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P R O C E E D I N G S

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3 COMMISSIONER CENTER: Good morning, everyone. As
4 noticed, this is an informational fact-finding hearing on
5 Senate Bill 60, implementation of the 8-hour day.

6 With that, I'd like to call the roll of the other
7 commissioners so we can open up the meeting.

8 Leslee Coleman?

9 COMMISSIONER COLEMAN: Leslee Coleman.

10 COMMISSIONER DOMBROWSKI: Bill Dombrowski

11 COMMISSIONER BROAD: Barry Broad.

12 COMMISSIONER CENTER: And Chuck Center. Seeing we
13 have a quorum, we'll commence our meeting.

14 What I'd like to do is just have individuals come
15 forward and testify and make comment. If you have written
16 comment, we would ask you to have seven copies to provide
17 for the Commission.

18 And what we're going to do today and next week is
19 try to gather as much information on the impacts of AB 60
20 and try to provide as much guidance as we can, as early as
21 we can in January, as to the effects of the changes in the
22 overtime law.

23 With that, some -- oh, we have to also approve the
24 minutes of the last meeting.

25 Has everyone read the minutes of the last meeting?

1 Do I have a motion to approve the minutes?

2 COMMISSIONER COLEMAN: So moved.

3 COMMISSIONER CENTER: Second?

4 COMMISSIONER BROAD: Second.

5 COMMISSIONER CENTER: All in favor, say "aye."

6 (Chorus of "ayes")

7 COMMISSIONER CENTER: Opposed?

8 (No response)

9 COMMISSIONER CENTER: The minutes are adopted.

10 With that, we had some individuals that called
11 ahead of time that would like to come up and testify first.
12 They called this morning.

13 The first one with that request to testify is
14 Willie Washington, with the California Manufacturers
15 Association.

16 MR. WASHINGTON: Good morning, Mr. Chairman,
17 members. Willie Washington, with the California
18 Manufacturers Association. Thank you for the opportunity to
19 speak, not necessarily first, but I did want to comment
20 earlier because a lot of the testimony that you're going to
21 hear today will have a great deal to do with what the
22 manufacturers are going to be doing a little later on.

23 I did prepare a very short comment letter for you
24 that is being distributed, and I'll kind of limit myself to
25 that this morning because we're still in the information-

1 gathering stage.

2 First of all, I wanted to bring to the attention
3 of the Commission that the number of changes AB 60 makes are
4 really, really quite overwhelming. And this is one of the
5 primary concerns that we have, is that there's so much for
6 the Commission to do before January 1, when this bill goes
7 into effect.

8 Of primary concern to the California
9 manufacturers, and the point that I'm going to be delving on
10 or speaking to at almost every opportunity, will be the
11 prohibition on the 12-hour shifts that will impact the
12 manufacturers more directly. Our concern here is that,
13 under the current law, under AB 60, an employer is going to
14 be -- it's going to prohibit the use of a 12-hour shift
15 without the payment of overtime before 40 hours of work in a
16 workweek.

17 Now, this has a real big problem because, for many
18 of our members, that is the mainstay of their working. In
19 other words, when we have employers who are working 24 hours
20 a day, seven days a week, 365 days a year, the 12-hour shift
21 is a mainstay. And to put them at a disadvantage of
22 requiring that they pay overtime on a daily basis will have
23 a negative impact on their competitiveness.

24 I have manufacturers who will be coming forward
25 who are in those particular situations, and many of them

1 will also be bringing their employees along with them to
2 give you some idea of the impact that that's going to have
3 on them, on them in terms of their competitiveness, and in
4 terms of the employees, how it's going to reshape their
5 lives. And I think you're going to be quite surprised, and
6 you're going to find a great deal of interest on the part of
7 those employees who have changed from the rotating 8-hour
8 days to the 12-hour shifts. And so, I'm looking forward to
9 their coming forward and testifying on that particular area.

10 In addition, we found it very, very difficult to
11 quantify this. I've been asked before the quantify this,
12 the impact that we continue to say it will have on
13 manufacturers. The Commission and others keep asking us to
14 quantify that, and it has been extremely challenging and
15 very difficult to do. We're still trying to do that, and
16 we're making one last effort, all-out attempt to do that.
17 And maybe by the 15th of December meeting in Los Angeles, we
18 hope to be able to quantify the impact that it will have on
19 these employers, and perhaps even on California's economy.
20 So, that's a target that we're shooting for, to try to
21 provide you some information as to the negative impact of
22 this prohibition on 12-hour shifts.

23 We're also concerned about the volume of the
24 changes and the complexities of all of the changes that we
25 have to go through. I've read the bill many times over, and

1 the bill is extremely, in many instances, ambiguous.
2 Certainly it's contradictory, because in some instances you
3 have the labor law which takes precedence over your
4 regulatory issues, and yet and still you have back-and-forth
5 exchanges as to who will be making the rules on what
6 particular issues. And we think this makes it extremely
7 difficult for the employers to understand and to be able to
8 work with something that is so difficult to understand with
9 any degree of certainty that what they're doing is right.

10 And we think this is particularly germane
11 considering that this bill also includes some new, fairly
12 harsh monetary penalties. And to hold an employer
13 accountable for something that they're not yet able to
14 understand and to put into place in the workplace and to
15 comply with the law, we think, is just not fair. So, that's
16 one of the things that we would like for you to consider as
17 a way of dealing with that, considering the fact that the
18 bill is going to go into law on January 1, regardless of
19 what we do here, what we get resolved, and so the employers
20 are going to need some form of safe harbor as far as these
21 penalties and things are concerned, if the Commission has
22 not resolved it by the 1st of January.

23 I had indicated before that I had more questions
24 than I did testimony, and that's still true. But this -- I
25 decided, after going over the bill, that it was much, much

1 too complicated, and too many of them, to bring forward at
2 this time. So, what I did is I took those that are the most
3 immediate, the ones that are the most urgent for the
4 employers, the ones that they need to have an answer on now,
5 and I did comment on those.

6 For example, the number of questions that I've
7 received regarding whether or not an employer who had read
8 AB 60, if they can take a vote now that would be recognized
9 in 2000. Could they comply with 2000 by vote and have those
10 things registered in 1999, and would they be applicable or
11 acceptable in 2000? That's one of the questions that is
12 raised again and again and again.

13 The bill had what we call a grandfathering portion
14 in there for some of the members -- some of those members
15 are CMA's members -- that attempted to allow those employers
16 who had voluntary plans, who had complied with the law and
17 were working up to 10-hour days, to continue those if they
18 were in effect on July 1 of 1999. The problem is that the
19 bill also required that all of those people volunteer again,
20 in writing. And again, the question becomes, if those
21 people volunteer again in writing in 1999 so that the
22 program is still legitimate in 2000, is that going to be
23 effective? Is that going to be legitimate? Would the
24 commissioner view that as having been done properly?

25 Other problems deal with -- some complications

1 created by the bill is that it reinstates, for example, the
2 old wage orders, the pre-1998 Wage Orders 1, 4, 5, 7, and 9.
3 And it reinstates those, and it implies that we go back and
4 we reimplement all of the things that we were doing prior to
5 the changes that were made in 1998. But because AB 60
6 specifically does away with many of the things that were in
7 the old wage orders, it creates a dilemma for us.

8 For example, if an employer is operating an
9 alternative workweek under one of these orders, for example,
10 would they be required to requalify the program under AB 60,
11 for example? Even though they are operating under one of
12 those old orders, come 2000, the criteria is different. And
13 will they be required to requalify those programs?

14 Will the various exemptions that are contained in
15 these orders, for example, be valid? For example, a parent,
16 spouse, children of the employer and so forth are currently
17 exempt. AB 60 specifically requires that they also be
18 subject to overtime payments. And yet this will be in the
19 old wage orders where they were exempt that we're going back
20 to. And the question becomes, what takes precedence, the AB
21 60 rule of the law or these regulations that we're
22 reimplementing come January 1 of 2000?

23 And then there's some language in the bill. One
24 of them in specific -- in specific that we're concerned
25 about is what is an employer's overtime obligation to an

1 employee who works on a seventh -- on any seventh day of a
2 workweek? And again, it might be just semantics or the way
3 that the bill is written that it really didn't mean what it
4 says. But without indicating in the bill that the days of
5 work have to be consecutive or something of that nature, it
6 implies that a person who works on the seventh day would be
7 due overtime pay, even if that was the only day of the week
8 that they worked, or even if it was the third day of the
9 week that they worked. Whatever your workweek happened to
10 be, according to this section, it would mean that overtime
11 would be due on any seventh day that you work. So, that's
12 another clarification that we need, and need that fairly
13 quickly.

14 Some of the other requirements of the bill are
15 very, very complicated, and that's why I decided that we
16 really need -- I needed to have more guidance from my folks.
17 For example, creating a menu of alternative work schedules,
18 without more definitive guidelines, is, you know, possibly a
19 problem for employers. For example, under AB 60, only the
20 employees get to choose what schedule that they would be
21 willing or able to work. Now, if you had several schedules
22 and employees chose to work the first one or the first two,
23 and the third or the fourth shifts, or whatever they
24 happened to be, did not have enough people left over to man
25 them, there's nothing in there that would require the

1 employer or allow the employer to dictate which one of those
2 employees would have to work on a shift that they did not
3 want. If you were using a menu of alternative shifts,
4 that's the type of problem that this would generate if we
5 don't have some more definitive guidelines coming out of the
6 Commission and others on how the employee can do that.

7 Developing a one-size-fits-all secret ballot
8 process or disclosure requirement also creates a problem,
9 and it's going to be somewhat difficult. I know that from
10 having talked with my members. I have some members where
11 one particular avenue would be acceptable, and is not
12 acceptable to another large segment of my employee
13 population. In fact, that's precisely why I'm not able to
14 provide you with some recommendations in that particular
15 area now. And I just want to make you aware of the fact
16 that until I have some greater input from my members, I will
17 not be able to do that.

18 However, we are scheduled -- the Manufacturers
19 Policy Committee that deals with this issue is scheduled to
20 meet on the 19th of this month. And at that time, we will
21 be discussing this. And hopefully, I'll get enough guidance
22 at that time to be able to come back to you with something
23 that we think would be something that the employers as a
24 whole in manufacturing could work with.

25 Fundamentally, this is such a complicated issue

1 that the Manufacturers Association understands that it is
2 the law. We just want to make sure that our employers know
3 and understand what the law is. In trying to interpret the
4 law and implement the law, the Manufacturers Association
5 fully intends to work with the Commission and others, and
6 with the Labor Commissioner, to ensure that as this bill is
7 being developed and implemented, that we have input and to
8 work with you to try to make it a workable proposition for
9 both the employers and the employees of California.

10 Thank you for the opportunity to testify. And if
11 you have any questions, I'll be happy to answer them at this
12 time.

13 COMMISSIONER DOMBROWSKI: Just a question, Willie,
14 on this. You talked about quantifying the economic impact
15 on your members. Are you going to be able to give us
16 anything on the economic impact on the employees?

17 MR. WASHINGTON: Actually, that's the easiest part
18 because all of the employers that are working these
19 schedules can give me that quite quickly. And the answer is
20 yes.

21 COMMISSIONER BROAD: Willie, on some of those
22 issues that you've raised, I've thought about them myself,
23 and I think some of them, we've really got to avoid the
24 "Chicken Little" scenario and make more out of this than the
25 bill actually did.

1 For example, the bill clearly says that the
2 Commission can retain or eliminate any exemption from
3 provisions regulating hours of work that was contained in
4 any valid wage order in 1997. So, if it restores wages
5 orders, you know, temporarily, you know, on January 1, the
6 bill says, they're restored, and they're restored with all
7 their exceptions in them. And I don't think there's
8 anything in the bill, for example, that intended to overturn
9 the exemption of, you know, family members, or the one that
10 deals with trucking or public employees or anything else. I
11 don't -- I believe that the bill was intended to restore
12 daily overtime to people who lost it and to give them the
13 choice of having alternative workweek arrangements. I don't
14 think it was intended to say that every exemption that were
15 in valid wage orders at that time is wiped out and we're
16 starting from zero with nothing.

17 So, I think, to some extent, we need to avoid, you
18 know, getting overwrought about this and to sort of --
19 because some of the issues you raised are very legitimate.
20 I also think that, to some extent, some of it's outside of
21 the purview of the IWC. That is to say, how the Division of
22 Labor Standards Enforcement intends to enforce these things
23 is part of the issue. Now, it seems to me that if an
24 employer complies with the provisions of the bill in terms
25 of holding an election, and wishes to try to do that by

1 January 1, 2000, that it's -- and follows those provisions,
2 I would think it would be quite unfair to then impose some
3 tremendous burden on them, from an enforcement point of
4 view, because they did it in advance of the IWC considering
5 the issues.

6 There is some, I think, small risk there that they
7 do it wrong, that we make some change to the way things were
8 done in 1997, or as we hear the issue, but it's just hard
9 for me to believe that with all, you know, the problems of
10 employees who aren't being paid the minimum wage at all in
11 certain industries, or whose rights are being violated, that
12 the Division of Labor Standards Enforcement has plenty to do
13 without going after employers who are trying scrupulously to
14 comply with this.

15 MR. WASHINGTON: I'm encouraged by your comments,
16 Commissioner Broad, because I'm hoping that that's the case,
17 and that where it's appropriate, that the Commission can
18 speak to that point, that that was not the intent, even
19 though that's what the bill says in many instances. That
20 would be very helpful if the Commission was to echo your
21 sentiments there that that was not the intent of the law and
22 do clarifications of that.

23 And I would also say that I'm totally in agreement
24 with you that the Labor Commissioner can play a very, very
25 critical role in this process, because, fundamentally, if

1 they are able to provide some safe harbor, so that when I
2 tell my employers, "Yes, you can do this," they don't have
3 to worry about subsequently being fined or found in
4 violation of the law. That would help a lot. So, your
5 comment, for me, is very encouraging, because if the
6 Commission are recommending this -- and I'll ask if the
7 Labor Commissioner would have a representative here so he
8 could kind of hear those discussions -- that would be very,
9 very encouraging for me. I'd be able to provide better
10 answers to my members as they call me on this. So, I'm very
11 encouraged by your comments on that.

12 COMMISSIONER CENTER: Thank you, Mr. Washington.
13 And we did invite the Labor Commissioner and their chief
14 counsel, and we thought they were going to be here today.
15 Let's hope they will be at the other hearings or come in
16 later to listen to the testimony of both sides affected by
17 the legislation. But the bill's sponsors are here today.
18 Maybe either at this meeting or the next meeting, they can
19 address some of your concerns.

20 And I think it's our -- everybody's feelings on
21 the Commission to make it as fair and easily enforced for
22 the employers out there as we possibly can. Now, because
23 this is a fact-finding, we have no official positions on
24 your questions, but we will take them into consideration.

25 Thank you.

1 MR. WASHINGTON: Thank you.

2 COMMISSIONER CENTER: The next speaker is Jon
3 Ross.

4 MR. ROSS: Good morning. Jon Ross, on behalf of
5 the Restaurant Association.

6 It took me by surprise. I thought I signed it at
7 the bottom, but I'm happy to -- happy to kick it off.

8 In the interests of time and the audience gathered
9 here today, we have a number of people within the
10 association, hundreds who would like to comment on various
11 parts of this issue. They're not pounding on the doors here
12 today. We intend to present testimony more fully next week
13 in San Francisco. Following up on what Mr. Washington said,
14 however, we would like to bring your attention to one issue
15 that we think is -- excuse me -- worthy of your early
16 review.

17 Our interest goes specifically to the various
18 provisions in the bill that ask the Commission to review the
19 manager exemption. One aspect of that is a requirement
20 under the new law that a manager receive two times minimum
21 wage. It's unclear to us, and it's unclear to a number of
22 lawyers that we've had look at that, when that particular
23 provision becomes effective. The language is couched in
24 terms of your ability to create new exemptions, and it's
25 unclear whether that requirement kicks in on July 1, 2000 --

1 or January 1, 2000. We would suggest that as you're
2 prioritizing your list of issues, considering what to do
3 over the next few months, it's critically important to those
4 employers who are trying to set payrolls and everything else
5 for January 1 to have some guidance, whether it comes from
6 this board or another, as to what the -- when that
7 requirement kicks in.

8 Our read is it -- you know, a very strong argument
9 can be made that that requirement takes effect the 1st of
10 July. Given that all the other exemptions and reviews and
11 studies are to take place by that date, for simplicity of
12 bringing employers into a new system, it might make some
13 sense to have all of that happen at once rather than have
14 this happen in stages over the course of the next few
15 months. That's -- that's one comment we'd like to add.

16 Second, we look forward as an association to
17 working with you as you conduct studies and reviews of the
18 manager issue generally. This has been an area of some
19 concern for restaurants. We're a service industry. The
20 standards that have been in place before on how you
21 determine activities that constitute management activities
22 have been problematic for some of our members. And as we
23 move forward in the next months, we would like to engage in
24 a dialogue on how that standard may be better expressed so
25 that it reflects the reality that our folks see today.

1 That concludes our comments today, and we will
2 present more testimony next week.

3 COMMISSIONER CENTER: Any questions from any
4 commissioners?

5 MR. ROSS: I thought I was out clean.

6 COMMISSIONER BROAD: Well, no. I just -- Mr.
7 Ross, my question goes to that issue of the January 1
8 implementation date versus July 1. Now, what the statute
9 says is, "The Commission shall conduct a review of the
10 duties which meet the test of the exemption." However, it
11 basically says that the Commission may establish exemptions
12 and "where the employee is primarily engaged in the duties
13 which meet the test of the exemption, the employee earns a
14 monthly salary equivalent to no less than two times the
15 state minimum wage for full-time employment." It doesn't --
16 I don't think that the Commission has any leeway in that --
17 that's a statutory directive, and it seems that it's
18 effective, in my view, on January 1, as is, you know, the
19 main provision of the bill, you know, 510, saying that, you
20 know, basically, people get time-and-a-half on January 1.

21 I think it would be wise of you to talk to the
22 Labor Commissioner about their view of it. It's my opinion
23 that we need to reinstate the wage orders that we are
24 ordered to reinstate as soon as we can do that after January
25 1, with whatever other interim directive we need to give in

1 addition to that. But that provision, it seems to me, looks
2 on its face to go into effect on January 1.

3 MR. ROSS: But the interim -- the wage orders that
4 had existed spoke to a different income test for manager.

5 COMMISSIONER BROAD: That's correct.

6 MR. ROSS: And the new statute speaks to creating
7 new exemptions. Presumably, these are acts that would be
8 taken by this board subsequent to the effective date of the
9 legislation. And so, the question, I think, is are you
10 implementing the old rule and the old standard pending some
11 action to create a new exemption, or does the statute by
12 itself create a new exemption with new terms as of that
13 date?

14 And at least the preface to that section speaks to
15 this Commission having the authority to create an exemption
16 that contains an element such as two times the minimum wage,
17 so that the -- we're not here to make a substantive or
18 policy argument on the merits of \$2,000. We're not -- or
19 two times minimum wage -- excuse me. But we do think
20 there's a legitimate issue as to when that new standard
21 takes effect. And you and I, as lawyers, can sit here and
22 have a debate, and a lot of other lawyers are too, and I
23 guess our point is we ought to be creative in ways that we
24 can, one way or the other, resolve this issue in a rather
25 public way so that a lot of employers don't have to go to,

1 you know, the expense of hiring me and you to go out and
2 tell them how this works.

3 COMMISSIONER BROAD: So, you want a definitive
4 answer as soon as possible.

5 MR. ROSS: Yeah. And we would suggest that -- you
6 know, that a good answer is to delay implementation of that
7 particular requirement --

8 (Laughter)

9 MR. ROSS: -- until July 1st.

10 COMMISSIONER CENTER: Thank you. We'll give you a
11 fair answer.

12 MR. ROSS: Thank you.

13 COMMISSIONER CENTER: The next speaker is Ann
14 Greenhill.

15 MS. GREENHILL: I work for an organization in Yolo
16 County called Summer House, and we provide a variety of
17 services to people who have developmental disabilities. I'm
18 also here as a representative of the California Respite
19 Services Association. We're an organization of 33 respite
20 agencies in California, which is approximately two thirds.

21 COMMISSIONER CENTER: Ma'am, could you bring the
22 mike a little bit closer? It's recording.

23 MS. GREENHILL: Okay. Should I start again?

24 COMMISSIONER CENTER: No. I just wanted you to
25 bring it closer.

1 MS. GREENHILL: Okay.

2 The California Respite Services Association
3 represents 33 agencies, which is approximately two thirds of
4 the respite agencies in California. And we represent about
5 3,000 families in the state. I coordinate the respite
6 program for Summer House to seventy families.

7 And the purpose of respite is to provide care,
8 childcare, so that families can receive occasional relief
9 from caring for their children with developmental
10 disabilities. We provide respite care to children and
11 adults with mental retardation, autism, cerebral palsy,
12 seizure disorders, and other disabling conditions. Our
13 respite workers qualify under the updated Wage Order 15-86
14 as personal attendants.

15 I'm here to advocate for continuing the Wage Order
16 15-86 personal attendant exemption from overtime. If the
17 exemption is not continued, there will be a serious negative
18 impact on our families and the respite workers who provide
19 the care.

20 By way of background, I want to tell you that all
21 respite agencies are funded by the Department of
22 Developmental Services, and we all receive an hourly rate of
23 reimbursement. This rate is based upon the respite worker's
24 salary of \$6.56 per hour, payroll costs, and also includes
25 an administrative reimbursement. For many respite agencies,

1 the various rates barely cover our costs; for some, the rate
2 does not cover our costs and we operate at a deficit, which
3 is managed by fundraising or other income the organization
4 has managed to generate.

5 Although we are constantly advocating for higher
6 rates of reimbursement, nonprofit respite agencies simply
7 cannot afford to pay overtime to our respite workers. For
8 example, my agency receives a reimbursement of \$11.80 per
9 hour, which includes the \$6.56 per hour respite worker wage
10 and approximately \$1.00 in associated payroll costs. An
11 overtime rate of one and a half times the \$6.56 salary and
12 the payroll taxes would cost us most of what we are
13 reimbursed. It will not take many overtime hours to deplete
14 our organization's ability to fund respite services. For
15 programs that are already losing money, this makes the
16 situation even worse.

17 I'd also like to explain respite care from the
18 family's point of view. Respite care is provided in the
19 family home and the hours are as varied as each family's
20 need. Respites longer than 8 hours are common, since many
21 families want to spend more than 8 hours away from home at
22 one time. Some families use their respite time to go away
23 for an overnight, which would always exceed the 8-hour
24 schedule. It is intrusive and disruptive for a family and
25 their children to have more than one person providing the

1 care. For respites longer than 8 hours, I know that many
2 families will have concerns about their children's care,
3 schedules, and routines with more than one person providing
4 the care. Children with developmental disabilities require
5 continuity of care and consistent interactions with the same
6 respite worker. Parents will lose the peace of mind that
7 comes from knowing that the person they leave their children
8 with will not be there when they get home. For respites
9 longer than 8 hours, they will not be able to give face-to-
10 face, specific instructions about their children to each
11 respite worker, and this is very disconcerting for a parent.
12 Parents do not want to rely on several care providers to get
13 the respite care they need.

14 Because most agencies will not be able to pay
15 overtime, and many families will not want more than one care
16 provider at a respite, we will not be able to meet their
17 needs. Without the overtime exemption, there will be a
18 hardship for parents of children with developmental
19 disabilities.

20 I also want to address this issue from the respite
21 worker's point of view. It's very important for you to know
22 that respite workers are not assigned respite work; they are
23 not required to take a respite job. This is an on-call
24 position, and workers are free to accept or decline the
25 respite job offer. It is not the employer who mandates the

1 work, and there is no pressure or threat of job loss if they
2 decline a respite job. Most of our respite workers are
3 usually doing something else as well. They're either
4 students or they have part-time or full-time jobs elsewhere.
5 They like the flexibility of respite work and the
6 opportunity to work as many hours as they want when they
7 want. They fit respite around other obligations. Longer
8 respites, that is, more than 8 hours, are attractive to many
9 workers because they can earn what they need or want at one
10 time. Their choice of working longer shifts is a benefit to
11 them because it fits their schedules and their financial
12 needs. Some like the ability to work more hours less often.
13 If overtime is implemented and respite agencies are unable
14 to pay overtime, then the respite workers will actually
15 suffer the economic consequences.

16 We already have comments in employees in other
17 programs where the 8-hour daily overtime will have to be
18 imposed, and many of them are disappointed that this will
19 eliminate the flexible work schedules they now enjoy. I am
20 certain that respite workers will also be disappointed.

21 We hope that you will maintain the exemptions for
22 Wage Order 15-86. If you don't, then we urge the Commission
23 to create a provision which will assure that employers are
24 able to recapture the costs of overtime through some pass-
25 through rate adjustment with our funding source, that is,

1 the Department of Developmental Services.

2 Thank you in advance for understanding the unique
3 nature of our respite providers' employment and our
4 families' special care needs. They're counting on your
5 support in either exempting overtime or assuring additional
6 support to pay the overtime wages.

7 COMMISSIONER CENTER: Thank you.

8 Our next speaker is Connie Delgado Alvarez.

9 MS. ALVAREZ: Good morning. I'd like to thank you
10 for this opportunity to discuss a little bit about the 12-
11 hour shift and its importance to the healthcare industry.

12 I wanted to remind the IWC that in the past, after
13 careful consideration, when there was an 8-hour day with the
14 payment of overtime, the IWC, after careful consideration,
15 adopted wage orders that would allow for the exemption for
16 12-hour shifts in the healthcare setting. These 12-hour
17 shifts are so popular to our nurses and our hospitals, our
18 patients. We can see the popularity of these in the fact
19 that most of the contracts -- or many contracts, union
20 contracts, provide for a 12-hour shift without the payment
21 of overtime.

22 Despite arguments that 12-hour shifts may
23 compromise a patient's condition, there is no evidence to
24 prove that, and continuity of patient care has been
25 something that has been very important to our members, our

1 nurses, and our hospitals.

2 The alternative workweek schedule came about for
3 the reasons of allowing nurses to have the flexibility to
4 choose a 12-hour shift and be able to stay at home, take
5 care of family needs, and provide for a way of life that was
6 suitable and desirable to them. So, we wanted to talk a
7 little bit about that. We have a nurse that will be
8 testifying later on this afternoon or this morning to talk
9 about how that impacts their lives and how this affects the
10 overall condition for the shifts in the hospital and for the
11 nurses.

12 12 hours are critical to our industry because we
13 are one of the industries that service the community 24
14 hours a day, 365 days a year, seven days a week, and we
15 never close our doors. So, it's easy for our hospitals to
16 shift in two 12-hour shifts, as opposed to any of the other
17 provisions that are available in the bill. We understand
18 that there are some alternative provisions in the bill, but
19 it does really help for the healthcare industry, with that
20 24-hour staffing need that we have.

21 And looking about the shortage of nurses in
22 California, if we would have to shift to 8-hour schedules
23 for our nurses, we would have to come up with more nurses
24 available, and we're not sure that those nurses are there
25 right now. Actually, we've been working in a different area

1 to try to assure that we would be able to get some more
2 nurses.

3 So, we just wanted to talk to you a little bit
4 today about the -- hopefully, asking you to take careful
5 consideration and see if you might be able to reinstate the
6 Wage Orders 4- and 5-86 that were amended in '93, because
7 this was the allowance that provided for our healthcare
8 industry to have the 12-hour shifts.

9 I wanted to ask a question, because we have been
10 asking this question before: that if the wage orders that
11 we are going to be reverting to are the Wage Orders 4- and
12 5-86, amended in '93, we'd like to know whether or not those
13 wage orders are going to be available and how those will be
14 distributed to the employers so that, when the bill becomes
15 effective, we will know and be able to tell our members how
16 to get ahold of those wage orders so that they can post
17 them. I know that it's a question that's been asked of the
18 IWC in the past, and we've asked it in additional meetings.
19 And I've been hearing different variations about when and
20 how those documents will be available. So, that's a
21 question of clarification we're looking for.

22 I'd like to thank you.

23 COMMISSIONER CENTER: Thank you. And in an
24 attempt to answer your question, we're looking at all
25 possible ways, maybe making them available on the Internet,

1 if it meets legal requirements. But that's -- we're
2 pursuing that.

3 MS. ALVARADO: Will there be some notification
4 sent out just as soon as those will be available?

5 COMMISSIONER CENTER: Yes.

6 MS. ALVARADO: Okay. Thank you.

7 COMMISSIONER CENTER: Any questions from the
8 commissioners?

9 (No response)

10 COMMISSIONER CENTER: Thank you.

11 And per Mr. Washington's request and others, we do
12 have representatives of the Division of Labor Standards
13 Enforcement here now listening, so -- Miles Locker and Tom
14 Grogan.

15 We appreciate you attending the meeting. Thank
16 you.

17 The next speaker is Michele Buhlert.

18 MS. BUHLERT: Good morning. My name is Michele
19 Buhlert, and I'm a staff nurse at Marshall Hospital in
20 Placerville, where my colleagues and I serve the western
21 slope of El Dorado County. Marshall Hospital is the only
22 community hospital between Folsom and South Lake Tahoe.

23 I appreciate the opportunity to be able to speak
24 to you today about Assembly Bill 60 and how losing the
25 flexibility of the 12-hour shifts will affect not only

1 myself, but my colleagues in nursing.

2 Registered nurses dedicate their careers to
3 healing. In these times of shorter lengths of stay for
4 hospital patients, it is imperative that we're able to
5 maximize the continuity of our patients' care and best
6 utilize the time that we have with our patients and their
7 families. This is crucial time for teaching patients about
8 their surgeries or their disease processes, their
9 medications, preventing complications, and talking with
10 patients and families about how to optimize their wellness
11 and their enjoyment of life.

12 The 12-hour shift allows the nurse caregiver the
13 opportunity to bond with their patient and focus on the
14 tasks, the teaching, and the listening that every patient
15 deserves. With only two shifts every 24 hours, patients are
16 spared the constant changing parade of caregivers. Studies
17 have proven that most errors occur within an hour either way
18 of shift change. 12-hour shifts have the potential for
19 decreasing possible errors by one third.

20 Interviews with patients have shown that they
21 become frustrated with having a different nurse every 8
22 hours. Being hospitalized and being ill is frustrating
23 enough.

24 For nurses, being able to spend 12 hours with a
25 patient instead of only 8 allows us to better monitor our

1 patients' progress towards a favorable outcome. As nurses,
2 we have dedicated our careers to healing and serving the
3 members of our community. However, as people, we also have
4 lives outside the walls of the hospital.

5 I've made Marshall Hospital my career for many
6 reasons, including the unparalleled support and respect that
7 we, as employees, receive from our managers and
8 administrators, the autonomy that we enjoy as members of the
9 healthcare team, and the flexibility of being able to work
10 the hours that we have chosen.

11 Flexibility is a quality that drew many of us to
12 nursing. We choose to work three 12-hour shifts a week
13 because it fits our lifestyle so well and it allows us to
14 have a life outside the walls of the hospital.

15 Many nurses have children at home. Working three
16 days a week allows us the flexibility to volunteer in our
17 children's classrooms, to meet with teachers, take our
18 children to the park or to appointments, to spend quality
19 time that five 8-hour shifts a week does not allow.

20 Some of us are also pursuing advanced degrees.
21 Working three days a week allows us the flexibility to be
22 successful in our quest for higher education.

23 Some nurses take care of elderly parents or
24 disabled children. Working three days a week allows us the
25 flexibility to meet outside obligations and

1 responsibilities.

2 Many nurses commute to work, some of us very long
3 distances. A nurse who works three days a week instead of
4 five spends 40 percent less time driving and polluting the
5 air.

6 Working three 12-hour shifts a week allows nurses
7 and their families a better quality of life. It affords us
8 an opportunity to exercise, to travel, garden, swim, ski,
9 visit with the people that we care about, to unwind and
10 recharge ourselves for a demanding career. It allows us to
11 provide better continuity of care for our patients. This is
12 why we, as nurses, have chosen this schedule.

13 We have opted to forego overtime over 8 hours a
14 day for the flexibility of being able to work three days a
15 week and still earn a full wage. Registered nurses are
16 intelligent and educated professionals. I believe strongly
17 in the right of self-determination and personal choice as to
18 where we work, how we work, and when we work. AB 60 does
19 not provide this flexibility and personal choice we, as
20 nurses, need and want.

21 I appreciate your time and consideration, and I'd
22 be happy to answer questions if you have any of me.

23 COMMISSIONER BROAD: I've got a question.

24 When you -- at your hospital, presumably, some
25 time ago, you shifted from 8 hours to 12 hours.

1 MS. BUHLERT: Correct.

2 COMMISSIONER BROAD: And was that a sort of a
3 unaniously happy decision among the nursing staff, or were
4 there some nurses who were not happy with that?

5 MS. BUHLERT: When my hospital changed from 8- to
6 12-hour shifts, that was before I started working there --
7 I've been at Marshall Hospital a little over five years --
8 so I can't speak to the history of the vote. Many of the
9 nurses that work there now worked then, and the nurses that
10 I've spoken to in the last few weeks about this
11 overwhelmingly supported the 12-hour shift over the 8-hour
12 shift. My manager is also here today, and I'm sure she
13 could speak more accurately to how that went. But we, as
14 nurses, the nurses I've spoken to, feel overwhelmingly that
15 12-hour shifts not only fit their patients' needs better,
16 but their own personal needs.

17 Does that answer your question?

18 COMMISSIONER BROAD: Thanks.

19 MS. BUHLERT: I wasn't there then, would be the
20 short answer.

21 (Laughter)

22 COMMISSIONER BROAD: That's fair.

23 MS. BUHLERT: The fact that Marshall Hospital has
24 12-hour shifts was a strong factor in my choosing that
25 hospital to apply to and to stay with. I personally -- I

1 can only speak for myself -- I would not work at a hospital
2 where 8-hour shifts were mandatory. It's very difficult,
3 with my lifestyle, and I feel it's much better for my
4 patients.

5 COMMISSIONER CENTER: Thank you.

6 MS. BUHLERT: Thank you.

7 COMMISSIONER CENTER: I'd like to go a little bit
8 out of order now to bring up Julianne Broyles, with the
9 Chamber. She might be able to address some issues that some
10 of the other employers will be testifying on, in her
11 comments.

12 MS. BROYLES: Good morning, Mr. Chairman,
13 commissioners. It's a pleasure to be here and having the
14 opportunity to work with you on an issue that's of great
15 importance to our members and to their workers. We have a
16 side-by-side that I know that probably was provided to you,
17 but to become an official part of the record, we would like
18 to actually hand it in today, because I know that having it
19 officially submitted does give it a little bit more weight.

20 When we have looked at the issue of the overtime
21 reform over the last several years, it's been one of
22 conflict, it's been one of, in some ways, great excitement
23 for both workers and their employers, because when we view
24 the issue, we look at it in a positive way. We have felt
25 from the very beginning that having the ability to, one,

1 provide our works with the ability to flex hours in a way
2 that lets them meet their worklife obligations in an easier
3 manner, at the same time which does not penalize the
4 employer for doing so, has always been a benefit that goes
5 two ways. And when you look at what the mandate is to the
6 Industrial Welfare Commission, one of which is assuredly to
7 always look out for the best possible impact on the worker,
8 from the health -- their health and welfare -- by wage and
9 hour applications. You also have the additional mandate to
10 ensure that jobs remain in the state, that employers have
11 the ability to complete, and that job opportunities are not
12 lost. We know that that is a very, very hard line for this
13 Commission to have to walk over the next few months as you
14 look at how to implement a very, very confusing law, in some
15 ways, and the technical challenges that employers have in
16 implementing this law, is going to be great. And we'll be
17 looking to you for the guidance and the information that you
18 will be able to provide.

19 Like Mr. Washington, we do have probably as many
20 questions as we do the ability to provide information to the
21 Commission at this time. And they have -- something that I
22 don't think just a plain reading of the statute is going to
23 provide to the employers, in terms of how to set up, gear
24 up, and be able to roll out the new millennium with a brand-
25 new set of wage and hour rules that, in many ways, are

1 technically very, very impossible to do so without
2 additional guidance on the part of the Industrial Welfare
3 Commission.

4 The definitions within the bill are certainly very
5 troubling to the employer community. For example, Labor
6 Code 500 defines an alternate schedule as "any regularly
7 scheduled workweek with more than eight hours in a single
8 day," but that conflicts with later sections of the same
9 bill that define an alternate schedule as something that has
10 been put through the process, the two-thirds secret ballot
11 vote. And what kind of -- our question -- it's more a
12 question, again -- is there a conflict in those two? Do we
13 now have two definitions of what an alternate workweek is
14 and what an alternate schedule is? And the clarification
15 that the Industrial Welfare Commission could provide on that
16 would be certainly of help to the employer community as
17 they, again, look to provide the flexible schedules where
18 they can, in a manner that works for their workforce, their
19 corporate culture, their business culture in that business.

20 Additional questions that we do have concern the
21 exemptions. Now, as Mr. Broad had noted earlier, certainly
22 we're not trying to cry, "The sky is falling," but we do
23 have many questions because, again, if you do a plain
24 reading of the statute, it says that all employees are
25 subject to 8-hour overtime. And if that is so, then the

1 question's been raised on what about family members? How
2 are they treated? What about babysitting performed on a
3 casual basis? How does that now happen?

4 As you heard from the respite care association,
5 they have questions there on the companionship services that
6 they provide. You have issues dealing with certain truck
7 drivers, some parts of the agricultural industry, and
8 contract workers. We have lots of questions on those, and
9 we'll be happy to provide as much information as we can to
10 you. But, again, we'll be looking for answers as well as
11 providing the questions.

12 You do have, of course, your line of work very
13 clearly set out for you, in that you have to specifically
14 address certain industries, such as the ski industry, the
15 fishing -- commercial fishing industry, healthcare industry,
16 by a date and time certain. However, it's been troubling
17 for us to hear in the employer community that there are some
18 that believe that we now are going to cover industries that
19 have never historically been covered by overtime rules
20 before and would certainly be, as an employer
21 representative, opposed to, say, now suddenly saying that
22 on-site construction or logging or mining are now subject to
23 the provisions of AB 60, where historically they never have
24 been before.

25 Additionally, within your -- within AB 60, you

1 have the issue of the alternate schedules. Certainly Mr.
2 Washington touched on the issue of the menu of choices. Is
3 it one that the employer sets up and the employees choose
4 from? But then further questions when you go deeper into
5 the problem. Certainly, when we talked with workers on --
6 when we went into the alternate schedules that were
7 available under previous law prior to 1997, one of the
8 problems when you got into the situation, you have the
9 employers going, "Yes, I would love to work an alternate
10 schedule, I would love to come into work only four days a
11 week or three days a week;" however, the problem came around
12 when you had -- choosing that schedule, and then what
13 happens when a significant life change, as you -- a term
14 that I know that you've seen in terms of healthcare, but in
15 this instance, it might also be appropriate to view, is to
16 say, "I've got -- something has changed, I'm adopting a
17 child, I have a family member that is now ill; I want to now
18 change to a different menu selection," the process in which
19 an employee is able to do so, or which an employer is able
20 to ensure that he has enough people on a production line,
21 will have to be addressed by the Commission on this basis.
22 We think it's going to be a difficult task to figure out how
23 to do so.

24 What we have with other issues within the
25 alternate schedule choice, while you do have -- I believe,

1 and we'd like just to make sure that that is very clear --
2 in one part of the bill, it talks about any hour outside of
3 the selected schedule being required to have an overtime
4 payment of time and a half applied to it. So, again, if I
5 have chosen that four-day workweek, and I've decided that
6 that's Monday through Thursday, and I want to work some
7 hours on Friday to make it up, we would like to make sure
8 that there's clarification that employees on alternate
9 schedules, if they've been adopted by the two-thirds vote,
10 have the make-up time available to them and would not be
11 able to have the employer required to pay time and a half
12 for hours that -- on that basis for hours that are being
13 made up, underneath, I believe, it's Labor Code 511.

14 Other questions that we do have deal with the
15 legal status of the wage orders. What is the legal status
16 of the wage orders? Questions that -- if they were taken
17 out of effect in 1997, they are no longer legal and valid.
18 What is the status? How -- if we used any of the process
19 that is within those wage orders, what is our legal
20 liability as employers for doing so? Are we subject to
21 lawsuits? Are we subject to being sued and having back
22 overtime or other penalties assessed against us for going by
23 what previous wage orders said, even though AB 60
24 substantially changes some provisions of those?

25 Another challenge for this Commission will be how

1 AB 60 interacts with other leave laws. Now, you have, in
2 many instances, items such as family leave, whether it's
3 state- or federally-protected leave, under both of those
4 programs, whether it's pregnancy disability leave, whether
5 it is ADA compliance in order to accommodate somebody's
6 medical condition, someone with migraines, for instance,
7 someone with severe morning sickness, how does that work?
8 Does it work with the alternate schedules? Does it work
9 with the make-up time? All of those are issues that
10 certainly employers are going to need guidance on.

11 And the last part of this, again, deals with the
12 make-up time. We are happy to help and in any way comment
13 on suggested forms or notifications on the make-up time or
14 the alternate schedules, and we'll be happy to present at
15 least examples and samples of what we think might work and
16 work with the Commission and its staff on those issues.

17 But another issue that you will have to work to
18 clarify is that, under the make-up rules in AB 60, and
19 because it's very specific, make-up time has to be done
20 within the same week in which it is requested, what are you
21 going to do about that make-up time request that comes in on
22 Friday morning? "I've got to get out of here today; I want
23 to make up the time on Monday," how are you going to deal
24 with that?

25 So, again, I do not envy the challenges that

1 you're going to have to deal with in all of this. Certainly
2 we will have very concrete evidence -- in fact, we plan to
3 submit certainly our previous comments that were given to
4 the Industrial Welfare Commission when the changes were
5 being considered, as well as all of the statistical reports
6 that we were able to compile at that time, showing the
7 impact on wages, showing the impact on workers, and the
8 impact on the competitive nature of California businesses as
9 they were moving through this whole process.

10 I would be delighted to answer any questions you
11 might have. And hopefully, we'll be able to work with you
12 in the future on providing the information you may need.

13 Thank you.

14 COMMISSIONER BROAD: I read through your chart,
15 and I just had one question. What's the contract worker
16 issue? I don't understand that one.

17 MS. BROYLES: Well, actually, that's a good
18 question. And we're not -- again, this is something that
19 we're not sure of the impact. Now, a previous statute had
20 expressly exempted parties to a contract to waive 8-hour
21 overtime requirements. That was deleted by the new Labor
22 Code 500 -- 510 -- excuse me. And the question is, was it
23 specifically meant to cover just collective bargaining
24 agreements? Was there any issue dealing with contingent or
25 contract workers that the proponents of AB 60 were trying to

1 cover? And if so, what were they specifically so we can
2 make sure that, one, we don't abridge the law in any way
3 intentionally and knowingly, and then have the knowledge for
4 our employers, when they enter into contractual
5 relationships with workers, so they know their overtime
6 obligations and liability.

7 COMMISSIONER CENTER: Thank you.

8 MS. BROYLES: Thank you.

9 COMMISSIONER CENTER: Our next speaker is Tamme
10 Booth.

11 MS. BOOTH: Good morning. I'm Tamme Booth, a
12 licensed pharmacist working here in the Sacramento area.

13 Distinguished Commission members and concerned
14 individuals in the audience, please forgive me for my
15 inadequacy in public speaking. I'm very nervous, and, to be
16 honest, I'd like to bolt out the door right now. There are
17 probably much better individuals who could represent my
18 profession, but I feel it's very important to voice my
19 opinion.

20 My husband and I are both pharmacists. He is
21 pleased to work five 8-hour days, and he gets overtime for
22 anything over 8 hours in a day. I work longer shifts and
23 enjoy the flexibility that working only four days a week
24 affords me. I spend less time commuting, can take care of
25 medical and dental appointments, and enjoy long weekends

1 without touching my vacation time. I can attend continuing
2 education programs and participate in community and church-
3 related affairs much more readily. Most importantly is the
4 block of family time that my flexible schedule allows me.

5 At first glance, I had no qualms about this issue.
6 But, as they say, reality bites. Last Thursday, I was
7 informed by my regional manager that, under the new law, I
8 would lose certain benefits. Well, I'm still not happy
9 about the benefits I lost last year. As an assistant
10 manager, I'm certain that I could arrange to continue
11 working 10-hour shifts. My upper management in the Pharmacy
12 Division does consist of pharmacists. They're still
13 considered professionals in most states; they're reasonable
14 individuals. But what happens to the other pharmacists?
15 Budget restraints will lean toward the 8-hour workday. This
16 will result in reduction of pharmacists' hours, an increased
17 workload for those working, and endanger patients in the
18 long run.

19 I have seen many changes in the pharmacy
20 profession, and I laud the efforts of those who have brought
21 about advancements in the workplace, making it safer for
22 both the care provider and the patient. There are many
23 laborers in this state who work in some pretty horrible
24 circumstances, and they do need protection. We need to
25 ensure that individuals can use the restroom, take a lunch

1 break, and have a reasonable schedule. I'm just not sure
2 that this bill is the right mechanism.

3 Thank you.

4 COMMISSIONER BROAD: Where do you work?

5 MS. BOOTH: I work for Wal-Mart.

6 COMMISSIONER BROAD: And have they told you that
7 you can't have four 10-hour days under AB 60?

8 MS. BOOTH: No, they have not.

9 COMMISSIONER BROAD: Because you can.

10 MS. BOOTH: Oh, I can, yes. They assured me that
11 I could continue the 10-hour workday, but that's myself, on
12 management. You can have relief pharmacists, staff
13 pharmacists, who may be working 8-hour shifts.

14 COMMISSIONER BROAD: Well, they can work -- they
15 can work four 10-hour days too, under --

16 MS. BOOTH: But wouldn't they --

17 COMMISSIONER BROAD: -- with an alternative
18 workweek.

19 MS. BOOTH: But wouldn't they have to get overtime
20 after 8 hours if they're not considered management or
21 exempted?

22 COMMISSIONER BROAD: No. No, they can vote to
23 have an alternative workweek of four 10-hour days.

24 MS. BOOTH: And what if they don't?

25 COMMISSIONER BOOTH: Well, if they don't, it would

1 sort of seem like they probably don't want to, if they vote
2 against it.

3 MS. BOOTH: Right.

4 COMMISSIONER BROAD: But if they vote for it, then
5 they would be allowed to have those four 10-hour days.

6 I'm kind of concerned that the corporate
7 management of your company is giving you certain
8 misinformation about what the legislation did and didn't do.

9 MS. BOOTH: Well, no. They were clear that I
10 could continue with my 10-hour day, and they said that the
11 pharmacists could choose to do so. But I'm concerned about
12 budget restraints and the other impacts that may come into
13 effect.

14 COMMISSIONER DOMBROWSKI: Have they talked to you
15 about the elections at all at this point, the election
16 process?

17 MS. BOOTH: No. I just learned about this
18 Thursday, to be honest.

19 COMMISSIONER DOMBROWSKI: Okay.

20 MS. BOOTH: I tried to read the bill at home, and
21 it's very confusing to the average individual, and I'm not
22 sure I've perceived everything.

23 COMMISSIONER DOMBROWSKI: It's very confusing to a
24 lot of professional lawyers too.

25 (Laughter)

1 MS. BOOTH: Okay. I feel better.

2 COMMISSIONER DOMBROWSKI: You're not alone.

3 MS. BOOTH: Thank you.

4 COMMISSIONER CENTER: Thank you. That's why we're
5 having these hearings. Thank you.

6 I think it's Timothy Lang.

7 MR. LONG: (Not using microphone) Long.

8 COMMISSIONER CENTER: Okay. Sorry.

9 MR. LONG: Good morning, commissioners. I'm
10 Timothy Long, representing here today the California
11 Retailers Association. And by pure happenstance, the focus
12 of my presentation, as contained in the written submission
13 that I'm handing out and that I'll summarize verbally, deals
14 in part with the pharmacist issue.

15 The focus of my presentation, as well as the
16 testimony that will follow during the course of subsequent
17 IWC hearings, focuses on the administrative exemption. The
18 IWC has been empowered to define and delimit that exemption.
19 Likewise, the IWC has been empowered to review the wages,
20 hours, and working conditions of licensed pharmacists.
21 During the course of these hearings, we would like to put on
22 evidence that would enable you to conclude that pharmacists,
23 licensed pharmacists, who are engaged in specific duties
24 would qualify under the administrative exemption.

25 The duties that we have outlined at Page 3 of the

1 submission focus on those duties that only licensed
2 pharmacists can perform, pursuant to the Business and
3 Professions Code. Now, under the test that exists now with
4 regard to AB 60, or rather, that will go into effect on
5 January 1, the necessary analysis is whether, in fact,
6 exempt administrative employees are primarily engaged in
7 certain specified duties. And you have the task of defining
8 what duties qualify for exempt status. And we would suggest
9 and, again, intend to present both live and written
10 testimony, that licensed pharmacists who are engaged in the
11 duties specified here in this submission should be
12 considered exempt administrative employees.

13 Those are my comments for this morning. As I
14 said, we will be presenting, over the course of the
15 hearings, testimony, both in live and written form, to flesh
16 out this analysis, and I'd be happy to entertain any
17 questions you might have at this point.

18 COMMISSIONER BROAD: Mr. Long, how do you -- I
19 briefly read this, what you just handed in here -- how do
20 you reconcile your comments here with the provisions of SB
21 651?

22 MR. LONG: Well, SB 651, of course, says that
23 licensed pharmacists, effective 1/1/2000, cannot qualify in
24 California under the professional exemption. The
25 administrative exemption, obviously, is a different

1 exemption, as is the managerial exemption. So, with regard
2 to this, the reconciliation is: so long as licensed
3 pharmacists are engaged in these duties, as specified here,
4 they would qualify under the administrative exemption.

5 COMMISSIONER BROAD: And these are the duties that
6 essentially make up the practice of pharmacy.

7 MR. LONG: These are the duties that require a
8 pharmacist to exercise independent judgment and discretion.

9 COMMISSIONER BROAD: So, if we were to adopt this,
10 would there be any pharmacists that would be not exempt?

11 MR. LONG: Presumably. I think I'd dare say that
12 in any given pharmacist -- or pharmacy, rather, that
13 pharmacist, for one reason or another, and often appropriate
14 reasons, will not be primarily engaged in all of these
15 duties. And given that the test is "primarily engaged,"
16 i.e., spending more than 50 percent of the time, there may
17 be situations where licensed pharmacists would not be
18 engaged in such duties more than 50 percent of the time.

19 COMMISSIONER BROAD: Thanks.

20 COMMISSIONER CENTER: Thank you.

21 MR. LONG: Thank you.

22 COMMISSIONER CENTER: Mark Pawlicki.

23 MR. PAWLICKI: Good morning, Mr. Chairman and
24 members. I am Mark Pawlicki, representing Simpson Timber
25 Company. Simpson is engaged in the growing and harvesting

1 of forests and the production of lumber in Northern
2 California. I sent in some written comments, which I
3 believe are included in the record.

4 We have a narrow issue relative to AB 60. Our
5 particular issue concerns the issue of a lunch period that,
6 according to AB -- Section 6 of AB 60, must be offered to
7 those working 8-hour shifts or longer. In the logging
8 portion of our business, our employees are commonly
9 subjected to relatively dangerous working conditions on
10 steep slopes and wet conditions. They're usually a
11 significant distance from an enclosed vehicle or building,
12 and they eat their lunches in the area where -- right in the
13 woods where they're working. They do not want to stop for a
14 lunch break. They would rather opt to, alternately, eat as
15 they go and not shutting down the logging operation.

16 They prefer this because if -- they feel that if
17 they stop for a half-hour lunch break, they will just get
18 colder and wetter, and then when they go back to work,
19 they're going to be subjecting themselves to relatively --
20 you know, even more unsafe conditions and risk of personal
21 injury.

22 We believe that the law permits our employees to
23 opt not to take a formal lunch and continue just as they
24 have been doing. If our interpretation is correct, we hope
25 that the regulations will make this point clear, that upon

1 agreement of the employees and the company, a formal lunch
2 break need not be taken for an 8-hour workday. We believe
3 that in our particular case, this approach provides the
4 employees with the flexibility that they need to assure that
5 they are working under the safest conditions.

6 We do understand that the law does not permit
7 waiving the lunch periods for longer days. If you have more
8 than a 10-hour, you can only waive one of them, is our
9 understanding. But we only -- because of the strenuous
10 nature of our work, we only work an 8-hour shift.

11 So, that was our only point about this. We hope
12 that the regulations will be clear on that. And if there is
13 an issue, we'd certainly like to hear from you about that.

14 Thank you.

15 COMMISSIONER BROAD: Just one quick question.

16 MR. PAWLICKI: Yes, sir.

17 COMMISSIONER BROAD: Is it your assumption that
18 the logging industry is covered by AB 60 as of January 1?

19 MR. PAWLICKI: Well, there seems to be some debate
20 about that, and I -- I don't know. I really can't answer
21 that.

22 COMMISSIONER BROAD: Is the normal workday in
23 logging 8 hours?

24 MR. PAWLICKI: It is. And many of our employees
25 are union and they're covered by a, you know, agreement.

1 But some of them are not. And we only work an 8-hour day
2 because of the strenuous nature. They really can't work
3 more than 8 hours. And like I said, they just prefer to
4 work the 8 hours, grab a sandwich as they run -- as they go,
5 and not shut down.

6 COMMISSIONER BROAD: So, the application of the
7 daily overtime system, to the logging industry, if indeed
8 it's been exempt, would actually not change your operations
9 significantly.

10 MR. PAWLICKI: I would think not, yeah.

11 COMMISSIONER BROAD: Thank you.

12 MR. PAWLICKI: But this new section is added.
13 Section 6 is new to the law, and so I just wanted to make
14 sure it was clear.

15 Thank you.

16 COMMISSIONER CENTER: Thank you.

17 Robert Jones.

18 MR. JONES: Good morning. My name is Robert
19 Jones, and I represent the Northern California Chapter of
20 the National Association of Computer Consulting Businesses.
21 And I've already provided some written information to you.

22 We have -- I'm tempted to say, "Now for something
23 completely different" -- we have a very, very small
24 provision of this law which has a very broad impact on the
25 high-tech industry. There are two words in this law -- they

1 only appear once -- and that's "monthly salary." And
2 they're in 515(a).

3 The problem we have with this is not a new
4 problem. This is a problem that we ran into in the industry
5 under the federal law, and which we had -- an amendment was
6 passed to the Fair Labor Standards Act in 1990 that
7 corrected this problem.

8 Real briefly, the people that we're talking about
9 are the very highly paid computer consultants who perform
10 system analyst, programming, and other computer-related
11 work.

12 Excuse me. I'm coming off a cold.

13 The work that they perform -- these are all people
14 that make between thirty and some make well over a hundred
15 dollars an hour, and they tend to work on a freelance basis.
16 They work on an hourly basis through computer consulting
17 companies who locate the people who have the skills
18 necessary to perform project-based work for businesses that
19 require those computer consultants. And it's an industry
20 that's grown up -- I've been with it for a long time -- and
21 it's grown up. In the old days, they were all independent
22 contractors. Then, with all the problems that arose under
23 independent contracting, they became temporary employees of
24 the agencies which found the work for them. And that was
25 all done on a billed per-hour basis.

1 The reason it's done on a billed per-hour basis is
2 because the projects in this field are almost impossible to
3 estimate. And that -- we've had a number of determinations,
4 by both the IRS and the Labor Commissioner, that the fact
5 that are, in fact, billed hourly, they could still be
6 independent contractors. But there are other problems that
7 arise, including a lot of the companies provide benefits to
8 these people while they are working for them, so they are
9 treated as temporary employees of the consulting companies.

10 I don't want to jump through -- too far ahead as
11 to what's actually done, but basically, a company has a
12 systems problem that they need to have fixed or analyzed or
13 programs readied, and they will contact a company that's
14 part of the NACCB, who has comprehensive data bases of the
15 skills of individual people who work on this basis. The way
16 that they -- and what they'll do, then, is they will locate
17 people with the skills that are willing to perform those
18 services, and they will bill for those services on an hourly
19 basis, and they'll pay the temporary employee, computer
20 professionals, on an hourly basis for the work that they
21 perform.

22 Now, one thing that has been an issue with the
23 Labor Commissioner from time to time is that since these
24 people have always been found to be exempt -- and they are
25 administratively exempt or professionally exempt, depending

1 on which Labor Commissioner you end up in front of, but they
2 are exempt -- but they are paid for all hours worked in
3 addition to 8 and all hours worked in addition to 40.
4 They're basically paid for all hours worked. And so, if
5 they work 60 hours a week on a project and then move on --
6 at \$50.00 -- and then move on to the next project, that's
7 what they do for a living, and that's what they want to do.

8 The problem that comes up is that if you require
9 that they be salaried and paid a monthly salary, which is --
10 there's only -- well, not only -- but less than \$2,000 a
11 month -- if they were actually salaried employees, they
12 wouldn't be entitled to overtime hours on the basis of the
13 hours that they worked; they'd be exempt employees. They'd
14 be salaried, and under some federal statutes, if you were to
15 pay them straight time or time and a half or any type of
16 time based on hours, they'd lose their exemption. So, the
17 only way they could be paid additional time for doing
18 additional work on a faster basis is that they would have to
19 be paid that time in the way of bonuses, which couldn't be
20 tied to hours, but would have to be tied to profits. And it
21 would make a real nightmare for them and the companies.

22 Now, like I indicated, this isn't something that's
23 come up for the first time here. There's never been a
24 salary test, a salary basis test, under California law. We
25 had the remuneration -- which no one can pronounce,

1 including myself -- but that there was a minimum of \$1,150 a
2 month. But under the federal law, there's a weekly salary
3 basis test under the Fair Labor Standards Act. And in 1990,
4 when this first came to light, that said that these people
5 would not be able to work on an hourly basis under the
6 federal law, Congress amended the Fair Labor Standards Act
7 to create -- and it's a little confusing, and I provided you
8 with copies of the statute -- but to create what is commonly
9 called the computer professional exemption. And that
10 exemption says that if they qualify as a systems analyst,
11 programmer, other related computer technologies, and they're
12 paid at least \$27.63 an hour, then they can be paid on an
13 hourly basis and they'll be considered computer
14 professionals.

15 And that's what we've asked and what I've given
16 you in the language I -- as the last page of the three-page
17 presentation that I gave to you. That is precisely the same
18 language which exists under the Fair Labor Standards Act,
19 and we would like to recommend that this Commission adopt an
20 exception which is exactly the same -- under 515(b), by the
21 way, is -- we think that's where the authority is to do
22 this, of the Labor Code -- is that you adopt that exception,
23 saying that if you meet the criteria to be a computer
24 professional and you're paid more than \$27.63 an hour, that
25 you can be paid on an hourly basis.

1 And that's all we're asking for. Those two words,
2 by the way, the "monthly salary" test, the "monthly salary"
3 only appears once in the bill. I can't find it anywhere
4 else in the legislative history, and I can't find where it
5 was discussed. Now, perhaps it was. But the only place
6 that I can find it is in 515(a). And if it said
7 "compensation," we wouldn't be here today. But since it
8 says "salary," and given the nature of the history of the
9 Fair Labor Standards Act salary test, this is something
10 that's going to have to be corrected.

11 One of the -- the last point I wanted to make was,
12 this doesn't just impact the workers themselves, the
13 professionals. What it impacts is the industry itself,
14 because most of these companies that request this type of
15 work being done, they can have this work done anywhere. In
16 fact, the companies in California often bring people in to
17 work on projects for people in Tennessee and Texas and
18 Nevada. And who knows where this person's actually doing
19 the work, because all they have to do is look at the system
20 once -- generally -- and then they can go ahead and prepare
21 the code anyplace they want, e-mail it, and if they do that
22 out of a state other than California, they would be entitled
23 to be paid straight time and overtime for all hours worked.

24 And I'm here if you have any questions on this.

25 COMMISSIONER DOMBROWSKI: Not so much a question

1 as a comment. The situation you described, I find
2 personally -- because in the early '80's -- not in the
3 computer industry, obviously, but in a PR agency, that's how
4 I was working. And I think the issue he's bringing up,
5 unless I'm missing something, has some broader implications
6 to some other -- it isn't just the computer industry. There
7 are a lot of people who do this kind of consulting, probably
8 in the entertainment industry and others, that we're going
9 to need to think about.

10 So, I guess, for the public record, whoever has
11 those kind of thoughts about that should bring it to our
12 attention.

13 MR. JONES: The one comment I'd like to make on
14 that is that these -- all other industries, other than this
15 one, with some really strange exceptions, like people who
16 make wreaths at Christmas and so forth, they're all covered
17 under the Fair Labor Standards Act. And so, if they -- but
18 the only one that provides an exception in the Fair Labor
19 Standards Act for hourly professional is the computer
20 professionals making more than \$27.63 an hour. So, others
21 would still be subject to the federal law.

22 COMMISSIONER CENTER: On the same issue, probably
23 consultants dealing with AB 60 too would be affected.

24 (Laughter)

25 COMMISSIONER CENTER: Thank you.

1 MR. JONES: Thank you very much.

2 Kelly Watts.

3 MS. WATTS: Mr. Chair and members, I'm Kelly
4 Watts, with the American Electronics Association. I'd like
5 to thank the Commission for this opportunity to speak,
6 although I have a major cold, so I'm going to make it very
7 brief.

8 There are three issues of clarification our
9 members have requested, and the first one deals with the
10 voting process. We would like to see clarification on the
11 voting process that will be used for the implementation of
12 alternative work schedules. We're supportive of a simple,
13 easy to implement process that allows maximum flexibility
14 for employees.

15 One element of this process is the definition of a
16 work unit, and we would like to see the work unit defined by
17 supervisor and shift to provide for maximum flexibility for
18 employees.

19 The second issue relates to the hourly rate for
20 alternative work schedules. And assume that since 1997, an
21 employer has kept a consistent schedule of 12-hour days for
22 its manufacturing employees, the schedule was not
23 established pursuant to an employee vote or a plan filed
24 with the Labor Commissioner, and before 1998, the employer
25 did pay daily overtime. When the law changed to weekly

1 overtime, the employer added an hourly premium. Now the
2 employer intends to comply with the new law by paying the
3 daily overtime. May the employer eliminate the hourly
4 premium without violating Section 511(c) in AB 60?

5 And thirdly, we'd like to discuss the issue of
6 make-up time. In the interests of preserving flexibility
7 for employees who unexpectedly need time off toward the end
8 of a workweek, for example, on a Friday, what is the
9 protocol for making up the time, because they will have no
10 opportunity to make up that time during the same workweek?

11 Also, we understand that an employer may not
12 solicit employee requests for the make-up time. What would
13 be the appropriate method for notifying the employees of the
14 lawful request procedure?

15 And finally, in light of the new law and the
16 sufficiency of electronic signatures, may an employer have
17 the option to require that such requests in regards to make-
18 up time be digital or in writing?

19 And in sum, those are some brief issues that we
20 wanted to bring to your attention. And we've submitted some
21 more testimony and detail for your information.

22 COMMISSIONER CENTER: Any questions?

23 COMMISSIONER COLEMAN: I had a quick question.

24 Kelly, are there any examples of employers that
25 have used successful voting models that we could use as

1 we're considering how to write this up? Can you --

2 MS. WATTS: Yes. We do have several members who
3 have attempted to use the voting process in the past. It
4 hasn't been that successful, but I would be glad to get that
5 information to you.

6 COMMISSIONER COLEMAN: If you have any that they
7 like over other ones, that would be, I think, useful.

8 MS. WATTS: Sure.

9 COMMISSIONER COLEMAN: Thank you.

10 COMMISSIONER BROAD: I had one question. Someone
11 earlier raised the issue -- oh, Juli Broyles -- on make-up
12 time in the following week. I don't think that that's a
13 matter that's pre-empted by federal law, because what you're
14 doing is saying that a person's going to work more than 40
15 hours, potentially, in the following week. And I don't
16 think that the state has the ability to regulate -- regulate
17 that area. If somebody works more than 40 hours a week,
18 they get overtime under the Fair Labor Standards Act, so
19 that's why the statute requires that the make-up time be in
20 the existing workweek, for that reason.

21 So, there may be an issue there that's simply --
22 the State of California cannot resolve.

23 MS. WATTS: Thank you.

24 COMMISSIONER CENTER: Lowell Taylor.

25 MR. TAYLOR: I am Lowell Taylor. I'm a registered

1 pharmacist and employee in the State of California for the
2 last thirty years. And I'm here with concerns about the law
3 that's coming to pass in January 1st.

4 Excuse me if I'm a little nervous when I'm talking
5 to you. I haven't done this before, so --

6 Anyway, what we have now in the company that I
7 work with is a choice, a choice that we can either be an
8 hourly associate, paid by the hour, overtime if we worked
9 over 8 hours or over 40 hours per week, and we also have the
10 choice, we can be a salaried employee, which we can work
11 longer hours per day and have fewer shifts per week. And
12 it's sort of a rotating thing, where we can work less hours
13 one week and more hours the next week. And this way, it
14 gives us -- we feel we have a better chance of having more
15 family time at home. We feel that we have a better work
16 relation in the stores because we work -- and we have 12
17 hours, so that we're open in the store, and when we have
18 worked 10-hour overlap, we have a better overlap in working,
19 and which gives us less stress time, and we also have better
20 customer service.

21 And I'm just afraid that, come January the 1st,
22 that we're going to be losing this and we're going to be
23 losing the choice that we've had now. And we've never had
24 this choice before, where we could have the choice of being
25 either an hourly or a salaried employee. And I think this

1 is going to be taken away from us, and I'm just wondering if
2 this is what's going to happen on January 1st, if we are
3 losing this right.

4 COMMISSIONER DOMBROWSKI: We hope not.

5 I have a question. Of your associates, do you
6 have any sense of how many choose to work the manager or the
7 exempt status, choose that route and the longer hours versus
8 the 8-hour?

9 MR. TAYLOR: Well, I can only say -- you know, the
10 ones that I work with, I'd say probably 90 percent of the
11 pharmacists that I work with have chosen the salaried
12 position over the hourly position. Mainly, most of the
13 people that want to work the hourly positions are the ones
14 that are part-time and just -- just want to work a few hours
15 per week or so. The benefits to us are -- far outweigh
16 being in a salaried employee than they would be if we were
17 hourly. We would be taking a step backwards if we would go
18 back to the hourly position.

19 And when I say this, we have more benefits, like
20 we have paid time if we're out sick. We're completely paid
21 for it, and it doesn't matter if we're out two or three
22 weeks. I have a pharmacist right now that's out with
23 appendicitis for two weeks, and he hasn't lost a day's pay.
24 If he were on the hourly, this would be different because
25 it's a built-up time of sick leave and things over the year.

1 And there's just so many more benefits for us.

2 And the time that we have at home is much more now
3 than it was before, when I used to work just a five-hour --
4 I mean an 8-hour, five-day-a-week job. And I think the
5 benefits are much better for us now that we're in the
6 situation that we are now.

7 COMMISSIONER DOMBROWSKI: Thank you.

8 MR. TAYLOR: Okay.

9 COMMISSIONER CENTER: Thank you.

10 Julie Garcia.

11 MS. GARCIA: Hello there. My name is Julie
12 Garcia. I'm from Rialto, California, and my purpose of
13 coming to the committee members is to show the approval of
14 the flexible workweek that are given.

15 We've had -- well, I've worked for thirty years,
16 since graduation, on eight-day rotation, or 8-hour rotation
17 of seven days, which doesn't give you very much time at
18 home. It's seven days off in a 24-hour workday -- or
19 workday week. That's thirteen rotations. So, if you sit
20 there and you do the math, it's seven times thirteen that I
21 have days off. With the flexible workweek, we get fourteen
22 workdays that I have off, and I work for fourteen.

23 What I'm asking for is consideration to allow us
24 to continue this way. We voted. You were asking about how
25 we came to go to the flexible? We were allowed. We brought

1 this up to the company because we knew one of our sister
2 plants in Kentucky went to it.

3 COMMISSIONER DOMBROWSKI: A quick -- which
4 industry are you from?

5 MS. GARCIA: Paper industry.

6 COMMISSIONER DOMBROWSKI: Oh, okay.

7 MS. GARCIA: It's a factory.

8 COMMISSIONER DOMBROWSKI: Okay.

9 MS. GARCIA: And what it is, is they were doing it
10 back east, and some of our people said, "Why don't we take a
11 look at it?" And enough people said, "Well, let's take a
12 vote." Well, we voted. Not everybody was in favor for it.
13 I think, out of 84 people, 18 said, "No, we're not really
14 interested." So, the majority went, and we said, "Let's try
15 it." We tried it. At the last count, when it was -- the
16 six-month trial was over, only eight said they didn't want
17 the flexible. We went ahead and went on the 12 -- or the
18 flexible hours, 12 hours, and we're very happy with it.

19 The people who are working there are happy. It
20 gives us more days off, which we can have our family lives.
21 We have the opportunity to be with our families, to
22 maneuver, to rotate our days off. If somebody has a day
23 that they need off on a certain Friday, you can get somebody
24 who's working on Thursday and rotate it around. They've
25 given us a lot of opportunity to work with the flexible

1 schedule.

2 And, you know, if you sit there and you do the
3 math, seven times thirteen, or fourteen times thirteen, how
4 many days do you have off with your family? We work
5 holidays. We're like the police officers; we work holidays,
6 our birthdays, our kids' birthdays. But if we are allowed
7 to have those fourteen days off, we have an opportunity to
8 be with our families more time. And those days are
9 important.

10 And it's kind of like any other thing -- if you
11 sit there and you look at the numbers, it helps us. It
12 really does, to be on this flexible schedule. And we did
13 vote, and it did fly with the majority of the vote. And it
14 wasn't just a few people pushing it. A lot of people wanted
15 it. We'd like to have the opportunity to be the exception
16 and stay on it, stay on the 12 hours for our particular
17 industry and the people who would like to stay there.

18 COMMISSIONER BROAD: I just was a little confused.
19 What's your schedule? It's --

20 MS. GARCIA: Okay. My schedule, if I'm on an 8-
21 hour rotation, you're looking at a 28-day cycle.

22 COMMISSIONER BROAD: Okay.

23 MS. GARCIA: I work 21 days, and I get off seven.
24 On a flexible schedule, the same 23 days, I get 14 days on
25 and 14 days off.

1 COMMISSIONER BROAD: Okay. But, I mean, what's
2 your actual week -- so, you work a week on and a week off,
3 or two weeks on, or --

4 MS. GARCIA: No. Actually, what it is, is if I'm
5 on a seven-day rotation for an 8-hour shift, I work seven
6 days in a row.

7 COMMISSIONER BROAD: For 8 hours a day.

8 MS. GARCIA: For 8 hours a day.

9 COMMISSIONER BROAD: Okay.

10 MS. GARCIA: And then I get two days off. Then I
11 work. And then -- that's on graveyard. Then I get seven
12 hours (sic) in a row working swing, with one day off. Then
13 I work seven days in a row, and then I get four days off.
14 And this is in a -- this is in a 28-day cycle. So, you go
15 from graveyard to swing to days.

16 And if you try doing that for 29 years, like I
17 have, it's very hard to get your body used to it.

18 COMMISSIONER BROAD: I bet.

19 MS. GARCIA: So -- it is. It's very rough.

20 And what we're looking at is, with the flexible
21 schedule, we are now working two shifts, and we're working
22 three days in a week, then four days in a week, then three
23 days in a week, and then four days in a week, days and
24 nights only. So, your chances are being able to be with
25 your family more often. And that's what we're really

1 looking at.

2 We do get paid time and a half for Sundays. So,
3 any time that we're away from our family on Sundays, which
4 is two days out of the month that we work Sundays, and then
5 we have two days out of the month on Sunday we don't.

6 COMMISSIONER BROAD: What's confusing me is I
7 don't -- in your old shift, I don't understand why you
8 weren't receiving overtime for hours worked after 40 hours
9 in a week.

10 MS. GARCIA: On the old shift?

11 COMMISSIONER BROAD: Yeah.

12 MS. GARCIA: Because it depends on when the week
13 started. The graveyard shift starts on Wednesday. It's the
14 manipulation of the days --

15 COMMISSIONER BROAD: I went into law because I'm
16 no math whiz, but --

17 MS. GARCIA: It's a manipulation of the days.
18 Okay. What happens is, you start your graveyard on
19 Wednesday. Then you work seven days. So, you go Wednesday
20 to Tuesday.

21 COMMISSIONER BROAD: Yeah, but then you worked 56
22 hours, is what you were telling me. You worked --

23 MS. GARCIA: In a row, but in two different work
24 periods.

25 COMMISSIONER BROAD: Oh, I see.

1 MS. GARCIA: You got it, right?

2 COMMISSIONER BROAD: Yeah. Thanks.

3 MS. GARCIA: But, see, the thing is, on this -- on
4 fourteen days off and fourteen days on, we're actually
5 better off because we're working three or four days a week,
6 and we do get our paid time and a half for Sundays, no
7 matter if it's only our third day. So, this is where it
8 benefits us too.

9 And for some reason that they wish to have us
10 overtime for a meeting, a safety meeting, something that's
11 necessary for our health -- we have safety meetings, quality
12 meetings -- we do get double time for after 12. And this is
13 something the company has given us without a problem.

14 But one of the things that was a big issue was the
15 attendance when we were on 8 hours. My plant does not shut
16 down. I personally am in charge of electricity. The plant
17 doesn't run without electricity, so the attendance is very,
18 very difficult. And you're working seven days in a row,
19 it's hard on your body, especially if you're on nights for
20 seven days in a row and -- I have three children -- have you
21 ever tried to keep three children quiet while mom's trying
22 to sleep? It doesn't happen. You hear them come in, you
23 hear them go out.

24 But on this flexible schedule, you're only working
25 three yards of graveyard, the night shift, in a row. So,

1 you get a little more resting in there. And it -- what I
2 really want to do is prove to you that the flexible schedule
3 works for the people who want it. And the people who have
4 voted for my company, the employees, they voted to accept
5 the flexible work schedule.

6 And your comment about the numbers? Only eight
7 people at the end still wanted 8 hours. Everybody else,
8 even those who did not want it at first, they went ahead and
9 changed their vote. And the right to choose is the most
10 important thing, and how we get to do our work schedule.

11 You'll never believe our work schedule!

12 (Laughter)

13 MS. GARCIA: But it has to do -- just like the
14 police officers. But the police officers, they get to
15 schedule themselves completely on night shift. We can't; we
16 have to rotate.

17 But, like I say, the whole main purpose of coming
18 here is to at least encourage the right to the flexible
19 hours. It will help us immensely.

20 Thank you.

21 COMMISSIONER CENTER: I can't read the first name,
22 but it's either Ms. or Mr. Washington from Inland Paper and
23 Packaging -- it looks like Mr.

24 MR. WASHINGTON: (Not using microphone) Tyrus.

25 COMMISSIONER CENTER: Tyrus. Okay. I'm getting

1 old and I don't see so well.

2 MR. WASHINGTON: It's still morning -- good
3 morning. My name is Tyrus Washington, and I am the human
4 resource manager at the plant that Julia works at. And I'm
5 going to echo some of her sentiments as well as add a little
6 more explanation as to how the schedule works.

7 I did fax you a copy of a letter with a copy of
8 the schedules attached to it. If you don't have that, I
9 have about three copies here I could leave with the
10 Commission as well.

11 COMMISSIONER BROAD: We've got a lot of paper
12 here.

13 MR. WASHINGTON: I understand. I have three
14 copies here.

15 Just to give you a little background on the work
16 schedule that our employees work, prior to 1998, employees
17 were on an 8-hour shift schedule. And that's a 28-day
18 rotation cycle. In those 28 days, they worked 21 out of
19 those 28 8-hour days. The workweek is from Monday through
20 Sunday.

21 Prior -- just prior to 1998, November of '97, when
22 we understood that the IWC had changed the wage orders to
23 allow for work over 8 without the payment of overtime,
24 employees approached us and wanted to try the 12-hour shift
25 rotation. At that time, we took a vote. We told employees

1 that before we'd go to that, we'd take a vote, because we
2 understood that everybody did not want to go to a 12-hour
3 rotation. Therefore, we took a vote in November of '97.
4 The count of that vote was 58 to 26, I believe, out of 84,
5 84 affected employees.

6 We did that on the understanding that we would go
7 on a six-month trial to make sure that everyone liked it and
8 wanted to stay on it. Just prior to the end of the six
9 months, sometime in May of '98, we took another vote. And
10 the count for that vote was 77 to 7 in favor of the 12-hour
11 shift rotation. And we have been on that ever since.

12 And employees were given a choice, although we
13 didn't have to have a vote or anything under present laws.
14 Employees were give a choice to vote on that.

15 Now, as we understand it, due to AB 60, we will
16 have to go back to an 8-hour shift. The reason for that,
17 the company can't afford to pay overtime on a daily basis on
18 a 12-hour shift. To try to quantify just a little bit, if
19 you go from an 8-hour shift to a 12-hour shift, that would
20 increase our labor cost some \$532,000 per year. From the
21 shift we're presently on to a 12-hour shift paying time and
22 a half after 8 in a day, that would increase the labor cost
23 an approximate \$440,000.

24 Well, the main thing we wanted to express here is
25 that the employees wanted the choice and they were given a

1 choice to go to the alternative work schedule of 12 hours in
2 day. It's not necessarily a 40-hour workweek because one
3 week's 36, the following week's a 48-hour workweek. We pay
4 time and a half after 40 in a workweek, and we still pay
5 double time after 12 in a workday, even though that's not
6 required at the time.

7 Personally, it would make my life a lot better if
8 we went back to the 8-hour shift, but it's not my job to try
9 to make my life easier. This is strictly a morale issue.
10 We did increase our labor cost when we went from an 8-hour
11 shift to the 12-hour rotating shift we're on now. Labor
12 costs increased some 2.1 percent. In view of that, if we
13 are forced to go back to an 8-hour shift, the employees
14 would receive a reduction in earnings for working the same
15 hours. In each 28-day rotation, employees work 168 hours.
16 On an 8-hour shift, they receive 180 hours times their
17 straight pay for those hours worked. On the present shift,
18 they receive 184 hours of their regular rate of pay for 168
19 hours worked.

20 So, I don't think this bill is really fair to
21 these employees who have voted. They were given an
22 opportunity to vote even though it wasn't required. Right
23 now, for myself, it's really a lot going on. I'm getting
24 calls every day, and Julie and everyone else are knocking on
25 my door, "What are you going to do about this 12-hour

1 shift?" Can we do anything? And we are almost at the end
2 of the road here.

3 So, I'll just ask the Commission to take a look at
4 it. I don't know if you have the power or not to make an
5 exemption for this industry or this organization in Ontario,
6 California.

7 COMMISSIONER CENTER: Any questions?

8 (No response)

9 COMMISSIONER CENTER: Mark Vegh.

10 MR. VEGH: Good morning. I'm Mark Vegh,
11 employment counsel with TOC Management Services. TOC is an
12 employer association with member companies throughout
13 California and the Pacific Northwest.

14 On Friday afternoon, I faxed down our written
15 comments. I believe you have those.

16 Just very briefly, my understanding of the purpose
17 today is for you to gather information on what the issues
18 really are. So, I'm not going to get into a lot of depth on
19 any substantive issues. I believe that that opportunity
20 will come later. But I do want to point out some -- just a
21 very few issues -- the previous speakers have already
22 pointed out some -- a couple of others that I want to point
23 out that haven't been mentioned thus far as well.

24 I believe that the need for clarity, and a prompt
25 need for clarity, is critical. I've been holding a series

1 of briefings, hour-and-a-half briefings, throughout
2 California thus far on AB 60 -- part two to follow next year
3 when the dust settles -- but I've had a lot of questions, so
4 I have -- as well as over the phone, just in my job. So, I
5 have a fairly clear idea on what some of these issues are of
6 concern to employers. And I've tried to give as many
7 definitive answers as I can. Unfortunately, there are a
8 number of areas where reasonable minds would differ. And
9 most employers want to be risk-averse and will use their
10 best guess, which is all they can do at this point, and then
11 an outcome that is conservative so that they don't run the
12 risk of these potentially high civil penalties and personal
13 penalties as well under AB 60.

14 The meal period issue has already been mentioned
15 this morning. I believe that the Commission should clarify
16 that the provision, the exception for an on-duty meal
17 period, still exists. I think that's still an open
18 question, even though I've heard comments in the last couple
19 of weeks from people in authority that it will survive the
20 first of the year. But I believe that's still somewhat of
21 an open question at this time.

22 There are some great reasons for continuing that
23 when the dust clears by the middle of next year. For
24 example, it is a fairly narrow exception, always has been.
25 It applies only when the nature of the work prevents the

1 employee from being relieved of all duty and for business
2 necessity, and it has to be agreed upon. So, I don't really
3 see a harm that's existed through the years with that --
4 with that on-duty meal period exception.

5 Somebody already brought up the issue of the
6 seventh day of work and the difference in the language.
7 I'll just very briefly add my two cents' worth on that. I
8 think, clearly, the -- for the time-and-a-half premium to
9 apply for the first 8 hours, it has to be the seventh
10 consecutive day in the week. I think that's clear under the
11 language of AB 60. What's unclear is the double time
12 language that says over 8 hours is double time if it's the
13 seventh day of the workweek. And therein is the issue.

14 I think that needs to be clarified. And there can
15 only be one reasonable answer, and that is that what's
16 intended here is what we had before 1998: the seventh day
17 premium applies, whether it's time and a half for the first
18 8 or double time over 8, when it's the seventh day of work
19 consecutively. I think that's the only reasonable outcome,
20 but there is still that open question because of the
21 language in AB 60. To say otherwise would also be an
22 anomaly because it would mean that if somebody's on vacation
23 or otherwise not working for the first six days, they come
24 in on the seventh day of the week, the first 8 hours is
25 clearly straight time, and then if they work over 8, it

1 suddenly jumps to double time. And to my knowledge, that
2 would be unprecedented, and that's not the intent.

3 The exemptions, several people have talked about
4 specific exemptions and some of the uncertainty with those.
5 The question was asked a few speakers ago, to Mr. Pawlicki,
6 about whether the exemption for logging, and on-site mining
7 and construction as well, still will survive come January
8 1st. I think the prudent answer, what I've been telling
9 employers, is it will not, because my understanding is that
10 that has been an exemption through the years simply because
11 there's no wage order that covers those occupations. So,
12 that's my opinion on that. I would like to see that
13 exemption continued, which you have the authority to do. I
14 would like to see, hopefully, some proposed rules, and then
15 I would comment further on the policy reasons for continuing
16 those exemptions. There are some special reasons for those
17 exemptions.

18 Another area which has been mentioned briefly,
19 certain intrastate truck drivers. My understanding from the
20 comments just this morning is that those and the other
21 miscellaneous exemptions will probably be continued
22 beginning January 1st, the other exemptions such as personal
23 attendants and the other miscellaneous ones.

24 Also, there were some comments regarding 12-hour
25 shifts. Mr. Washington, the first speaker, brought that up.

1 And I would also like to see some relief, some exemption
2 that would apply to those companies and, in fact, some
3 industries that do go around the clock and really have to
4 have the 12-hour shifts. That's often driven by business
5 necessity in some manufacturing establishments. There are
6 also some industries, such as -- just what comes to mind,
7 co-generation or power plants that traditionally pretty much
8 always have the 12-hour shift, often three days on or a
9 three-day workweek and followed by a four-day workweek. So,
10 it would be nice to see some proposed rules to comment
11 further on that would give some relief to those businesses
12 and those industries.

13 Finally, a couple -- one other definition which I
14 think is -- well, it's brand new, and it's unclear, dealing
15 with alternative work schedules, the term of "reasonable
16 efforts" that employers have to put out. If an employee
17 comes to them who's unable to work an alternative work
18 schedule and who is eligible to vote in the election,
19 employers are required to make reasonable efforts to
20 accommodate such an employee. Questions come up. For
21 example, when does that duty arise? In other words, when is
22 an employee unable to work? What kind of notice has to be
23 given to the employer? And then, finally, probably most
24 glaring, what do "reasonable efforts" really mean? It would
25 be real helpful to have some guidance on that and some

1 definition that we could comment on further.

2 Those are my comments on the issues right now.

3 I'd be glad to answer any questions.

4 COMMISSIONER BROAD: What's your opinion -- this
5 is sort of a question I have, and I'm just not sure at all
6 of the answer -- but what's your opinion about what is the
7 ability of the Industrial Welfare Commission to act in some
8 of these other areas, these sort of ancillary areas, where
9 it's not specifically mentioned that the IWC can act without
10 wage boards? And my assumption is that the normal petition
11 process would apply, and we would have to go through wage
12 boards, that we couldn't engage in some expedited process of
13 granting exemptions, sort of willy-nilly, as part of the
14 implementation of AB 60.

15 MR. VEGH: I'd be leery to give a definitive
16 answer on that off the top of my head, but I do think you
17 have authority to certainly continue, eliminate, or revise
18 any exemptions that are here now. And it would be helpful
19 to see some proposals, for example, on the 12-hour shift,
20 relief for the 12-hour shifts.

21 I could look into that issue and provide written
22 comments, though, on what I believe the bounds of authority
23 are.

24 COMMISSIONER BROAD: Well, I'd appreciate that
25 because, for example, let's say that you're correct and that

1 as of January 1, these five industries that were -- that are
2 in this peculiar situation where they were exempted by
3 custom by not -- or practice, but not -- but there is no
4 exemption in the wage orders, if, on January 1, they become
5 covered, it seems to me that if those industries wish to
6 have exemptions, they would have to petition the Industrial
7 Welfare Commission to grant those exemptions, and that the
8 IWC would have to go through the process of convening wage
9 boards in the normal course of business, as opposed to these
10 particular expedited responsibilities we have, you know, to
11 deal with specific questions without convening wage boards,
12 for example, with respect to pharmacists or back-stretch
13 employees at racetracks and healthcare and so forth.

14 So, I would be pleased to know what, you know,
15 your opinion is, as someone who deals with this.

16 MR. VEGH: I'll be glad to do that and give a more
17 thoughtful response. I think that those are some unique
18 exemptions, and I will look into what our opinion is on your
19 bounds of authority and what some options would be for those
20 industries.

21 COMMISSIONER CENTER: Thank you. What types of
22 employers do you represent?

23 MR. VEGH: We primarily, historically, have
24 represented wood products related. We now represent some
25 totally non-related manufacturing and even some non-

1 manufacturing members. But by and large, it's still those
2 associated with wood products.

3 COMMISSIONER CENTER: Thank you.

4 MR. VEGH: Thank you.

5 COMMISSIONER CENTER: Jan Ross.

6 (No response)

7 COMMISSIONER CENTER: John Dunlop.

8 (No response)

9 COMMISSIONER CENTER: We're wearing them out!

10 (Laughter)

11 COMMISSIONER CENTER: Larry Nelson.

12 (No response)

13 COMMISSIONER BROAD: The early lunch group.

14 (Laughter)

15 COMMISSIONER CENTER: Yeah, a break.

16 Vic -- and I can't -- is it Nard?

17 (No response)

18 COMMISSIONER CENTER: And Daniel McCarthy, it
19 looks like, from the truckers.

20 MR. SWARD: Thank you. I'm Vic Sward, currently
21 the president of the California Trucking Association and a
22 small business owner. Thank you for allowing me to speak.

23 The California Trucking Association represents
24 trucking companies in all areas of California. They are
25 from one truck to companies as large as UPS. As Association

1 president, I've created a special task force, chaired by
2 Dennis Altenaugh, to involve each of our thirteen units that
3 are located throughout California and to advise them of all
4 aspects of the hearings today and the effect this will have
5 on the individual business and employees.

6 Because of the late notice that we got or received
7 on this, this morning was the first chance we had to have a
8 meeting. And we will be having subsequent meetings involved
9 with this with all of our members.

10 One thing that I -- a point I want to make -- and
11 there's a lot of eloquent speakers here today that have said
12 pretty much what -- we're on a fact-finding mission. As we
13 compete in a global economy, and we are a service industry
14 competing with Mexico and the interstate carriers that come
15 into the California market, and I don't want to hurt our
16 employees, and I don't think our employees want to be hurt,
17 by some law that we -- that is different from our
18 competitors throughout this industry. So, as you take into
19 this, we have had exemptions, and we'll need to look at them
20 thoroughly, but right now we don't have any other comments
21 that I'm aware of.

22 So, if there's any questions, that's what I have
23 to --

24 COMMISSIONER CENTER: I apologize for trashing
25 your name there.

1 MR. SWARD: That's all right.

2 COMMISSIONER CENTER: I need to either get bigger
3 type or better glasses.

4 MR. SWARD: It's been trashed worse than that
5 before.

6 Thank you.

7 COMMISSIONER CENTER: Thank you.

8 Daniel McCarthy.

9 MR. McCARTHY: Good morning. My name is Daniel
10 McCarthy. I'm a lawyer representing the California Trucking
11 Association, and my comments will be very brief because
12 President Sward basically stated the California Trucking
13 Association's position.

14 It's our understanding that these hearings will
15 continue into the next year. CTA will be present and
16 participating in all the hearings, and we'll do our best to
17 bring any assistance we can to the Commission in its work.

18 COMMISSIONER BROAD: Mr. McCarthy, I'd like you
19 guys to think about the exemption. Obviously, I don't
20 believe it's -- the truck and bus driver exemption, it's
21 just not really affected by the bill directly. If someone
22 wanted to change it, they'd need to petition the Commission
23 to change it. Nevertheless, it's an issue that's been close
24 to my heart for a long time.

25 And I'd like -- I believe that the hours of

1 service rules are often observed in the breach, and perhaps
2 the Commission should consider a rule that requires the
3 payment of overtime after any -- any hours after those which
4 are lawful to work. And I'd like the Trucking Association
5 to think about that, because, currently, that would mean
6 after 80 hours in eight days or 15 hours on duty in any
7 single day. And since it would illegal to require employees
8 to work those hours, perhaps a further disincentive towards
9 violating those important safety laws would be the payment
10 of overtime in excess of those hours.

11 MR. McCARTHY: Yes, Commissioner Broad. We'd
12 certainly consider that. Safety is our ultimate objective
13 in the trucking industry.

14 COMMISSIONER CENTER: Thank you. You might
15 consider a guillotine too.

16 Teresa Miller, please.

17 MS. MILLER: I'm Teresa Miller, executive vice
18 president of the California Society of Health System
19 Pharmacists. We represent pharmacists that work in hospital
20 and other health system settings, as well as home health
21 settings, managed care, clinics, and ambulatory care
22 settings.

23 A majority of our members who work in -- and most
24 of them do work in hospitals and integrated health systems
25 -- do work in a clinical role, and in that role are involved

1 in specific patient care functions, including things such as
2 pediatrics, neonatal, intensive care, oncology, and critical
3 care. And while we are sympathetic to the concerns of some
4 of our colleagues in the retail setting, which was the
5 impetus for the SB 651 and the removal of the professional
6 categorization for purposes of the Labor Code, because of
7 some of the situations that those colleagues found
8 themselves in with respect to not being able to take lunch
9 breaks and those things, which we, of course, support, we
10 remain concerned about the impact that AB 60 -- actually, SB
11 651, which is directly related to AB 60, will have on our
12 pharmacists being able to continue to provide the quality of
13 patient care services that they have been able to in the in-
14 patient setting.

15 Some of the reasons for that, the impact that we
16 predict, is the fact that, as has been mentioned by a number
17 of the other speakers that have already spoken today, many
18 of our members have 12-hour shifts. They have the
19 alternative workweek schedule such as the seven-day-on,
20 seven-day-off, and those kinds of things. And a lot of the
21 reason for that is because we have 24-hour staffing of
22 hospital pharmacies and those sorts of things.

23 We would like to work with the Commission and are
24 interested in some sort of exemption that might provide for
25 12-hour shifts for members practicing specifically in those

1 kinds of situations so that we continue to provide those
2 kinds of services in the in-patient setting.

3 Also, there was an interesting comment made
4 earlier in terms of clarification of what meets the test for
5 administrative functions for purposes of exemption. And
6 that would be something else we would be interested in
7 pursuing, in terms of the pharmacists who are performing
8 certain types of functions and would qualify under those
9 criteria, so that they would be able to use these flexible
10 scheduling and those sorts of things.

11 If you have any questions, I'd be happy to try and
12 respond to those. And we will be participating in the
13 future hearings.

14 COMMISSIONER CENTER: Thank you.

15 MS. MILLER: Thank you.

16 COMMISSIONER CENTER: Les Clark.

17 MR. CLARK: For the record, my name is Les Clark,
18 vice president of Independent Oil Producers Agency. And we
19 too are in a process of putting some other comments
20 together. Probably those comments will be forthcoming at
21 your San Francisco meeting.

22 We were under the understanding that we weren't
23 even a part of this. We were under a term of exclusion in
24 the past; we weren't even part of the wage orders. And now
25 we were told by -- potentially, by one of the legal folks

1 that happened to come our way, that not only were we a part
2 of it now, but we might be a part of it retroactively, which
3 really concerns us.

4 So, we're looking into providing more information.
5 And I think one of the things that is of interest to me that
6 you've talked about already is the balance of authority,
7 because if we were excluded in the past, I'm not sure how
8 that works back in. I would assume we would have to
9 petition for an exemption, as you so suggested. So, those
10 are some -- that's one of the things we're going to look at.

11 We too -- and the Manufacturers Association,
12 rather than go all back into it, I think he made a very good
13 presentation as the 12-hour shift. The Independent Oil
14 Producers Agency, we represent mom-and-pop operators, and in
15 that representation we have well pullers and well drillers.
16 Those are 24-hour operations. For me to go tell a well
17 puller we're going to take away his 12-hour, you know, shift
18 is not going to be good, because those folks really like
19 that. And this was sort of -- got me -- I mean, our
20 employees are happy with 12-hour and employers are happy
21 with 12-hour, but now we're trying to defend that.

22 The quality of life, I think it's been mentioned
23 several times, the ability to have those long days off after
24 you're working, and I would well pulling and well drilling,
25 I'd put it up there as just as hard work as any other folks

1 that have mentioned their occupations.

2 And also, we've met with -- realizing all of a
3 sudden, in the last week or so, that we might be a part of
4 it, we met with -- we're going to meet with Assemblyman
5 Flores Wednesday. And he asked me to relay to you all that
6 whatever takes place in that meeting, that he'd like to have
7 that -- he'll send it up and would like to have that
8 incorporated as part of the record and testimony. So, he
9 asked if that's okay.

10 Now, the other thing, there's an urgency here
11 without something. We've got -- the shift dates, as far as
12 your hours of work, this is going to have to be done by
13 December -- probably 15th, in order to make sure that you
14 have your schedule in place. And I'm not quite sure how
15 this is going to play out, whether it's going to be three 8-
16 hour shifts or we're going to continue on with the 12-hour
17 shift. So, there's an urgency -- I don't know how the
18 petition thing works, but there's a timing thing here that a
19 lot of folks -- and there's a lot of employees that are
20 going to be impacted by this in Kern County. So, I would
21 think, as you all are doing your deliberations, the urgency
22 -- and I don't know how that works. Can you -- I mean,
23 what's the milestone dates? The dates would be as of
24 January 1, we're -- we're all a part of that, unless we
25 petition prior to. So, how do we do that?

1 COMMISSIONER CENTER: And that's why we're having
2 the fact-finding. That's part of the problem. The
3 legislation does not go into effect till January 1st.

4 MR. CLARK: It is going into effect January 1st,
5 right?

6 COMMISSIONER CENTER: That's when the legislation
7 goes into effect.

8 MR. CLARK: Yeah.

9 COMMISSIONER CENTER: And with the question of
10 retroactive enforcement, that's not been a formal position
11 of this Commission. So, we're doing the fact-finding
12 hearings. We hope to give you guidance as soon as possible.
13 But the Legislature adopted -- AB 60 was signed by the
14 Governor, and now it's our cause to implement it.

15 MR. CLARK: Yeah. I appreciate it. Well, if
16 there's any -- if there's any way in which your suggestions
17 or your thoughts as far as us -- you know, on the petition
18 process, we'd certainly be interested, and not necessarily
19 just how do we -- however process you go through that, so
20 that we could get into the loop to do that before my
21 drillers start drilling around my house.

22 COMMISSIONER CENTER: I understand. I used to
23 work in the dredging industry. It was somewhat similar,
24 so --

25 MR. CLARK: Yeah. The independent oil, they don't

1 call them "independent" for nothing, I'll tell you.

2 (Laughter)

3 COMMISSIONER CENTER: Thank you.

4 MR. CLARK: Thanks a lot.

5 COMMISSIONER CENTER: Brad Trom.

6 MR. TROM: Good morning. I'm Brad Trom. I'm vice
7 president of pharmacy for Albertson's and Savon Drug Stores
8 in the State of California.

9 I just wanted to make some comments, and the first
10 being of which I'd like to augment our support for the
11 comments Tim Long made with regard to the California
12 Retailers Association in regards to the pharmacists being
13 considered as an exempt class due to their extreme
14 discretion and independent judgment making that they must
15 have. So, I'd like to -- I'd like to urge you to consider
16 that as one of your thoughts as the new laws take into
17 effect.

18 Secondly, I want to comment on the family economic
19 impact and the business economic impact and how the new law
20 relates, and the practicality in how it affects pharmacists
21 throughout the State of California.

22 We currently operate over 400 pharmacies within
23 the State of California. We have a number of collective
24 bargaining agreements with different unions, and we also
25 have nonunion locations.

1 The impact of an additional time-and-a-half rate
2 after 8 or after 10, based upon their ballot, has an impact
3 that, due to the fact of the limited and the very small
4 reimbursement that prescriptions give back to the employer
5 and to the owner of the business, the probability of paying
6 additional payroll increases above current rates can impact
7 dramatically. Also, in meeting with many of the pharmacists
8 throughout the state in the past couple of weeks and trying
9 to discuss this situation through, that it would change
10 their schedule, and we have a majority of our pharmacists
11 who work on a 12-hour shift. We also are fortunate that we
12 have enough locations where people have an opportunity to
13 choose whether they want to work an 8-hour shift, a 10-hour
14 shift, a 12-hour shift, depending upon the store they want
15 to work at. And the majority of them prefer the 12-hour
16 shifts.

17 And the points that were brought forth to me by
18 staff pharmacists were of the nature -- and we will have --
19 at future hearings, we will have some pharmacists that would
20 like to comment themselves -- but in summarizing some of the
21 comments that I received back, that it limits their personal
22 flexibility within their -- within their personal lives,
23 limits part-time jobs that they may have outside of our
24 business. Too, the question that was asked earlier about
25 the economic impact on an individual: if we determine --

1 and we believe we have determined -- that we can't afford to
2 pay time and a half or double time, then we are going to
3 have to require our folks to work either 8- or 10-hour
4 shifts. If they work 8-hour shifts, that then, of course,
5 expands their workweek to a five-day workweek.

6 It will limit their vacation and their personal
7 days off because pharmacists -- and within the industry,
8 it's very common for pharmacists to cover each other,
9 somebody taking a day off, somebody else covering it, and,
10 of course, that would be required that they be paid time and
11 a half or double time to cover for their partner.

12 These additional days of work, of course, then
13 requires that they're going to work additional days,
14 additional nights, additional weekends. There will be more
15 commute days to get to work, which, of course, also affects
16 things such as childcare, elder care. And from a business
17 standpoint, we're concerned about the limitation this may
18 have on the ability to offer for the consumer expanded hours
19 that the consumers and the patients can take and get their
20 prescriptions filled. The vast, vast majority of our stores
21 have a minimum of a 12-hour shift. They're open nine to
22 nine; many are open 24 hours. And with the current law as
23 it goes into effect, because of the economics of that, that
24 may force shorter hours in those stores, or if we don't find
25 pharmacists that want to work beyond a 10-hour shift, that

1 also may require us to evaluate the number of 24-hour
2 locations because of the extreme additional payroll that
3 would be required to staff those 24-hour shifts.

4 The easy answer is to say, "Well, we'll hire
5 additional pharmacists within the industry." And the
6 practicality of that isn't real either, since there is a
7 shortage of pharmacists within the State of California
8 today.

9 So, those are my comments. And any questions?

10 COMMISSIONER BROAD: During the debate on SB 651,
11 there was a lot of agitation among pharmacists in favor of
12 the bill because many of them are working 12-hour shifts,
13 13-hour shifts, and in some cases, 14-hour shifts, without
14 any breaks, no meal periods, no breaks at all. And there
15 was concern that those long, extremely long shifts with no
16 breaks raises a question of prescription errors, which, of
17 course, as you know, are going -- have gone up dramatically.
18 And so, my question to you is whether you think there's any
19 public health issue here with pharmacists working very long
20 hours with no breaks.

21 MR. TROM: Well, thanks for bringing that point
22 forward. The State Board of Pharmacy recently passed a law
23 that allows pharmacists to leave the pharmacy to get a lunch
24 break and to have breaks. Previously, it was required by
25 the State Board of Pharmacy or the state regulations that

1 pharmacists had to be in control or be within the pharmacy
2 at all times. Now, with the new regulations, they will be
3 allowed to leave the pharmacy without having to go through
4 and actually close your business down during that time. And
5 as a consequence, that should eliminate any of the concerns
6 of the long shifts without breaks and without lunches, which
7 we, of course, can identify.

8 To comment on your second part that has to do with
9 an increased percentage of errors that you're suggesting, we
10 don't find that to be true. Recently the prescription
11 incidence of errors has gone down significantly due to the
12 introduction of technology and work procedures and workflow
13 procedures that basically eliminate the possibility of an
14 error because of either the technology checking to make sure
15 it's the right prescription in the bottle, or, secondly, the
16 ability of having two individuals review all prescriptions.
17 So, we don't find that to be true at all.

18 COMMISSIONER DOMBROWSKI: Brad, could you talk a
19 little bit about the technology? Because I think one of the
20 things the industry is looking at is greater use of
21 technology in lieu of some of the manual labor back there.

22 MR. TROM: Well, one of the biggest increases in
23 technology that allowed pharmacists to be assured that they
24 had the right medication in the bottle was the introduction
25 of scan-verify technology that is a scanned bar code on the

1 product and a scanned bar code on the label that is
2 generated by the computer. And the ability to scan those
3 two bar codes and make sure that they match ensures that
4 right medication has gotten into the bottle that the bottle
5 -- that the prescription label generates. So, that's one of
6 the technology.

7 Second, technologies that are coming, which are
8 very large capital investments which will be coming, will be
9 the filling of prescriptions by automatic -- automation as
10 opposed to by individuals.

11 COMMISSIONER DOMBROWSKI: Thank you.

12 MR. TROM: Thank you.

13 COMMISSIONER CENTER: Jim Ewert.

14 MR. EWERT: Good morning, Mr. Chair, members of
15 the Commission. My name is Jim Ewert. I represent the
16 California Newspaper Publishers Association. We have about
17 500 members that are in our association, both daily and
18 weekly newspapers throughout the State of California.

19 The daily overtime standard that is re-established
20 in AB 60 may work well for those industries that employ
21 technologies that make widgets, and maybe even some other
22 industries, but for the newspaper industry, where scheduling
23 is quite uncertain and there is no cyclic fluctuation in
24 production, it just doesn't operate very well at all.

25 The models that are also in AB 60 for creating

1 alternative scheduling, the elections, the menu of options,
2 the make-up time provision, also doesn't work well for the
3 newspaper industry because we can't estimate when schedules
4 are going to need to change.

5 We have many employees who are quite unsettled by
6 the upcoming implementation of daily overtime on January
7 1st, primarily reporters. And the reason why they're upset
8 about this is the potential that they may be called off
9 particular stories that they're covering if their employers
10 cannot afford to pay the daily overtime that the law would
11 require.

12 That is why we have proposed an exemption for the
13 newspaper industry that we think is reasonable and may even
14 work for other industries as well. But essentially, our
15 proposal has generally the following provisions. It would
16 allow an employer and an employee to negotiate day by day or
17 week by week up to 8 hours of overtime that would be
18 eligible for compensation as flex time. Both the employer
19 and the employee would be able to request an individualized
20 flex time schedule under this model. The employee would
21 then have the right to refuse the flex time in favor of
22 being paid an overtime premium as of January 1st for the
23 overtime that's worked in excess of 8 hours per day.

24 Again, we think that this would be a reasonable
25 solution for our industry. And if you have any questions,

1 I'd be willing to --

2 COMMISSIONER CENTER: Just to comment on that
3 proposal, when you have two employees and the one employee
4 continues to accept the flex time and the other one accepts
5 the overtime, which employee is going to get most of the
6 work, do you think?

7 MR. EWERT: Well, I don't know. But certainly, in
8 the ranks of the reporters, they would certainly, at least
9 as indicated to me so far, choose the flex time schedule.
10 And it wouldn't be a matter of the employer dictating, due
11 to the provisions in this proposal, what type of schedule
12 that the reporter would be working.

13 COMMISSIONER CENTER: Thank you.

14 COMMISSIONER BROAD: Jim, how did things function
15 before the previous IWC got rid of the 8-hour day?

16 MR. EWERT: Well, either the employer paid the
17 overtime to the reporters that stayed on the stories, and
18 most of the large newspapers were able to do that; for
19 community newspapers, they were not. Under the most recent
20 standards that we've been using under the federal law, the
21 smaller newspapers have been able to dedicate reporters to
22 cover more local news and more local stories that they
23 probably otherwise wouldn't have been able to under the old
24 standard, and may not under the new standard.

25 COMMISSIONER BROAD: Now, I have a technical

1 question about your proposal. There was a provision passed
2 dealing with comp time that's in the Labor Code now that's
3 never gone into effect because it conflicts with the Fair
4 Labor Standards Act in that it requires, in effect, people
5 to work more than 40 hours in a workweek in some future
6 week. And how do you deal with that FLSA preemption issue
7 here in your proposal?

8 MR. EWERT: Well, we wouldn't propose that this
9 carry over into the second week. We would propose that this
10 occur within the same workweek to comport with the federal
11 standard. So, there really wouldn't be a preemption
12 problem, at least in our view.

13 COMMISSIONER BROAD: Okay. Now, are you
14 submitting this as a proposal? Are you petitioning the IWC
15 to do this, or is it your intent that -- this goes back to
16 my question of what the IWC can and cannot do -- or do you
17 feel that we have the authority to just act on this without
18 convening wage boards?

19 MR. EWERT: In the event that you determine you do
20 have the authority under AB 60, it is a formal proposal
21 submitted for your consideration. If, however, it's
22 determined that a formal wage order has to be -- or a formal
23 wage board has to be convened for consideration of the
24 proposal, we'll be more than happy to submit it in a
25 petition form at that time.

1 COMMISSIONER BROAD: Thank you.

2 COMMISSIONER CENTER: Richard Holober.

3 (No response)

4 COMMISSIONER CENTER: He must be getting his meal
5 period.

6 Bruce Young.

7 MR. YOUNG: You guys look pretty good out there.

8 Bruce Young, on behalf of the California Retailers
9 Association. And I appreciate the opportunity, Mr. Chairman
10 and members, to speak to you today.

11 I, frankly, didn't anticipate coming forward with
12 at least my initial concern about the implementation of AB
13 60, but I've been traveling around the state talking to both
14 employees and employers from the retail community as we go
15 about preparing to implement AB 60. And perhaps, as you all
16 know, we were at least involved deeply in the discussions on
17 AB 60 and 651. One thing I think we probably didn't
18 calculate, at least from our side, is the fact that our
19 members, our employers, would, in essence, go to five 8-hour
20 days.

21 And frankly, I think -- and, Barry, you asked the
22 question about the four 10's -- none of our employers feel
23 the ability even to have an election. I mean, there are so
24 many questions about, you know, what is a work group, do you
25 include part-timers, do you -- I mean, what -- I mean,

1 there's a whole process. So, we -- we've told our members,
2 and they're proceeding with the basis on January 1st, you
3 have to have five 8-hour days in place, and there can't be
4 the flexibility, other than the exemption of the -- that was
5 in there for the July 1st. Even that's cloudy in some of
6 our members' eyes.

7 And we have begun the process of implementing it,
8 telling our employees the new schedules, and the response
9 has been anything but favorable. I think -- they complain
10 about the lack of their own personal flexibility. One of
11 the attractions of retail is, because of the number of hours
12 we have and -- and the store settings we have, we can
13 accommodate people who want to work three days or who want
14 to work a four-day shift, because, again, we're open a
15 number of hours.

16 And the problem that -- as I thought, that simply,
17 "Well, then, have the election on January or whenever the
18 Commission acts and change the schedules," but many of our
19 members are now saying that when they're -- when the
20 schedules are in place and they've hired new people on
21 January 1st, it's going to be difficult for them to go back.
22 So, if there's any way, certainly, the Commission or the
23 staff, at least, can give some advisory opinions to the
24 employer community about how to hold elections and what does
25 make up a voting group. And I've given to Mr. Baron a

1 series of questions of all that. Any direction you could
2 give would be helpful, because we need to do -- certainly,
3 perhaps a lot of it has to be formally adopted by the
4 Commission, but at least, again, suggestions or advice or
5 staff counsel on it would be helpful because many of our
6 members, as I say, feel they would get to the point of
7 crossing the Rubicon of giving people new schedules, hiring
8 new people. And at that point, when then it's -- the
9 flexibility is restored, they don't feel like they have the
10 ability to arbitrarily go backwards.

11 And I do want to then speak about two specific
12 issues in AB 60 that the Commission does have the authority
13 and the flexibility and, indeed, we would argue, the
14 direction from the Legislature, to consider. And one of
15 them is the manager exempt issue. And this is one that has
16 been -- has bedeviled the retail community for a long time,
17 because if you fully consider the retail community
18 environment, where our business is ebbs and flows, where a
19 manager at -- certainly, at a grocery chain, may at one
20 point where there's -- when it's frantic and busy, either
21 unexpectedly or it's a momentary rush, may have to hop on a
22 register, or help one of his clerks bag groceries, or go out
23 into the parking lot and pick up carts, that person is still
24 the manager. Yet, under California -- it's not even
25 regulation -- interpretation from previous Labor

1 Commissioners, there's been -- it's been more qualitative
2 than quantitative, where there's been an interpretation that
3 people cannot use the contemporaneous hand and mind. The
4 California Labor Commissioner, unlike any other state, has
5 ruled that if a person is using their hands, they are not --
6 then they no longer -- they cease to become a manager. And
7 we would argue that that very narrow interpretation is not
8 realistic, certainly for our industry, but for many others
9 where, again, not as the rule, but just to get -- to service
10 the customer, a manager has many roles.

11 And it's not -- and certainly, I think there has
12 to be a bright line drawn so it's not a matter of not hiring
13 sufficient people, where the manager takes a place of -- for
14 what then would be an under-staffed situation. But as I
15 said, certainly the Commission may -- should -- may consider
16 perhaps making it on an industry-by-industry basis, where,
17 as I say, these ebbs and flows and dealing with the
18 consumers are things that can't be anticipated many times
19 and can't be -- and these peaks and valleys can't be staffed
20 for.

21 But we really are looking to the Commission for
22 some guidance on this issue prior to July 1st. We will be
23 bringing a proposal at a subsequent meeting with our
24 suggestions and thoughts about how to deal with the status of
25 manager exempt.

1 And the second one -- issue that I want to deal
2 with in AB 60 is about the pharmacists. And I think you've
3 heard from just a couple of them, and I guess I'm back not
4 asking for the blanket exemption, but asking for the
5 Commission to consider allowing some freedom of choice
6 between some of these pharmacists. The ones that I've met
7 with over the weekend and during last week have talked about
8 -- some of them doing the seven on and seven off, and then
9 there's also the question of some of them will do four --
10 work four 10's one week and five 10's another week, whether
11 they can do that. They argue with me that it's about their
12 quality of life, their personal -- their personal values.
13 And some of them indeed also have second jobs. I think
14 earlier speakers have spoken -- have mentioned the severe
15 shortage of pharmacists in California. It's not unusual in
16 the stores where we have seven on and seven off to find
17 pharmacists who seven 8-hour days in one week, the next week
18 when they're off they'll work two or three days at a -- at a
19 hospital or another -- and indeed, another chain store.

20 And I -- I guess I bring forward that request for
21 this flexibility on behalf of the pharmacists that I've
22 talked to. And we're going to ask them to come before the
23 Commission and try to give you some of their own personal
24 feelings. But we as the employers -- I mean, as the chains
25 -- are making the -- are adapting -- I think one of the

1 ladies from Longs spoke about how we're actually even taking
2 our assistant managers and making them hourly. Now, that's
3 not punitive; it's just trying to adjust to the fact that
4 we're now going to -- I mean, people are going to be on the
5 clock. In some cases, they are losing their benefits, the
6 flexibility for additional sick time or consideration for
7 vacations. But we are going to adopt and adapt to that.

8 But on behalf of the employees, we think that some
9 flexibility that could be -- could be adopted that would be
10 -- again, give the employee the ultimate of choice, not be
11 dictated -- I think, as Barry mentioned earlier, some of the
12 stories we heard about 651, about where employees were
13 required to work 13 and 14 hours and come back with no time
14 off -- I think that situation is not tolerable. And we're
15 again -- a point where a flexible, reasonable schedule could
16 be adopted at the employee's election with the consent of
17 the employer, we think, would be preferable.

18 Thank you.

19 COMMISSIONER CENTER: Any questions?

20 (No response)

21 COMMISSIONER CENTER: Thank you.

22 Joe Brown.

23 MR. BROWN: Hello. My name is Joe Brown. I'm a
24 plant manager for Conectiv Operating Services Company.
25 We're in the electric power business, electric power plants.

1 My company is based in Wilmington, Delaware, has a few
2 operations here in California, and, very frankly, I've been
3 here as the West Coast initiator of our business, and I've
4 seen it scale back.

5 In the past twelve years, our company did invest
6 \$50 million in power plants in California. And now, because
7 of unsurety (sic) of -- a lot of it because of unsurety
8 (sic) of legislation in California, we've scaled back.
9 We're just in the service business now, not in the
10 investment business any more.

11 And I'm afraid that things like AB 60 makes our
12 East Coast-based company, not familiar with what's happening
13 each day here in the capitol, even more unsure about staying
14 in the service business. We potentially have three more
15 bids next month. AB 60 and the unsurety (sic) of these wage
16 orders has made my company nervous about bidding on those
17 jobs.

18 But anyway, that's my editorial. I'll get to my
19 specific -- thanks for your patience on that -- my specific
20 concerns or request for AB 60 or the wage orders. You know,
21 we're a 24-hour, seven-day operation. Our operators work
22 12-hour shifts, as most electric power plants do. And the
23 unsurety (sic) of whether or not on-duty meal periods are
24 still allowed or not allowed in this interim, I don't know.
25 I've got different interpretations.

1 The unsurety (sic) of the double-time pay after 8
2 hours on the seventh day, because of the wording, currently
3 it's worded -- well, AB 60 says double time after 8 hours on
4 the "seventh day." The previous or currently existing wage
5 order says "seventh work day."

6 We, in all our plants, have four operators that
7 are regularly scheduled on Sunday, which is our seventh day
8 of the pay week. They're working 12-hour shifts, so that
9 would put what currently is time and a half after 8 hours as
10 4 hours of double time.

11 And this is an unsurety (sic). I really don't
12 know what the law says to do January 1st.

13 And the main thing, even though, you know, I don't
14 think AB 60 was necessary, I think it was rash -- but that's
15 editorialism, I guess, again -- what I need to know is what
16 are the rules that I'm working by? Right now, I'm held up
17 on finishing my budget for next year. I'm late. And it's
18 affecting whether or not we get benefit enhancements
19 improved in other areas, like disability insurance and
20 health plans, not knowing whether we're paying double time
21 after 8 or time and a half after 8. It's holding me up on
22 my budget process, getting those benefits approved, which
23 the rest of our company is doing in 51 other states. Ours
24 is on hold, on approval, because of this unsurety (sic),
25 what our expenses are going to be.

1 The biggest impact is the unsurety (sic) of the
2 paid on-duty meal period. There's not a single guy in any
3 one of our plants that's working 12-hour shifts that isn't
4 100 percent for this on-duty paid meal period. I'm not sure
5 that we can continue this without a liability between
6 January and July, that there's not some daily penalty that
7 -- I don't know which wage order we're following here,
8 what's the interim rules.

9 I'm also currently holding up posting our shift
10 schedule for the year 2000. I normally would have done that
11 the first of this month. This is November now. Operators
12 want to plan their lives after January 1. I don't know for
13 sure whether we can have 12-hour shifts, I'm so unsure about
14 interpretations here.

15 So, what I'm asking is that we can get clarity,
16 that we know what the rules are that we're living by, not
17 July 1 next year. The law is effective January 1, and we're
18 going to post the detailed rules July 1 -- that's -- that's
19 totally unacceptable. I need to know today, not -- let
20 alone January 1, because it's affecting my operation today.

21 And I don't -- you know -- you know, I would
22 suggest something as simple as -- I think the intent of the
23 law was that the previous wage order goes back into effect,
24 although there were some changes. So, I have here, like for
25 our case, Wage Order 4-89 for the professional and

1 technical; that was the one in effect before the -- before.
2 I went through here, and I'm kind of -- you know, I'm not
3 the right guy to do this, but I could go through here and
4 compare what I've read off the Internet on AB 60, and I can
5 make four changes to this, with a red line, and then say:
6 "Post this; this is the rules we live by till July 1," or
7 something of that nature.

8 I need to know the rules, and I need to know them
9 like this afternoon, not January 1, and certainly not July
10 1. That's -- that's my big problem.

11 I don't like AB 60, but it's here, we've got to
12 live with it. So, what are the rules to live with it, to
13 live by?

14 COMMISSIONER BROAD: I am sure that -- I mean,
15 speaking for myself, I'd like to be able to tell you
16 definitively this afternoon what you have to do.

17 MR. BROWN: Yeah.

18 COMMISSIONER BROAD: The problem is, we have one
19 of these --

20 MR. BROWN: Yeah.

21 COMMISSIONER BROAD: -- it's been alluded to -- we
22 have one of these kind of structural problems of what
23 happens when bills are passed. They don't go into effect on
24 January 1, so anything that the Commission does officially
25 prior to January 1 to implement the bill would be

1 potentially subject to some legal challenge, that the
2 Commission was without authority to provide definitive
3 anything prior to January 1. So, it's one of those
4 situations where you have to use, I think, the best,
5 reasonable judgment.

6 Now, you know, there's a couple things here.
7 You're probably right: what it's going to look like after
8 January 1 is the restoration of Order 4-89 and the others,
9 with, you know, a relatively small number of changes, good
10 through July, at which point some permanent changes will be
11 made in all the wage orders, based on AB 60.

12 Some of the issues that you alluded to, in my
13 opinion, were simply codifications of existing law. And I
14 think the "seventh day" issue was probably an ambiguity
15 created in the way the statute was drafted, but I don't
16 think that the proponents -- they're not here, but I don't
17 think the proponents intended to change the rules with
18 regard to the seventh day of work. I don't think it would
19 make much sense if they did. I don't think it makes much
20 sense to suggest that if someone works one hour a day and
21 that, on the seventh day -- or, you know, three hours in a
22 week and then on the seventh day of the week, even though
23 they've worked three hours that week, they're suddenly going
24 to get a whole bunch of overtime, that's really -- it's
25 about the seventh consecutive day of work.

1 MR. BROWN: Yeah.

2 COMMISSIONER BROAD: So, I --

3 MR. BROWN: But that word is missing.

4 COMMISSIONER BROAD: I understand that. I
5 understand that, but I --

6 MR. BROWN: Yeah, the "seventh day of work" is
7 missing. The word "worked" is missing, yeah.

8 COMMISSIONER BROAD: Right. I realize that, and I
9 wish it wasn't missing. It is missing, but -- and I think
10 that, you know, if we could provide guidance today, I would
11 certainly vote to say that what that was intending to do was
12 -- was restore -- was actually codify the existing rule.
13 That rule has never really been changed. I mean, you know,
14 in the -- so, I -- I think you have to try to use some
15 common sense in this, and perhaps talk to the Division of
16 Labor Standards Enforcement and discuss with them what their
17 opinion of what happens on January 1.

18 And I think it's incumbent upon us, just as soon
19 after January 1 as we can do it, to give people a definitive
20 answer to these questions. But, you know, it may be January
21 10th before we could do that, because we would have to hold
22 public hearings based on what the statute says, hear many of
23 these concerns again, have something out, probably prior to
24 that, for people to at least be looking at, so that they
25 have the ability to comment and suggest changes that they

1 might like before we were to adopt something.

2 But your point is well taken. Businesses have to
3 operate as of January 1, and they don't want to operate in a
4 vacuum without guidance. But I think we all have to sort of
5 move forward with as logical an approach to this as
6 possible.

7 MR. BROWN: Yeah. I appreciate -- I appreciate
8 your guidance, as much as you can give at this point. But
9 you need to respect that there are penalties in this, that
10 include civil penalties, and there's a daily penalty which
11 could be considered a bounty type thing, the daily penalties
12 that are in this new AB 60, \$50 a day per incident. And I'm
13 going to be doing payroll January 1 because I don't pay my
14 payroll person enough to take the liability for \$50 -- and
15 she gets paid very well, but she's nervous about doing
16 payroll January 1.

17 But I do respect your position, that you can't
18 maybe legally take action or guidance today for fear of --
19 and a legitimate fear of somebody filing suit, but you're
20 putting me and all the other employers in that position
21 January 1 by not taking that action. That's the problem
22 here, is the penalties that are written into this. And they
23 could be -- they could be bounty type penalties.

24 COMMISSIONER DOMBROWSKI: I don't know if you have
25 done anything about contacting either the Department of

1 Labor with some specific written questions on these matters,
2 because, obviously, everybody this morning has the same
3 problem you have there. There's mass confusion about how
4 this thing's going to be implemented. But I would think it
5 would be appropriate to at least try to get some questions
6 on paper to them, see if they can give some guidance, at
7 least.

8 MR. BROWN: Okay. Thank you.

9 COMMISSIONER CENTER: And as earlier noted, their
10 chief counsel is here today listening to the testimony,
11 so --

12 MR. BROWN: Oh, good.

13 COMMISSIONER CENTER: -- hopefully, he takes that
14 into consideration. So --

15 MR. BROWN: Where's he at?

16 COMMISSIONER CENTER: I don't want to identify
17 him. You'll lynch him right now. So --

18 (Laughter)

19 COMMISSIONER CENTER: You need to bend their ear a
20 little bit.

21 COMMISSIONER DOMBROWSKI: He's the guy in the red
22 tie.

23 MR. BROWN: Okay.

24 COMMISSIONER CENTER: Thank you.

25 MR. BROWN: Well, thank you very much for

1 listening.

2 COMMISSIONER BROAD: Mr. Chairman, maybe it would
3 be appropriate to ask the chief counsel to come up and ask
4 if they've taken any -- given opinions on this and what
5 their opinions might be on some of these things that have
6 come up repeatedly. Is that -- after lunch? I mean, after
7 the people have testified.

8 COMMISSIONER CENTER: Yeah. Is there anybody else
9 in the audience who has not testified who would like to at
10 this time?

11 (No response)

12 COMMISSIONER BROAD: No. We're done.

13 COMMISSIONER CENTER: I don't know. Miles, are
14 you prepared to address the Commission?

15 MR. LOCKER: (Not using microphone) Certainly.
16 Would you prefer I do it now, after lunch, or what?

17 COMMISSIONER CENTER: Well, we're not going to
18 have lunch, but -- yeah, I listened to you -- so, don't take
19 too long, Miles.

20 MR. LOCKER: Hi. I'm Miles Locker, chief counsel
21 for the State Labor Commissioner. And thank you for
22 inviting me to speak.

23 A couple of the questions that -- first of all, I
24 just want to say that we have been amassing quite the
25 collection of requests for opinion letters on AB 60, on how

1 we interpret it and how we would intend to enforce it. And
2 it's our hope to start getting these out very quickly,
3 within the next two weeks. And it's also our hope that as
4 they come out, we would like to see them posted on the
5 Department of Industrial Relations Web site. I think that
6 would be very helpful to the entire public. So, that's what
7 we're aiming for.

8 And in assessing a lot of the questions we've
9 gotten, both in terms of written letters to us and also what
10 I'm listening to today, we do -- you know, preliminarily, I
11 think we do have answers to a lot of the questions that seem
12 to be troubling people.

13 First of all, in terms of just a few things, I
14 guess, the confusion about the "seventh day" of work, the
15 same way as Commissioner Broad was speaking before, we do
16 agree that that needs to be read in the context of the
17 entire section there. And we would interpret that to --
18 it's an ambiguity. We would interpret the provision for
19 double time after 8 hours on the seventh day of work to mean
20 after the seventh consecutive day of work in the workweek,
21 that it needs to be read in conjunction with the earlier
22 part about -- the section that talks about time and a half
23 for the first 8 hours in the seventh consecutive workday of
24 the workweek. So, that would be the answer to that.

25 There -- I think, you know, one issue that we've

1 heard a lot about, and I guess I was listening to today come
2 about, in terms of the issue of meal periods and whether or
3 not AB 60 does away with the on-duty meal period. And we do
4 not believe it does away with the on-duty meal period. And
5 there are a couple reasons that we would say that. First of
6 all, with respect to, I guess -- let me just find this here
7 -- Section 516 is added to the Labor Code to provide that:

8 "Notwithstanding any other provision of law,
9 the IWC may adopt or amend working condition
10 orders with respect to break periods, meal
11 periods, and days of rest for any workers in
12 California consistent with the health and
13 welfare of those workers."

14 When you start something with "notwithstanding any other
15 provision of law," that seems that there's clearly an intent
16 to give the IWC the authority to regulate as to, you know,
17 the on-duty meal period.

18 Also, going back to Section 512 that's added to
19 the Labor Code under AB 60, I think what's significant in
20 reading this is it talks about the requirement for the first
21 meal period of the day, that if -- it's required if you're
22 working more than 5 hours in a day, but it can be waived by
23 mutual consent if you are working up to 6 hours, over 6
24 hours, then, it says you have to get that meal period. It
25 then goes on to say, though, that:

1 "An employer may not employ an employee for a
2 work period of more than 10 hours per day
3 without providing the employee with a second
4 meal period of not less than 30 minutes,
5 except that if total hours worked is no more
6 than 12 hours, the second meal period may be
7 waived by mutual consent of the employer and
8 the employee" --

9 -- and here's the key --

10 " -- only if the first meal period not
11 waived."

12 What that tells me, then, is that despite what it says
13 earlier in the section, that you can't do a waiver if it's
14 more than 6 hours, the next sentence after that is saying,
15 yes, there can be a waiver; what you can't waive is the
16 second one, then, if you're working, you know, more than 12
17 hours. It provides that you can waive the first.

18 So, we're kind of thinking, "What does this mean,
19 if it first says you can't waive the first and then implies
20 that you can waive it?" And our thinking on that is there's
21 only one way you can still waive that first meal period, and
22 that would be, then, through an on-duty meal period. So, we
23 do not think there was an intent to do away with that. And
24 I know this sounds a little convoluted, but, you know, in
25 searching through this language and trying to figure out

1 what it all meant, I think that's the most reasonable
2 reading of it.

3 I know there's a lot of other questions out there
4 in terms of, for example, provisions in the existing IWC
5 orders that provide for express exemptions such as -- we
6 were talking about truck drivers before. I think, clearly,
7 AB 60 provides that as to any of the pre-1998 wage orders,
8 if you have -- if there is an exemption contained within one
9 of those orders, such as the truck driver situation, then
10 that exemption would still apply. So, that would be our
11 answer to that.

12 And, I guess, in terms of just some enforcement
13 issues that I just want to touch on, because what I was
14 hearing was an awful lot of discussion about -- well,
15 suggestions to the IWC to somehow expand the administrative
16 exemption somehow to cover certain groups of people now, I
17 think it is important to note that with respect to how DLSE
18 enforces the administrative exemption, in terms of -- and
19 certainly, we enforce it -- to the extent that California
20 law is inconsistent with federal law, to the extent it
21 provides for greater protections to workers than federal
22 law, we are very careful to apply, you know, the California
23 greater protections, as the recent Supreme Court case,
24 *Ramirez v. Yosemite Water Company*, that talks about that.

25 But, on the other hand, where the purposes of the

1 law and the law is -- where there is a consistency, then we
2 do rely on federal law and federal regulations. And in one
3 area on that is with respect to the definitional question of
4 the administrative exemption. Certainly California law
5 differs from federal law in that you have the "primarily
6 engaged in" test versus the "primary duty" test. But with
7 respect to defining certain things about the administrative
8 exemption, the question of discretion, independent judgment,
9 what's found in intellectual work, those phrases that are
10 found in the existing IWC orders, we do look to the Federal
11 Code of Regulations and federal case law. And one of the
12 things that we get out of that is the dichotomy between
13 production workers versus workers who would truly be
14 administratively exempt.

15 And I think that, certainly, in terms of our own
16 enforcement, with respect to workers who are employed by an
17 employer, where what that employer is doing is producing a
18 product or a service for customers of that business, if
19 that's what that enterprise is doing, then the workers who
20 are engaged in doing that cannot come under the
21 administrative exemption. There's a whole bunch of federal
22 cases in the last ten years under the FLSA that have spoken
23 about that. And instead, the administrative exemption is
24 geared towards workers who are employed dealing with
25 administrative issues for the enterprise itself. And I

1 think that's an important distinction, because otherwise, I
2 think you'd be running into some issues there.

3 COMMISSIONER BROAD: So, in other words, if people
4 were coming forward and saying, "Let's just take the
5 administrative exemption and instead of having the test
6 that's in the wage orders now, primarily engaged in
7 activities which are intellectual, et cetera, et cetera,
8 we're going to have a list -- a laundry list of things -- if
9 it's a pharmacist, if they actually -- if they, you know,
10 look at the bottle and see if it's got the right
11 prescription in it" -- that, in effect we would be running
12 up against a federal Fair Labor Standards Act preemption
13 question --

14 MR. LOCKER: Absolutely.

15 COMMISSIONER BROAD: -- squarely.

16 MR. LOCKER: Yes, squarely. There's simply no way
17 that -- if you have a pharmacist, for example, employed by a
18 pharmacy or a hospital, let's say, there's no way under
19 federal law that person is going to fall within the
20 administrative exemption. It's just -- it's consistent with
21 -- within the production versus true administrative
22 dichotomy, they would fall as a production worker.

23 So, I did want to mention that.

24 In terms -- earlier there was a little bit of
25 discussion, I guess, with respect to the issue of, I guess,

1 in the computer industry and hourly employees. The speaker
2 was correct that under federal law, which has a salary basis
3 test under the FLSA, and also, certainly, under AB 60 now,
4 that it will have a salary basis test, if you are an hourly
5 employee, you -- that you're not going to be exempt. And
6 that's -- you're simply -- that can be the end of the
7 discussion. The only way, under federal law, these computer
8 professionals could now be exempt is because, in 1990, the
9 FLSA was amended by Congress to specifically provide for
10 that type of exemption for computer professionals, and it
11 provided that they could be paid on an hourly basis and
12 provided that they were making six and a half times the
13 minimum wage and were engaged in certain types of activities
14 that are delineated in the Code of Federal Regulations.

15 Under California law, it's a different situation.
16 First of all, as I indicated, you do have a salary basis
17 test in now. But secondly, there's nothing in California
18 law in any of the existing IWC orders that would apply that
19 provide for a special exemption with respect to workers in
20 the computer industry. Instead, what we look at is really
21 the learned professional exemption that's been, you know,
22 set out in the IWC Orders 1, 4, 5, 7, and 9, I believe, in
23 the 1989 versions of those.

24 And quite frankly, there, there's a little bit of
25 a dichotomy there too between state and federal law.

1 Federal law dealing with computer workers specifically
2 provides that they are -- that they would be exempt under
3 the special new federal provision, notwithstanding whether
4 or not they would have been exempt under the learned
5 professions exemption. In California, the 1989 IWC order
6 "Statement of Basis," talking about how DLSE ought to be
7 enforcing the learned professions exemption, it basically
8 DLSE and suggests that DLSE ought to be relying on federal
9 regulations in delineating the learned professional
10 exemption. And in looking at that, one of the things that
11 the Code of Federal Regulations talks about in that
12 exemption is that it is almost universally expected that for
13 someone to be exempt as a learned professional, they would
14 not only have a basic academic degree, but some sort of
15 advanced degree or certificate beyond that. So, in general,
16 what we're looking it not just a B.A., but also some --
17 perhaps a year or something beyond that, a master's degree
18 or some certification beyond that. Again, this is different
19 than federal -- than the federal provisions on the computer
20 industry, because there you could have someone who perhaps,
21 you know, doesn't have a bachelor's degree at all, but
22 because they're doing this type of work and making more than
23 six and a half times the minimum wage, they'd be exempt.
24 But that did take a specific law.

25 If you have any other questions or anything, I'd

1 be happy to respond.

2 COMMISSIONER BROAD: One question that's come up
3 is the collective bargaining exemption. My understanding is
4 that that proponents of AB 60 intended to codify the
5 existing collective bargaining exemption that was in -- that
6 was in the wage orders. Is that how you view that? Or do
7 you view it as accomplishing something different?

8 MR. LOCKER: Codification and going a tiny bit
9 beyond it, I would say, is how DLSE view it.

10 COMMISSIONER BROAD: Okay.

11 MR. LOCKER: Under the existing wage orders --
12 well, certainly, the most -- the one difference that's
13 visible right away is, instead of a dollar an hour more than
14 the regular rate now, it's thirty percent more or whatever.
15 But that's clear.

16 The other difference that I think is very
17 important is, in the existing wage orders, it talks about
18 premium pay for "overtime hours worked." The language that
19 the statute now uses, AB 60 uses, is premium pay for "all
20 overtime hours worked." And adding the word "all," I think,
21 was significant. We had been involved -- DLSE had been
22 involved in a couple of court cases on that very subject,
23 where you had collective bargaining agreements that
24 provided, let's say, for no premium pay until the tenth hour
25 or the twelfth hour of employment in a day, and then did

1 provide for premium pay. And it's our understanding the
2 intent of "all" and how we interpret "all" is to mean there
3 has to be some premium pay for all overtime hours worked,
4 and overtime hours would be defined by the statute as
5 anything over 8 in a day or 40 in a week.

6 Now, having said that, premium pay, that's the
7 area where -- premium pay does not necessarily mean time and
8 a half. It could be ten cents an hour more than the regular
9 rate of pay. But we do think there has to be premium pay
10 for all overtime hours worked.

11 COMMISSIONER CENTER: Any other questions?

12 COMMISSIONER COLEMAN: Chuck, I had a sort of a
13 procedural question.

14 In terms of giving some guidelines to the
15 employers, as we go through these hearings, can we -- are we
16 talking about maybe drafting some guidelines that people can
17 comment to us so that we can then implement them as soon
18 after January 1 as we can gather ourselves, to give us much
19 assurance as possible as soon as possible?

20 COMMISSIONER CENTER: Yeah. I think our goal
21 right now is by the December meeting, to have some draft
22 guidelines, to have the industry comment -- labor and
23 industry, and then be ready to act as soon as possible in
24 January.

25 COMMISSIONER COLEMAN: Okay.

1 COMMISSIONER CENTER: I think that's our goal and
2 that's where we're trying to go right now.

3 MR. BROWN: (Not using microphone) A question
4 from the audience.

5 Can I -- can I ask a question?

6 Yes. I just wanted to ask about the on-duty meal
7 period.

8 THE REPORTER: Identify yourself, please, and come
9 to the microphone.

10 MR. BROWN: Joe Brown, from Conectiv Operating
11 Services Company.

12 COMMISSIONER CENTER: You should address that out
13 of the room. We're an independent commission, and we'll
14 offer guidelines to DLSE. But if it's a DLSE question, you
15 might just want to address him individually outside.

16 MR. BROWN: Oh, okay.

17 COMMISSIONER CENTER: That's a suggestion.

18 MR. BROWN: Okay.

19 COMMISSIONER CENTER: No other comments from the
20 audience?

21 (No response)

22 COMMISSIONER CENTER: And Miles will be here to
23 answer questions. He likes to answer questions.

24 MR. LOCKER: Absolutely.

25 COMMISSIONER CENTER: With that, I'll entertain a

1 motion to adjourn.

2 COMMISSIONER BROAD: So moved.

3 COMMISSIONER CENTER: And a second?

4 COMMISSIONER DOMBROWSKI: Second.

5 COMMISSIONER CENTER: All in favor.

6 (Chorus of "ayes")

7 COMMISSIONER CENTER: Motion carries.

8 (Thereupon, at 12:29 p.m., the public
9 meeting was adjourned.)

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CERTIFICATE OF REPORTER/TRANSCRIBER

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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 Meeting of the Industrial Welfare Commission, held on November 8, 1999, 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: November 22, 1999

CYNTHIA M. JUDY
Reporter/Transcriber