay while that’s
going on. You can’t do it.
And frankly, if we let Burger King be the
determiner of what our industrial policy in this state is,
we’re in deep, deep trouble.

(Applause)

MR. McKINNON: I could go through, and I would be
happy, as you’re working on this, to go through point by
point, but there are tens of thousands of workers that do
nothing but work on the control of flow of materials that
are being manufactured. They’re not managerial; they’re
workers. They’re people that plan things. You would not
want one of our United Airlines mechanics to give up his
emergency repair duties to somebody that didn’t get paid
overtime because they were salaried managerial. You
wouldn’t want that to happen. You wouldn’t want a tool-and-
die maker to not think and plan and figure out how to do
something. His boss doesn’t know how to do it.

Anyway, I’m pushing my luck with time, I’m sure.

COMMISSIONER DOMBROWSKI: I’m sorry. I just --
we’re going to lose Commissioner Coleman, and I want to make
sure we do get to some of these other items because we need
her vote on them.

MR. McKINNON: Well, on behalf of the machinists
union, thank you for your time. And please, take this thing
back and really work on it. It should have never even got
out here.

(Applause)
COMMISSIONER BROAD: Mr. Chairman? Mr. Chairman?

COMMISSIONER DOMBROWSKI: Yes.

COMMISSIONER BROAD: I’m wondering, if Commissioner Coleman has to leave, maybe we should take sort of a hiatus and do the business that we need to do before she leaves.

COMMISSIONER DOMBROWSKI: One?

COMMISSIONER BROAD: You have till one? Okay. All right.

COMMISSIONER DOMBROWSKI: We have till one. I just want to make sure we get this by one.

MR. PULASKI: What do we do? Are we to go?

MR. LAGDEN: I’m Keith Lagden. I’m a former manager of Taco Bell and Wendy’s. I’m part of a -- well, I’m actually one of the representatives of a class action against one of the fast-food companies.

It’s been very interesting listening to the arguments here this morning. And the overtime rule has really been an eye-opener for me, because suddenly, with Taco Bell, it was compulsory to work 50 hours. And the only way to get paid was to put your hours into the computer, as you would do with the rest of staff. However, being a general manager, as I was called, I would enter the 50 hours that I worked in that week, or more, and the computer would simply throw it back out, that I was only allowed to put 40 hours in. So, I had to work 50 hours, register 40, to be
paid.

If, however, I omitted to put in the 40 hours and only put in 32, I would only be paid for 32. And in my simple brain, I thought, “Well, you know, maybe I’m just hourly paid, but the other ten hours, I give away for free.” Commissioner Broad, I thought, was rather amusing this morning, because I’m sure that he’s spent some time working in fast food, particularly with the amount of thinking time that’s done. And he’s absolutely right.

(Applause)

MR. LAGDEN: You know, whether you’re trying to stuff a taco with meat or whether you’re trying to flip a burger, and you look around and you think, “There’s 37 people standing in line there, and they want fed.” There’s enough people there to see that the job is done. You can’t control the line unless you stop the people coming into the store.

But there’s a big difference between managerial thinking and physical management. And I think that this needs to be sort of clarified, the thinking managerial and the physical managerial. In my time as a general manager in both Wendy’s and Taco Bell, my physical managerial time was less than 20 percent. The 80 percent of the time was flipping burgers, stuffing tacos, burritos, you name it, putting your head out the drive-through window, thanking everybody for coming by, taking the money out of the drive-
through at the back, or thanking the customers for coming in.

The lawyers that were up here this morning made a big deal about customer satisfaction. They obviously have never worked fast food. I doubt if they’ve ever done anything other than sit behind a desk in a law office. But what they don’t understand is that everybody who works in a fast-food establishment is responsible for customer satisfaction, because if there’s no satisfaction, there’s no job for them. They need the satisfaction.

And as this gentleman here said, you know, when he was 16, he had to make a management decision: did he wipe up the ketchup or did the company get an action against them? It’s the same with the 16-year-old kid or the 35-year-old person that’s working in fast food. Is it a management decision? No, it’s a commonsense decision, not management.

The training of people is strictly laid out in fast-food companies. It’s done by books. There’s a book which comes, thicker than that, and in Taco Bell it’s called “The Answer Book.” And if you want to know the answer, you look in the book. It tells you how to make beans, it tells you how to cook meat, it tells you how to stuff a taco, it tells you how to clean the bathroom, it tells you how to clean the pan, and it tells you how to shut the door and set the burglar alarm. It’s all in the book. Everybody in the
store reads it, so everybody needs to know.

The training is done on what they call cascade fashion. I start -- it’s my first job in Taco Bell, and my job is just to clean the floor. Somebody else gets hired, I get promoted. So, I show the next person down the line that comes in how to clean the floor. I don’t need to be a manager to do that, but is it a management decision to show somebody how to clean the floor? Scrub it this way one week and that way the next week. That’s how it’s done, and it isn’t a management decision; it’s a commonsense -- really, a commonsense decision.

I think the -- if the law goes ahead creating management positions, for fast food, everybody will be a manager. You’re going to go into a Burger King, a Taco Bell, a Wendy’s -- you name it. It’s going to have a staffing of 42 managers if the store does about $1.25 million a year. Everybody will be a manager. Everybody will think managerially, and that’ll be fine. But they will all be managers because they all have to think. They all have to try and give the customer that little bit more.

Trying to decide whether we’re management or whether we’re crew, that’s very difficult when we’re told, “These are the uniforms you’re going to wear,” and you’re going to look the same as the guy that’s handing the food out the window, the guy that’s flipping the burger, the guy that’s stuffing burritos, chopping the lettuce, sweeping the...
floor, wiping the tables, emptying the trash. You all have
the same uniform; you just have a little different badge.

The other thing that I do want to make really
known to you is that there is a class action with -- against
Pepsi Cola and Taco Bell. The class action was raised in
1996. Immediately it became known, Pepsi Cola hired off the
fast-food business to a company called Tricon. It’s still
controlled by Pepsi Cola, but on the stock market it’s a
different entity. The reason for that is, is that should
the class action be successful and there’s a run on the
stock, it will be less harmful to Pepsi Cola than it will be
to Tricon. That tells you how much money that they’re
prepared to put up to make sure that they do, in fact, get
everybody with no overtime. That’s what they’re really
looking for.

I have stock options from Wendy’s, and, quite
frankly, they’re not worth the paper they’re printed on.
Just like my friend said, they give them to you at the
highest value of the year. Had I have bought them, I’d have
been better just giving the money to the Salvation Army.
Really, they’re half the value of what the stock is or what
the options are, so they’re not worth having. I would need
to go probably for another four years before they would make
anything or even break even.

And that really is about as much as I have to say,
from the fast-food industry.
Thank you, and I thank you for your time.

COMMISSIONER DOMBROWSKI: Thank you.

(Appause)

MR. GETZ: Hello. My name is John Getz. I work in the food industry. I work for Albertson’s. I’ve worked there for 17 years now. I’ve held a number of different positions, from over ten years in management to -- actually, I started from the bottom, worked my way up, and worked my way back down again. I’m now a grocery clerk.

I’ve had the opportunity to work for companies like Super K -- I’ve worked both nonunion and union retail.

Really, what I am here is I’m a father. I have a 2-year-old, I have a 4-year-old, married, trying to buy a home in Orange County. I depend on my overtime to make my bills. And that’s -- that’s it in a nutshell. I have to -- I don’t make -- I make just barely enough to afford a home, put clothes on my kids’ back. I count on that money.

What you’re proposing to do here is use a broad brush. I’ve been in this industry for 17 years. We provide service, and we provide a product. That just about covers everything that we’ve talked about today. Everybody in my store would be a manager.

If you go around -- we’re heavy on titles. We have -- it’s numeric. We have a manager, from 1 to 6. Those are store managers. We have two front-end supervisors. We have a deli department and assistant
manager there, a bakery department manager and assistant manager, a meat manager and assistant manager, a produce manager, so on and so on and so on and so on. We’ve got more chiefs than we do Indians, just be title alone. Everybody in my store could be classified as a manager under the language that we’re using here today.

My wife was a -- she left the bargaining unit and went into a management position, administrative position. This practice goes on today, even now, in the food industry. They got her to a point where, when we had children, the employer changed the rules of the game and told her that she had -- she was mandatory, had to be in a store to manage her store, for ten hours a day, five days a week. If she did not cut the numbers they needed to do, she needed to be there another extra day. That’s a salary employee. What you’re proposing is, they could make everybody -- all my co-workers, myself, everybody included, a salary employee.

If you really think that the employer will define this and not exploit the working class people in our state, that’s -- if they see an opportunity to do that, they will. And what we’re talking about here is making it legal.

They told me to keep it brief, so thank you very much for your time.

(Applause)

MR. KITTREDGE: Hello. Good afternoon, commissioners. I’m in the same industry as John is. I’m in
the retail food industry. I’ve been a 20-year employee of
Ralph’s.

I’m rank and file, on the front line. I’ve held
many different positions and wore many different hats, such
as a frozen food manager. I was the only person in the
whole department. I did the order. That was it. I had
nobody that I managed.

As I heard -- I believe his name was Mr. Laidlaw
speak this morning, I doubt that he ever worked in this
industry because of some of the things that he said. I’m
sure that he thought he was narrowing the definition of
overtime, but I think that he was expanding it to include
almost every single person that works in my store.

When I was younger, overtime pay helped pay for
the extra stuff I needed to get for my growing kids. Today
my kids have their own kids, and overtime laws allow me to
have the time to give back to my community, to be a
volunteer on boards and committees.

Contrary again to what Mr. Laidlaw said, you would
be opening the floodgates of abuses that would follow this
type of change in the overtime law.

I think California today is probably economically
bigger than a lot of the Third World countries. I think
that it’s time that the employers in California share some
of the phenomenal economic growth that we’re having. And by
not passing this measure, you will not create additional
hardships on working families in California.

Thank you.

(Applause)

MR. POWELL: Mr. Chairman, members of the Commission, my name is Edward Powell. And in addition to the title that Art Pulaski gave me, I’m also the senior vice president for the International Alliance of Theatrical Stage Employees, and we have over 40,000 people working in the entertainment and motion picture industry in this state.

The issue before us today is one that we have had before us many, many times. As a matter of fact, I have argued in front of the Industrial Welfare Commission in the past against employers that would take overtime and take minimum wage away on the basis that they had special interests, in terms of trying to put young people through college or anything else that they could dream up at the time.

The fact is that the Industrial Welfare Commission was formed in 1913 to protect the interests of working people of this state, not to give in to the greed of the employers. And it seems like we are constantly fighting the battle with the employers to take more and more away from the lower income people so that chairmen, like the Bank of America chairman that just retired, can get a $50-million bonus at the expense of the little people that work under his position.
I believe that the time has come when we have to take a look at what’s best for the people, because the people are what make this state work. We’re the fifth largest economy in the world, and we’re the fifth largest economy of the world because we have a workforce that puts everything that they have into making this state what it is.

The people that I represent all work with their minds. They all make decisions that could be construed by the other side as being managerial. It’s important that everyone take a position to think like a manager in order to do their job better, because the product that we deliver to the American people is a product that has to be perfect. If you see a product on the screen or you see a stage play, you don’t want to see mistakes, you don’t want to see miscues, you don’t want to see bad dialogue or bad lighting or bad photography. You want to see a perfect production because that’s what you paid for.

So, I believe that the position that the employers are taking relative to this management position, which I still find it very, very difficult to understand, is wrong.

One of the speakers had mentioned a couple of points which I wrote down because I couldn’t quite fathom what he was trying to say. But one was that mental work is an integral part of management duties. Well, I would say that that fits into just about any category that we would -- that we would work under. And secondly, in rebuttal to
Commissioner Broad, he was saying that there’s a rebuttable presumption that a certain law can be changed. But when I add those two up, I can always come to the reality that he spoke of, that the bottom line is to get as much from the little person as you can to satisfy the people up on top. And I think now is the time for you to take action, in my opinion. Drop this like a hot rock and go on and represent the people of this state in a better fashion.

Thank you very much.

(Applause)

COMMISSIONER DOMBROWSKI: Art, we’re over 50 minutes here, and I do have some other people who want to come up and testify in opposition, I believe, so could we --

MR. PULASKI: We’ll ask each one just to be very, very brief.

COMMISSIONER DOMBROWSKI: Thank you.

MR. PULASKI: Uwe, please go ahead.

MR. GUNNERSOM: Yeah. My name is Uwe Gunnerson, and I’m a member of the Operating Engineers Union Local Number 3.

Let me tell you that God cursed operating engineers. They only work nine months out of the year because God makes it rain for three months. And he makes it rain for three months so that they can atone for the sins of the people who write proposals like the one that we are discussing right now.
(Laughter and applause)

MR. GUNNERSON: Operating engineers do indeed and must at all times work with head and hand, to have a safe workplace, to apply skills that you do not learn from a book, that you learn from your seniors who are experienced. That’s how you acquire your skills and that’s how you become valuable to the employer. And that’s how you make sure that your head is not in your hands.

(Applause)

MR. GUNNERSON: My grandfather used to have a beautifully well-drawn hunting dog, a beautiful animal, just like this article, Item 4 there. He shot the damn animal.

(Laughter)

MR. GUNNERSON: It was no good. It wouldn’t hunt. Let me tell you, if my grandfather were around, he would shoot Item Number 4 too.

Thank you.

(Applause)

MR. GUNNERSON: Any operating engineers joining me here?

(Applause and cheering)

MS. PEREZ: Mr. Chairman and fellow commissioners, my name is Judy Perez. I’m with the Communication Workers of America, Local 9400. I live in San Bernardino County. Communication Workers of America represents over 50,000 workers in the State of California. We represent
hospital workers, university workers, teachers, printers, broadcasters, and the major telecommunications corporations, also the Indian casino workers amongst them.

I’ll only briefly discuss one of our employers, and that is the telephone corporations, GTE, Pac Bell, and AT&T. We have titles such as service assistants, marketing reps, service reps, head seniors, to name a few. The ones that you as commissioners would be most familiar with would be the telephone operator. Telephone operators and installers, as a condition of their employment, as any other employee of the telephone corporations, must sign an agreement saying they will ensure customer satisfaction, not 50 percent of the time, but 100 percent of the time.

It would give me great pleasure to go to Pacific Bell and GTE and AT&T and let them know that our 50,000 employees are now in management and should get about four or five times more of what they’re currently making.

It would be more of a shock to go to our installers, who are worked 70 hours, forced hours, every week, and tell them they will no longer get paid for that overtime because they are considered managers.

You had a speaker earlier who spoke for the proposal, and he kept using the word “reality.” And I would just like to tell you, in reality, this proposal is an insult to the working men and women of the State of California.
(Applause)

COMMISSIONER DOMBROWSK: Thank you.

MR. HUNTER: Hi. My name is Keith Hunter. I’m here on behalf of the District Council of Ironworkers. Ironworkers are the men and women of California who build your bridges and your overpasses and put the iron in your high-rises.

I’m going to be brief. I just want to put on the record that the ironworkers are opposed to this proposal.

Thank you.

COMMISSIONER DOMBROWSK: Thank you.

(Applause)

COMMISSIONER DOMBROWSK: Briefly, please, identify yourself, affiliation, position.

MR. KOSNIK: My name is Bill Kosnik. I’m a restaurant manager with Carrow’s. I’ve worked for Carrow’s, Baker’s Square, Chevy’s, and Lyons for the last ten years. And I’ve never received a minute of overpay. And from -- I never even knew what exempt and non-exempt meant until the last year.

All my employees, when a Coke spills or a bottle of ketchup, they all know that it’s their job to pick it up. Also, all day long, we put away the truck, we wait tables, we serve, we take cash, we get drinks, and we all take care of the customers the same. And I’ve been doing this for about ten years.
And my wife’s a restaurant manager also, and we have two small children. And we barely see each other or the kids. And we work between 55 and 65 hours each a week. So, that’s all I’d like to say. Thanks.

COMMISSIONER DOMBROWSKI: Thank you.

(Applause)

COMMISSIONER BROAD: I have a question.

COMMISSIONER DOMBROWSKI: Real quick.

COMMISSIONER BROAD: I’d like to ask him a question.

Excuse me, sir.

COMMISSIONER DOMBROWSKI: He’s walking away.

COMMISSIONER BROAD: Do you spend a significant amount of your time doing the same work as your subordinates? Do you pour coffee, do you run the cash register? What do you do?

MR. KOSNIK: All day long, with different companies it was different things. The training is basically the same. You’re on the cook line cooking for two, three hours, you know, burning yourself. You’re not thinking about anything manager when you’re working a 360-degree fryer or using a knife to cut a sandwich, you know. I’ve got plenty of cuts to show for it.

It’s, you know, prepping. You know, we spend two or three hours prepping every day.

And I heard somebody else say that worked for
Wendy’s, you know, if your food cost or labor is high, you work a sixth day. And to bring it down, how do you bring down your labor? You actually do an hourly job.

COMMISSIONER BROAD: Well, let me ask you this question. Does the company tell you to think about managerial things while you’re doing these other duties? I mean --

MR. KOSNIK: You know, when I was in training -- and my wife’s a trainer for Carrow’s right now -- and they never once tell you, “Okay, now while you’re cutting a sandwich, make sure you’re thinking about your P&L,” or “Make sure you make your 3 percent sales commitment.” You know, that’s in the back of your head, because if you don’t get that, you have a chance of losing your job, you know. Basically, in order to hit your goals, you have to do the hourly job. I’ve cleaned bathrooms, I’ve, you know, fixed plumbing, you know, I’ve done everything so as not to hire somebody else, because I have a chance of losing my job because my numbers are not in line, you know. And I’ve been doing this for ten years.

COMMISSIONER BROAD: So, maybe the thought that’s going through your mind while you’re doing those other jobs is, roughly, sort of anxiety? That would be --

MR. KOSNIK: Right, right, right. Exactly. Or, you know, kissing my kids at nine o’clock at night when you’re walking through the door and they’re already asleep,
you know, and leaving at 4:30 in the morning, you know, to
go to work, you know, or working the sixth or seventh day,
whatever. I’ve put in 35 days in a row times, and I’ve
never seen a minute of overtime. I never knew what exempt
or non-exempt was until a year ago. And then, when I talked
to -- I’ve managed fifteen different restaurants in the Bay
Area. I’ve managed over 55 managers, and we all do the same
thing.

You know, the busboy, if he sees the ketchup drop
on the ground, he’s going to pick it up. I don’t have to
tell -- stop cooking to tell him to get the ketchup or to
clean up the Coke, you know, on the floor. You know, we all
do the same job. It’s just that I’m titled kitchen manager
or general manager, assistant manager.

So --

MR. PULASKI: Thank you.

COMMISSIONER BROAD: Thank you.

MR. PULASKI: Mr. Chairman, we have one final
brief comment from Ken Lindeman, and then we’ll end.

COMMISSIONER DOMBROWSKI: Thank you.

MR. LINDEMAN: Yes. My name’s Ken Lindeman, and I
also was with Wendy’s and Taco Bell for fifteen years as a
general manager.

And I concur with what the last gentleman said,
and with Mr. Lagden, who was also with Wendy’s and Taco
Bell.
I would say at least 80 percent of my time was based on production work, meaning cutting tomatoes, onions, flipping burgers, making tacos, stocking shelves, or working the drive-through. Believe me, when you’re stuck on that drive-through, you’re not thinking anything else but that drive-through. You’re not concerned about your P&L or scheduling or anything else.

I just want to say that some of the proposed duties, like the last gentlemen said, are not managerial. Customer relations, that’s everybody’s responsibility in the store. Customer complaints, you know, unless you have somebody very, very belligerent, anybody could take care of that. And training is also -- it’s done on the crew level too. The crew do most of the training.

And I just wanted to say that, average, I spent 60 hours a week, sometimes 70. I did work 30 days straight at one time, have not seen any overtime, responsible for a one-to two-million-dollar store and amounted to about $12.80 an hour, is what I made.

Thank you very much.

COMMISSIONER DOMBROWSKI: Thank you.

(Applause)

MR. RANKIN: Thank you.

In conclusion, the statute required you to review management duties. You’ve done your duty. Drop it. Don’t bring it back.
(Applause)

COMMISSIONER DOMBROWSKI: John Bennett.

John Bennett, I believe?

MR. BENNETT: That’s correct.

I was going to say good morning, but I will now say good afternoon. I want to introduce myself. From 1978 to 1984, I was a management representative on the Industrial Welfare Commission. And for the last two years of that period, I was the chairman.

Since January 1, I am now happily retired, and I am not here today representing anybody, any organization, or anybody except myself.

Most of my adult life, I have been concerned with protective labor legislation, both from the standpoint of a corporate human resources and labor relations executive and also as an attorney specializing in employment and labor law. Most significantly, for ten years I worked for Montgomery Ward and Company, which was then -- may they rest in peace, I guess -- plagued with very serious compliance issues under the Fair Labor Standards Act and under other corresponding state laws. I finally wound up writing an internal manual on how to comply with the wage-hour law as a way of trying to relieve the pressure on the violations that kept seeming to be cropping up.

Later, for eleven years, I was the labor relations director for Crown Zellerbach, a -- once again, formerly a
major corporation in the Bay Area, and most recently, a vice
president of human resources for another paper manufacturer
with 2,500 employees and about a billion dollars in -- a
billion dollars in revenues.

COMMISSIONER DOMBROWSKI: Mr. Bennett? Mr.
Bennett?

MR. BENNETT: Yes.

COMMISSIONER DOMBROWSKI: Could you just -- we'll
acknowledge your résumé if you could just go to the heart of
your comments, please.

MR. BENNETT: Yeah. I'm here today to say that
despite my orientation toward management, I think that the
proposals that have been made here are wrong and faulty and
should not be adopted.

(Applause)

MR. BENNETT: It's a new one on me to be applauded
by labor people.

(Laughter)

MR. BENNETT: First of all, the language proposed
unduly broadens the definition of exempt employees, who are,
in reality, in no way executives. These people should
enjoy, I think, the protections afforded by the wage and
hour laws that exist today.

Secondly, the proposed redefinition of exempt
work, I think, directly contradicts the terms of AB 60, and
if enacted by the IWC will almost certainly result in
litigation in court, and probably a return to the limbo from which the IWC most recently emerged.

Let me comment on the first one. I think what you’ve heard today is very typical. It is particularly true in the retail and service industries that first-line supervisors have to spend some percentage of their time doing the same work as their subordinates, waiting on customers, working the cash register, stocking shelves, doing the same kind of work. And depending on the size of the department, it might be 5 percent of the time and it might be 95 percent of the time. If you’re the manager of an auto service unit with one tire-buster and a mechanic plus you, it’s going to be 95 percent of the time. And if, on the other hand, you have a dozen mechanics working for you, you’re going to be supervising them 95 percent of the time.

Because of the enormous competitive pressures that are put on retail and service industries, there is a terrific economic pressure on employers in this state to find a way to exempt more people from overtime. One of the ways under current law that this is done is to try to characterize non-exempt work as exempt work. For example, a department manager who makes a sale when no salesperson is available can be said to be doing emergency work or to be providing customer satisfaction, because the customer won’t be satisfied if they don’t get waited on. Sweeping the
floor could be characterized as ensuring the safety of employees and customers.

In one case I am familiar with, I heard it argued that a manager of a retail establishment who cleaned the toilet was performing exempt work because, in doing so, he was supposed to be setting a good example for other employees. Now, understand, I’m not knocking these arguments, because, as a management representative, I used to make a lot of them myself. However, now that I’m retired and not being paid, I can tell it like it is.

(Laughter and applause)

MR. BENNETT: So, the intent is --

COMMISSIONER DOMBROWSKI: We are on a schedule, though, please.

COMMISSIONER BROAD: I think we should -- Mr. Chairman, I think we should afford the witnesses as much time as they need. And if the proponents would like to come back up and talk some more, we should let them do that too.

COMMISSIONER DOMBROWSKI: I would just -- how long do you think you’re going to need? Because we do need to get some other -- I’ll put this on hold and you can speak after we finish some other business if you’re going to take a while.

MR. BENNETT: Three minutes.

COMMISSIONER DOMBROWSKI: Okay. Go ahead.

MR. BENNETT: What the proposal before the
Commission attempts to do is to get at the proposition that if you are a manager, by definition any work you do is managerial work. And this is explicit in the case of the proposal for an employee in charge of an independent or physically established branch. If you’re in charge of that, then everything you do is presumed to be managerial because you’re a manager.

And in a very complicated and difficult, broadly phrased language, that is the intent also of the redefinition of managerial work, which, in effect, seeks to redefine managerial work as including time-card work.

In terms of real people, what the Commission has to decide is whether people like the Taco Bell manager, for example, who was here previously, whether as a matter of policy that’s someone who, under the laws of California, should receive overtime or not, if a -- working 60, 80 percent of the time doing time-card work is typical. If it is the Commission’s conclusion that this person should not receive overtime, then the clean and honest way to do it is to toss out the concept of exempt and nonexempt work altogether. Be clear about it. Be honest. And don’t try to do it by way of the back door, because all that will do is throw the whole process into limbo. And only the attorneys, of which I used to be one, will benefit.

In closing, I should say that I fully understand and appreciate the competitive -- the enormous competitive
problems of retailers and service establishments today, and
I’m fully aware of the fact that controlling labor costs is
frequently the difference between profit and going out of
business. I also believe that the majority of employers in
this state are decent employers who want to do the right
thing and who would be ill-served by adopting this very
broad language that’s been proposed. I think the only
people who would benefit from this kind of language are the
least ethical employers, whereas the great majority would
actually suffer from what would be done here.

In conclusion -- and I hope I’m not over three
minutes -- I want to -- well, I don’t know whether to
congratulate the members of the Commission on their
appointment or to offer my condolences.

(Laughter)

MR. BENNETT: You will find, if you haven’t
already, that this will amount to a second job. The issues
you are facing are very important, and they are also very
tricky, difficult to understand, and the process is not made
any easier by fast-talking smoothies or people who just make
emotional appeals. So, I -- in way, I -- may you live in
interesting times. You are living in it. And best of luck.

Thank you.

COMMISSIONER DOMBROWSKI: Thank you.

I’m going to go slightly out of order here and go
to Item Number 8, the appointment of members to the wage
board for computer professionals, in accordance with Labor Code Section 1178.5(b) and 1179.

I believe Commissioner Coleman and Commissioner Broad have some names they want to suggest.

MR. RANKIN: (Not using microphone) Would you mind listening on this?

COMMISSIONER DOMBROWSKI: Go ahead, Tom.

MR. RANKIN: Tom Rankin, California Labor Federation.

I hope you’re in receipt of a letter that we sent you recently on this whole issue. I just want to make the point again -- I tried to make it at your last meeting when you set up this wage board -- one, you have no statutory authority to set up -- to deal with this issue for hourly computer professionals, to try to exempt them. The statute does not give you that authority. The statutory sets out a salary in the statute. You’re trying to play with that. You can’t do it.

Two, even if you could do it, you have not followed your procedures for setting up a wage board. You have not ever publicly noticed a hearing on this issue. You may have heard a couple witnesses from management on it, but you never noticed a public hearing. You’re setting up a wage board without following procedures.

Moreover, you have not indicated, specified which wage order these people are covered under. And I would
submit to you they’re probably covered under many. And one
wage board will not work legally -- just a note of warning.

(Applause)

COMMISSIONER BROAD: Mr. Chairman, can I raise
that as a point of order? What is the intention here, to
establish one wage board which is going to make a
determination across every -- and then make recommendations
that would go in every wage order?

MS. STRICKLIN: My understanding is that this was
going to go initially into the interim order. That’s what I
understood the proposal was at the last hearing.

COMMISSIONER BROAD: And it’s your opinion that
that’s lawful?

MS. STRICKLIN: Yes. There can be -- there are
only computer programmers that are listed under 4. And I
understood that the procedure that this Commission was to
taking was to initially put everything into one order, which
would then be branched out into the individual orders that
they would particularly go into.

COMMISSIONER BROAD: And it’s your understanding
that that’s lawful?

MS. STRICKLIN: My understanding is, yes, that
that’s lawful, that we are amending, under 517, the interim
order, on all these various subjects, the stable employees,
which was continued, the consideration of duties, the
election procedures, and that they would eventually all be
COMMISSIONER BROAD: Okay. For the record, it is my view that it’s unlawful because, one, as Mr. Rankin pointed out, there has to be an investigation that includes a public hearing. There was no notice. And as you notice -- or as we received testimony, it was only after we voted to appoint a wage board that people in opposition had any opportunity, so we had no opportunity to consider their testimony, for example, that gentleman that came today.

That’s point number one.

Point number two is the interim wage order is intended to implement the provisions of AB 60. There’s nothing whatsoever in AB 60 that has any bearing on an exemption for computer professionals. That’s a matter that goes forth in our normal process.

Therefore, I think what’s being proposed here is unlawful. However, the majority has taken that view, and I guess we’ll -- if somebody is aggrieved, they’ll raise that matter in the courts.

MS. STRICKLIN: As you recall, at the last hearing we discussed whether it was appropriate at that time to call a wage board or whether or not more investigation needed to be made, and the Commission as a whole made that decision that there was sufficient investigation with the notices that were sent out in prior hearings and meetings that the Commission would be taking testimony under AB 60.
That decision having been made, this is where we are.

COMMISSIONER BROAD: I appreciate that. I just wanted to make that point of order for the record.

COMMISSIONER BOSCO: Mr. Chairman, I don’t know if -- I don’t know if -- okay.

As I understand it, the threshold for appointing a wage board is simply that the Commission has done an investigation and then moves forward to the wage board. The purpose of the wage board is to allow both sides, in effect, management and labor, the opportunity to hold hearings throughout the state and come back to the Commission with their recommendations, which I think would certainly give everyone an opportunity to speak, not only here, but throughout the state.

Am I correct that the only threshold for appointing a wage board is that we have conducted an investigation and that there is no further delineation of what an investigation consists of?

MS. STRICKLIN: You are correct, in that there’s no case law that defines what the extent of an investigation has to be. But in order to appoint a wage board, there has to be, quote-unquote, “an investigation,” and there has to be a finding by the Commission that a particular industry, trade, or occupation has certain -- may be affected prejudicially, their health or welfare. And that’s under
MR. RANKIN: I’d just like to point out 1178, the
last sentence --

COMMISSIONER DOMBROWSKI: Identify yourself.

MR. RANKIN: Tom Rankin, California Labor
Federation -- which deals with the selection of wage boards.
The last sentence of that, “Such investigation” -- which
gives you the duty to investigate, and then, also, as a part
of your investigation, you have to find that the -- in this
case, the hours or condition of labor may be prejudicial to
the health, morals, or welfare of the employees. I don’t
know how you could find out, without hearing from one single
employee from that industry, just hearing from management.
And the reason you didn’t hear from those employees was the
last sentence: “Such investigation shall include at least
one public hearing.”

Now, in -- as far as I know, if you have a hearing
and it’s not noticed, that does not constitute a public
hearing on this issue. If you had public hearings on -- you
know, anyone in the world could come in -- but you never
noticed a public hearing for computer professionals.

COMMISSIONER DOMBROWSKI: Any other comments?

COMMISSIONER COLEMAN: I’d like to submit some
names for consideration by the Commission for the -- for the
wage board for computer professionals. The names are Jim
Schneider, Don McLaurin, Spencer Karpf, Mary Ellen Weaver,
Julianne Broyles, and Duane Trombly.

COMMISSIONER DOMBROWSKI: Those are the employer --

COMMISSIONER COLEMAN: These are the employer representatives.

COMMISSIONER BROAD: That’s five plus -- which one is the alternate?

COMMISSIONER COLEMAN: Duane Trombly would be the alternate.

COMMISSIONER BROAD: And I would like to propose, for --

(Pause)

COMMISSIONER DOMBROWSKI: There you go. There you go.

COMMISSIONER COLEMAN: Try again.

COMMISSIONER BROAD: Oh, now it --

COMMISSIONER DOMBROWSKI: Try it now.

COMMISSIONER BROAD: Somebody’s getting sick of me.

Anyway, I’d like to propose, for labor, Jim Gordon, Bruce Hartford, Edward Powell, Andreas Ramos, Tom Rankin, and Dirk Van Nouhuys, who -- and the last, Mr. Van Nouhuys, would be the alternate.

COMMISSIONER BOSCO: Mr. Chairman, I would like to propose as chairperson of that wage board Carol Anne Vendrillo.
COMMISSIONER DOMBROWSKI: Very well.

COMMISSIONER COLEMAN: The charge for the wage board has been distributed to all the commissioners, the draft charge.

COMMISSIONER DOMBROWSKI: So, a motion to adopt the charge and the names.

Do I need to do it separately, or can I do it all as one, or -- do it all as one.

All in favor, say “aye.”

(Chorus of “ayes”)

COMMISSIONER DOMBROWSKI: All opposed?

(No response)

COMMISSIONER DOMBROWSKI: Thank you.

We’ll go back to the agenda item, consideration of and public comment on convening a wage board regarding the minimum wage. And again, to maybe save some time on this, I, for one, am prepared to vote for that. I don’t know about the other commissioners. I don’t know if others want to come up and testify or if we can just go to the wage board for minimum wage.

MR. RANKIN: Tom Rankin, California Labor Federation. I think there may be a few people who came here to testify, one or two, on this issue. All I’d like to say, because I know you’re pressed for time, is that it is time to act on this. The statute requires that you do it at least once every two years. Minimum-wage workers in
California have not seen an increase since Proposition 210 was passed in 1996, and it’s high time to bring that wage up to a living wage in California.

COMMISSIONER BOSCO: Mr. Chairman, may I make one comment to Mr. Rankin?

And I don’t like doing this. Being a former member of the Legislature, I don’t like to point out any inconsistencies in people’s positions. However, I will note that you don’t seem to be taking the same umbrage at us setting up a wage board for the minimum wage without having --

MR. RANKIN: You did have a hearing in Los Angeles. There were several hundred people there, I believe.

COMMISSIONER DOMBROWSKI: That was before Commissioner Bosco was appointed.

COMMISSIONER BOSCO: Okay. Thank you. Sorry.

AUDIENCE MEMBER: (Not using microphone) I think it was actually a noticed meeting.

MR. RANKIN: Yes. And it was noticed, also.

COMMISSIONER BOSCO: Okay. Thank you. That is true, it was before I was on the Commission.

MS. BRIDGES: Good afternoon, ladies and gentlemen of the Commission.

COMMISSIONER DOMBROWSKI: Use the microphone.

COMMISSIONER BROAD: Press the button.
MS. BRIDGES: Are we working?

COMMISSIONER DOMBROWSKI: There you go.

MS. BRIDGES: Okay. My name is Tracey Bridges, and I live in Sacramento. I’m a member of Acorn, Association for Community for Reform Now.

You’re talking about minimum wage. $5.75 isn’t even enough for a family of four to live on, if you consider childcare, around $400 a month, rent $600 or more, utilities $200 to $300, groceries $400 to $500. You’re talking about $1,800 a month that a family should have to live on. They can’t do it, not with a family of four.

A single mother who’s on AFDC, who may have, say, on Child Action, who’s paying part of her childcare bill, still cannot make ends meet on $5.75 an hour.

(Coughs) Excuse me.

If you cut out the overtime that they are given, then that’s the extra money that they might be able to barely make it by on.

There’s grandparents who are raising their children. $5.75 isn’t enough, not when a movie, to take those children to, is $6.00 a person. It cannot be done.

What about the medical bills? It can’t be done.

Parents with children that have special needs, special education, that comes out of their pocket. $5.75 is not enough to raise a child on and to give it a decent education, clothes, shoes. We need a higher minimum wage.
Thank you.

(Applause)

MS. BER: Hi. My name is Esperanza Ber, and I represent the garment union workers.

On behalf of my fellow members, I just came to tell you to please raise the minimum wage, because in the garment industry, we see a lot of, you know, work under -- I mean, the minimum wage. And it’s hard to keep a family like this.

And that’s it. I just want you to please think about it and ask to help our union members to raise the minimum wage.

COMMISSIONER DOMBROWSKI: Thank you.

(Applause)

COMMISSIONER DOMBROWSKI: I guess I’d like a motion.

COMMISSIONER BROAD: Yeah. Mr. Chairman, I’d like to make a motion that we, based on statutory requirements in the Labor Code, that we convene a wage board to consider whether it is appropriate at this time to increase the state minimum wage.

COMMISSIONER BOSCO: I second the motion.

COMMISSIONER DOMBROWSKI: All in favor?

(Chorus of “ayes”)

COMMISSIONER DOMBROWSKI: All opposed?

(No response)
COMMISSIONER DOMBROWSKI: Motion passes.

Item 7, appointment of members to the wage board for construction, mining, drilling, and logging, as defined in interim wage order pursuant to Labor Code Section 1178.5(b) and 1179.

Commissioner Broad, I believe you have those names.

COMMISSIONER BROAD: Do you want me to read all of them?

COMMISSIONER DOMBROWSKI: Yeah, go through all of them.

COMMISSIONER BROAD: Okay. For the employers, John Clarke, who will be the alternate, Ken Perry, Doug Ralston, Ron Rule, Charles Sloan, Scott Strawbridge, Mike Anderson, Frank A. Sanderson, David Charles Lefler, and Betty Walker.

And for labor, Nico Farraro will be the alternate, Cedric R. Porter, Dale Robbins, Gary Saunders, Gary Wagnon, Scott Wetch, Marie Box, Paul Cohen, Tom Rankin, Ronald E. Myers, Gunna Lundsberg, and Bill McGovern.

COMMISSIONER BOSCO: Mr. Chairman, I --

COMMISSIONER BROAD: Yeah, I’m done.

COMMISSIONER BOSCO: I nominate Daniel Altemus to be the chairperson of that wage board.

COMMISSIONER DOMBROWSKI: All right. I guess we have a motion.
COMMISSIONER BROAD: I’d like to move that we adopt those appointments to the wage board and that we approve the charge to the wage board.

COMMISSIONER BOSCO: Second.

COMMISSIONER DOMBROWSKI: Okay. All in favor, say “aye.”

(Chorus of “ayes”)

COMMISSIONER DOMBROWSKI: All right.

Any further business that may come up before the Commission? Does anyone wish to bring anything forward?

COMMISSIONER BROAD: Mr. Chairman, I -- perhaps you could also entertain -- I think the opponents (sic) of the earlier proposal had considerably more time than the opponents, as it turned out, and if there’s any of them that would like to make further comments.

COMMISSIONER DOMBROWSKI: Okay. Okay.

Please identify yourself and your subject.

MR. AYAD: Good afternoon. Emil Ayad, Guard Vision Private Security. I’m here to speak about the concern of AB 60 towards the security guard industry.

The security guard industry is extremely, extremely affected by AB 60, especially over the eight-hour day, due to the fact it’s very, very common for the security officers to work over eight hours a day. We are not against paying them the overtime, but, unfortunately, we don’t get paid the overtime. Our clients, when they subcontract a
contract out to us, they do it for account. For example, we say, “We have 100 hours of security; give us a price.” We quote them a price of, let’s say, $10, $11 an hour. They don’t care how many guys or how many people it will take to cover those hours; all they want is their location to be covered.

So, if we have a 24-hour location to be covered with security and the morning officer does not get relieved by the afternoon officer, he automatically kicks into overtime after eight hours. And a lot of these security officers have to work double jobs anyway to make enough living, because the security industry, the billing wage is not as high as we would like it to be. That’s just the way the industry is.

What I would like to ask for today, to be exempt from over the eight-hour day, back to the 40.

Another problem we’re having is this law right now, it was in effect before Pete Wilson came into office, and it was very easy for us to run the security industry because we had more manpower. But right now the unemployment rate is so low, it’s down to 4 percent. And to get the manpower out of that 4 percent to work as a security officer, half of them have felonies, misdemeanors, and it’s very hard to hire them if they have that kind of background, as security officers. So that would leave you just 2 percent. And the Los Angeles area has over 2,000 security
companies that are trying to hire out of those 2 percent.

And it’s very, very hard to operate a security
company under the new AB 60, which is over the eight-hour
day. It’s very, very difficult. And what we’re doing right
now, in order to for us to cut back on the overtime because
we don’t get paid for overtime, is basically schedule the
officers to work 32 hours a day -- I mean a week. So, that
way, I have a lead of eight hours so I don’t kick into the
overtime.

We’re not trying to get away from it. We’d like
to comply with the law, but it’s very, very difficult to
operate under those circumstances.

I spoke to one of the senators about this back in
November, and his response was, you know, “You should have
thought about the business you were getting into.” I was
not expecting to hear that. I mean, we have our problem,
we’re looking for a solution where we can make it happen.

And another senator asked me, “Why are you the
only one out of the security industry that’s making a fuss
about it?” Well, basically, a lot of self-employed people
feel like, as employers, we have no rights. Maybe we don’t.
The employees have all the rights in the world. I was an
employee at one time. I started off as a security guard and
I worked my butt off to start my own business. I never came
up here to cry about overtime or sued anyone.

It’s becoming very, very difficult to operate in
California as an owner of a company. Insurances, taxes, city taxes, corporation taxes -- no one has a clue, unless you have your own business, how expensive it is to operate in California. It’s not easy to operate in California any more, and that’s why a lot of the big companies are leaving California, due to the fact that -- I mean, every city that I have a security officer, I have to pull a license to operate in that city. On top of that, I have to pay taxes in that city, okay? And it goes on and on and on. If I have a patrol unit go through a city in a vehicle, I have to pay taxes for the car going through the city. It’s becoming very, very tough to operate.

And I’m here today because I do have faith in the system. Unfortunately, a lot of the security companies told me today that I’m wasting my time coming up here because they feel like it’s a waste of time. Well, I don’t feel like I’m wasting my time, because I’m fighting for something I believe in. And that’s what it’s all about.

I’m from another country. I’m not from here. And I have to admit, this is the greatest country in the world, because you come here, you can do something for yourself and your family. And I hear a lot of people up here today complaining about the overtime and all that. Well, you know what? As an employer, I’m going to find a way to cut down schedules and hire more people so I don’t have to pay the overtime. You’re going to have to go get another job anyway.
somewhere else to make ends meet. You’re going to work
another 30 or 40 hours somewhere else, at straight time.

   So, that’s what I’m asking today, if we could look
at it again. Again, I’m not against the idea of paying the
overtime. But in the security industry, we bill straight
time. Clients do not pay overtime. The only time they pay
overtime is holidays. That’s the only time. So, when they
give out a contract -- the best example I can give you is,
if you hire a contractor to build a room this size, and he
gives you a bid for $100,000, and he runs out of money, he’s
going to come back to you and say to you, “I paid my people
overtime.” You don’t want to hear that. You paid for the
project; you want it done. So, you either end up firing him
or suing him.

   So, please, if you could think about it. And it’s
for the security industry. A lot of security companies were
not aware of this meeting today. Otherwise, they would have
been here. I’ve been fighting this through last November.
I wrote to Washington, I wrote to every senator, and I got
very good response. I gave Andrew all the letters that I’ve
received from the White House and the attorney general and
the senators.

   So, I ask of you, please reconsider to exempt
security companies from the eight-hour days.

   Thank you.

COMMISSIONER DOMBROWSKI: Any questions, comments?
COMMISSIONER BROAD: Yes, sir. Just one question.

Were you previously not paying people overtime after 40 hours in a week?

MR. AYAD: No, we were paying over 40 hours a week -- over 40 hours in a week.

COMMISSIONER BROAD: Because that’s been the rule under federal law since 1938. Nothing’s changed, period, in that. It’s always been the rule.

MR. AYAD: No, we have been paying the overtime over 40 hours. But now we have to pay it over eight and ten or twelve hours a day. That’s what’s going to hurt us, because what happens is, when the officers --

COMMISSIONER BROAD: Okay, I understand. I thought you were complaining that you had to pay overtime after 40, and I don’t quite understand that.

MR. AYAD: Oh, no. No, no. No, I’ll clarify that. No, we -- I’m not against the idea of paying the overtime over 40, but over eight-hour days, for security companies, which -- security company is the largest -- or the fastest growing industry in California. It’s the fastest growing. And I’m sure some of the companies that I know employ at least -- we’re a small company; we have about 350 employees, and that’s a small company. Some of the bigger companies, they have 5,000, 10,000. I know one company that’s got about 74,000 employees. And that overtime will basically either put them out of business or
leave the state.

COMMISSIONER DOMBROWSKI: Mr. Ayad, I’m going to ask Andy Baron, our executive director, to talk to you on the side about what kind of possible options you have within the context and help you out a little bit with that.

MR. AYAD: Okay. Thank you very much.

COMMISSIONER DOMBROWSKI: Thank you.

Anyone else want to bring something up?

MR. ULREICH: I don’t want to swallow the microphone here. Is that about right?

COMMISSIONER DOMBROWSKI: Yes.

MR. ULREICH: I wasn’t going to say anything today. My name is Bob Ulreich. But my reason for sitting down here and speaking briefly with you is the remarks made by the last speaker.

For twenty years, as a union official, as a representative and as a vice president, and then as a president of the International Union of Security Officers, I represented security officers. And I take the gravest possible exception to the remarks made by the last speaker.

If you take his remarks seriously, then I recommend that you have a two-pronged proposal as part of a complete program to disenfranchise security officers from the rest of the human race. The first part would consist of eliminating overtime after eight and double time after twelve. And then, as a second proposal, I suggest that you
see how you can eliminate the rights of the security
officers to participate in the American democratic process.

They are very, very unable to defend themselves.

Without a union, they are usually individuals at single
sites on graveyard shifts. They are easily taken lightly,
although sometimes their responsibilities include protecting
$100-million, $200-million properties. And if this
Commission doesn’t act rightly, no matter what I’m doing in
the future, I will come back here and be a spokesperson for
that group, because having spent twenty years of my life
representing them, I’m not going to see one individual who
purports to speak for the entire security industry undo what
has been done on behalf of my members.

I will also add that I have spoken to many, many
executives in security companies who, contrary to what you
have heard, believe that it is right for security officers
to be paid overtime after eight hours, double time after
twelve. Their concern is about having a level playing
field. So, the way that you would be able to get them to
agree with the position taken by the last speaker is if you
said, “Well, small businesses won’t have to abide by those
standards,” at which point they would say, “Hey, we have to
compete with these guys, so why not give us the same rights
and privileges?” because it is a very cutthroat -- everybody
knows what I mean when I say “cutthroat”? -- it is a very
cutthroat industry. Margins of profitability range between
one and three percent. And if you sow the wind, you will
reap the whirlwind.

Thank you.

(Applause)

COMMISSIONER DOMBROWSKI: I have another
housekeeping -- just a housekeeping note, for the record.
We have letters from the Attorney General’s Office and
legislative counsel opinion concerning the stock option
proposal that are on the public record. People who want
copies of those can inquire at the IWC office.

Any other business?

Is that a “yes”? You want to -- okay.

MR. DELTE: Hi. I’m Nick Delte, from Californians
for Justice, in San Jose.

And I agree with minimum wage getting higher
because, you know, my mom has six kids, and it’s hard for
her. You know, she’s a single parent and it’s hard for her
to make a living with us. And, you know, it’s -- it’s hard
for her because, you know, she doesn’t have any help from my
dad, and she has six kids. Even though they’re not living
with us, you know, she still helps them out, even if it’s
her last dollar. She’ll give it to the brothers and
sisters.

And highering the minimum wage would help us, you
know, with groceries and clothing. And right now I’m in
high school, so I’m trying to graduate from high school, and
it’s hard for me, you know, seeing other kids with nicer clothes, and I’m over here, you know, struggling. And I’m going to probably get a job right now at, you know, Baskin Robbins or something, just to help her out. But I think, you know, it should be higher, just for, you know, helping parents out, families that are on low budgets right now. You know, it’s hard for her. She’s like struggling with her last cent just to feed us. And it helps other families out too.

And I think, by raising it, it would take a big step for California and for justice. Thank you.

(Appause)

COMMISSIONER DOMBROWSKI: Thank you.

MS. CUNEY: My name is Dee Cuney. I’m from Napa, California. I’m a private childcare provider, and I’m also an employer. And, of course, I do pay my overtime to my staff.

But you know what we’re seeing in the childcare industry? We’re seeing people get their hours cut to avoid paying overtime. Because, you know, we work ten to fourteen hours a day taking care of the working families’ kids. But we’re seeing an abuse of it, where people have had their hours cut, or they hire two people to work that day when the original -- before that, people would get their overtime. Now they’re cutting staff hours in half.
But I think you need to be aware of what’s happening. Childcare workers don’t make very good money anyway, but you need to know that that’s happening out there.

Thank you.

(Applause)

COMMISSIONER DOMBROWSKI: Thank you.

Do I have a motion to adjourn?

COMMISSIONER BROAD: So moved, Mr. Chairman.

COMMISSIONER DOMBROWSKI: Do I hear a second?

COMMISSIONER BOSCO: Second.

COMMISSIONER DOMBROWSKI: All in favor, say “aye.”

(Chorus of “ayes”)

COMMISSIONER DOMBROWSKI: Thank you.

Oh, I should say the next meeting of the IWC will take place April 14th, at a site to be determined in Oakland.

MR. BARON: The federal building.

COMMISSIONER DOMBROWSKI: Oh, the federal building in Oakland.

Thank you.

(Thereupon, at 1:12 p.m., the public hearing was adjourned.)

--o0o--
I, Cynthia M. Judy, a duly designated reporter and transcriber, do hereby declare and certify under penalty of perjury under the laws of the State of California that I transcribed the three tapes recorded at the Public Hearing of the Industrial Welfare Commission, held on March 31, 2000, in Sacramento, California, and that the foregoing pages constitute a true, accurate, and complete transcription of the aforementioned tapes, to the best of my abilities.

Dated: April 6, 2000

______________________________
CYNTHIA M. JUDY
Reporter/Transcriber