

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS  
INDUSTRIAL WELFARE COMMISSION

Public Meeting

November 15, 1999

Hiram Johnson State Office Building  
455 Golden Gate Avenue, Auditorium B100  
San Francisco, California

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P A R T I C I P A N T S

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I N D E X

	<u>Page</u>
Proceedings	5
Public Testimony:	
KEN SULZER, Association of Energy Service Companies, Independent Oil Producers Agency, California Independent Petroleum Association	8
FRED HOLMES, Western Drilling	8
PAUL HANCOCK, Poole California Energy Services	8
TIM LONG, California Retailers Association	27
DAVE FONG, Longs Drug Stores	32
DUANE BLACK, pharmacist, Longs Drug Stores	46
ALAN POPE, Longs Drug Stores	53
BILL WEBSTER, pharmacist, Vons Pharmacy	66
VINCENT PAYNE, pharmacist, Pavilions/Safeway/Vons	68
JOHN PEREZ, United Food and Commercial Workers	72
BOB ROBERTS, California Ski Industry Associations	76
MARLA HERRERA, respiratory therapist, John Muir Medical Center	77
SAL NICOLOSI, chemical worker, Dow Chemical	86
STEVE FRIDAY, Dow Chemical	89
VICKI ZAHN, nurse, Queen of the Valley Hospital	92
CONNIE DELGADO ALVAREZ, California Healthcare Association	97
JUDITH LEVIN, Family Support Services of the Bay Area	99
JULIANNE BROYLES, California Chamber of Commerce	105
JOHN DUNLAP, California Restaurant Association	106

<u>INDEX (Continued)</u>	<u>Page</u>
GREG WELLINGTON, Papa Murphy's Pizza	110
JIM NICHOL, Harmon Management	113
Afternoon Session	120
MARCY SAUNDERS, State Labor Commissioner	120
MAUREEN WRIGHT, Respite Inn	121
LISA TOMLINSON, Pac Pizza	123
MARCIE BERMAN, California Employment Lawyers Association	130
GAIL SKINNER, nurse, California Pacific Medical Center	135
MARY CHRIS VALLARIO, nurse, California Pacific Medical Center	138
JONATHAN MAYES, Safeway	144
RON BINGAMAN, pharmacist, Safeway	144
MARC KOONIN, Steinhart & Falconer, LLP	149
BRAD CINTO, pharmacist, Walgreens	153
FRANCIS CHENG, pharmacist, Longs Drug Stores	160
JIM MERRILL, United Defense	162
SUSAN KRAFT, Safe, Inc.	168
TOM RANKIN, California Labor Federation, AFL-CIO	169
FRED MILLS	178
JIM EWERT, California Newspaper Publishers Association	180
Adjournment	182
Certification of Reporter/Transcriber	183

P R O C E E D I N G S

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(Time noted: 10:04 a.m.)

COMMISSIONER CENTER: Good morning, everybody. Can you hear me in the audience?

I want to welcome you to our second fact-finding hearing on implementation of Assembly Bill 60 on daily overtime requirements.

I'd like to call the roll of commissioners and establish a quorum.

AUDIENCE MEMBER: (Not using microphone) Turn it up! Can't hear.

COMMISSIONER CENTER: I can't turn it up from here. It's got to be back there.

Can you get an audio-visual man back there?

Let me call the roll anyway.

First, Leslee Coleman.

COMMISSIONER COLEMAN: Here.

COMMISSIONER CENTER: Bill Dombrowski.

COMMISSIONER DOMBROWSKI: Here.

COMMISSIONER CENTER: John McCarthy.

COMMISSIONER McCARTHY: Here.

COMMISSIONER CENTER: Barry Broad.

COMMISSIONER BROAD: Here.

COMMISSIONER CENTER: Chuck Center. Official

1 quorum.

2 And the meeting's now open. And we'll wait for  
3 the mike before we start.

4 I'll tell you -- you can hear me because I talk  
5 loud -- anybody that wants to speak, please come up and sign  
6 up at the sign-up sheet in the very front, if you would like  
7 to speak at the hearing. Thank you.

8 (Pause)

9 COMMISSIONER CENTER: Is this mike any better or  
10 is it the same?

11 AUDIENCE MEMBER: (Not using microphone) It's  
12 better.

13 COMMISSIONER CENTER: Okay. I thank you.

14 What we're attempting to do is have input from  
15 industry that's going to be affected by the new legislation  
16 that comes into effect January 1st. And with that, we're  
17 taking all the testimony -- it's being recorded. We're  
18 reviewing all the letters. We hope to have draft  
19 regulations for you to review at our December 15th meeting,  
20 and, as soon as we possibly can in January, act on those  
21 regulations.

22 I'd like to also just, for information of the  
23 commissioners, I would like to entertain a motion to direct  
24 our Executive Director, Mr. Andy Baron, here -- I'll  
25 introduce him here -- to send a letter to the Department of

1 Industrial Relations, the Division of Labor Standards  
2 Enforcement, pursuant to Section 1198.4 of the Labor Code to  
3 inform the Commission of any changes in enforcement policy  
4 implementing any regulations that fall in the purview of the  
5 Industrial Welfare Commission.

6 With that, I would make a motion to adopt that.

7 Do I have a second?

8 COMMISSIONER BROAD: Second.

9 COMMISSIONER CENTER: Call the roll. All in  
10 favor, say "aye."

11 (Chorus of "ayes")

12 COMMISSIONER CENTER: Any opposed?

13 (No response)

14 COMMISSIONER CENTER: The motion is passed. Thank  
15 you.

16 With that, I'd like to, as soon as the individuals  
17 get done signing up, call our first speaker up here.

18 And just for information, we'll have -- we have  
19 the sponsors of the bill that will be here to address  
20 everybody at the end of the testimony, and also the State  
21 Labor Commissioner will be here to also address the  
22 Commission too. Thank you.

23 (Pause)

24 COMMISSIONER CENTER: With that, I'd like to call  
25 the first speakers, and I assume they're a group of three.

1 It's Ken Sulier (sic), Paul Hancock, and Fred Holmes.

2 MR. SULZER: Good morning, Chairman Center and  
3 members of the Commission. My name is Ken Sulzer. I'm a  
4 partner at Seyforth, Shaw, Fairweather, and Geraldson, in  
5 Los Angeles. I represent the Association of Energy Service  
6 Companies, the Independent Oil Producers Agency, and the  
7 California Independent Petroleum Association. With me, on  
8 my right, is Mr. Holmes, Fred Holmes.

9 Want to introduce yourself?

10 MR. HOLMES: I'd Fred Holmes, with Western  
11 Drilling, and I'm also the president of AESC and IOPA, and  
12 along with the CIPA, C-I --

13 MR. SULZER: CIPA is the California Independent  
14 Petroleum Association.

15 MR. HOLMES: Yes.

16 MR. HANCOCK: And my name is Paul Hancock. I'm a  
17 senior vice president for Poole California Energy Services,  
18 and I'm the vice chairman of the Association of Energy  
19 Service Companies and also a member of the California  
20 Independent Petroleum Association.

21 MR. SULZER: The employees of our members work for  
22 oil service companies, offshore and on-site drilling  
23 companies.

24 I want to give you a little information about the  
25 employees in our industries so that you have some background

1 for the legal arguments that I'll set forth.

2           Offshore oil drilling employees typically earn  
3 about \$50,000 per year; service company employees between  
4 \$30,000 and \$50,000 per year. Many of the employees  
5 typically work 12-hour shifts and receive -- do not receive  
6 overtime based on the exemptions or exclusions of the on-  
7 site oil drilling that are set forth in numerous IWC and  
8 DLSE documents, as the law currently stands.

9           Most of these people who work the 12-hour shifts  
10 work a schedule of seven days on and seven days off. So,  
11 many of these employees basically have 26 weeks a year off  
12 of work, and do various different things with it, have  
13 second jobs, go to school, et cetera, somewhat analogous to  
14 firefighters, who work large hours, many longer -- longer  
15 workweeks, and then are off for significant periods of time.  
16 This is particularly true in the offshore situation,  
17 although it is also true in many respects for onshore oil  
18 employees.

19           By our count, there's approximately 3,000 to 4,000  
20 employees who would be subject to the exclusion or the  
21 exemption of the on-site oil drilling employees in our  
22 state. There are approximately 45,000 operating wells in  
23 California.

24           Our purpose today, in addition to providing some  
25 information about our industry and our employees to the

1 Commission, is to address two specific legal issues. And  
2 real simply, what it is, is what's the current state of the  
3 law, before January 1 of 2000, and second, as of January 1,  
4 2000, what is the state of the law with respect to these  
5 exemptions and exclusions, in particular, on-site oil  
6 drilling, which is what we're here to talk about. But those  
7 exclusions are basically the same for on-site construction,  
8 logging, and mining, and those legal arguments would apply  
9 to those industries as well.

10 First, the overriding premise of our position,  
11 both before January 1 of 2000 and after January 1, 2000, is  
12 that unless and until the IWC acts to promulgate a wage  
13 order regarding these people, that these people would be  
14 excluded from enforcement by DLSE of regulations by IWC, as  
15 they are currently.

16 With respect to the state of the law, I'm going to  
17 give you a brief historical background as to why these  
18 industries have taken these positions and why it was  
19 reasonable to do so. It goes back to February, 1974, a  
20 statement by IWC Commissioner Chairman Todd, that basically  
21 said, "We have no intent, we never want to regulate on-site  
22 oil drilling, logging, mining, and on-site construction."

23 Since that time period, there have been at least  
24 -- at least ten by my count, and I'm sure there are more as  
25 we continue to research archives and so forth -- different

1 statements by the IWC, 1974m multiple statements in 1978,  
2 and later on, that illustrate that this is the intent of the  
3 IWC, and this is the state of law. There's even a statement  
4 by the deputy Attorney General in 1974 which says, "The  
5 current state of the law is these people are excluded from  
6 regulation by IWC."

7           The reason we're up here today is that the  
8 Division of Labor Standards Enforcement has taken the  
9 position, at least publicly in legal briefs in a case before  
10 the -- in Orange County that's before the Court of Appeal  
11 right now, called *Hestand v. Jose Miyan*, which says,  
12 basically, that it doesn't matter, all these statements by  
13 the IWC and so forth doesn't matter; we're going to go  
14 retroactively and go back to essentially 1996 and say  
15 there's no exclusion and you have to pay overtime for all  
16 these people for all this time.

17           And needless to say, our industry thinks that that  
18 is incorrect, an incorrect position to take, and it's being  
19 litigated right now. And my understanding as of today is  
20 that that case has been stayed and will have oral argument  
21 sometime in May. Oral argument was originally scheduled for  
22 November 16th. I don't know that for sure.

23           MR. LOCKER: (Not using microphone) Oral argument  
24 was vacated.

25           MR. SULZER: Okay. Thank you.

1           We'll provide all these statements and all the  
2 back-up evidence of the various statements by the IWC and  
3 the DLSE on this with our written comments that we'll make  
4 that will set forth these legal arguments.

5           One of the principal legal reasons why, as of  
6 January 1 -- and both as of January 1 and as we sit here  
7 today, these people aren't covered by any wage order --  
8 there was never a wage board convened to address these  
9 industries or individuals working in these industries. No  
10 wage boards were ever convened. It's patently clear from  
11 several statements by the IWC on the record that the wage  
12 boards that were convened for the other wage orders,  
13 including Wage Order 4, the occupational catch-all wage  
14 order, did not include consideration of the employees who  
15 are the subject of these exclusions.

16           Accordingly, under Labor Code 1178-1181, there's  
17 no valid wage order that covers these people until the IWC  
18 acts and covers them with a wage order. And I believe,  
19 although the archives on Wage Order 4 would probably bear  
20 that out, I have not -- that's an area that we'll submit  
21 more written materials on to the Commission.

22           Again, to address the retroactivity issue, there  
23 was a statement made, apparently, that there's no explicit  
24 exemption for these people. What it is, in the "Statement  
25 of Basis" for the minimum wage order -- I believe it's MW-

1 80, there is -- was a statement in the "Statement of Basis"  
2 that says these people are not covered by any IWC orders.  
3 They are covered by the minimum wage orders, but they're not  
4 covered by anything else.

5           As similar evidence of that and looking to another  
6 branch of government that kind of covers this exclusion, in  
7 1987, Assembly Bill 809 was passed, 42 to 36, which  
8 basically said these on-site employees are -- should be  
9 covered by Wage Order 4 until the IWC acts to create a wage  
10 order for these employees. The bill was passed by the  
11 Assembly, vetoed by the governor, so it was recognized by  
12 the Legislature, and apparently the governor, that these  
13 people were not currently covered by any IWC wage order;  
14 they were excluded or exempted. And the legislative history  
15 on this issue suggests that everyone understood that quite  
16 clearly and expressly.

17           An additional point, in a case called *Cooper Heat*,  
18 which was an on-site construction case, there was a  
19 stipulation on the record in that -- in that case with  
20 respect to on-site construction, but it set forth the point,  
21 the DLSE's position, stipulated on the record in court, that  
22 these people were not covered by any IWC order, they were  
23 exempted, excluded, et cetera.

24           And I use the terms "exemption" and "exclusion"  
25 somewhat interchangeably, and I'll get to that later. There

1 are numerous DLSE interpretive bulletins that refer to the  
2 exclusion of these industries as an "exemption," and they  
3 are treated like the exemption for public employees,  
4 transportation employees, et cetera, that are set forth in  
5 the wage orders themselves. DLSE has treated them that way  
6 in their interpretive bulletins.

7 In short, this issue, particular with respect to  
8 retroactivity, has been considered many times, many  
9 different places, and it's always come out that these people  
10 are exempted or excluded from the IWC wage orders. And our  
11 hope is, at least with respect to the retroactivity issue,  
12 is that the IWC consider these arguments as it does its work  
13 in the future.

14 And all these -- I went through this because I  
15 think all these kind of facts and this evidence is relevant  
16 to issue number two, which we're all really here to talk  
17 about, which is what happens January 1, as of January 1.  
18 It's our position that because the wage orders were  
19 specifically reinstated in AB 60 by Section 21, that the  
20 exemptions or exclusions are also continued and reinstated  
21 in the bill.

22 DLSE's position may or may not be that the 8-hour  
23 day governs immediately as of January 1, despite the  
24 reinstatement of wage orders with the various exemptions,  
25 exclusions, and otherwise. We don't believe that this

1 position is correct, and I'll go through some of the reasons  
2 that we believe that.

3           First, Section 21 reinstates the wage orders, and  
4 it reinstates the wage orders as they are. Wage Order 4,  
5 for example, it reinstates. We're excluded from Wage Order  
6 4. There was never a wage board convened for on-site oil  
7 drilling, so what Wage Order 4 covers is not us. We're  
8 excluded and exempted, and we would be entitled to that  
9 exclusion or exemption based on the reinstatement of the  
10 wage orders.

11           To counter the argument, "Well, AB 60 says  
12 everybody's got an 8-hour day and you can't have an  
13 alternative workweek of more than 10 hours in the day,"  
14 there's a statutory construction issue. The wage orders,  
15 arguably, conflict with the statute. What's more specific?  
16 Well, the wage orders are specifically reinstated, 1, 2, 3  
17 -- with all of their exemptions, et cetera. That should  
18 take precedence over the general terms of the statute. I'll  
19 sort of explain why we feel that way.

20           Number one, the wage orders don't conflict with  
21 the statute because the statute itself enables the IWC to  
22 create exemptions. It grants broad authority to create  
23 exemptions. So, there is some expectation in AB 60 that  
24 there will be other people that may be exempt from those  
25 specific terms of AB 60. So, that's no surprise, on the

1 face of the legislation.

2           Second, AB 60 doesn't say the wage orders are  
3 reinstated to the extent consistent with the statute. The  
4 statute could have said that. It could have also said AB 60  
5 reinstates the wage orders except for the 8-hour day and  
6 except for the maximum 10-hour alternative workweek. It  
7 doesn't say that. Another point on this ground, Section 11  
8 says the IWC must promulgate wage orders which are  
9 consistent with AB 60. If you read Section 21 that  
10 reinstates the wage orders, it doesn't say anything about  
11 consistent with AB 60. It says they're reinstated. If they  
12 wanted to say that, they could have, just like they said in  
13 Section 11. And as a rule of statutory construction, that  
14 should be significant.

15           And I think that's consistent with businesses'  
16 understanding -- these industries' understanding of what was  
17 happening when AB 60 was going through, that it was intended  
18 to undo what was removed during the Wilson administration,  
19 meaning the 8-hour day overtime, during 1997 and 1998.

20           Again, another argument that I think shows that  
21 this is sort of the correct interpretation until there's  
22 some action by the IWC is that saying that this exemption  
23 disappears as of January 1 leads to some absurd results.  
24 For example, neither in the Labor Code nor in AB 60 are  
25 public-sector employees exempted from the statute. They're

1 exempted by IWC actions. If the wage orders are reinstated  
2 without their various exceptions, exemptions, and others  
3 lost, I would argue that public-sector employees would be  
4 covered by the 8-hour day, that trucking employees may be  
5 exempted -- could be, and so forth. The only way you get  
6 away from that is if you were to say, "Well, this is an  
7 exclusion and not an exemption," and I don't think that  
8 argument holds water because of what I've said earlier.

9 Fifth, I think the industry and most people  
10 dealing with this didn't understand that AB 60 was intended  
11 to change this at all. For example, these associations did  
12 not submit letters in opposition to AB 60. It was  
13 understood that this was undoing the 8-hour that -- the 40-  
14 hour week put in by the prior administration, and it was not  
15 eliminating exemptions that have existed for the past  
16 quarter-century.

17 In sum, I'd submit that there's really no rational  
18 or lawful way that these exclusions or exemptions, by any  
19 name, don't survive the January 1, 2000. The exemptions and  
20 exclusions do survive January 1, 2000, in the absence of a  
21 new wage order.

22 And we -- our associations look forward to and  
23 would very much appreciate the opportunity to submit further  
24 comments and meet with your staff regarding these issues, as  
25 it affects our industry. And I want to thank you for your

1 time and indulgence. If you have any questions, I'd be  
2 happy to address them.

3 COMMISSIONER BROAD: Thank you, Mr. Sulzer, for a  
4 very cogent presentation. Let me ask you a couple of  
5 questions.

6 Other than these four industries, what exclusions  
7 that don't exist in wage orders are there? For what sort of  
8 occupations?

9 MR. SULZER: Other than are set forth in wage  
10 orders or --

11 COMMISSIONER BROAD: No. We have this admittedly  
12 peculiar situation, perhaps unique situation, in which we  
13 have these four industries that were excluded, that is to  
14 say, by comments of members of the Industrial Welfare  
15 Commission over a period of years, but they're actually  
16 unlike, say, public employees or the trucking ones. There  
17 actually is nothing in the wage orders that refers to any  
18 exemption.

19 Are there -- you said that there were other  
20 occupations that are treated similarly that have been  
21 excluded, even though they're not specifically exempted.  
22 What are they?

23 MR. SULZER: Yeah, I didn't -- I don't know -- I  
24 don't know of any. If I said that, I misspoke. I think  
25 these four industries are -- those are the four that are not

1 explicitly mentioned in a -- in the body of a wage order  
2 itself. They are mentioned in the "Statement of Basis" for  
3 the minimum wage order, so there is some express, formal,  
4 public, if you will, written acknowledgment that these  
5 exemptions or exclusions exist, and coupled with the actions  
6 of the DLSE, there is the level of formality, I think,  
7 that's necessary, is there from a legal standpoint. And  
8 that may, you know, estop DLSE, or based on some other legal  
9 theory, prevent them or preclude them from prosecuting these  
10 types of actions, in absence of action by the IWC.

11 COMMISSIONER BROAD: Okay. So, unless we discover  
12 something different, this is the universe of this particular  
13 problem, is these industries.

14 MR. SULZER: I think that's correct.

15 COMMISSIONER BROAD: Okay. Now, let's go to AB  
16 60. Clearly, AB 60 is a statute of general application that  
17 applies to all workers in the State of California. And it  
18 applies the 8-hour day, that there are specific exemptions.  
19 Then, in Section 9, which would be new Labor Code Section  
20 515(b)(2), which I think is the -- this is where it all  
21 comes down to:

22 "Except as otherwise provided in this section  
23 and in subdivision (g) of Section 511,  
24 nothing in this section requires the  
25 commission to alter any exemption from

1 provisions regulating hours of work that was  
2 contained in any valid wage order in effect  
3 in 1997. Except as otherwise provided in  
4 this division, the commission may review,  
5 retain, or eliminate any exemption from  
6 provisions regulating hours of work that was  
7 contained in any valid wage order in effect  
8 in 1997."

9 So, the question is whether, in this sort of peculiar  
10 situation where we have an exclusion that isn't an  
11 "exemption," quote-unquote, "contained in any valid wage  
12 order in effect in 1997," there's at least a strong argument  
13 that, as of January 1, these industries are covered by the  
14 terms of AB 60, and that if we wish to exempt these  
15 industries, they have to be exempted through the normal  
16 process of amending the wage orders to exempt them.

17 MR. SULZER: I guess I would turn it on its head.  
18 I mean, the wage orders are reinstated until otherwise dealt  
19 with by the IWC. That exclusion is the same thing as an  
20 exemption from a legal standpoint. I would argue it's the  
21 same thing as an exemption, basically because of all the  
22 evidence, all the history. It's just an exemption by  
23 another name. It's kind of form over substance, if you  
24 will, to argue that it's not -- it's not an exemption.

25 Beyond that, I think that's, you know, part of the

1 enabling legislation, to let the IWC act on it. And the  
2 intent is to have the IWC act before these, you know, Wage  
3 Order 4, which excludes our industry, is changed.

4           COMMISSIONER BROAD: Well, I guess that's probably  
5 -- in this respect, you can turn it on its head once again  
6 by saying, "How could the IWC exempt anyone without  
7 convening a wage board, except to the extent that the  
8 Legislature has granted explicit authority in this bill to  
9 do something?," so that perhaps the IWC's action, if they  
10 took any, or nonaction over the years, in effect deprived  
11 workers and employers of the rights they have statutorily to  
12 meet in wage boards to effect changes, which -- some of  
13 which, if they vote by a certain amount, are binding on this  
14 Commission, whether the Commission agrees with them or not.

15           So, by that argument, we could start willy-nilly  
16 creating exclusions just be standing up here and having the  
17 chairman read a statement that says, "Well, we really don't  
18 want to cover, you know, people that are flying trapeze  
19 artists or whatever, whoever they might be." So, that's  
20 very troubling to me, from a kind of orderly way that one  
21 should deal with statutes and their administration, and  
22 regulations and their administration.

23           MR. SULZER: Dealing with it in an orderly fashion  
24 is really what I think meets what's appropriate here, is  
25 that exclusions are in place, industries relied on them for

1 a long time; acting hastily on it without doing appropriate  
2 investigation to determine what exemptions are appropriate  
3 in the future should go through that, the process that the  
4 IWC should go through to make changes, if any, to what we  
5 believe the current state of the law is.

6 We ought to do that in an organized and  
7 businesslike fashion so that we have all the information,  
8 because, you know, on the one hand, there's never been a  
9 valid wage board convened to regulate our industry in any  
10 event -- in any event. We're excluded from Wage Order 4 by  
11 that action. Wage Order 4 is reinstated, and if we get Wage  
12 Order 4 reinstated, we're specifically excluded from it.  
13 That should continue until there's some action by IWC.

14 Does that answer at least some of your question?  
15 Okay.

16 COMMISSIONER McCARTHY: Yeah. I just -- just a  
17 couple questions by way of clarification. So, actually, as  
18 I understand what you said, for quite a lengthy period of  
19 time, your industry has acted under the assumption that you  
20 had an exemption.

21 MR. SULZER: Correct.

22 COMMISSIONER McCARTHY: During that period of  
23 time, was there any government agency dealing with labor  
24 issues that challenged your operating under that assumption?

25 MR. SULZER: That challenged that? I'm not aware

1 of any. I'm certainly aware of legislation that said, "We  
2 should regulate these guys," that was passed and vetoed.  
3 So, there's some legislative activity, governmental  
4 activity, on this particular exclusion that everyone  
5 understand was in state law.

6 COMMISSIONER McCARTHY: Well, I think what I'm  
7 getting at -- and correct me if I'm in error, because I  
8 think this is a pertinent point, but essentially, in terms  
9 of official action from government bodies, for all of the  
10 length of time your industry operated under the assumption  
11 you had an exemption, for all that length of time, official  
12 government agencies basically didn't challenge your  
13 understanding.

14 MR. SULZER: I think that's correct.

15 COMMISSIONER McCARTHY: In terms of official  
16 action.

17 MR. SULZER: I think that's correct.

18 COMMISSIONER McCARTHY: So, they were -- so,  
19 basically, I mean -- you know, one can't get into the minds  
20 of everybody, but in terms of their overt actions, they were  
21 certainly thinking of this premise, and by not challenging  
22 it, basically, putting you on notice that -- or failing to  
23 put you on notice that you needed to seek some other  
24 recourse.

25 MR. SULZER: I guess, Commissioner McCarthy, I

1 would -- to say that we were challenged implies this was  
2 never discussed. It was. I mean, I think there -- in the  
3 IWC -- we'll submit that with our written comments and we'll  
4 flesh it out -- I know there was discussion, "Should we  
5 regulate these guys?" Some say "yes," some say "no,"  
6 there's discussion, debate. The answer has always been "no"  
7 from IWC, and the DLSE took that, and that was its  
8 enforcement policy, following that policy.

9           So, there's been discussion, legislative activity  
10 on the issue. People have challenged it, saying, "We should  
11 regulate these guys," but they've never been regulated. The  
12 result of these challenges, if you will, has been that these  
13 exclusions or exemptions have stood. I am not aware of any  
14 lawsuit challenging this.

15           COMMISSIONER McCARTHY: Well, I guess what I'm  
16 saying is, a reasonable assumption would be, or seems to be,  
17 that you were operating correctly in your understanding.

18           MR. SULZER: Absolutely. Absolutely, and  
19 understood that this to be the state of the law, based on  
20 all of the evidence that I've mentioned and summarized very  
21 briefly but we'll submit in written comments, that we rely  
22 on that, and that survives January 1, until the IWC acts.  
23 And if it doesn't deal with this exemption, then it should  
24 continue as it has, as the current state of these orders.

25           COMMISSIONER CENTER: Just a couple comments. I

1 think it's -- we're probably safe to assume whatever action  
2 IWC takes in January, it will be challenged in court.

3 MR. SULZER: It depends.

4 COMMISSIONER CENTER: Well, by you or not, by some  
5 other party. And I think that understanding these  
6 industries were never intended to be covered -- you know,  
7 looking at this article in the *Sacramento Business Journal*,  
8 and one statement they made is, "Construction companies  
9 won't be exempt any more. However, when the state's daily  
10 overtime law takes effect in January, in January they'll be  
11 covered." So, it's -- there's going to be disagreement all  
12 over the lot on this, and we're finding that in the comments  
13 we're receiving.

14 But I think what we want to do is take as much  
15 input from the industry, from labor, from affected parties,  
16 and make the fairest decision we can, make the decision  
17 where we're going with it.

18 MR. SULZER: Right. And our one request is  
19 basically that we do it in a businesslike fashion. On the  
20 one hand, employees -- nobody's -- nobody's been hurt on  
21 these exclusions, and there's a lot of information from our  
22 employees, for example, some that we will submit, will be --  
23 we give every -- we give people a choice, you know, "Do you  
24 want the seven days, seven days off?" They want it. That  
25 -- and that's never been the subject of a wage board or any

1 hearings, as far as -- as far as I know. And we'd hope that  
2 you would go through the process, probably post-January 1,  
3 dealing with this issue, or not.

4 COMMISSIONER CENTER: In the finding "nobody's  
5 been hurt," I worked in the construction industry for twelve  
6 years. But under collective bargaining agreements, I  
7 received daily overtime, and the people who were non-  
8 regulated did not. So, I made a whole bunch more money than  
9 they did. To find "not being hurt," you know, it's all  
10 perception.

11 Any other comments from --

12 MR. SULZER: I think that's what we intended to  
13 submit today. We'll submit some written -- further written  
14 legal argument, additional, and a packet of the evidence  
15 I've discussed and whatever other research we're going to  
16 find from archives describing, one way or the other, about  
17 these exclusions.

18 COMMISSIONER DOMBROWSKI: Could you also -- could  
19 you also make sure you reference AB 60 and your -- AB 60 and  
20 the exemption that you're looking for?

21 MR. SULZER: Currently? In the reinstatement --

22 COMMISSIONER DOMBROWSKI: Your interpretation.

23 MR. SULZER: -- of the wage orders?

24 COMMISSIONER DOMBROWSKI: Well, your  
25 interpretation of --

1 MR. SULZER: Okay. Yes, absolutely. Absolutely.  
2 Okay. We thank Chairman Centers and members of  
3 the Commission and staff for this opportunity.

4 COMMISSIONER CENTER: Thank you.

5 I think it's Tim Long, with Orrick, Herrington,  
6 Sutcliffe, and the Retailers Association.

7 MR. LONG: Good morning.

8 COMMISSIONER CENTER: Can you put that -- yeah,  
9 move the mike in as close as you can.

10 MR. LONG: Better?

11 COMMISSIONER CENTER: Yes.

12 MR. LONG: Good morning. I am here again today,  
13 as I was last week, on behalf of the California Retailers  
14 Association, and I'd like to summarize verbally what I've  
15 presented to you in writing, and then follow up my comments  
16 -- we have some folks here from Longs Drug Stores who will  
17 introduce themselves and present testimony consistent with  
18 and in support of the position that we have summarized  
19 heretofore and in the submission here today.

20 What I've provided to the Commission is a first  
21 crack with regard to defining administrative duties. And we  
22 believe that it would be appropriate and lawful for the IWC  
23 to adopt, as a definition for administrative duties, the  
24 proposed definition.

25 Now, at last week's hearing, the legality of

1 defining the administrative duties differently than the U.S.  
2 Department of Labor defines the administrative exemption was  
3 called into question. And so, attached to the letter is a  
4 legal analysis, summary of a legal analysis of this very  
5 issue. And in a word, we believe that the law shows that it  
6 would not be preempted and would be perfectly enforceable.

7           And under this proposed language, as I said last  
8 week, licensed pharmacists who are engaged in specific  
9 duties -- and those duties are reiterated at Pages 2 and 3  
10 of the cover letter -- and who are, in fact, spending more  
11 than 50 percent of their time engaged in those duties, would  
12 be exempt, recognizing that not all pharmacists would  
13 qualify for this exemption, for any variety of reasons, many  
14 of which are perfectly appropriate.

15           We also believe -- and you all heard testimony  
16 from licensed pharmacists last week -- that allowing  
17 licensed pharmacists who are primarily engaged in specified  
18 duties to be exempt allows them more flexibility and  
19 furthers a wide variety of important interests.

20           So, with that said, if you have any questions at  
21 this point with regard to either the legal analysis or the  
22 submission I provided to you last week, I'd be happy to  
23 address them. If not, we'll turn it over to those folks who  
24 will testify and give you some facts and examples about what  
25 the impact would be, both if they were classified as exempt

1 employees or if they were classified as nonexempt employees.

2 COMMISSIONER CENTER: Questions?

3 COMMISSIONER BROAD: Well, Mr. Long, I've read  
4 your submission last week, and it's similar. What you've  
5 added on is this issue of -- this response to the question  
6 of federal preemption.

7 It looks to me like this is -- you're asking the  
8 IWC to repeal a statute by regulation, and it looks to me  
9 like it's a subterfuge, because I don't believe that this  
10 would exempt any pharmacist in the State of California,  
11 because these various duties that you mention are the duties  
12 that distinguish pharmacists from anyone else.

13 The statute flat-out says that pharmacists cannot  
14 be exempted by the IWC; the IWC has no power to exempt  
15 pharmacists as professionals. What you've done is bootstrap  
16 onto the administrative exemption the definition of  
17 professions, so there would not be a pharmacist at all who  
18 would be covered. In my view, it would violate SB 651, not  
19 to mention the various agreements between management and  
20 labor that accompanied the passage of SB 651 as it made its  
21 way through the Legislature. It seems as though there's an  
22 effort to sort of back away, as it were, from a bill that  
23 was agreed to by the industry.

24 And the consequence of this would be to allow  
25 pharmacists to continue to work any number of hours per day,

1 with no breaks, and no meal periods. And I know from my own  
2 experience, after the passage of SB 651, I went to a Rite-  
3 Aid pharmacy, mentioned it to the pharmacist and the  
4 pharmacy technician, and the pharmacist said, "Oh, we were  
5 just talking about the problem yesterday; I just came off of  
6 five 14-hour days, and I'm dead tired. And this is the best  
7 thing that's ever happened."

8           So, I can understand the industry coming forward  
9 and saying, you know, "We want this kind of accommodation or  
10 whatever, based on the expressed interest of all the workers  
11 in that industry." For example, hospital pharmacists should  
12 be entitled to all the alternative workweek arrangements  
13 available to all people who work in hospitals. That makes  
14 sense to me. But to exempt them flat-out by calling  
15 professionals administrators is to really, in my view,  
16 contort the law.

17           MR. LONG: Well, the IWC has the opportunity to  
18 define all of the exemptions, the duties, under which -- and  
19 we have proposed a definition of administrative employees,  
20 or the administrative duties that we would believe exempt  
21 certain pharmacists.

22           I can't comment in terms of deals and what-have-  
23 you. I'm just here proposing what we think is a perfectly  
24 lawful, legal, sound, and it makes sense, approach.

25           If a licensed pharmacist is not spending more than

1 50 percent of his or her time engaged in these duties, that  
2 person is not exempt. So, for example, if somebody is  
3 merely doing the counting, pouring, licking, and sticking,  
4 following instructions and what-have-you, under our  
5 proposal, that person would not be exempt.

6 COMMISSIONER BROAD: How's that? That is what is  
7 defined as the practice of pharmacy. That is exercising  
8 professional judgment. No one but the pharmacist can check  
9 that to determine whether it's the appropriate medication.

10 MR. LONG: Well, we will have some pharmacists  
11 here who will talk to you about what the duties are and what  
12 pharmacists are engaged in. Pharmacists do far more than  
13 follow the instructions of a physician. They do far more  
14 than just fill in the containers. There are many other  
15 duties that they are engaged in that require them to utilize  
16 their specialized training, to exercise their discretion and  
17 independent judgment in the carrying out of those duties.

18 Now, again, if a pharmacist is not engaged in  
19 those duties more than 50 percent of the time, they wouldn't  
20 be engaged -- or they wouldn't be exempt, rather.

21 COMMISSIONER CENTER: Any questions?

22 COMMISSIONER McCARTHY: Just one. I'm looking  
23 over the criteria you've put here to justify this definition  
24 as an administrator. You have, among other functions that  
25 they perform, is they interpret a prescription. Now, one of

1 the unfortunate things about growing old is that you visit  
2 the pharmacy ever increasingly, and I've had many a  
3 prescription. I didn't realize it required a great deal of  
4 interpretation. Could you elaborate on that? I mean, it  
5 says -- you know, it's so many tablets of such-and-such.  
6 And where's the interpretation? You make it sound so  
7 complex.

8 MR. LONG: I tell you what. I would ask -- if you  
9 could ask that same question to a pharmacist -- I don't  
10 pretend to sit -- stand up here as a pharmacist and -- in  
11 terms of what it means to interpret and what-have-you. But  
12 that's an example of the type of duties that would fall  
13 under the administrative exemption, as we're proposing.

14 If I -- this is just an example of a type of  
15 administrative employee.

16 I would ask you to re-ask that question to one of  
17 the pharmacists who will be testifying here as well.

18 COMMISSIONER CENTER: Thank you.

19 MR. LONG: Thank you.

20 MR. FONG: Good morning. My name is Dave Fong,  
21 and I'm the senior vice president of Pharmacy for Longs Drug  
22 Stores. Longs Drugs has approximately 1,400 pharmacists  
23 working for them, and we believe that we are not only a very  
24 good employer, but also a very good company when it comes to  
25 developing a working environment and a professional

1 environment for our pharmacists to practice within.

2 I am a pharmacist. I'm a graduate of the  
3 University of California Medical Center, here in San  
4 Francisco, with a doctorate of pharmacy, and I've been  
5 practicing for approximately the last 22 to 23 years, both  
6 as a pharmacist as well as a pharmacy executive.

7 My comments here today are to support the position  
8 that Tim Long has presented to you, having pharmacists  
9 classified as exempt employees, for the following reasons.

10 One is, I -- you know, to give you a little  
11 background, I didn't go to pharmacy school to count, pour,  
12 lick, and stick. I went to pharmacy school because I  
13 believed that I could contribute towards improving health  
14 care out there in the community. That was 1975, and back  
15 then, you know, it was count ,pour, lick, and stick versus  
16 "What's going on and what can we do to improve the health  
17 care of America?" And as a pharmacist, I recognized that  
18 the education, but more important, the role of the  
19 pharmacist, was continuing to evolve, and that pharmacists  
20 were going to be much more actively involved in enhancing  
21 the health care of consumers in America and in the world  
22 where we operate.

23 Our practice, what I learned in school wasn't just  
24 what I call the count and pour, but then, in fact, the  
25 curriculum included very little on that. It was mostly

1 spent with understanding how to use the information, the  
2 clinical information on drugs, how to apply that to each and  
3 every patient, to be able to understand and work within case  
4 histories and case management and disease state management  
5 to manage patients more effectively, and to work very  
6 closely with the other health care team, including the  
7 doctors, the nurses, and others, to improve the overall  
8 welfare of patients that we serve.

9           Now, I won't deny that over the last several  
10 years, that the perception of pharmacists being only the  
11 count-pour-lick-and-stick, all you see them is behind a  
12 five-foot wall, all you see are the pills popping over the  
13 counter. And, gee, what else do they do, and do they really  
14 play an important role in health care?

15           And the fact is -- and you'll hear from a  
16 practicing pharmacist -- what really does go on besides just  
17 the pills coming over the counter. Pharmacists are much  
18 more actively today than ever before involved with managing  
19 patients' welfare. They are the most accessible and  
20 available professional, as determined by the Gallup poll.  
21 Given what's happened with managed care and what I would --  
22 I would say the minimal opportunity to visit with doctors  
23 and other healthcare professionals, the corner drugstore  
24 pharmacist becomes much more of an active participant and  
25 accessible to consumers, when it comes to not only their

1 prescription care, but also the OTC products that they buy.  
2 And I think many of you have had the experience of going  
3 into a drugstore, you go down the cough and cold aisles, and  
4 all you see are colors. And you say, "Which is good for me,  
5 considering I'm a diabetic?" Do I ask questions? Gee, who  
6 can help me in order to ensure that I'm getting the proper  
7 product? That is the role of the pharmacist. That is the  
8 role of the pharmacist to be accessible and available. But  
9 the fact is, today it's not happening to the degree that we  
10 would like.

11 Yes, I do have pharmacists that perform  
12 immunization, I do have pharmacists that are involved with  
13 managed care and with disease state management, and they're  
14 -- what we call clinical coordinators, working with patients  
15 and doctors. But, in many cases in the retail, at the  
16 drugstore, the pharmacists, not only are they responsible  
17 for their professional responsibilities, as mandated by  
18 regulation and law, but they probably spend a lot of their  
19 time doing the count-and-pour. Why is that the case? The  
20 reason is plain and simple: we currently have a shortage of  
21 pharmacists in the State of California, if not in America.  
22 And I have documents in front of me that share with -- that  
23 can share with you what's going on, with a 44 percent  
24 increase in prescriptions over the next four to five years,  
25 coupled with only a 6 percent increase in pharmacists that

1 are going to be available to service the patients who  
2 continually want more pharmacy care.

3           We talked about the aging Baby Boomer and the  
4 number of prescriptions that are going to be filled for the  
5 aging Baby Boomer, as well as other factors that are  
6 impacting on increasing -- not only the numbers of  
7 prescriptions, but also the demand for pharmacy services and  
8 the need for accessibility, pharmacists to assist and to  
9 care for these patients.

10           Unfortunately, in this state we have restrictions  
11 that limit how many pharmacists -- not how many pharmacists,  
12 but the number of pharmacists that are available to us. We  
13 do not have reciprocity with other states. There's only an  
14 exam, and that's the exam you have to pass in order to work  
15 in this state. We have a technical ratio now. The  
16 technicians would do the count-pour-lick-and-stick, but  
17 considering, right now, we have what's called a one-to-one  
18 ratio, which means you can't have more than one tech per  
19 pharmacist, if you don't have the pharmacist, you don't have  
20 the tech. And therefore, who is doing the count-and-pour?

21           So, obviously, because -- and again, the  
22 relationship we have with our patients, the care we have  
23 with our patients and the need to take care of them when  
24 they demand and expect that service, we end up doing the  
25 count-and-pour or doing whatever it takes to make sure that

1 that patient is getting the level of care that they expect  
2 from us.

3 Yes, we can do a much better job. Yes, we can be  
4 much more actively involved with our health care, but the  
5 fact of the matter is that in regulations today there are  
6 some reasons, restrictions that prohibit us from doing as  
7 much as we can.

8 I also want to share with you a white paper that  
9 was produced by NACDS, our national association, that really  
10 talks about community pharmacy practice in the U.S. and what  
11 is our role, but more importantly, what must be our role as  
12 we move forward, and what are the factors that must be  
13 considered if we are to achieve that objective of really  
14 enhancing the care of our patients in the U.S. And I can  
15 leave that with you, if you'd like, so you can read a little  
16 bit more and understand a little more on pharmacy. Okay.

17 And finally, having to do with flexibility of  
18 scheduling, we recognize that SB 651 has passed. Okay. We  
19 are now going to adapt. What we are very concerned about is  
20 flexibility. If we are taking care of the patients, and if  
21 we have an issue right now where people need their service  
22 right now, this minute, this moment in time, and because of  
23 the inflexibility of scheduling, we're not able to provide  
24 that because someone has called in sick or someone is not  
25 available, or we have to work extra hours because there's a

1 shortage, that that has occurred. There needs to be more  
2 flexibility by the staff on covering and to make sure that  
3 they are providing the necessary services to take care of  
4 the patients in their community.

5           Our company not only supports, but allows, our  
6 pharmacists to develop the schedules, in order to make sure  
7 that we address not just flexibility in being there, but  
8 considering, you know, their quality of life and their own  
9 personal life, but also to make sure that we're taking care  
10 of the patients as well, and that the coverage represents  
11 them.

12           We believe that we will not have that level of  
13 flexibility in the new law. We believe that the alternative  
14 work schedule protocol that's been outlined in here is too  
15 cumbersome and does not provide enough flexibility and  
16 timely response in order to address the needs, not only of  
17 the professionals, the pharmacists who are trying to take  
18 care of the patients, but really demand by the consumers on  
19 wanting that service now, not a day later or two days later,  
20 or, "I'm sorry, I can't help you because our pharmacies have  
21 to close because we don't have enough pharmacists to cover  
22 the hours in order to provide that service to you."

23           So, in conclusion, what I would like to comment  
24 and really say is that we believe, one, that pharmacists  
25 are, in fact, contributing to good health care, that we use

1 our discretion and judgment each and every minute, hour,  
2 day, in taking care of the needs of the patients. Maybe we  
3 don't do as good of a job as we should, but clearly, there  
4 are some reasons why that is not happening today. But we  
5 continue to move forward with the understanding that we will  
6 do a much better job, and we just need help from you in  
7 order for us to be able to achieve that, and a little  
8 flexibility in the process.

9 Questions of me?

10 COMMISSIONER BROAD: Do you have pharmacists at  
11 Longs working 12- or longer-hour shifts per day?

12 MR. FONG: Yes, I do.

13 COMMISSIONER BROAD: Do you think that they get  
14 tired working 14, 15 hours a day?

15 MR. FONG: The answer would be, logically, yes.

16 COMMISSIONER BROAD: Do you think it's possible  
17 that if they're that tired, that they could be making errors  
18 or it could be causing them sort of physical harm to their  
19 bodies, working those kind of hours day after day?

20 MR. FONG: To your question, possibly, yes.

21 COMMISSIONER BROAD: So, then, it's something that  
22 we should be considering.

23 MR. FONG: Absolutely. But let me comment on  
24 that, and I think this is what is absolutely important. And  
25 we will have a practicing pharmacist before you, but I --

1 but I would recommend you talk with pharmacists out there.

2           Why are they working these hours? Is it because  
3 they want to, or is it because there's factors that are  
4 requiring them to do that? I have pharmacists say, "I don't  
5 want to work the extra hours, I don't even want the extra  
6 pay; give me my time off." But at the same time, they also  
7 recognize that they are healthcare professionals in the  
8 community trying to take care of the patients. They have a  
9 relationship with the patients in those communities.

10           And every one of you have relationship with your  
11 pharmacist, and, more important, they with you. They want  
12 to make sure you're taken care of. And if it means taking  
13 the extra step or doing something more, they'd rather --  
14 they would do that.

15           But the other point is, we don't have enough  
16 pharmacists right now, or technicians, or enough -- what  
17 I'll call folks that assist in order to reduce the number of  
18 hours required for a pharmacist to service our patients in  
19 the community.

20           COMMISSIONER BROAD: Well, I can understand  
21 addressing that question elsewhere, at the Board of Pharmacy  
22 or in the Legislature. But it does seem to me -- I mean,  
23 you know, I don't know if you're aware of this, but there's  
24 a provision in the Labor Code -- it's been there since 1937,  
25 before the passage of the Fair Labor Standards Act, before

1 California's IWC regulated industries employing men at all,  
2 that limited the number of hours of work in a pharmacy. So,  
3 we've been regulating by statute and limiting the hours in  
4 this industry for, you know, the second two-thirds of the  
5 20th Century, because there's a concern that there's a  
6 public health issue involved in working pharmacists to the  
7 point of exhaustion.

8           And it seems to me what you're suggesting is that  
9 we -- that what you're doing is respecting the free choice  
10 of pharmacists, but you would like us to do nothing that  
11 ensures that their free choice is actually respected. In  
12 point of fact, what you can do is say, "Work 14 hours or  
13 you're fired, work 15 hours or you're fired; I don't care  
14 how tired you are, that's what the shift is. If somebody --  
15 you don't take breaks, too bad, you know, I don't care what  
16 your problem is. You're here for lunch, you're here for  
17 breaks. And if somebody wants to have a prescription  
18 filled, it's too darn bad." And that seems to me to be --  
19 it's those sort of conditions that the Legislature found  
20 were unacceptable.

21           MR. FONG: Two comments on that.

22           First is, you are aware that that Board of  
23 Pharmacy has -- through the Legislature, has promulgated  
24 regulations to provide for lunch breaks and other breaks.

25           COMMISSIONER BROAD: Only -- only -- I was

1 involved in drafting those regulations --

2 MR. FONG: Yeah, I know.

3 COMMISSIONER BROAD: -- and working on them, so I  
4 know that only for breaks and meal periods mandated by the  
5 Industrial Welfare Commission. So, you're coming here and  
6 saying they're no longer mandated, which means it's gone.  
7 Poof!

8 MR. FONG: The second comment I will make is  
9 having to do with flexibility and choice for pharmacists who  
10 have really been attracted into our profession. And we  
11 question whether we will continue to have the number of  
12 pharmacists that can work within our practice. And that has  
13 to do with women pharmacists. Approximately 60 percent of  
14 the enrolling classes right now in pharmacy school are  
15 women. The number of pharmacists within my company continue  
16 to grow as a percentage of the total.

17 There is flexibility that's needed, a choice by  
18 them on when they want to work, but more importantly, the  
19 hours that they're willing to work. And I won't limit it  
20 only to women. Really, it's parents who have young kids who  
21 need the flexibility to take care of their families and that  
22 whole quality of life part of their life.

23 And we believe that this will restrict, if not  
24 limit, the number of available pharmacists willing to work  
25 part-time with flexible hours, because that will not be as

1 attractive as it has been in the past.

2 Thank you very much.

3 COMMISSIONER COLEMAN: I have a comment.

4 MR. FONG: Oh, I'm sorry.

5 COMMISSIONER COLEMAN: The situation described,  
6 about the 15-hour days, reminds me very much of the  
7 situation that many doctors are in. Having lived with a  
8 woman who was going through her residency and then her first  
9 several years of being a doctor, she had to routinely work  
10 24-hour shifts, emergency room, and, you know, sometimes I  
11 would wonder whether or not I wanted her working on me if I  
12 was dragged into the emergency room at 4:00 a.m.

13 But that decision, we, as a state, have given that  
14 discretion to the hospitals to regulate the hours of the  
15 interns and the doctors. So, I guess the question here is,  
16 are we -- is this something that the IWC is -- to what  
17 extent does the IWC regulate this or to what extent do we  
18 leave that decision to the professionals and the pharmacy  
19 industry? That seems to me to be one of the fundamental  
20 questions that we have.

21 And a point of clarification. The last several  
22 speakers are basically appealing to the Commission to  
23 institute exemptions for particular industries. I just want  
24 to clarify that, in my understanding, is -- you know, that  
25 is within the realm of what we can do, with or without wage

1 boards, depending on the actual exemption. And I just --  
2 before everyone else comes up and continues to ask us for  
3 exemptions, I want to make sure. Is that a correct  
4 interpretation of this?

5 COMMISSIONER CENTER: Yes. But that answer  
6 probably is if that's what we want to do, because in the  
7 industries -- there's five industries we do that without  
8 wage boards that were stated in the law. But our  
9 responsibility still here is to protect the welfare of the  
10 workers in California.

11 COMMISSIONER McCARTHY: I just have one comment,  
12 because you've referred frequently to the shortage of  
13 pharmacists in the state. And I guess the question I have  
14 is, how are you going to encourage more people in California  
15 to pursue a pharmacy career if one's requiring mandatory  
16 overtime without overtime pay? I mean, it seems to me  
17 you're making the position less attractive rather than more  
18 attractive.

19 MR. FONG: There's been a number of initiatives,  
20 both within the state as well as nationally, to try to  
21 attract more people into pharmacy. In every state except  
22 two, there has -- there is now a shortage.

23 Congress just promulgated some evaluation and  
24 surveying to find out what the magnitude of that shortage  
25 is, and, more importantly, what actions should be taken if,

1 in fact, the shortages are acute enough that it impacts on  
2 the healthcare of the consumers of America.

3 Internally, we're out there talking with pharmacy  
4 schools, trying to get them to expand on the number of  
5 students that they would enroll. But as you know, bricks  
6 and mortar and buildings don't come up overnight; it's a  
7 process that takes a while. And UC, because it is a state  
8 school, it has its other challenges with fiscal budgeting  
9 and all of that. We're getting -- we're actually attracting  
10 -- recruiting down at the high school level to try to get  
11 high school kids to work in pharmacies, to get some exposure  
12 to what goes on back there, but to give them a good  
13 experience on how they can contribute to good health care.

14 I mean, I did that. I was a delivery boy at a  
15 pharmacy in Hayward, California, and I learned what happened  
16 in the pharmacy and how I could make a difference in helping  
17 my patients out there. And that's one reason why I went to  
18 pharmacy school.

19 COMMISSIONER McCARTHY: No. My only point is,  
20 wouldn't an 8-hour day be more conducive to a lot of people,  
21 especially the number of women you mentioned, many of whom  
22 will have family responsibilities?

23 MR. FONG: Yeah.

24 COMMISSIONER McCARTHY: Wouldn't an 8-hour day be  
25 more conducive to people pursuing responsibilities than

1 mandatory, say, 12-hour shifts, especially --

2 MR. FONG: You know, that's a good question. And  
3 at this point, I haven't even focused on that. I'm more  
4 focused on, you know, who out there -- how can I promote  
5 pharmacy as a profession and as a contributor to health  
6 care, and who out there want to make a difference in good  
7 patient care. And I really have not gotten into, you know,  
8 how many hours of the day are you going to work. That  
9 really has not been my objective.

10 COMMISSIONER McCARTHY: I see.

11 COMMISSIONER CENTER: Thank you.

12 COMMISSIONER McCARTHY: Thank you very much.

13 MR. BLACK: Good morning. Good morning, ladies  
14 and gentlemen. My name is Duane Black, and I'm one of the  
15 people you're talking about. I'm a pharmacist in California  
16 and have been for the last 45 years. I have been a pharmacy  
17 manager for Longs Drug Store up in Novato for the last 32.

18 I'm real lucky, in that I have reached an age in  
19 my life where I don't have to work. But I'm a little crazy,  
20 so I continue to work. So, what I am going to tell you  
21 today, or at least express my opinion, will not be affected  
22 by the fact that I'm afraid Dave Fong, sitting behind me, is  
23 going to fire me, because, in fact, I'm trying very hard to  
24 talk him into letting me work fewer hours.

25 I didn't know I was going to be here today until

1 last night. And I started thinking, well, what would you  
2 folks like to hear about pharmacists, because most of you,  
3 what you've really seen is the little bottle of pills you  
4 get when they throw them at you through the window in the  
5 pharmacy.

6 I wrote an article about fifteen years ago, which  
7 was -- made the papers and then some of our internal  
8 publications -- that said, "There's a lot more in this  
9 bottle than just pills." And it showed a bunch of pills  
10 spilling out of the bottle. But what you get in that bottle  
11 besides pills is you get me. And me, I am, and my  
12 colleagues are, the experts on prescription drugs and over-  
13 the-counter drugs. It's our job to make sure that all the  
14 laws are followed, that everything that we give you is going  
15 to improve your health and make you well. And in so doing,  
16 we're not just counting, pouring, and filling. We're doing  
17 a whole lot more.

18 Mr. McCarthy, you mentioned the interpretation of  
19 a prescription. I know, from a layman's standpoint, you  
20 walk in, there's a piece of paper that the doctor gives you  
21 that says, "Go get some pills." A lady told me it also  
22 said, "I got your money, now you" -- I mean, "I got my  
23 money, now you get yours." But that's not anywhere included  
24 on the paper.

25 (Laughter)

1           MR. BLACK: The interpretation part comes when I  
2 look at that piece of paper, and it says something like  
3 "Celebrex" -- this is the new drug for arthritis. And off  
4 to the side, it says, "5 milligrams, take one tablet three  
5 times a day." Well, the interpretation comes -- "Gee,  
6 that's funny, doc, they don't make a 5-milligram Celebrex,  
7 and we don't give it three times a day. What did you really  
8 mean by this prescription?"

9           So, I call him and say, "Do you" -- well, first I  
10 talked to you, John, and I said, "John, how's your  
11 arthritis?" "Well, I'm not being treated for arthritis."  
12 So, I say, "Let me take a -- make a call to your doc." So,  
13 I call the doc and I say, "What did you really mean with  
14 this prescription for John?" And he says, "Oh, I don't mean  
15 Celebrex, I mean Celexa," an anti-depressant.

16           That's the interpretation of the prescription, and  
17 it happens all the time, before you ever get a little bottle  
18 of pills in the pharmacy.

19           In addition to that, we check the drug  
20 interactions with what you've had. Fortunately, with the  
21 advent of computer systems, we are much more sophisticated  
22 in the way we can check the medicine that you get.  
23 Nowadays, with almost everyone being covered with an HMO,  
24 much of my time is spent negotiating with HMO's and  
25 prescribers which drug we're really going to give you, John,

1 because your pharmacy -- I mean your HMO -- doesn't cover  
2 this new arthritis drug. So, I have to call the physician  
3 and tell him what is covered, and look back at your records  
4 to see if you've failed on any of the other drugs in this  
5 class, and determine whether we should try you on one of  
6 those or whether the doctor should go to all the trouble of  
7 trying to get a special authorization from your HMO. All of  
8 that's done before you ever see the pills in the bottle.

9           Finally, when it's a new prescription and the  
10 pharmacist feels it's appropriate, he'll come out and talk  
11 with you about that medicine, consult with you about some of  
12 the other medicines you're taking. We as pharmacists are  
13 probably the most accessible health professionals, in that  
14 we're there. All you've got to do is ask for us. I spend I  
15 don't know how many hours a day answering questions for  
16 folks and taking calls on the phone.

17           There's a couple of examples of things that we do  
18 I'd like to briefly tell you that shows you that we do a lot  
19 more than just count and pour.

20           A lady in her thirties at our store suffers from  
21 severe lupus disease, which is a degenerative disease of the  
22 organs and joints, and is in excruciating pain. She was  
23 taking multiple prescriptions from multiple doctors, taking  
24 huge quantities of narcotic painkillers, was even going to  
25 Mexico to get muscle relaxers that her physician here would

1 not prescribe. Because our pharmacist knew her, knew her  
2 history, had talked to her when she gets medicine, we talked  
3 with this patient and said, "Susie, you're addicted to all  
4 this pain medicine, and yet you're not getting any pain  
5 relief. I think we should work with your doctor to see what  
6 we're going to do for you."

7           So, my staff and I got together, called her  
8 physician, and said, "You know, this patient shouldn't be on  
9 all these tons of painkillers. Let's put her on morphine  
10 itself, which is a far better drug for her particular  
11 condition and for the rest of her life." And we did that.  
12 Well, the lady is now able to lead a functional life. Her  
13 lifespan is not expected to be very long. But it was the  
14 intervention of my staff and working with the physicians  
15 that helped this lady achieve this goal.

16           In another example, we have a welfare patient, or  
17 a MediCal patient, who was very mentally ill. This lady was  
18 a real pain in the derriere, and she kept calling our  
19 pharmacy and renewing prescriptions and taking too much of  
20 the medicine, and wasn't getting any better. Here again,  
21 our pharmacy staff showed concern that this lady -- number  
22 one, she's a real pain; number two, she's taking way too  
23 much medicine; and, more important of all, number three,  
24 she's not getting any better.

25           So, we talked with her psychiatrist and with her

1 physician and said, "Look, we'll set up a box of pills to  
2 send out to this lady every week so that she doesn't take  
3 too many pills. And we'll take that upon ourselves to do  
4 that, to see if we can control how much she's taking." We  
5 did that. She got a little bit better. She wasn't abusing  
6 her pills quite so much.

7           She was still pretty loony, though, so my staff  
8 and I decided, "You know, there's a couple of new drugs that  
9 are now available on MediCal that I think, doc, we ought to  
10 try and maybe eliminate some of these older ones." Well, in  
11 this lady's case, it was a miracle. The new drugs worked.  
12 The old drugs, having been removed, removed a lot of her bad  
13 symptoms she was having. The lady today is still mentally  
14 ill, but she's able to take care of herself, function  
15 socially, and it won't be too long until she'll be a  
16 productive member of our community again, and, with luck,  
17 off MediCal.

18           You folks are here today to try and determine the  
19 best way to implement work hours for people like me. I  
20 heard mention of the 14-, 15-, and 16-hour days. That's a  
21 rare exception in our company, as far as I know. In my  
22 particular store, my pharmacists work a 40-hour week, except  
23 when they work the long weekend, in other words, 11 hours on  
24 a Saturday and 10 hours on the Sunday -- by our own choice,  
25 may I say. And when we do work that long week, the

1 following week we pretty much take the whole week off,  
2 Tuesday, Wednesday, and Thursday. So, this schedule is  
3 flexible. And that's what I would like to see come from  
4 your group, is allowing me the flexibility to continue to  
5 practice pharmacy the way I want to.

6 One of the reasons I stayed with Longs Drug Store  
7 all these years is they did just that, they allowed me the  
8 flexibility. As long as I perform my duties legally and as  
9 long as I make money, I can run that pharmacy any way that I  
10 want, and, in fact, still do.

11 I don't -- and I don't think the other pharmacists  
12 on my staff -- want to have to punch a time clock. I, and  
13 I'm sure the other members of my staff, would like to  
14 continue the flexibility to work whatever schedule we agree  
15 upon among ourselves.

16 Now, having said that, I applaud your efforts to  
17 redress some of the wrongs which I know have occurred within  
18 our industry, where pharmacists were being forced to work  
19 hours that they didn't want to. In my experience with my  
20 company, in those instances where pharmacists have had to  
21 work longer hours, it's been to cover illness, it's been to  
22 cover a shortage of pharmacists, and they have always agreed  
23 to it -- maybe haven't always liked it, but we've always  
24 agreed to it.

25 So, I guess, in closing, is I'm a pharmacist; I'm

1 very proud of being one. Allow me the flexibility to  
2 continue to practice the way I do now, and keep your efforts  
3 to provide some safeguards in such a way that it allows me  
4 to do that.

5 Thank you.

6 COMMISSIONER CENTER: Any questions?

7 (No response)

8 COMMISSIONER CENTER: Thank you, Mr. Black.

9 MR. POPE: Good morning. My name is Alan Pope. I  
10 also work for Longs Drug Stores. I'm going to give you a  
11 little bit of my background, just to let you know where I'm  
12 coming from. I was educated as a pharmacist at the  
13 University of California San Francisco School of Pharmacy,  
14 and obtained my Pharm.D. degree in 1978. And I practiced at  
15 Alta Bates Hospital in Berkeley for eight years, and  
16 occasionally with Kaiser Hospital I'd fill in.  
17 I later went back to school, at the University of California  
18 San Francisco Hastings College of the Law and became an  
19 attorney. I've been an attorney for Longs Drug Store for  
20 approximately ten years. I am now assistant general  
21 counsel. I handle all types of pharmacy matters, including  
22 claims of pharmacy malpractice or prescription errors,  
23 pharmacy licensing matters before the Board of Pharmacy, and  
24 wage and hour matters that occasionally come up. That's a  
25 little bit of my background.

1 I'm here to support what the prior speakers have  
2 said regarding CRA's position that the IWC recognize that  
3 pharmacists may fit into the administrative exemption  
4 because their duties involve primarily discretionary tasks.

5 And from what I've heard this morning, I think the  
6 members of the IWC may be under the mistaken profession that  
7 pharmacists perform primarily production tasks. That is not  
8 the case. As Duane just mentioned, pharmacists perform a  
9 number of other tasks. If you want a pharmacist to dispense  
10 a drug and that's it, a robot can do that. With the  
11 technology that's available today, robots can dispense drugs  
12 accurately. But that's not what pharmacists do. That's not  
13 the only thing that they do. Actually, technicians can do  
14 that.

15 Pharmacists evaluate prescriptions when they come  
16 in. They interpret them. I'm not going to address that  
17 because Duane did, but they look at the medication, the  
18 medication that was ordered, based on the age, based on the  
19 gender, based on the physical condition of the patient, and  
20 based upon the disease states. Now pharmacists -- the role  
21 of pharmacists is expanding into disease state management.

22 For example, if you are diabetic or you have  
23 asthma, in some states now, you can go in to the pharmacist,  
24 the pharmacist will perform a brief physical evaluation and  
25 make recommendations to the physician, and, in some cases,

1 be able to change drug therapy for that particular patient  
2 based on their disease state.

3           Pharmacists check on drug-drug interactions. They  
4 check on drug-disease interactions. They check on drug-food  
5 interactions. They also supervise technicians routinely,  
6 because the technicians are really the ones who are supposed  
7 to be filling the prescriptions. They consult with  
8 physicians. In addition to what Duane mentioned, I've had  
9 doctors call me when I was practicing as a pharmacist,  
10 doctors call me and say, "Alan, I've got this patient in  
11 this condition, I want to dispense -- I want to give --  
12 prescribe this drug. Do you think that's okay?" "No, I  
13 don't think so. I think you're really better off doing a  
14 different drug." And that's what we would do, we would  
15 recommend. That happened in the hospital routinely because  
16 pharmacists were available and on the first floor, at that  
17 time.

18           We also advise patients on proper use of OTC  
19 medications. Dave Fong mentioned that. That's a very  
20 important -- very important aspect of the pharmacist's job.  
21 They are available to the patient. They are the -- they are  
22 the professional -- I don't want to get into the  
23 professional exemption issue -- but they are the  
24 professional who is available, most available and most  
25 accessible, to the consumer.

1           They are also a patient advocate. Now with third-  
2 party prescription plans, the pharmacist is the one in  
3 between who has to advocate for the patient as to particular  
4 medications that are covered by their prescription drug  
5 plan. It's, unfortunately, a sad fact of the managed care  
6 era that pharmacists have been put in that position, but,  
7 unfortunately, they are. And they do that routinely, every  
8 day.

9           These discretionary tasks -- under the  
10 administrative exemption, these discretionary tasks require  
11 specialized training and they're used every day by the  
12 pharmacists. Pharmacists are not performing production  
13 work; at least, we don't want them to.

14           Now, will this mean -- if you allow pharmacists to  
15 fit into the administrative exemption somehow, will that  
16 mean that all pharmacists are -- will become exempt? No,  
17 they won't. Unfortunately, the sad truth is that, in some  
18 stores, some drugstores, in some of our stores, you only  
19 have -- you may open a store with two pharmacists. They're  
20 not going to be performing all those tasks that I said.  
21 It's really a fact-based inquiry. And those pharmacists  
22 would probably be paid time and a half after 8 hours.

23           But if the IWC allows this administrative  
24 exemption to go through, it will allow the pharmacists to,  
25 hopefully, fit within that exemption if they want to -- if

1 they want to, and if they're doing their tasks. Again, we  
2 don't think that all pharmacists will fit into that  
3 exemption, but we would like that flexibility.

4           As far as scheduling, right now in our  
5 organization, pharmacy managers, with the pharmacists, make  
6 up their own schedules. And I've had pharmacists I was --  
7 when I talk with them on the phone, and I get calls every  
8 day -- I had, one time, a pharmacist say, "Boy, I worked  
9 this weekend and I filled almost 300 prescriptions." I  
10 said, "Were you by yourself?" He said, "Yeah." And I said,  
11 "Well, why were you -- why didn't you have some help?" He  
12 says, "Well, because that's the way we arranged our  
13 schedule. I only wanted to work one weekend in five." So,  
14 on that particular day, he had worked 12 or 13 hours. And I  
15 don't advocate that, but that was their choice. That's what  
16 they wanted to do. I don't think I'd want to do that, but  
17 that's what they wanted to do.

18           And without that flexibility, unfortunately, I  
19 think our company would have to start mandating some  
20 different schedules so the pharmacists are working, you  
21 know, 8 or 9 hours a day maximum.

22           One of the previous speakers talked about  
23 prescription error rates and the amount of time that they  
24 work. I have not found that to be the case. If --  
25 certainly, workload and staffing can affect prescription

1 errors, whether a prescription error occurs. That can -- no  
2 doubt, that can happen. However, I haven't found that to be  
3 the overwhelming factor.

4           Really, the overwhelming factor is, at least in my  
5 -- in my experience, is that the pharmacy has a procedure to  
6 double-check the prescription. They have -- in other words,  
7 they have proper procedures to make sure that pharmacists,  
8 technicians, are double-checking that medication, making  
9 sure the right medication gets to the right patient. We  
10 have -- we've altered -- about four or five years ago, we  
11 altered our dispensing procedures slightly, and it caused a  
12 dramatic decrease in the prescription error rate.

13           Finally, one of you had asked about how do you  
14 attract pharmacists to the profession if they're working 9-,  
15 10-, 11-hour days. There are advantages to being an exempt  
16 employee. Actually, scheduling, you can work your own  
17 schedule. That is an advantage. That's what they can do  
18 now.

19           If we were dictating the schedule, I'm sure I  
20 couldn't make that argument. But right now, they make their  
21 own schedules.

22           There is an advantage to being a salaried  
23 employee. There's a certain -- I don't know if you'd want  
24 to call it status, but you could say, "Yeah, I make the same  
25 whether it's 32 hours a week or whether it's 48 hours a

1 week." And actually, pharmacists typically work on a  
2 rotating two- or three-week schedule. They may 36 hours one  
3 week, they may work 44 the next, or -- based on their  
4 scheduling, based on the needs of the store.

5 So, there are ways to attract pharmacists into the  
6 profession without having -- saying, "Well, you know, you'll  
7 just have to work 8 hours a day." I think the flexibility  
8 is very important.

9 And that's all I have. If there's any  
10 questions --

11 COMMISSIONER BROAD: I don't know if it's  
12 appropriate for you to address this or Mr. Long. I actually  
13 wanted to go through your proposal a little bit, your actual  
14 language that you submitted.

15 MR. LONG: I'll move up.

16 COMMISSIONER BROAD: The existing administrative  
17 exemption says:

18 "The employee is engaged in work which is  
19 primarily intellectual, managerial, or  
20 creative, and which requires exercise of  
21 discretion and independent judgment, and for  
22 which the remuneration is not less than  
23 \$1,150 per month."

24 That's changing to twice the minimum wage on January 1.

25 Your proposal extends that considerably. It says:

1           "Customarily and regularly exercises  
2           discretion and independent judgment in the  
3           performance of intellectual work which is  
4           office or non-manual work directly related to  
5           management policies or the general business  
6           operations of the employers or the employers'  
7           customers."

8       First of all, this is not limited to pharmacists, right?

9           MR. LONG:   That's correct.

10           COMMISSIONER BROAD:   Okay.   So, there's a whole  
11       lot of other people that this may create an exemption for  
12       that we would call administrators, out there in the larger  
13       workforce.

14           MR. LONG:   It may very well.

15           COMMISSIONER BROAD:   Okay.   Now, I guess the  
16       question I have is, what do each of these things that you've  
17       added do?   What's your intent?

18           For example, then it says "regularly and directly  
19       assists a proprietor or an exempt executive or  
20       administrator."   So, it's not -- it's -- someone who's  
21       exempt as an administrator is someone who helps out someone  
22       who's exempt?   So, I mean, my question is, I hope we're not  
23       talking about clerical employees here, because they engage  
24       in office work and they regularly -- they regularly assist  
25       executives or administrators.

1           MR. LONG: Well, I might point out, the touchstone  
2 starts off with "customarily and regularly exercises  
3 discretion and independent judgment in the performance of  
4 intellectual work." By your reference to clerical  
5 employees, if you mean, let's say, a word processor,  
6 obviously that wouldn't come into play. If you're talking  
7 about an executive administrative assistant to whom has been  
8 delegated the authority, on behalf of the executive, let's  
9 say, to make decisions of consequence relating to exercising  
10 discretion and independent judgment, that would be the case.  
11 And that's the law now.

12           COMMISSIONER BROAD: Well, suppose -- let's give  
13 the example of a pharmacy technician. Would they be?

14           MR. LONG: No.

15           COMMISSIONER BROAD: Why not?

16           MR. LONG: Because they -- technicians are not  
17 authorized to be engaged in those duties that we've  
18 specified. They're -- to use the analogy that's come up  
19 time and again in terms of the pharmacists who have  
20 testified, the counting, pouring, licking, and sticking, the  
21 dispensing, that is what a technician can do. That's what a  
22 machine could do.

23           And to the extent that a pharmacist, for whatever  
24 reason, and appropriate reasons, is doing just that, that  
25 would not count on the ledger side of whether somebody would

1 be engaged in exempt duties.

2 But Alan also wanted to --

3 MR. POPE: Yeah. The -- right now, the pharmacy  
4 regulations say that a pharmacy technician can only perform  
5 clerical, nondiscretionary, and repetitive tasks. So,  
6 clearly, they wouldn't fit in with that definition, the  
7 proposed definition.

8 COMMISSIONER BROAD: Do you have any idea, besides  
9 pharmacists, what classes of employees this would affect, or  
10 how many? Are we talking about a million people, 100,000  
11 people?

12 MR. LONG: I haven't engaged in any studies of how  
13 many folks it would impact.

14 COMMISSIONER BROAD: Was it your intent to impact  
15 people beyond the practice of pharmacy?

16 MR. LONG: Well, I think that it would depend on  
17 what somebody is engaged in. Theoretically, you could have  
18 somebody who's got the title of administrative executive  
19 assistant who appears by -- because of somebody's -- their  
20 occupation, to be engaged in administrative tasks, et  
21 cetera, at a very high level. But then, when you get behind  
22 the job description, what you find is that the only thing  
23 that that person is doing is perhaps scheduling meetings.  
24 And that would not be somebody, if that person was engaged  
25 in those activities more than 50 percent of the time, that

1 individual would not fall within the exemption.

2 I think one of the speakers referred to it as a  
3 fact-intensive inquiry, and it would be. And you would have  
4 to look to see how many -- or what was the nature of the  
5 person's duties and what were they engaged in. And again,  
6 if they were not engaged in these duties more than 50  
7 percent of the time, they would not be exempt.

8 COMMISSIONER BROAD: Okay. Now, I had a question  
9 about scheduling. How hard would it be for you to operate  
10 under a four-10 workweek, if what you're saying is you have  
11 8-hour days, a 40-hour workweek followed by two 10-hour  
12 days, or one with an 11-hour day? We're talking about -- if  
13 there was no exemption, you would be talking about, at the  
14 most, one hour of overtime. Is that right?

15 MR. POPE: Yeah. I think what the -- what our  
16 schedules, when we looked at some of the schedules that the  
17 pharmacists are working, sometimes they would work 4 hours a  
18 day, and then they would work 11 hours or 10 hours the next  
19 day. And sometimes they would work, as Duane had mentioned,  
20 12, which, you know, again, I don't favor that, but that  
21 would happen on the weekend.

22 So -- but the problem that I think we have, and  
23 perhaps, as an industry, pharmacy has, is that you have a  
24 retail environment where the store is open a certain number  
25 of hours, and the pharmacists work to try to tailor their

1 hours within that environment. So, I can't say that it's  
2 impossible, but I don't think it provides enough  
3 flexibility, is what I'm afraid of. And I think that that  
4 is going to be a problem.

5           COMMISSIONER BROAD: Well, given the fact that  
6 there's sort of been an acknowledgment that there has been a  
7 problem with work hours and excessive scheduling in your  
8 industry, though not at your company, the question for us,  
9 obviously, is how to strike that balance. And it just seems  
10 to me that the existing AB 60 strikes that balance quite  
11 effectively. I mean, it allows up to 10-hour days.  
12 Conceivably, in hospitals, it may allow up to 12-hour days  
13 if the Commission agrees to keep 12-hour days in that  
14 industry, at which overtime kicks in. And it allows  
15 employers to give employees a menu of options from which to  
16 choose for scheduling purposes, which means that, you know,  
17 you can have something that's 4 hours one day and 10 hours  
18 the next day. And it formally requires some assent by the  
19 affected employees.

20           And so, I'm trying to figure out how much of a --  
21 you know, you guys are coming forward here and you're  
22 saying, "We need all this help, we need all this help," but  
23 it doesn't sound like you have that big of a problem with  
24 the -- and if you don't favor 12-hour days, then -- and  
25 you're the boss, then, you know, you can probably, you know,

1 get the employees to agree to go to 10-hour days and, you  
2 know, make it all work.

3 MR. POPE: Well, I just want to bring up one  
4 point. When the regulation, the statute, says that you can  
5 have four 10-hour days or a menu of items, again, what I'm  
6 looking at, from a pharmacist's standpoint, working in the  
7 store, the company is dictating to me what I can do rather  
8 than saying, "Hey" -- I mean, I'm saying for myself -- I  
9 don't want to work a 12-hour day, but these guys, they may  
10 want to do that.

11 And again, we've never dictated their schedules.  
12 We don't say, "You have to work this." They basically do it  
13 themselves. And I think that's where we're losing  
14 flexibility. They're losing some autonomy there. And  
15 again, I think, for those companies where you have  
16 pharmacists and all that they're doing is production work,  
17 you know, just doing -- that's fine for them. I mean, if  
18 that works for them, that's fine. But there are -- there  
19 are others that work in a different environment where they  
20 would like to have a little bit more flexibility. If they  
21 want to work 12 hours a day, you know, I'm not going to take  
22 that away from them, if they want to do that.

23 COMMISSIONER BROAD: Thank you.

24 COMMISSIONER CENTER: Thank you.

25 MR. POPE: Thank you.

1           COMMISSIONER CENTER: I guess we'll have one  
2 hearing on the pharmacy.

3           I'll go a little bit out of order. We have a  
4 request and people have to leave. I'd like to call Bill  
5 Walsh (sic), Vincent Payne, and John Perez.

6           We'll get the other side, maybe, on the pharmacy  
7 issue.

8           MR. WEBSTER: Good morning. My name is Bill  
9 Webster, and I work at Vons Pharmacy in San Diego, and I've  
10 been a pharmacist for 36 years.

11           I'd like to comment on some of the things that  
12 have been laid out by the previous pharmacists that  
13 testified. The things that they say that we do as  
14 pharmacists, the tasks that they talked about, are what make  
15 us professionals, not administrators. And until the passage  
16 of SB 651, pharmacists were working longer and longer hours,  
17 with no breaks, no meal periods, and no overtime pay. 12-  
18 hour and longer shifts without breaks or meal periods were  
19 common, sometimes for six and seven days in a row. You can  
20 imagine how hard this is on us, to work such long hours with  
21 no breaks, and at straight time.

22           And frequently, when a pharmacist would apply for  
23 a position, they were told that the only shifts available  
24 were 12-hour shifts. They had no choice. They didn't do it  
25 by choice. They had to either take the job or go somewhere

1 else.

2           These long hours have led to increased fatigue  
3 among pharmacists, which affects our health and wellbeing,  
4 and dramatically increases the potential for making errors.  
5 Prescription errors have been on the rise, and I believe  
6 that much of this is attributable to the working conditions  
7 of pharmacists.

8           In addition to long hours, managed care has  
9 resulted in pharmacy managers pushing us to fill more and  
10 more prescriptions to increase the bottom line. These  
11 competitive pressures, combined with long hours we work, is  
12 bad for us and bad for our customers.

13           It is important that the Commission not weaken our  
14 rights to receive overtime under SB 651, and that we be  
15 entitled to breaks and meal periods. Alternative scheduling  
16 systems such as four 10-hour days may make sense in some  
17 settings, but it is important that our free choice be  
18 respected. That is what AB 60 requires, and this is all we  
19 are asking for.

20           I understand that the industry is asking that we  
21 be exempted as administrators. I don't know exactly why we  
22 are administrators, since what we do is fill prescriptions  
23 and counsel patients. We are providing our service to the  
24 public, not to the employer. Please don't let the industry  
25 take away what we have gained through SB 651 and AB 60.

1 Pharmacists need your protection.

2           When you are considering issues involving  
3 pharmacists, please remember you are also impacting an  
4 important public health issue.

5           That's all.

6           COMMISSIONER CENTER: Questions?

7           (No response)

8           COMMISSIONER CENTER: Thank you.

9           MR. PAYNE: My name is Vincent Payne. I'm also a  
10 pharmacist with Pavilions/Safeway/Vons. I'm here on short  
11 notice. I'm going to try and be more open to hearing your  
12 questions. I'm also a lawyer as well, so I'd like to  
13 address -- my understanding is that we're here to decide if  
14 we're administrators as opposed to maybe professionals.

15           So far, I've heard nothing to substantiate that we  
16 are administrators, or at least to conclusively say that we  
17 are administrators. Certainly, the laundry list of things  
18 I've heard that we do, we interpret prescriptions -- of  
19 course we do. That implies that the doctor is communicating  
20 with us. Clearly, he is, and we have to interpret that and  
21 produce a product. And also, on top of that product, we're  
22 also emphasizing patient care. So, you're not just getting  
23 these bottles of pills; you are getting information, and you  
24 are getting help, and you are getting assistance. And our  
25 computers help us out. They tell us drug interactions as

1 such. They give us a wealth of information that we present  
2 to the patient as a total healthcare package. That's clear  
3 to me. It doesn't sound like anything administrative to me,  
4 though.

5 Administrators form policies, they make policy  
6 decisions. And we do no such thing. We produce the  
7 product, and we also give the information for a total  
8 healthcare package.

9 I understand that the retailers make arguments in  
10 terms of providing flexibility. Well, when it comes to  
11 manning the store, there are no real options. The store is  
12 open a finite amount of time, say 80 hours a week, maybe, in  
13 some cases, 90 hours, 100 hours a week. You have "x" number  
14 of pharmacists. The math is clear; you have to have so many  
15 shifts of certain periods of time in order -- that have to  
16 be covered.

17 So, in order for them to achieve their  
18 flexibility, they would either have to increase the number  
19 of pharmacists, which would increase our flexibility in  
20 terms of how we staff hours, or they would have to  
21 accommodate the 10-hour day, to make the 10-hour day  
22 rational and reasonable as an option.

23 I wholly agree with what I heard earlier about  
24 bootstrapping these -- this laundry list of things that  
25 pharmacists do as -- and calling them -- characterizing them

1 as "administrative." Clearly, if these things are defined  
2 within the rules promulgated by the Board of Pharmacy, it  
3 would seem to me that these things are clearly professional,  
4 the things that we do.

5           Things that were mentioned, things like reading  
6 prescriptions when they come in, kind of doing an  
7 interpretation of, "Is this Celebrex or is this Celexa?,"  
8 those things come about because we not only know the  
9 language, but we also -- we had chemistry. We -- there are  
10 certain things that, if I were to hand you the same  
11 prescription, you would be able to interpret certain things.  
12 You would be able to say, "Yeah, there's the letter C,  
13 there's the letter L, and -- you know, if I can read, then  
14 this is what it says." But we see it differently. We see  
15 it as a big picture, and there is an interpretation that  
16 goes on. And I would suggest, clearly, clearly, that is not  
17 an administrative function. That is a professional function  
18 that comes from experience, our understanding of chemistry,  
19 our understanding of therapy, and so on.

20           And so, that's clear to me.

21           I've heard the definition of "discretionary,"  
22 because we perform discretionary tasks, therefore we're  
23 administrators. I fail to understand the connection between  
24 things that are discretionary are therefore administrative.  
25 Professions also exhibit discretion. I just don't

1 understand that that is an ipso facto link, that because we  
2 do discretionary things, because we decipher, because we  
3 decide, "Hey, this looks like this might be too many tablets  
4 for this particular patient," that therefore this is  
5 something that's -- this is an administrative function. As  
6 a matter of fact, I would see it cutting the other way, as a  
7 cognitive function, a professional function.

8 I'd like to wrap up shortly by saying --  
9 addressing the safety issue. Taking Ms. Coleman's analysis  
10 of her roommate doing 24-hour shifts, clearly she had an  
11 impression that, at the end of that shift, this person is  
12 going to be compromised in some kind of way, tired,  
13 fatigued. That only makes sense. That only makes sense, if  
14 you work long hours, that you're going to be tired and  
15 fatigued.

16 What's the difference? When I hear other people  
17 say, "I work 12 hours too, I work 14 hours too," my response  
18 is reflexive: "You get a break. You get to go to lunch."  
19 Imagine that. Imagine where -- we do -- the law allows us  
20 to have a break, but it is not functional as it is now. I  
21 don't take breaks. I'm permitted to, but it requires me to  
22 close down the store. I can't do that. I can't do that and  
23 try to not only accomplish what my company wants me to  
24 accomplish, which is to provide professional service, but I  
25 also want to be there, in the instance of having the doors

1 open. So, safety is a true issue.

2 And I would like to just field questions at this  
3 point, if there are any.

4 COMMISSIONER CENTER: I've got one. Is it  
5 required to have a licensed pharmacists be there at all  
6 times when the store is open?

7 MR. PAYNE: Yeah, absolutely. Absolutely. And  
8 that inhibits you from going away. It obviously puts a  
9 restriction on what is a break, and on how a break can be  
10 taken.

11 MR. PEREZ: Mr. Chairman, commissioners, I'm John  
12 Perez. I'm the executive director of the United Food and  
13 Commercial Workers States Council. We represent some  
14 190,000 workers in groceries and related industries in the  
15 State of California. Thousands of them are employed by  
16 pharmacies throughout the State of California, and roughly  
17 1,200 of them are actually licensed, practicing pharmacists  
18 in the State of California.

19 The two gentlemen who just spoke before me talked  
20 about the practice of pharmacies leading up to the passage  
21 of SB 651. In fact, what has been the regular practice in  
22 retail pharmacy settings is that pharmacists have been  
23 expected to work longer and longer shifts with no breaks  
24 whatsoever. And as the chairman made reference to, it has  
25 been a requirement that a pharmacist be within the four

1 walls of the pharmacy at all times that the pharmacy is  
2 open. That's one of the things that distinguishes  
3 pharmacists from doctors, for example, when they work a long  
4 shift. A doctor may leave whatever office, whatever  
5 examination room they're working in, go down to the  
6 cafeteria, leave the building altogether, and enjoy some  
7 sort of time off, before they go back and care for patients.  
8 Pharmacists, in fact, have not been able to take breaks,  
9 have not been able to take meal periods, and have not even  
10 been able to legally go to the restrooms if the restroom is  
11 located outside the four walls of the pharmacy. This has  
12 been a problem for many years.

13           In this last legislative cycle, we proposed SB  
14 651. SB 651 said that no longer would pharmacists be exempt  
15 from daily overtime protection purely on the basis of their  
16 professional status. And the reason that we picked on their  
17 professional status is because that had always been the  
18 argument, that pharmacists were exempt because they were  
19 professionals. We wanted to make sure that this legislation  
20 was one that made sense for working pharmacists, was one  
21 that made sense for the general public, and was one that  
22 made sense for employers in the pharmacy industry. And as a  
23 result of that, we negotiated the terms of SB 651 with  
24 employers, with professional organizations, and with other  
25 unions representing pharmacists as we do. And that result

1 of that negotiation was SB 651, which said that the only way  
2 -- in essence, the legislative intent was that the only way  
3 that pharmacists would be exempt from daily overtime is if  
4 they met the -- if they individually met the tests. What  
5 we're seeing now is the California retailers coming forward  
6 and saying, "Well, all those years that we said pharmacists  
7 were exempt because they were professionals, well, maybe we  
8 were wrong; it's not that they were professionals, it's that  
9 they were administrators." I think that's the most  
10 disingenuous argument that could possibly be made.

11           We wanted to make sure that employers were taken  
12 care of in this legislation. That's why, with them, we  
13 sought clean-up legislation which empowered the State Board  
14 of Pharmacy to create regulations that allow for pharmacies  
15 to continue to operate for short periods of time while  
16 pharmacists enjoy a lunch period or a break. That break is  
17 only allowable after the Industrial Welfare Commission  
18 mandates it.

19           What we're seeing now is employers renegeing on a  
20 deal that they made through the legislative process, and  
21 saying that they now want a new way to exempt our members  
22 and all pharmacists from daily overtime protection.

23           I mentioned that in addition to the 1,200  
24 pharmacists we represent, we also represent some 190,000  
25 other workers in retail industries. And the reason I

1 mention that is because all of those members stand with our  
2 pharmacists in saying that they will not support any efforts  
3 to undo what the Legislature did through the passage of AB  
4 60 and SB 651.

5           We're here today asking you to defend the rights  
6 of our pharmacists to enjoy safe working conditions and  
7 protect the public from this practice that's been going on  
8 far too long.

9           And with that, I'll take any questions that any of  
10 you have.

11           COMMISSIONER DOMBROWSKI: John, just a point of  
12 clarification. I think the retailers are responding to the  
13 scheduling changes that they're hearing. They're not trying  
14 to renege on a deal. Hold onto the bombers. We're looking  
15 at just seeing, "Is there a public purpose to get some  
16 flexibility beyond what's in AB 60?" The answer hasn't been  
17 given yet, but that's what we're looking at.

18           MR. PEREZ: May I respond? As I said, we  
19 represent 190,000 people in the retail industries. And the  
20 reason that that's significant is we've been able, for all  
21 the course of time that we've represented these workers, to  
22 figure out a way to protect the integrity of their work  
23 shifts in a way that makes sense for employers. It seems to  
24 me that if we've been able to find scheduling systems that  
25 work for everybody else in the retail industry, we'll also

1 be able to find scheduling situations that work out for  
2 pharmacists.

3           The idea that having no protection whatsoever  
4 gives employee protection, which is what was stated --  
5 employee flexibility -- is absurd. A statement was made  
6 earlier today that not having any cap on the number of hours  
7 worked would allow for greater flexibility for working  
8 mothers. In fact, it's having a cap and having the  
9 flexibility to go to a four-10 schedule, if that's the  
10 schedule that's mutually agreeable, that creates  
11 flexibility. Not having any cap whatsoever, and making it  
12 the sole discretion of the employer in real practice, is no  
13 protection, is no flexibility for anybody but the employer.

14           COMMISSIONER CENTER: Thank you.

15           Bob Roberts, please.

16           Sorry.

17           MR. ROBERTS: Mr. Chairman, members of the  
18 Commission, my name is Bob Roberts. I am the executive  
19 director of the California Ski Industry Association.

20           Insofar as our industry was one of the exempted  
21 industries until July 1st under the legislation of AB 60,  
22 and insofar as you have quite a line-up of people who I  
23 believe need remedy prior to January 1, we are very willing  
24 to defer our presentation until after January, if that would  
25 be the will of the Commission.

1           COMMISSIONER CENTER: Yeah. I would think we'd be  
2 better served, because I think we're going to conduct some  
3 hearings on the ski industry.

4           MR. ROBERTS: I would expect you would. So, we  
5 simply wanted to register our presence here today. We hope  
6 you're all praying for snow, because we need it, and that --  
7 we look forward to working with you, because we do have one  
8 of the more unique industries, up above 6,000 feet in the  
9 winter.

10           Thank you very much.

11           COMMISSIONER CENTER: We're looking forward to on-  
12 site hearings too.

13           (Laughter)

14           MR. WEBSTER: I'm sure you are!

15           COMMISSIONER CENTER: Marla Herrera, please.

16           MS. HERRERA: Hi. I just want to let you know  
17 that I am a registered respiratory therapist. I think I  
18 would fall under the professional. The licensure that I  
19 have to maintain for the State of California, I am required  
20 continuing education units to keep that license to be able  
21 to practice. I work at John Muir Medical Center in Walnut  
22 Creek. We are a trauma center for all of Contra Costa  
23 County and a partial of Solano County. We have a helipad on  
24 site, and we are directly involved in the care of the  
25 patient that comes in, to maintain their airway.

1 I am here to try, on all of our behalf, to have  
2 the 12-hours maintained in our industry. And there's a lot  
3 of reasons that I have, that I've really given a lot of  
4 thought of.

5 The law, I understand, has actually been put into  
6 effect to right some wrongs that have occurred. However, I  
7 don't think the healthcare industry falls under the  
8 mainstream of America. I understand that the police and the  
9 fire departments have been exempt, and I think we work hand  
10 in hand with them. When they're on an accident scene, when  
11 their job ends, that's when I go to work.

12 I think there's also two other shifts that need to  
13 be considered when you're taking away a 12-hour shift, and  
14 that is a swing shift, which is from three in the afternoon  
15 until eleven at night, and the night shift, which is from  
16 10:30 at night to seven in the morning.

17 PM shift is not a great shift. It's not a  
18 suitable shift for anybody that has any type of quality  
19 marriage or children. You're gone before they get home, and  
20 you're home after they're in bed.

21 Night shift is probably the worst shift because  
22 it's just not in your body's nature to be up and functioning  
23 in those hours. Nobody likes night shift -- there's a small  
24 percentage. But for the most part, the people that are on  
25 night shift is because of childcare issues and because

1 they're low man on the totem pole for seniority. And that's  
2 usually, when you're a new grad, where you start.

3           Single parents that work night shift, 12 hours,  
4 only have to deal with a daycare issue three nights a week.  
5 And a lot of people work weekends, Friday, Saturday, Sunday,  
6 so there's available daycare as far as family or being able  
7 to hire somebody to come in. If you push these people back  
8 to 8-hour shifts, because 10 hours does not work in the 24-  
9 hour setting in the hospitals, you have huge childcare  
10 issues. You have to hire somebody to come in and take care  
11 of your kid five nights a week to work a 40-hour week.  
12 That's extra money out of these people's pockets. And to  
13 find somebody that's willing to come in is almost  
14 impossible.

15           Night shift people are normally sleep-deprived to  
16 begin with. That goes without saying. So, instead of  
17 working three nights a week and I'm home four days out of  
18 the week with my kids, I will be forced to be gone five  
19 nights a week. That's a huge, huge change. Night shift  
20 people tend -- even though they're sleep-deprived, they are  
21 more involved with school functions, they're able to do  
22 field trips, they're able to, you know, participate in a  
23 child's life.

24           I worked, for seven years, night shift. And it  
25 doesn't matter whether you work 8 hours or 12 hours; you

1 still only get 5 hours of sleep. You're just doing it every  
2 day, day in, day out.

3           The quality of people that we are able to attract  
4 at John Muir is high. And the reason is we have 12-hour  
5 shifts. My particular department, respiratory, the whole  
6 department is 12-hour shifts. We are able to -- able to  
7 have people commute in to John Muir from all over the Bay  
8 Area. We have therapists from UC Davis, we have people that  
9 come in from -- up from Sacramento. They come in, they do  
10 their three days, and they go home. The flexibility of a  
11 12-hour shift in a hospital setting is huge. It has a huge  
12 impact on the patient care, the quality of care that you're  
13 able to give, and also your home life and the quality that  
14 you're able to give at home.

15           Yes, 12 hours seems horrendous, but most of us  
16 work and eight-to-five job and then go home and put in  
17 another four hours anyway. We just don't get paid for it.  
18 In my case, my 12 hours, I go home, I'm able to read the  
19 paper, visit with my children, and then I'll go to bed.  
20 There isn't any extracurricular activities those three days,  
21 but I'm home for them.

22           At John Muir, we have flexible scheduling.  
23 Because I don't have to work three days in a row, I can  
24 split those up any days that I want or any combination that  
25 I want, to allow me to participate in my kids' life.

1           We have issues with commuting. You take away the  
2 12-hour shifts, now you have more people on the road  
3 commuting more miles round-trip by themselves. And that  
4 impact, I think, would affect our staff; we would lose  
5 people. Just from Fairfield to Walnut Creek is an 86-mile  
6 round-trip daily trip. You're asking people to do that five  
7 days a week versus three. The cost out-of-pocket goes up,  
8 not including childcare. If you're one of the lucky ones to  
9 work day shift, you're home by 3:30. Most of us aren't that  
10 lucky.

11           And the biggest reason to keep 12-hour shifts is  
12 the burnout factor. It's huge in our industry. Healthcare  
13 has changed and placed so many more demands on us every  
14 year, and we're required to do more. I just do not help  
15 people breathe; I also work in the neonatal unit, I do  
16 EKG's, I do all the phlebotomy in the neuro intensive care.  
17 Every year, we are asked to do more and more. And for me to  
18 have to come in five days a week and deal with death and  
19 dying on a daily basis, and to deal with the families and to  
20 counsel them, it's a little bit more than one person can  
21 handle. Your sick calls go up with 8-hour shifts, and your  
22 burnout rate is high, and your staff level -- your turnover  
23 is very high.

24           I think I was one of the last employees to be  
25 hired at John Muir. I've been there nine years. And the

1 reason is, I have the flexibility to be able to do my best  
2 the 12 hours I'm there and to give everything I have, and  
3 then be home for four days, to pursue extra educational  
4 opportunities, to rejuvenate, to be able to rest and not be  
5 so sleep-deprived.

6 Healthcare is a demanding, demanding business.  
7 Flexibility and patient quality of care is what it's all  
8 about. I think that we're going to lose a lot of people if  
9 we have to go back to 8 hours. I also know that people are  
10 already trying to figure out how they can work less hours.  
11 They don't want to be there five days a week. How are they  
12 going to get by with less income and try and only work three  
13 or four days a week?

14 The mental aspect of our business is very, very  
15 tough, when you're dealing with death every single day. And  
16 along that line, you're dealing with counseling and helping  
17 family members make a decision whether somebody should die  
18 or not. And I think by taking away our flexibility with 12-  
19 hours, we're going to create a bigger shortage in the  
20 healthcare industry. People are leaving already, as it is,  
21 for various different reasons, but one of them is burnout.

22 Quality care, that's the big thing we hear,  
23 quality care, quality care. I give better care to my  
24 patients on my eleventh hour of night shift because I only  
25 do it three days a week, versus my fifth day of night shift

1 that I've been there, because it becomes a job. You're  
2 there because you have to be there, and it gets tough,  
3 because then you just want to get through your shift and  
4 make it through the night, not, "How am I going to make this  
5 person better?"

6 So, any questions?

7 MR. BARON: I had a question in terms of process.  
8 Was your scheduling instituted through a secret ballot vote  
9 or a two-thirds vote? Or how did that work?

10 MS. HERRERA: It was -- it was instituted by a  
11 vote. They used to be -- before my time, they had 8-hour  
12 shifts. And they took, in my time, a vote. And everybody  
13 voted for 12-hour shifts. And we've been on 12-hour shifts  
14 -- I've been there eight years, and they were already  
15 implemented when I started. And one of the reasons I went  
16 there was because, wow, three nights a week, four nights  
17 home.

18 COMMISSIONER BROAD: Do the other employees, other  
19 than the respiratory care therapists in your department,  
20 like clerical employees and so forth, do they work 12-hour  
21 shifts too?

22 MS. HERRERA: No.

23 COMMISSIONER BROAD: So, they're on regular, 8-  
24 hour schedules.

25 MS. HERRERA: Right.

1           COMMISSIONER BROAD: Okay. So -- and in the  
2 hospital generally, who's on 12-hour shifts?

3           MS. HERRERA: Anybody clerical, that I'm aware of  
4 personally, is usually on the 8-hour shifts. But it's  
5 mostly -- what I have seen in nursing, there's a  
6 combination, almost in every department, of 8-hours and 12-  
7 hours, so that there is an -- there is an option. It is by  
8 choice. Our department just happens to be all 12 because we  
9 all like it. We all like our flexibility and all, and being  
10 home.

11           COMMISSIONER BROAD: So, does it appear to you  
12 that the people that are on 12-hour shifts are doing direct  
13 patient care?

14           MS. HERRERA: Yes.

15           COMMISSIONER BROAD: You know, hands-on patient  
16 care.

17           MS. HERRERA: Yes.

18           COMMISSIONER BROAD: Okay. So --

19           MS. HERRERA: Yes.

20           COMMISSIONER BROAD: -- it's not like the -- you  
21 know, the janitorial staff or any of those people, you're  
22 aware, are -- okay.

23           MS. HERRERA: No. And I know for a fact  
24 housekeeping is not, the clerical is not. I don't even -- I  
25 think there's an option in the X-ray Department of either 8

1 or 12's.

2           You know, it allows me also to pick up more  
3 overtime. I'm not losing money. If I only work three days  
4 a week and they call me and say, "Hey, you know, hep's broke  
5 out here and we another therapist; can you come in and  
6 cover?" Sure, I'll come in an extra day. It's my option.  
7 But I still have three more days off. It's also my option  
8 to -- I am not committed to working a 12-hour shift when I  
9 say I'll work overtime. I'm able to say, "Well, I can come  
10 in and work 8 hours. That's all I can give you today."  
11 I've even came in a worked 4 hours. "Hey, I'll come in and  
12 cover the first shift, but, you know, I've already made  
13 plans for the afternoon." That is the flexibility.

14           My schedule is 36 hours a week. That is  
15 considered full-time. I work three days a week. I have  
16 worked 8-hour night shift, I have worked 12-hour night  
17 shift, and now I am on 12-hour days. And I -- whether a day  
18 shift or night shift, I personally could not work full-time  
19 and do 8-hour shifts. I have two teenagers at home.

20           COMMISSIONER BROAD: Have you ever -- this is sort  
21 of a two-part question. Have you ever worked a four-10  
22 workweek, and how would you feel about that?

23           MS. HERRERA: I have not worked a four-10  
24 workweek. I don't think it would work very well when you  
25 need 24-hour coverage, because you're 4 hours short every

1 day, which means you have double the amount of people in  
2 there to cover a shift for a 4-hour period, or you work  
3 something out for 4 hours, which I couldn't even imagine. I  
4 wouldn't come in for 4 hours.

5 COMMISSIONER BROAD: Well, how do they work this  
6 deal where they have some people working 8-hour shifts and  
7 some people working 12-hour shifts?

8 MS. HERRERA: It's a buddy system. If you have a  
9 12-hour person on days, you have a 12-hour person coming in  
10 at night. If you have the 8-hour person on days, you have  
11 an 8-hour person coming in on PM. Some people choose to  
12 work PM's. It works with their lifestyle. Some people  
13 choose to work nights. Most of us choose to work nights  
14 because of childcare -- your husband's home, you go to work,  
15 you come home, they go to school, you sleep when they're at  
16 school. But it's a buddy system, so everybody's matched up.

17 COMMISSIONER CENTER: Thank you.

18 Before the next speaker, just some housekeeping  
19 measures, just because I have another page of people that  
20 want to talk. I think we'll take a 30-minute break at one  
21 o'clock because we'll lose one of our commissioners and so  
22 we can get through this at some reasonable hour today, if  
23 that's okay with the rest of the commissioners.

24 Sal Nicolosi.

25 MR. NICOLOSI: First, I want to make a brief

1 statement. Here's a copy for you.

2 Good morning, Mr. Chairman and members of the  
3 Commission. Thank you for the opportunity to speak today.  
4 My name is Sal Nicolosi. I'm a chemical plant lead operator  
5 for Dow Chemical Company. I work rotating shifts, where we  
6 don't have the option to stay on days, nights, or swings,  
7 but it's a continuing rotation.

8 I'm here today on behalf of myself and many of my  
9 co-workers to request your consideration to continue to  
10 allow 12-hour shifts as an alternative work schedule. My  
11 fellow employees and I have been working 12-hour shifts  
12 since the early '90's. We requested and fully supported  
13 these shifts.

14 Working 12-hour shifts allows us more personal  
15 time for ourselves and with our families. When my co-  
16 workers and I have requested to work 12 hours, we wanted to  
17 keep it cost-neutral for the company, which would allow it  
18 to be a win-win situation for both us and the employer. As  
19 members of a power team at Dow Chemical, we completely  
20 understand what it means to control costs. In recent years,  
21 we've seen our site go from approximately 900 employees to  
22 400 employees, due in part to our historical inability to  
23 compete from a cost perspective.

24 I sincerely hope that you would allow and trust me  
25 and my fellow co-workers to vote for 12-hour shifts as an

1 alternative schedule if that's what we think is best for us  
2 personally. The ability to consider 12-hour shifts should  
3 be available to all employees in California. The ability to  
4 work 12-hour shifts over the past eight years has provided  
5 me with additional personal time and family time, which has  
6 been invaluable and which I do not wish to sacrifice in the  
7 future.

8           Thanks again for the opportunity to speak. Any  
9 questions?

10           COMMISSIONER McCARTHY: Well, I want to thank you  
11 for taking the time to come here. Obviously, this is a  
12 matter of concern to you and to your family and fellow  
13 workers. But I do, in fairness to you and to others who may  
14 express similar sentiments, I must point out that our job --  
15 perhaps there's a misunderstanding of what we are empowered  
16 to do here. Our job is not to repeal the act of the  
17 Legislature. And while there are places where we can make  
18 exemptions, that's true, by and large the decision with  
19 regard to these matters has been settled by the Legislature.

20           And so, it may be -- very well may be the case --  
21 essentially, what you're asking us to do is to overturn the  
22 law of the Legislature, which is not in our lawful capacity.

23           MR. NICOLOSI: I understand that. What I did want  
24 to do today is go on the record with my opinion, not  
25 necessarily ask you to change something outside your realm

1 of power, but just be heard as a public worker.

2 COMMISSIONER McCARTHY: Well, I appreciate you  
3 taking the time to come here and do so. Thank you.

4 MR. NICOLOSI: Thank you.

5 COMMISSIONER CENTER: Steve Friday, please.

6 MR. FRIDAY: Thank you. I think I can keep this  
7 even shorter because Sal and I came together.

8 I'm Steve Friday. I'm a human resources manager  
9 for Dow Chemical here on the West Coast.

10 And I think I'll just cut mine down a whole lot  
11 here, and just say that we are still hopeful, perhaps, that  
12 as this process goes forward -- and Mr. McCarthy, as you  
13 indicated, the law sets this out -- I think some of the  
14 interpretations we have seen may have indicated that there  
15 might have been an omission or that some of these were left  
16 out.

17 Our employees do very much like 12-hour shifts.  
18 It's a four-on, four-off, so four days of 12's, two nights  
19 -- two days. They don't have to worry about who's got  
20 seniority; it does rotate. Then they have four days off  
21 with their family.

22 Our employees are very much -- in today's  
23 environment, we've gone down from eight or nine levels in  
24 our company down to four. So, Sal only has two people to  
25 look through before he's looking at a CEO of the company.

1           We have nice programs. We have nice variable pay  
2 rewards. We're looking at a great on this year, on top of  
3 our salaries, where -- Sal makes probably \$27 to \$28 an  
4 hour. Our operators are highly paid, with an average of \$25  
5 an hour. But we've also learned to be very much cost-  
6 conscious. In other words, they play an active role in  
7 setting the budgets now in their plants.

8           I think the thing that they've seen -- when Sal  
9 mentioned that we've gone from 900 down to 400 employees --  
10 is that we've lost our ability to compete with other Dow  
11 locations in the U.S. What happens is, we may have a plant  
12 generating the same product elsewhere in the country. If  
13 they can make it for a few cents a pound less, whether  
14 they're a union shop or not, when the decisions are made  
15 where to build a new plant or whether we're going to shut  
16 down a plant, it's based on those tenths of cents per pound.

17           And so, the operators like Sal have taken a real  
18 pride in the company and in their roles of being able to  
19 compete. But granted, we've gone from 900 to 400, and we  
20 did just close down an epoxy plant for that very reason,  
21 because another location in Dallas that could make the same  
22 product cheaper and we could get it shipped out.

23           So, what we're looking at preserving, really, with  
24 some of these opportunities is a chance to keep our payroll  
25 here. Even with 400 employees at our Pittsburg site -- now,

1 we have sites in Pittsburg, Torrance, Long Beach, and San  
2 Diego -- but just with the 400 employees at our Pittsburg  
3 site, we're generating \$20 million per year payroll into  
4 that area, \$15 million a year into that Pittsburg area for  
5 contractors and services that we purchase. We pay \$18  
6 million in income taxes as well -- to the State of  
7 California annually, plus \$4 million on local property  
8 taxes.

9 Sal also participates in a program that generates  
10 \$100,000, just into the local schools and charitable  
11 organizations, that we donate each year.

12 What he looks at -- and we've all learned to  
13 realize -- is we're not the federal government in our  
14 company. And if we can't be competitive, if we can't get  
15 those costs reasonable -- and we're not asking our employees  
16 to do anything unsafe -- by the way, our safety record is  
17 the best it's been in a decade. We are committed to zero  
18 OSHA recordables, and we're at our lowest level, which right  
19 now is 1.1 incidents. That's 1.1 injuries, which may even  
20 be a scratch, per 100,000 hours in the chemical industry.

21 We have a lot of training, a lot of very qualified  
22 and capable and intelligent people. And they love the four  
23 12's, and they're willing to understand what it means to  
24 watch the line on costs in order to continue that job and to  
25 have that opportunity in the future.

1           So, that's our request. If there is a chance or  
2 an opportunity, as all of you move forward, to consider  
3 whether or not 12-hour shifts could be considered as an  
4 alternative schedule, we would -- it is important, and it's  
5 not just a way to skip a buck or cheat somebody out of a  
6 penny. It's quite the opposite of that. It's a matter of  
7 maintaining the roles we have here in California and keeping  
8 our plants here so we can compete with those states that  
9 don't have to deal with these issues. And we are very  
10 competitive amongst ourselves, much less with our  
11 competitors outside of the company. But we tend to compete  
12 very well within our own company.

13           With that, I appreciate it, or any questions, I'd  
14 be happy to address.

15           COMMISSIONER CENTER: Thank you.

16           MR. FRIDAY: Thank you.

17           COMMISSIONER CENTER: Vicki Zahn.

18           MS. ZAHN: Hi. Good morning. I'm a registered  
19 nurse at Queen of the Valley Hospital, which is in Napa,  
20 California. And I work in the intensive care unit.

21           When I first started at the hospital about eight  
22 years ago, I was hired onto 8-hour shifts. But when I took  
23 the job, it was with the promise that we would soon be  
24 having a vote and possibly going to 12-hour shifts, which we  
25 did. I was, at that point, on a telemetry floor, which is

1 cardiac monitoring. And as I recall, we had to vote it in  
2 by a greater than two-thirds majority. And it voted in  
3 overwhelmingly, by about 90 percent of the staff. The few  
4 nurses that did not want to work 12-hour shifts, for a while  
5 we had a combination 8-hour shift, 12-hour shift floor. And  
6 eventually, that was a nightmare in scheduling. And most of  
7 those nurses either decided to try the 12-hour shifts, which  
8 they either liked, or they decided to go elsewhere in the  
9 hospital, because within the hospital there's a combination  
10 of 8-hour and 12-hour shifts.

11           So, I just want to make a couple of points about  
12 the advantages that we see -- I'm representing myself and  
13 also all my co-workers who work 12-hour shifts and uniformly  
14 love the 12-hour shifts.

15           From the patient and family viewpoint, we've  
16 always, as a profession, wanted to provide continuity of  
17 care for our patients. And with shorter hospital stays, 12-  
18 hour shifts actually provide much better continuity of care  
19 than an 8-hour shift. In 12 hours, we have time to really  
20 get to know our patients, really get to know our families.  
21 They're in a crisis situation, very ill, and we have time --  
22 we feel we have time to really deal with the psycho-social  
23 issues as well as the patient care issues.

24           In 12 hours, you really get to know your patient  
25 on a physiological level. We're dealing with very

1 critically ill patients who are very sensitive to the  
2 treatments that we're giving. In 12 hours, we know our  
3 patients much more -- we can much more succinctly give the  
4 right amount of medications and note their response, from a  
5 physiological level. And I feel that we -- feel like we may  
6 impact the quality of the care of our patients much more on  
7 12-hour shifts than on an 8-hour shifts.

8           We have many tasks that we do within our day that  
9 have to be done once per shift. In the 8-hour shift, you're  
10 struggling to get your morning stuff done, starting to catch  
11 up in the middle, and then struggling to get afternoon stuff  
12 done, and then you're going home. In a 12-hour shift,  
13 you're doing certain tasks, you're doing the same once a  
14 shift, but you have several more hours to spend quality time  
15 with patients and with your families. They have time to  
16 really develop a trust level with you, really open up with  
17 you in a way that does not happen nearly as readily on an 8-  
18 hour shift.

19           From the point of view of the night shift, if  
20 there -- when there's three shifts a day, we have to cover  
21 24 hours, so 10-hour shifts are not really feasible in our  
22 environment. On an 8-hour shift rotation, you have to wake  
23 the patient up after 11:30 at night and do a complete body  
24 assessment, interrupt their sleep cycles, and then you try  
25 to get them to sleep, and then do a few tests in the

1 morning, and then the night shift is going home. So, that  
2 shift really never gets to know their patients and really  
3 doesn't have a high level of job satisfaction.

4           As for mistakes, I haven't personally seen any  
5 mistakes made because of the exhaustion level of the nurses.  
6 I've seen lots of mistakes made in the changes of shifts.  
7 When you're changing shifts three times a day, there's a lot  
8 more potential for the kinds of mistakes that happen because  
9 of miscommunication or because of missed communications.  
10 Personally, I think that there's far fewer mistakes in a 12-  
11 hour shift rotation than in an 8-hour shift rotation.

12           I would like to emphasize the importance of  
13 maintaining flexibility in a healthcare environment. It's  
14 very stressful. It's very hard to attract employees.  
15 Having the flexibility for a 12-hour or an 8-hour workday,  
16 which we have in our hospital, attracts many people. And  
17 the same as the respiratory therapist pointed out, we, with  
18 12-hour shifts, are more likely to attract professionals who  
19 have to commute to work and only have to commute three times  
20 a week rather than five times a week.

21           We give a lot of ourselves in a our job. It's a  
22 highly stressful job. We can do it because we have enough  
23 time off to completely rejuvenate ourselves. Whether it be  
24 family, whether it be other activities that we're involved  
25 in, most of the nurses that I know feel that they have a

1 very rich life. And part of it involves their time at work  
2 and part of it involves their time out of work.

3           We also have more time to enrich our career on a  
4 12-hour shift. We have time for educational opportunities.  
5 Many nurses have a second position where they do some  
6 teaching. They may be involved in community work, they may  
7 be involved in the schools, somehow involved in the  
8 community outside the day-to-day, on-the-floor hospital  
9 care. So, I think that most nurses feel that  
10 professionally, we have a much more rich career when we have  
11 the 12-hour shifts and we have time in our lives to do other  
12 things than work actually on the floor.

13           It enables us to be involved in more projects in  
14 the hospital. We can be involved in committees. The work  
15 that I do, we don't have time to go to a meeting in the  
16 middle of our workday. If we want to be involved in  
17 committees and developing policies, in any project for the  
18 hospital, then most of us do that on our days off. And we  
19 like doing it, it makes us feel more involved in the  
20 hospital, but it's not feasible in the environment where I  
21 work, to be able to go to a meeting at twelve o'clock one  
22 day, or whatever, because you don't know what would be going  
23 on at that time.

24           And another point is that many nurses -- it's a  
25 good-paying position; it's not a fantastic-paying positions.

1 Many nurses, in order to support a family, carry a second  
2 job. And they have time to do that on a 12-hour shift,  
3 whereas they wouldn't maybe pick up one day a week somewhere  
4 else, whereas they wouldn't.

5           And also, with the staffing, our census is so  
6 variable that when staffing is tight and if we are short of  
7 nurses, we can call around. I think we're much more likely  
8 to find a nurse who has some time on a day off on a 12-hour  
9 shift schedule than on an 8-hour shift schedule where you're  
10 working five days a week.

11           So, I think the real bottom line for me,  
12 personally, is that why would you try to take an industry  
13 where we give so much, work so hard, and have a shortage of  
14 nurses and other healthcare professionals, and take away  
15 some of the flexibility, when we have freely voted it in and  
16 love it? It's a wonderful schedule.

17           So, that's all I have to say. If you have  
18 questions --

19           COMMISSIONER CENTER: Thank you.

20           MS. ZAHN: Thank you.

21           COMMISSIONER CENTER: Connie Delgado Alvarez.

22           MS. ALVAREZ: Good morning -- oh, afternoon --  
23 sorry.

24           I just really have a very quick technical  
25 clarification. Last week when I made a presentation, I was

1 -- I'm with the California Healthcare Association -- I was  
2 asking for the IWC to look to restoring Wage Orders 4 and 5.  
3 And I mentioned 4- and 5-86. And it's 4- and 5-89, amended  
4 in '93.

5 So, if there was any confusion on my part, I'm  
6 sorry for that -- probably a lack of oxygen, with two people  
7 breathing here. So, just if there was any confusion, I  
8 hoped to clear that up. Thank you very much.

9 COMMISSIONER CENTER: Thank you.

10 COMMISSIONER BROAD: Can I ask a quick question?

11 COMMISSIONER CENTER: Yeah, go ahead.

12 COMMISSIONER BROAD: I was wondering if you would  
13 address the question I asked the other witness earlier about  
14 whether non-patient-care employees are on 12-hour shifts in  
15 hospitals.

16 MS. ALVAREZ: To the best of my knowledge, the  
17 answer that she had given was what we -- we assume that most  
18 of the hospitals are, the nursing and therapists, and not  
19 really clerical or janitorial staff. That may depend on  
20 independent, you know, contracts with union organizations  
21 that may be on alternative shifts like that, but for the  
22 most part, I believe it's just limited to the personnel that  
23 she had mentioned, the nursing and the therapists.

24 COMMISSIONER BROAD: Thank you.

25 COMMISSIONER CENTER: Juli Broyles.

1 MS. BROYLES: I'll wait until the December 15th  
2 hearing.

3 COMMISSIONER CENTER: Thank you.  
4 Judith Levin.

5 MS. LEVIN: Good afternoon. I just have a simple  
6 question to start, and maybe no comment afterwards.

7 I know that the hearing is about merely Wage  
8 Orders 1, 4, 5, 7, and 9, and I'm wondering if the exemption  
9 that existed under 15-86 for personal attendants would be  
10 affected by this bill.

11 COMMISSIONER CENTER: The answer is yes. And  
12 we'll give you direction in our next hearing.

13 I think the bill affects all overtime for all  
14 workers, unless you have specific exemptions, and it named  
15 the industries that were affected.

16 MS. LEVIN: When you say "in the next hearing," do  
17 you expect things --

18 COMMISSIONER CENTER: What we're attempting to do  
19 is, our December 15th hearing, have proposed regulations to  
20 the industry to labor to make comment to us, and adopt these  
21 regulations in January.

22 MS. LEVIN: So, would it be appropriate to give  
23 testimony about 15-86, the exemption for that, at this time?

24 COMMISSIONER CENTER: Yes.

25 MS. LEVIN: Okay.

1           My name is Judy Levin, and I'm the associate  
2 agency director at Family Support Services of the Bay Area,  
3 which is a private nonprofit social service agency. We  
4 provide respite services, which are breaks for families who  
5 have kids with special needs, a chance to get away. I'm  
6 also the vice president of Respite Services Association,  
7 which is a statewide group of nonprofit agency which  
8 likewise provide respite services to about 3,000 families of  
9 children with special needs, developmental disabilities.

10           So, respite workers go into the homes of families  
11 to give them a break away from their care. They act as  
12 surrogate parents during that time, doing whatever the  
13 parent might do. Currently, our respite workers are exempt  
14 under Wage Order 15-86, and I'm here to strongly advocate  
15 for continuation of that exemption, in the best interest of  
16 the families.

17           Why is this exemption so critical? There are  
18 really two reasons. First is a very practical level. The  
19 way that we are reimbursed from the State Department of  
20 Developmental Disabilities is on a fee-for-service basis, an  
21 hourly wage based on a base salary for the respite provider,  
22 and then a small administrative cost for the respite  
23 agencies.

24           If overtime were required, there is no effort at  
25 the state to pass on any payment to respite agencies for

1 those additional overtime payments, so we would then be in a  
2 position of truly of being a nonprofit agency. We would go  
3 out of business, basically, is the problem, or we would have  
4 a choice, which would be to tell families, "You can't use  
5 respite for more than 8 hours." Why is that a problem? Any  
6 of you who are parents, I think, can understand sometimes  
7 you need to get away, and you need to get away for more than  
8 8 hours. And certainly, respite providers do short-term  
9 things, like allow parents to go to their own doctors  
10 appointments or run errands or do simple things, but  
11 families also want longer periods of time, where they can go  
12 away overnight or for a weekend. So many of us, as parents  
13 of typical children, enjoy that opportunity. That would not  
14 be possible.

15 I think you can understand that families are  
16 reluctant to turn the care of their child with special needs  
17 over to anyone, and when they do so, reluctantly, they want  
18 to have face-to-face contact with that person, explaining  
19 what the care needs of their children are for the time  
20 they'll be there. If we have to put in shifts of people,  
21 that parent would not have an opportunity to connect with  
22 the second or the third or the fourth employee coming into  
23 the home. And I don't think that provides good care for  
24 children.

25 It's also very disruptive to children with

1 developmental disabilities to have multiple caregivers.  
2 Children who are autistic do not do well with change, and  
3 having shift-like coverage could actually escalate  
4 children's behaviors and cause them to have a lot more  
5 behavior problems than they currently do.

6 I also want to address it from the point of view  
7 of the respite provider. Families are usually given a set  
8 number of hours per month, and the family can use that in  
9 any way they want; it's up to them. Respite providers might  
10 only work with one family. And if that family gets, let's  
11 say, 42 hours of respite every quarter, and the family wants  
12 to go to Reno, that's how they want to use it. And that  
13 respite provider, they could only do 8 hours. And that may  
14 be the only person they trust with their child. So, I guess  
15 I would wonder why we're limiting families in that way.

16 These respite providers are on-call, hourly  
17 employees. They can choose to accept or not accept any  
18 position that they would like. Most of our respite  
19 providers do something else in their lives; they're  
20 students, they're part-time workers, they're homemakers,  
21 they're doing this maybe as community service, or just as a  
22 part-time job. It works for them because they can get in a  
23 large number of hours, perhaps in a weekend, and then they  
24 may not work for the rest of the quarter with that family,  
25 or they may not work the rest of the month. So, they do

1 their respite and then they're off usually for, you know,  
2 quite a long period of time with that family.

3           If overtime is instituted, those respite providers  
4 will be financially limited because we won't be able to  
5 allow them to work more than 8 hours because we won't be  
6 reimbursed from the state for that.

7           So, I urge you maintain the overtime exemption  
8 that currently exists under 15-86. Families of children  
9 with special needs have service needs that exceed 8 hours.  
10 It's not well served by multiple persons. Children with  
11 special needs do not benefit from shift-like coverage of  
12 their childcare needs. And respite providers prefer the  
13 flexibility that respite work does as their schedule  
14 permits.

15           If overtime cannot truly be maintained under 15-  
16 86, then there must be some provision that mandates  
17 reimbursement for these kinds of hours for providers.

18           So, thank you in advance for your thoughtful  
19 consideration.

20           COMMISSIONER BROAD: Well, it appears that what  
21 happened with the exemption that was in 15-86 is that when  
22 the last Industrial Welfare Commission eliminated daily  
23 overtime in general, it -- as I understand it, it eliminated  
24 the exemption that you are talking about. And so -- and the  
25 old wage orders are only reinstated for certain ones. Order

1 15 doesn't change; it's not affected.

2           And so, what you have is a situation, as I  
3 understand it -- and I may be wrong -- it's from reading the  
4 submission from people in your industry -- is that there's  
5 one set of rules that affects personal attendants who are  
6 employed by a business entity, or a nonprofit or a --

7           MS. LEVIN: Right.

8           COMMISSIONER BROAD: -- facility, and another set  
9 of rules for personal attendants employed in the home. Is  
10 that right?

11           MS. LEVIN: Outside of a nonprofit agency, do you  
12 mean, then?

13           MR. BARON: No. I think the key is where do the  
14 workers work. If you're working in a facility, in a  
15 hospital, you'd be under Wage Order 5. If you're working in  
16 a home, you're under the wage order that you referred to.  
17 And the issue of -- there were different -- in the older  
18 Wage Order 5, for personal attendants in a facility, as you  
19 go back and you look at -- refer to Section 21, there is a  
20 54-hour exemption for those personal attendants. In terms  
21 of -- I don't -- in terms of the newer -- in terms of Order  
22 15, for instance -- that's why I was just -- it doesn't make  
23 reference to a 54-hour week.

24           MS. LEVIN: Right.

25           MR. BARON: It makes reference to either 8 or 40.

1           And I heard just -- I just want to be clear on  
2 what the shifts, how many hours a week the workers, your  
3 workers, work.

4           MS. LEVIN: I guess I was -- I looked at 15-86 and  
5 saw that there was an exemption for personal attendants,  
6 that there was no work limitations. So, our shifts vary  
7 based on family needs.

8           MR. BARON: So, do you have any -- over the  
9 general sense of -- would you say they vary from 20 hours a  
10 week to --

11          MS. LEVIN: It could be anywhere from 3 hours to  
12 50.

13          COMMISSIONER CENTER: Now, if you were reimbursed  
14 by the Department of Developmental Services for the  
15 overtime, would you support overtime for the workers then?

16          MS. LEVIN: It would be great for the providers to  
17 have more money, sure. They're one of the most underpaid  
18 groups. I'm sure that would be helpful.

19          COMMISSIONER CENTER: Thank you.

20          Juli Broyles, yeah.

21          MS. BROYLES: Julianne Broyles, from the  
22 California Chamber of Commerce.

23           I did have a just a process question. You have  
24 mentioned a couple times that draft wage orders will be --  
25 and regulations will be available for comment at the

1 hearing, or prior to the hearing with a chance to review  
2 them so we can provide accurate comments on those?

3 COMMISSIONER CENTER: We hope to have them by  
4 December 15th. Then you'll have a month to comment if  
5 there's -- well, for a 30-day notice.

6 MS. BROYLES: Okay.

7 COMMISSIONER CENTER: Then you can supply comment.

8 MR. BARON: We would like to issue them in  
9 January.

10 MS. BROYLES: Okay. And then these would be the  
11 wage orders that you would then be voting on in --

12 MR. BARON: January.

13 COMMISSIONER CENTER: January 15th.

14 MS. BROYLES: Okay.

15 Bill Webster. He already testified.

16 John Dunlap.

17 MR. DUNLAP: Good afternoon, Chairman Center and  
18 commissioners. It's a pleasure to be with you today. I'm  
19 John Dunlap, the president and CEO of the California  
20 Restaurant Association. And I wanted to introduce two of  
21 our members, Greg Wellington, to my left, who's with Papa  
22 Murphy's, and Jim Nichol, who is with the Harmon Management  
23 Group, which are the franchisees of KFC's and Taco Bell.

24 I wanted to give you -- I appreciate the  
25 opportunity to come before you today. We had -- at last

1 week's hearing, Jon Ross, with the law firm who represents  
2 us, had a chance to speak to you briefly.

3           We want to tell you a bit about our trade  
4 association. We represent some 3,400 restaurants, who  
5 actually represent some 13,000 food service businesses  
6 statewide. The restaurant industry is the largest retail  
7 employer in California, providing jobs for in excess of  
8 890,000 people.

9           Having sat for a few years as a regulator, on the  
10 other side of the table, I appreciate the painstaking  
11 process you're involved in now relative to ensuring full  
12 public participation before your body. I think that's  
13 important, and we want to commend you for that. We think  
14 that reaching out to all those that will be impacted by  
15 issues that you have the responsibility for is responsible  
16 and good government.

17           Restaurants, like other employers you've heard  
18 from today, have used flex-time scheduling to help their  
19 employees satisfy competing demands in their work and  
20 private lives. People eat, and therefore restaurants stay  
21 open all hours of the day. This presents unique challenges  
22 to restaurant operators and unique opportunities for  
23 restaurant workers.

24           As enacted by the Legislature, AB 60 offers both  
25 workers and employers considerably more scheduling

1 flexibility than existed under California's prior daily  
2 overtime system. The Legislature left to this Commission  
3 the task of developing rules that make this promised  
4 flexibility a reality.

5           In talking to our board and members around the  
6 state since the passage of AB 60, one theme has emerged  
7 quite clearly: the extent to which our members continue to  
8 make alternative schedules available to their workers will  
9 depend, in large part, on the rules established by this  
10 Commission to implement alternative schedules. Small  
11 businesses will be very reluctant to adopt alternative  
12 schedules if the procedures for establishing alternatives  
13 are overly complicated, particularly in light of the  
14 substantial new penalties now imposed for violations of your  
15 work orders.

16           It is our strong belief that our workers have  
17 benefited from flexible scheduling, not unlike those stories  
18 we've heard from others today. We have similar we can, of  
19 course, share with you. If these benefits are to continue,  
20 the process for establishing alternatives must be manageable  
21 for small businesses.

22           At this point, I'd like the change gears and talk  
23 about the manager exempt provisions of AB 60. Like other  
24 retail employers, restaurants have a unique interest in this  
25 issue. In the restaurant industry, managers are not

1 stationed at desks directing the activities of subordinates.  
2 Rather, the manager's primary duty is to ensure that  
3 customers are served. This means working alongside  
4 employees, at times assisting and teaching the cook in the  
5 kitchen, helping guests when short-staffed, and, of course,  
6 trying to work out a schedule that meets the demands of all  
7 employees overall. What distinguishes the manager from  
8 other employees is often his or her responsibility to  
9 simultaneously perform multiple tasks, all designed to  
10 ensure that the restaurant provides first-rate service to  
11 its customers, for without the first-rate service, because  
12 there are so many choices for people in which to dine,  
13 they'll go somewhere else. So, the customer service element  
14 is extremely important.

15           As enacted, AB 60 directs the Commission to  
16 conduct a review of the duties which meet the test of the  
17 exemption. In directing the Commission to review this  
18 issue, the Legislature clearly acknowledged that current  
19 notions of a manager's duties may not reflect the reality  
20 that exists in retail businesses such as restaurants. In  
21 the coming months, we look forward to working closely with  
22 you as you consider this issue. And we want to thank you  
23 again for the opportunity to speak today.

24           And with, I'd be happy, Mr. Chairman, to introduce  
25 my two colleagues here.

1 COMMISSIONER CENTER: Thank you.

2 MR. DUNLAP: Greg Wellington, from Papa Murphy's.  
3 Thank you.

4 COMMISSIONER CENTER: Can you give him the mike?

5 MR. WELLINGTON: Thank you very much. Good  
6 afternoon, Chairman Center and commissioners. My name is  
7 Greg Wellington, and I am currently an owner-operator of a  
8 take-and-bake pizza concept called Papa Murphy's. Just  
9 opened up our second store in the Sacramento area, in  
10 Roseville. We have another store in Sacramento up Bradshaw  
11 Road.

12 A little bit about who I am: I've been in the  
13 industry since I was a young teenager, started out with  
14 Sambo's, which was a pancake house a number of years ago,  
15 washing dishes, have grown up in the industry, have worked  
16 for Taco Bell, Pizza Hut, have grown in my stature within  
17 the industry, worked for Pepsico in a number of different  
18 capacities, and have recently branched out and become a  
19 franchisee, which is exciting, going into that line of work  
20 and being an owner-operator.

21 Again, the reason I'm here, in defense of what we  
22 would call our profession -- I'm a food service professional  
23 -- and how we look at our managers and the job that our  
24 managers do. Being somebody that's risen up within the  
25 industry from humble beginnings, I know what it takes to

1 deliver to the customer what they expect when they come into  
2 a dining establishment: quality food, excellent service,  
3 clean environment, and of particular note in this day and  
4 age, healthy food, safe food. Given the nature of our  
5 business, we deal with the public and we want to make sure  
6 that our industry is kept wholesome and that we can provide  
7 the things to the consumer that they've always expected from  
8 the restaurant industry.

9           To do that does take a broad number of skills.  
10 Being a manager in a food service environment and juggling  
11 all the balls that it takes isn't just something you can do  
12 from behind a desk. You need to be out in front of the  
13 public. In many cases, being a manager in a food service  
14 environment, you can't differentiate between the manager, in  
15 some cases, unless they're wearing a name tag or a different  
16 color shirt, but they are on the front line. They're  
17 dealing with the consumer, they're watching the flow of  
18 business, making sure that the food is served quickly,  
19 friendly, and making sure that the customers are happy.  
20 Food service managers are accountable for the entire  
21 business. Any service issues, any product issues, they have  
22 to be on that front line engaged in activities that are  
23 going to impact that final product they're delivering to the  
24 customer.

25           Our business is all about QSC, quality, service,

1 cleanliness. But beyond that, to hire quality people, to  
2 train people, coaching them, the administrative part of the  
3 business is important. We can't neglect that, keeping track  
4 of the numbers and the books and deposits, payroll,  
5 ordering, are all important in business. However, what  
6 makes the difference between a well run restaurant and a  
7 restaurant that was here today, gone tomorrow, was the  
8 ability of that manager to connect with the public and to  
9 make sure that QSC is first and foremost the priority.

10 I've always taken great pride in pleasing people.  
11 Being in a service business, to me, what it's all about is  
12 when I hand, in my case, my take-and-bake-product, across to  
13 that consumer and they get a good value, good price, they  
14 take it home, and they love our product. That's something I  
15 learned a long time ago at the places I worked when I was  
16 young. And I've worked my way up. And I take great pride  
17 in the business. I'm part of the food service industry.  
18 Working together with my staff in the front of the house, in  
19 the back of the house, the kitchen, the front lobby, to  
20 provide excellent customer service.

21 So, that's kind of my spiel. Thank you.

22 COMMISSIONER CENTER: Thank you.

23 MR. DUNLAP: I'd also like to introduce Jim  
24 Nichol, who's with Harmon Management Corporation. They have  
25 some 41 -- he represents the Bay Area Region -- they have 41

1 franchisees or franchise sites, including both KFC and Taco  
2 Bell.

3 MR. NICHOL: First off, can you hear me? Okay.

4 As I'll explain here, my name is Jim Nichol. I'm  
5 with Harmon Management Corporation. I had a real similar  
6 experience in my life to Greg. I grew up in the restaurant  
7 industry. I started when I was 16 years old, cooking  
8 chicken for KFC. Luckily, I hooked up with a good  
9 franchise, which is Harmon Management. They gave me many,  
10 many opportunities to grow and learn things as I aged, and  
11 I'm still learning and growing right now. Anyway, I had a  
12 chance to become an assistant manager, manager in the  
13 business, and now I'm a supervisor for forty stores here in  
14 the San Francisco Bay Area. I'm also a vice president with  
15 our parent company.

16 Today I want to address your concerns and also  
17 just to say that we are very interested in how you respond  
18 to this legislation. There was somebody here earlier that  
19 stood out in my mind when I was just sitting here, something  
20 about the status and how do you determine a manager versus a  
21 regular employee. And I looked at a manager, and I was  
22 thinking back to when I was a store manager in the industry  
23 and working day-to-day, every day in restaurants. And I  
24 think it's a 50 percent basis; you manage 50 percent and you  
25 work 50 percent to become exempt here. And I cannot

1 remember one day in my life that I wasn't managing 100  
2 percent of the time I was in a restaurant. Now, I may have  
3 been sweeping a floor, but while I was sweeping the floor, I  
4 was probably figuring out why my cleaning schedule wasn't  
5 working and why an employer would be doing that job. Or I  
6 may be cooking chicken sometime back there, but at the same  
7 time, I was determining how I was going to get this new  
8 employee a better job of making sure that my products were  
9 fresh and preparing them for the customers the way they  
10 should be.

11           So, I think that, you know, when you look at a  
12 manager in a restaurant, it isn't, hey, this guy works half  
13 the time being a boss, and half the time he might wait on  
14 customers, or half the time cooking chicken or whatever,  
15 making pizza or whatever it is that he turns out there.

16           You guys have got a tough job to determine here.  
17 You know, how you guys -- how do you address this, and how  
18 do you protect that are doing the job of it, and not the  
19 ones that are abusing it. I understand that. But we want  
20 to be sure that you know that we're here to help and we want  
21 to provide you with information.

22           I want to -- you know, most of our managers in our  
23 businesses are set up with an incentive plan. They get paid  
24 more if they perform at a higher level. By doing that, it  
25 helps the owners of the restaurants, obviously, and it also

1 provides them a chance to make more money, if they want.  
2 They have the right to make their schedule the way they feel  
3 that it needs to be set. They are treated fairly, and they  
4 can run and manage a restaurant efficiently, protect the  
5 customers, keep it clean, and help it grow. And I think  
6 that's very important.

7           If you eliminate, you know, the manager's chance  
8 to go out and run a restaurant by saying now they're an  
9 employee, and "We're going to pay you as an employee, and  
10 you're going to be treated like an employee," you eliminate  
11 all chance of an incentive. People don't have the  
12 independence they want. Now, maybe labor is about that, but  
13 that's not what our business is about. And if we start  
14 controlling those guys and having other people tell us how  
15 to run it, we're going to have problems.

16           You know, when I walk a restaurant now -- I have a  
17 Kentucky Fried Chicken that's only two blocks away from  
18 here, on Polk -- I pick up the trash when I walk in. If a  
19 table needs to be wiped off, I wipe off the table. And  
20 that's in each of our businesses. And you can't be  
21 controlling it by other people telling us how much we can  
22 work, one aspect, how much we're going to get paid, another  
23 aspect, how much we've -- and how -- let me rephrase that --  
24 and we want to be able to make our own decisions.

25           Let's see here. I think that, you know, if you

1 look at the way a restaurant is set up, and -- John was  
2 telling you that we don't have offices in our restaurants --  
3 managers don't spend their time in offices. Our offices are  
4 closets with some computers. They end up having a place  
5 where they can go in there and maybe place an order, do  
6 their scheduling, keep the files, you know, basically that  
7 kind of stuff. But they're out on the floor all the time.

8           That's my representation here today. If you've  
9 got any questions, I'd be glad to address them.

10           COMMISSIONER CENTER: Thank you very much.

11           COMMISSIONER COLEMAN: I have a quick  
12 question.

13           COMMISSIONER CENTER: Okay. Sorry.

14           COMMISSIONER COLEMAN: On the voting requirement  
15 part of -- you mentioned, John, the task of this Commission  
16 to sort of operationalize the flexibility and keep the  
17 protections in place. Do you have any models that you can  
18 share with the Commission of voting procedures that have  
19 worked in your industry?

20           MR. DUNLAP: Sure. We'd be happy to do  
21 that.

22           One of the things that I didn't mention in my  
23 remarks, in the interests of time, but I should, is we have  
24 very high turnover in the restaurant industry. In some  
25 cases, particularly in quick service, it could be as high as

1 150 percent. So, employee retention and involvement in the  
2 scheduling process is very important to keep, you know, your  
3 people around.

4 As Jim mentioned, his career is not unique.  
5 Actually, both of these gentlemen, they worked their way up,  
6 and they found what it means to keep employees happy and  
7 around. And that flexibility is very important. So, they  
8 have a very inclusive management style as company managers  
9 and representatives.

10 We'd be happy to share with you some of the more  
11 successful schedules.

12 But the restaurant industry overall has very high  
13 turnover. We're devoting ourselves to training the  
14 workforce of today and tomorrow to stay with this industry.  
15 It's very important. Also, the -- it's a very competitive  
16 industry. There's a large number of restaurants that fail.  
17 There are some statistics things about -- some of them that  
18 are mentioned, there are four out of five restaurants that  
19 are open today that won't be around in five years. And so,  
20 we're learning, we're evolving, and trying to figure out how  
21 to do this better.

22 That's why we have a very high level of interest  
23 before your Commission here. We're gratified -- we had some  
24 conversation with -- both in the Legislature and the  
25 Governor's Office -- about this body's willingness to be

1 flexible and work with us. But we do not have an answer.  
2 That's why we're here. We want to kind of hear about it and  
3 work with you to get --

4 COMMISSIONER CENTER: Just one comment. Mr.  
5 McCarthy and I, we were on the prior Commission when we took  
6 the vote to eliminate the 8-hour day in California. One of  
7 the proposals was to change the definition of "primarily,"  
8 and it was proposed by industry. That fell by a 5-0 vote in  
9 the former Commission. And so, it was fear of abuses out  
10 there --

11 MR. DUNLAP: Right.

12 COMMISSIONER CENTER: -- by testimony of employees  
13 coming forward, one after another, that they were classified  
14 managerial so they could eliminate even the minimum wage on  
15 those. And we had a number of people testify on that, and  
16 it was a unanimous vote not to pursue changing that  
17 definition of "primarily."

18 MR. DUNLAP: Yeah. Well, I'm relatively new to  
19 this post. We have a new team at the Restaurant Association  
20 -- not just a staff team, but leadership. And we'll examine  
21 what we said before and make sure we're aware of the  
22 history.

23 But again, we want to pledge our commitment to  
24 work with you in this important matter.

25 COMMISSIONER CENTER: Thank you.



A F T E R N O O N     S E S S I O N

--o0o--

(Time noted: 1:43 p.m.)

COMMISSIONER CENTER: Excuse me. Could we finish the conversations and continue with the hearings, please?

I'd like to call up now Marcy Saunders, the State Labor Commissioner.

MS. SAUNDERS: Chairman Center and the rest of the IWC members, I just wanted to try to clarify one issue today at DLSE and how they're interpreting the wage orders.

First of all, because mining, drilling, and the construction industry, as an example, were not clearly exempted from Wage Order 4, it is our position that they are covered under -- for overtime after 8 hours in a day. However, as the Labor Commission, I have the discrimination to interpret the law for enforcement. And that's how we are interpreting the law at this point.

We have not made -- taken a position on anything other than it's covered. We haven't taken a position yet, and we're still looking at it and studying it, as far as how we are going to enforce it. However, it does appear to us that, as of January 1st, because there is no clear statement within AB 60 that exempts those different industries, that we feel that they will be covered under AB 60, no matter

1 what the situation is, because there is no clear exemption  
2 for them in the bill now.

3 And I hope that clarifies. I know some of the  
4 questions people have had.

5 COMMISSIONER CENTER: Anybody have any comments?

6 And what we intend, hopefully, is to give you  
7 clear direction from the Commission come January 2.

8 MS. SAUNDERS: That would be very much  
9 appreciated. Thank you.

10 COMMISSIONER CENTER: Thank you.

11 Now Maureen Wright.

12 MS. WRIGHT: Good afternoon. My name is Maureen  
13 Wright. I'm from the Respite Inn. And we're a nonprofit  
14 agency that serves developmentally disabled adults in a  
15 respite care facility.

16 And what I am here today is in regards to Wage  
17 Order 5, under the personal attendants. And I'm talking in  
18 regards to if it ended up going to an 8-hour -- 8-hour day.  
19 Currently, how our shifts operate is we operate -- we have  
20 8-hour and 16-hour shifts. And the people who work 16-hour  
21 shifts, part of that time is sleeping, so it's 8 hours of  
22 sleeping and then 8 hours of providing direct care. All of  
23 our staff are on call, so they have a preference of working  
24 8 hours or 16 hours. And in the wintertime, we're only open  
25 on the weekends. In the summertime, we're open seven days a

1 week.

2           For -- what we have found historically is it is  
3 difficult to find employees to work 8-hour shifts, 8-hour  
4 shifts or less. People who are employed by us are typically  
5 single parents, they have another job, they're going to  
6 school, they want three or four days off so they can have  
7 time to do other activities and personal -- for their  
8 personal care.

9           I have talked to our employees in regards to if  
10 the 8-hour was instated for personal attendants. 70 percent  
11 of our employees said that they would have to quit. They  
12 don't want to be working 8-hour days. It wouldn't be  
13 beneficial for them. Why come in for 8 hours and give up a  
14 weekend, to come in for just 8 hours at a time?

15           And the other issue in regards to if we end up  
16 having to put on three shifts, the amount of sick -- people  
17 calling in sick would dramatically increase. And what  
18 happens is, I as an administrator, ends up having to cover  
19 the shifts myself, which ends up -- in turn, I have to end  
20 up working 80, 90 hours a week, because of that.

21           And also, in regards to the communication among  
22 staff, we all have heard that when you tell one person one  
23 thing, it goes to the next person, and it goes to the next  
24 person, and by the time it gets to the third person, it's  
25 completely different. What ends up happening when we have

1 three shifts is the communication ends up very convoluted at  
2 times, and can, in turn, be detrimental for the people that  
3 we serve.

4 So, thank you for your time. Any questions?

5 COMMISSIONER CENTER: Thank you.

6 Just a point -- Commissioner McCarthy also wanted  
7 to let me explain to the audience that this is being  
8 electronically recorded, so he'll be getting copies of this  
9 testimony too.

10 Next is Lisa Tomlinson.

11 MS. TOMLINSON: Good afternoon. Can you hear?  
12 Okay.

13 My name is Lisa Tomlinson, and I'm the vice  
14 president of human resources for Pac Pizza. And I've held  
15 that position since 1997. Before that, I was the director  
16 of human resources for the Marriott Corporation.

17 Pac Pizza is the second largest franchisee of  
18 Pizza Hut restaurants. We currently have 149 restaurants.  
19 Pac Pizza operates 126 of those restaurants throughout  
20 Northern California.

21 I understand that you have the responsibility to  
22 review the duties that will allow employers to classify  
23 various employees as exempt from overtime pay requirements.  
24 I would like to share my company's thoughts about the duties  
25 of the managers of Pizza Hut restaurants and why Pac Pizza

1 believes those managers qualify for the executive exemption.

2           Pac Pizza's restaurant managers are responsible  
3 for all aspects of restaurant operations. They recruit,  
4 interview, hire, discipline, and, if necessary, terminate  
5 employees. They are sure that all employees are properly  
6 trained and report to work, make pizzas to meet high quality  
7 standards, and provide good customer service. They perform  
8 periodic evaluations of employee performance, they forecast  
9 labor requirements, and schedule and deploy crew members to  
10 cover the hours the restaurants are open and the busiest  
11 times of the week. They analyze financial performance each  
12 week and make adjustments in operations to improve  
13 performance. They direct and monitor food preparation.  
14 They manage the inventory of food and supplies. They  
15 establish community relationships, such as school lunch  
16 programs or athletic team parties. They market Pizza Hut  
17 products. They manage all the cash, balance cash accounts,  
18 and make bank deposits. The restaurant managers make sure  
19 that each restaurant is safe, clean, and properly  
20 maintained.

21           At times, the manager will also engage in  
22 production activities, such as making pizzas or cashing out  
23 customers. Part of the time, they do this production work  
24 to train new employees. At other times, the manager  
25 performs this work because there's a rush or because there

1 are simply not enough crew members available to do all the  
2 work without the manager's help. Even when the manager is  
3 helping with production work, though, the manager remains  
4 responsible for supervising all of the employees in the  
5 restaurant and monitoring the restaurant's operations to  
6 make sure the product is being made properly and efficiently  
7 and that customers are kept happy.

8           In other words, as far as Pac Pizza is concerned,  
9 the manager is running the show, and the buck stops with the  
10 manager. Pac Pizza needs to have someone who is ultimately  
11 responsible for what happens in the restaurant, and that  
12 person is the restaurant manager. That is why Pac Pizza is  
13 willing to pay its managers as much as \$41,000 per year and  
14 make them eligible for bonuses. They are paid far more than  
15 crew members. If the restaurant managers were just being  
16 paid to make pizzas or to do other crew work, Pac Pizza  
17 would pay them a lot less money.

18           My point in telling you all of this is that the  
19 ongoing duties of supervising employees and monitoring  
20 restaurant operations are duties that should be treated as  
21 exempt functions, regardless of whether a restaurant manager  
22 is also performing some kind of production work. In other  
23 words, it just doesn't make sense to treat a person with the  
24 responsibility our managers perform every hour they work  
25 just because they may spend some time helping their crew.

1 And a manager does not have to just stand there during the  
2 lunch rush in order to be a manager. Any list of exempt  
3 duties that fails to recognize this reality does a  
4 disservice both to employers and to the managers themselves.  
5 Pac Pizza, and, I'm sure, many other companies, expects its  
6 managers to focus on the restaurant's operations and  
7 employees and attend to those operations and employees  
8 throughout the day, even if they may also engage in  
9 production work from time to time.

10 The supervision of operations and employees are  
11 the essential duties of the job and the focus of the  
12 training given by Pac Pizza to its managers. They are the  
13 focus of how the restaurant general managers are evaluated.

14 Pac Pizza respectfully requests that you recognize  
15 these expectations in rules or regulations describing the  
16 duties that make a restaurant manager an exempt executive  
17 employee.

18 COMMISSIONER BROAD: Just by way of clarification  
19 for me, you have crew members and you have managers. Is  
20 there anybody else that's employed in a Pizza Hut?

21 MS. TOMLINSON: No.

22 COMMISSIONER BROAD: And how many managers are  
23 there at -- existing generally at a franchise? More than  
24 one?

25 MS. TOMLINSON: There would be more than -- no.

1 We have a full-time restaurant general manager assigned to  
2 every restaurant, and we have shift leaders that are able to  
3 deploy resources during the course of the day.

4 COMMISSIONER BROAD: Okay. So, these shift  
5 leaders -- because someone who's a full-time restaurant  
6 manager --

7 MS. TOMLINSON: Yes.

8 COMMISSIONER BROAD: -- I can understand. And  
9 they would fall within the exemption, probably, now --

10 MS. TOMLINSON: Right.

11 COMMISSIONER BROAD: -- because they spend more  
12 than half their time engaged in managerial duties. But what  
13 you're reaching for are these lead persons.

14 MS. TOMLINSON: No, we are not. Just the  
15 restaurant general managers.

16 COMMISSIONER BROAD: So, it wouldn't be assistant  
17 managers or training managers or anybody like that?

18 MS. TOMLINSON: No.

19 COMMISSIONER BROAD: Okay. So, this is a person  
20 who's -- now, is that manager there full-time? Are they  
21 there all hours of operation?

22 MS. TOMLINSON: No. They would have at least a  
23 40-hour workweek that they would be responsible for being  
24 there. However, they may have to work 50 hours if they're  
25 busy, during a peak period, for example, during a

1 Thanksgiving period or a holiday period when people are -- a  
2 lot of people are off.

3 COMMISSIONER BROAD: Are you saying, then, your  
4 concern is that they spend more than 50 percent of their  
5 time now doing -- making pizzas and doing non- --

6 MS. TOMLINSON: No. I'm saying that they spend at  
7 least 50 percent of their time doing managerial  
8 responsibilities.

9 COMMISSIONER BROAD: Okay. But what I'm trying to  
10 understand is that that would exempt them under current law  
11 and under the current rules of the IWC. I'm trying to  
12 figure out what you want that you don't have now.

13 MS. TOMLINSON: Going forward, we may not -- we  
14 may lose that, in January, with AB 60.

15 COMMISSIONER BROAD: Okay. I just don't  
16 understand how. But maybe you can elucidate for me. I  
17 don't see what is there in AB 60 that changes that. It  
18 essentially codified a rule that said -- there was already a  
19 rule of the IWC that said people that are primarily engaged  
20 in these duties are exempt. And AB 60 put that in statute.  
21 And it changed another thing. It said that they had to be  
22 making at least twice the minimum wage.

23 Are these people making twice the minimum wage?

24 MS. TOMLINSON: Yes, they are.

25 COMMISSIONER BROAD: Okay. Then I'm -- I'm having

1 -- I have some difficulty figuring out what is changed for  
2 them.

3           COMMISSIONER DOMBROWSKI: I think that maybe I  
4 could -- since I worked for a Pizza Hut once in my life --  
5 the manager -- the manager is often -- I mean, I remember  
6 our guy was making pizzas and managing the place. I think  
7 what you're saying is using your head and your hands at the  
8 same time, in a lot of situations.

9           MS. TOMLINSON: Yes. But they are 100 percent --

10           COMMISSIONER DOMBROWSKI: And you're wondering  
11 where that 50 percent line falls.

12           MS. TOMLINSON: That's right. That's our --  
13 that's our big issue, because the 50-50 -- because you're  
14 making the distinction between the 100 percent block of  
15 time, and you say 50 percent has to be managerial in nature.  
16 Where does that line cross over? There is a crossover.  
17 While they're making pizzas, they may very well still be  
18 managing a customer relations issue, or they may be  
19 directing or delegating tasks to someone at that time as  
20 well.

21           COMMISSIONER CENTER: I agree with Commissioner  
22 Broad. I don't think there's been a change in the former  
23 IWC's regulation that's now in statute. So, if you had that  
24 exemption under the former exemption, obviously you would  
25 have it now with the new law too.

1           COMMISSIONER BROAD: Yeah. I mean, I guess what  
2 -- it's possible that we could review it and constrict that.  
3 So, you're -- what you're really saying is you're coming  
4 before us saying you want to maintain the status quo.

5           MS. TOMLINSON: Yes.

6           COMMISSIONER BROAD: Okay. That's -- then that's  
7 really what I wanted to clarify.

8           Thank you.

9           MS. TOMLINSON: Okay.

10          COMMISSIONER CENTER: Thank you.

11          MS. TOMLINSON: Thanks.

12          COMMISSIONER CENTER: Marcie Berman.

13          MS. BERMAN: My name is Marcie Berman, and I'm  
14 here as a representative of the California Employment  
15 Lawyers Association, which is a group of about 250 attorneys  
16 in California that represents employees and employment-  
17 related litigation of all variety, including wage and hour  
18 types of matters, and in particular, overtime and other  
19 types of wage issue that fall under the wage orders.

20                 And I'm here today to address two types of  
21 concerns that CELA has. One is the procedural issues that  
22 you raised in your agenda that you put out, and another to  
23 respond real briefly to some of the things that have been  
24 said in writing and orally here.

25                 First of all, I would wholeheartedly support all

1 efforts on your part to communicate as quickly as possible  
2 to everybody concerned about the new rules that go into  
3 effect. And I understand that you're planning to have  
4 hearings on December 15th for the proposed interim wage  
5 orders that will be finalized shortly thereafter, I guess,  
6 and disseminated to employers. Is that accurate?

7 COMMISSIONER CENTER: Yeah, that's pretty close.

8 MS. BERMAN: Theoretically? All right.

9 I guess I would ask that you, in addition,  
10 communicate these new rules in other ways too, to make sure  
11 that everybody affected by them is going to be able to find  
12 out about them as quickly as possible. I'm not sure what  
13 your standard procedures are, but if there's some way that  
14 you could utilize the media or other channels of  
15 communication to ensure that employees find out about these  
16 new rules too, that would be something that we would  
17 recommend.

18 And in terms of substance of this communication, I  
19 would ask that the Commission be sure to include the new  
20 remuneration provision for the overtime exemptions as part  
21 of this communication, specifically, the new rule in AB 60  
22 that goes into effect immediately on January 1 that requires  
23 that in order to be exempt as an administrator, executive,  
24 or professional, that that individual has to be making at  
25 least twice the state minimum wage.

1           Another thing that we would ask the Commission to  
2 put into these communications, including proposed wage  
3 orders and any other form of communication, is some kind of  
4 admonishment or advice to employers about potential ways of  
5 circumventing the new law. I know that it's not common  
6 sense or intuitive on any of our parts to understand what's  
7 a legitimate loophole and what's not a legitimate loophole,  
8 because it varies. And I think that there are ways in which  
9 employers may try to circumvent this law without  
10 understanding that it's not okay to do that. And I think it  
11 would be to their advantage to let them know up front that  
12 that's not okay, so that they can lawfully comply with the  
13 law and not risk litigation later.

14           In particular, there's a provision right in AB 60  
15 itself that speaks to this, that states that -- I think it's  
16 new Section -- Labor Code Section 511(c) -- that states, in  
17 essence, that an employer cannot reduce somebody's base rate  
18 in order to fund this new, you know, overtime costs of the  
19 alternative workweek and 8-hour overtime provisions. I  
20 would ask that that be specifically included in your wage  
21 order and communications to the public.

22           Secondly, there are -- we've found that there are  
23 other ways in which employers sometimes try to circumvent  
24 overtime and other kinds of wage and hour laws by taking  
25 something away from a non- -- a non-wage payment to

1 employees to fund an employer's overtime liability. For  
2 example, there are situations in which employers may lease  
3 equipment from an employee who does work for them, you know,  
4 a rig or some kind of equipment that the employee has, and  
5 the employer will lease that equipment. And during weeks  
6 when that employee works overtime, the employer will reduce  
7 the lease payments to that employee in the exact amount that  
8 the employer has to pay in overtime.

9           And whenever that situation comes up, the courts  
10 have unanimously said you can't do that. That just fatally  
11 undermines the overtime laws. It's a violation of the  
12 overtime laws, and it's just not okay to do that. So, I  
13 would certainly want employers to know up front that that's  
14 not an acceptable way to fund their costs under this new  
15 legislation.

16           Another implementation issue -- I guess it's not  
17 really immediate implementation, but I want to respond to  
18 all of the various requests that I've heard and read from  
19 last week's presentation wherein employers are making  
20 requests that you change the overtime exemptions, the  
21 administrative, managerial, and professional exemptions, one  
22 way or another. I understand that AB 60 does include a  
23 provision that requires the Commission to, quote, "review"  
24 these matters. However, it doesn't include any kind of time  
25 deadline for you to do that. It just says that you have to

1 review it. The only thing it says in terms of time  
2 deadlines is that if you want to change anything, and if you  
3 want to make those changes without convening wage boards,  
4 then you've got to do it by July 1st, year 2000.

5           And it would be my recommendation that you not  
6 rush into doing that right now. It certainly seems like  
7 you've got a full plate, just dealing with the things that  
8 the law requires you to get done by July 1st, in terms of  
9 the regulations for the alternative workweek elections and  
10 related issues. Overtime exemptions are a very complicated  
11 type of issue that have really dramatic ramifications  
12 whenever they're tinkered with. And I know from my own  
13 personal legal practice that there are still a lot of abuse  
14 of overtime law in California, and there are class action  
15 lawsuits throughout the state, ongoing and being filed every  
16 week, that are a reaction to the abuses that still exist.

17           So, it certainly would be the position of CELA  
18 that the current law needs to be enforced better. And  
19 indeed, we would actually have recommendations for narrowing  
20 the exemptions so that fewer individuals would be exempted  
21 from overtime. But I don't want to address all that now,  
22 because I think that, you know, it's better done after the  
23 big press of business regarding the alternative workweeks,  
24 at which time I would recommend that you look at it very  
25 carefully and make use of the wage board, advisory wage

1 boards, and we'll come to you at that time with our specific  
2 recommendations.

3           The other thing I wanted to respond to that's been  
4 said here is that -- a lot of what I'm hearing seems to be  
5 people asking you to dismantle AB 60. There are some things  
6 that AB 60 gives this Commission discretion to do, but there  
7 is a lot of AB 60 that's set in stone, and it doesn't give  
8 the Commission authority to undo it.

9           And I just want to state for the record that those  
10 aspects of AB 60 can't be undone. There's no room to  
11 interpret them out of the law. And I think it's  
12 inappropriate for requests to be made that the Commission  
13 undo something that can't be undone.

14           I do have some specific responses to some of the  
15 proposals that have been made to change the overtime  
16 exemptions, but what I'll do is submit something in writing  
17 to you to address that and not take up any more of your time  
18 today.

19           COMMISSIONER CENTER: Thank you very much.

20           Any questions?

21           (No response)

22           COMMISSIONER CENTER: I think we can get the  
23 nurses in before their shifts now.

24           MS. SKINNER: Good afternoon. My name is Gail  
25 Skinner, and I'm a registered nurse here in San Francisco.

1 I work in a critical care unit at California Pacific Medical  
2 Center.

3 I work 12-hour shifts, and I'd like to continue to  
4 have the option to work those 12-hour shifts. For me, I  
5 find that 12-hour shifts allow me better continuity of  
6 patient care. I work day shift predominantly, and when I  
7 start my shift at seven o'clock in the morning and get my  
8 assignment and get report, I pretty much have a plan of care  
9 with the physician and the other healthcare professionals on  
10 the team about what's going to happen with my patient or  
11 patients during that shift. And I have a full 12 hours to  
12 work that plan with the patient and with the patient's  
13 family. And so, it's very useful to have -- to be there for  
14 12 hours for my patients.

15 As recently as Friday of this last week, I was  
16 involved in a very sensitive situation with a patient and  
17 family who were struggling to make a decision to withdraw  
18 life support. And when we started the process -- again,  
19 when I began my shift at seven o'clock in the morning -- I  
20 was able to reassure the family and the patient that I was  
21 the nurse with them for that 12 hours, and that I would be  
22 working with them as they struggled with this issue and made  
23 their decisions.

24 And, by the way, I was -- as painful as that can  
25 be, I felt very privileged to be part of that process.

1           Another reason that 12-hour shifts work for me is  
2 I have improved opportunities to participate in professional  
3 nursing organizations. I'm a member of the Nursing Pain  
4 Association, and I'm a member of the American Association of  
5 Critical Care Nurses. And not having to work five days in a  
6 week, and just work three days in a week, frees up time for  
7 me to attend meetings and to participate in seminars and do  
8 some teaching within those professional memberships.

9           Also, I have increased opportunity with more days  
10 off during the week to take continuing education and to have  
11 more options for what kinds of continuing education I take.

12           On a personal level, I have more time to spend  
13 with family. And I don't have children, but my co-workers  
14 who have children asked that I bring to you that they  
15 appreciate having opportunity to attend school events and  
16 participate in other activities with their children and be  
17 at work less days of the week in working 12 hours.

18           The commute is better for some of my co-workers.  
19 I have worked at my hospital for sixteen years, and I work  
20 with nurses who've been there for -- some of them, for as  
21 long as twenty or twenty-five years, and some of them  
22 commute from a distance. And they continue to commute from  
23 Santa Rosa or Vallejo, for instance, because of the option  
24 of the 12-hour shifts.

25           There's more time to participate in other

1 community activities like volunteering. And for myself, I'm  
2 a docent at the San Francisco Zoo, so having extra days off  
3 during the week allows me to do tour guides with school  
4 groups, and I very much enjoy that. There's more time for  
5 recreation and rejuvenating. I feel like I'm a better nurse  
6 and I'm a happier nurse because I do 12-hour shifts and I  
7 have more days off during the week.

8           And with regard to time off during the week, it's  
9 certainly more convenient for me to run my errands and do  
10 grocery shopping on weekdays, when maybe everybody else is  
11 at work, and I can get my things done.

12           Thank you for the opportunity to speak.

13           This is my colleague, Mary Chris Vallario.

14           MS. VALLARIO: And I work in an emergency room  
15 here for a local hospital. I also work a combination of 12-  
16 and 8-hour shifts.

17           And I sit on the local committee that represents  
18 emergency departments throughout San Francisco, and I can  
19 tell you that as word is beginning to seep out slowly to the  
20 rank and file that they may lose their option for 12-hour  
21 shifts, I think distraught would probably describe it pretty  
22 accurately.

23           A few years ago -- I've been working as a nurse  
24 for 32 years, and a few years ago, nurses were first given  
25 the option to work 12-hour shifts, and at that time they

1 were paid time and a half for the last four hours. And this  
2 looked like a real good deal to the nurses, and many of them  
3 signed up for it. And then, several years later, the  
4 administration came back and said, "We're going to take that  
5 away; we'll still give you the opportunity to work 12-hour  
6 shifts, but we will no longer pay the last four hours at  
7 time and a half." At that time, I think both the  
8 administration and the nurses, everybody was grumbling, and  
9 everyone felt that the nurses would immediately drop off 12-  
10 hour shifts and go back to 8-hours.

11 But much to everyone's surprise, once given the  
12 option to work 12-hour shifts, the professional nurses much  
13 preferred to continue to do that, for all of the reasons  
14 that Gail has articulated and that our colleague from John  
15 Muir, in respiratory therapy, gave you already. It simply  
16 is a difficult job. Obviously, intensive care and emergency  
17 room nursing is a very intense field, and the ability to do  
18 it three days a week versus five days a week makes a huge  
19 difference. I find, as I get older, I can recuperate much  
20 better if I'm doing 12-hour shifts three times a week.

21 In our particular department, we allow the nurses  
22 to take a vote, and we have a mixed unit of some people  
23 doing 8-hours, some people doing 12-hours. I am personally  
24 involved in the staffing. It makes it much easier for me to  
25 staff the department with that combination of shifts. It

1 makes it easier for me to retain nurses. I think that if we  
2 lose the option of 12-hour shifts, we will see nurses  
3 leaving.

4           And currently there is a dearth of nurses in  
5 specialty care areas. As managed care has affected  
6 healthcare -- and California has been the vanguard in that  
7 -- and hospitals have gotten leaner and meaner, they have  
8 started to cut what is now perceived of as "fluff," for want  
9 of a better word. And one of the areas of fluff is  
10 training. And one of the things that's been cut is training  
11 programs for specialty care areas. So, there is currently a  
12 lack of nurses for CCU, ICU, and emergency room departments,  
13 operating room nurses, cardiac, for example. And being able  
14 to retain those nurses is critical.

15           The administration has always worked very closely  
16 with the nurses in hospitals to try to give them what the  
17 nurses perceive as the best situation they can get. And  
18 flexible scheduling has been a huge issue, across the board.

19           There may be some instances of hospitals in the  
20 state where nurses are taken advantage of, being asked to  
21 work double shifts, which no one should have to do. But I  
22 personally have -- I have no information about that. And  
23 certainly, here locally, that is not the case. Hospitals  
24 want to retain all these nurses. They know that the nurses  
25 want flexible scheduling, and they're willing to accommodate

1 that.

2           So, I would strongly hope that any -- that we will  
3 be able to be an exemption from this law, as far as  
4 professional nurses go.

5           I think -- I understand that your role is to  
6 protect workers from being abused, but I would argue that  
7 professional nurses have the ability to negotiate directly  
8 with hospital administrators, and we have done that  
9 successfully. And in certain hospitals, for example, in San  
10 Francisco, where the nurses are members of the California  
11 Nursing Association, if they get into difficulties with  
12 scheduling problems, they can negotiate through their  
13 bargaining unit. So, at least in this area, it has not been  
14 an issue.

15           Thank you.

16           COMMISSIONER CENTER: Thank you.

17           MS. VALLARIO: Any questions?

18           COMMISSIONER BROAD: Yeah. I have a question.  
19 How would people -- you say you have people, some of whom  
20 work 8-hour shifts, some of whom work 12-hour shifts. Would  
21 the people who work 8-hour shifts be unhappy if they were  
22 told that they were going to work 12-hour shifts?

23           MS. VALLARIO: No, but we would just have the  
24 option. I think that's the key to this whole thing, is you  
25 don't have to work either 12 or 8, but you have the option

1 to work with your individual unit supervisor, to work out  
2 the best shifts for your particular unit. That's what I  
3 would like to see retained, is the option.

4 We would continue to work a mix of 12- and 8-hour  
5 shifts.

6 COMMISSIONER BROAD: See, I'm not sure what you  
7 have is really what the law gives employers the right to do.  
8 It basically allows the employer to determine what shifts  
9 people will work at. You happen to be in some kind of  
10 employment context where the employer has given you great  
11 latitude to choose shifts. But it would be within the  
12 employer's right to say, "Look, we're doing 12-hour shifts,  
13 no more of this 8-hour stuff," just as they earlier stopped  
14 paying you overtime and lowered your wage base at that time  
15 -- right? I mean --

16 MS. VALLARIO: Right. But employers are not  
17 stupid. They can't run the hospital without the nurses, and  
18 there aren't enough nurses, particularly specialty nurses.  
19 So, if you want to retain those nurses and be competitive in  
20 your area, you more or less have to sit down and negotiate  
21 with them, and that is a huge issue, probably, at this  
22 point, more than pay, is flexible scheduling for nurses.

23 COMMISSIONER BROAD: Okay. Now, let me ask you  
24 this question. Would you think that the other staff that  
25 are non-professional in hospitals, like janitors and food

1 service people and other persons, nursing assistants, have  
2 the same kind of bargaining chits to play with employers in  
3 the healthcare industry?

4 MS. VALLARIO: I think the employers try to be  
5 very careful with this, because it frequently runs up  
6 against union issues. And they don't have a lot of leeway  
7 with that. At least in the institutions that I'm familiar  
8 with, the non-nursing personnel are generally all working 8-  
9 hour shifts.

10 I have people that are working in our unit that  
11 are clerical workers who would much prefer to work longer  
12 shifts and not commute. And they currently are asked to  
13 work 8-hour shifts. And the employer tries to be very  
14 careful with it because they don't want to run into union  
15 issues.

16 So, that's something that they would need to  
17 discuss directly with their union representation, if that's  
18 something they want written into their contracts.

19 COMMISSIONER BROAD: Thank you.

20 MR. BARON: I guess, on this issue of non-direct  
21 care employees, I know that while it was said earlier that,  
22 as far as they knew, that it was always under an 8-hour. I  
23 see he had to leave, but I guess Tom Luevano, from Sutter  
24 Health, would want to come up and say that it is true, in  
25 instances, that folks in non-care are working a longer

1 shift, longer than 8 hours.

2 MS. VALLARIO: Anything else?

3 COMMISSIONER CENTER: No. Thank you.

4 MS. VALLARIO: Thank you.

5 COMMISSIONER CENTER: Let me make sure Andy gives  
6 me my microphone back.

7 Jonathan Mayes and Ron Bingham -- or Bingaman.

8 MR. MAYES: Chairman Center and commissioners,  
9 good afternoon. I'm Jonathan Mayes, and I have the good  
10 fortune of serving as the vice president of government  
11 relations at Safeway. Safeway operates 517 stores in  
12 California, under the names Vons, Pavilions, Pak-n-Save. We  
13 employ about 57,000 employees. We also operate a number of  
14 pharmacies. We operate 250 pharmacies in California,  
15 employing over 600 pharmacists.

16 We're here to talk to you about a couple of issues  
17 related to alternate work schedules. And I'd like to  
18 introduce Ron Bingaman, who's been a pharmacist for over 28  
19 years, to talk to you about what our perspective is on some  
20 of these work hours issues that have been addressed already  
21 earlier today.

22 Mr. Bingaman.

23 MR. BINGAMAN: Thanks, Jonathan.

24 Chairman Center, commissioners, I recently had the  
25 opportunity to meet with a group of our pharmacists, about

1 32 of them. From comments earlier about the pharmacist  
2 shortage, I hope you can appreciate the difficulty in  
3 getting that many pharmacists together at one time. So,  
4 this issue was discussed in terms of the flex scheduling  
5 and, as of January 1st, to get a sensitivity check on what  
6 their feelings were. And I'd like to break those down and  
7 present those to you at this time.

8 First of all, I'd make the offer that if live  
9 bodies are preferred, please let me know and we'll see what  
10 arrangements we can make for the December 15th meeting.

11 I would like to give you a sensitivity check on  
12 what I learned at this meeting. Basically, the comments  
13 ranged in three areas.

14 First were professional -- excuse me -- first was  
15 personal and family time. Under these, a vast majority of  
16 the pharmacists felt it very important to have more  
17 continuous time, in terms of hours and days off per week,  
18 particularly in coordinating with their spouse when she may  
19 be working.

20 Another area that was particularly important was  
21 childcare, home care, and, in one instance, home schooling,  
22 that a flex scheduled was needed to be able to continue  
23 their home schooling program with their children.

24 The next area had to do with business. Several of  
25 them had additional part-time jobs. With the shortage,

1 there are various business opportunities out there where  
2 they can work an extra shift or two. And the flex  
3 scheduling was very important to be able to continue that.

4 And the third was in the area of their profession.  
5 Several of them take continuing education and pharmacy  
6 courses. Also, some of them take advanced education  
7 courses, M.B.A., this type of thing, where flex scheduling  
8 would enable them to be able to have the time necessary to  
9 participate in these programs.

10 And then, the third area in the professional has  
11 to do with community activities, community services.  
12 Several of them volunteer for senior programs, brown bag  
13 sessions, this type of thing, where they donate their time  
14 and expertise to the community.

15 I'd like to talk just a moment about flex  
16 scheduling. And I understand that there's an option of four  
17 10's, and I'd like to address that issue for just a moment,  
18 how, in my opinion, in a retail pharmacy, four 10's are not  
19 appropriate as some other flex schedules might be. And  
20 we'll talk about those in just a moment.

21 First of all, pharmacies do maintain some 24-hour  
22 stores. So, the same arguments that you've heard earlier  
23 about shift and -- would be the same.

24 The second thing is, traditionally the hours of  
25 business where you see the most business, the most people

1 coming into stores, is a little bit longer than 10 hours. A  
2 12-hour shift would cover the bulk of this business. If you  
3 take a 24-hour store business and look at the times where  
4 the register is being rung the most, it's over 10 hours, but  
5 usually 12 hours or less.

6 Now, another flex schedule option I'd like you  
7 might consider instead of four 10's would be two 8's and two  
8 12's. In a pharmacy, some of the days of the week are  
9 particularly stronger in business, more likely than others.  
10 So, let's say, if a pharmacy is traditionally open 12 hours,  
11 let's say that Mondays and Fridays are traditionally busy.  
12 We could have two 8-hour shifts and overlap 4 hours, and  
13 that's some extra pharmacist time to be able to handle the  
14 additional pharmacist calls or additional patient calls,  
15 rather than compared to the mid-days that are less busy,  
16 Tuesday, Wednesdays, Sundays, this type of thing. So, a  
17 combination of two 8's and two 12's would be a stronger flex  
18 schedule in retail pharmacy than perhaps four 10's.

19 Another element of a flex schedule that I'd like  
20 you to consider would be, in the rural communities, out in  
21 the smaller areas and towns that maybe just have one store,  
22 one pharmacy, where we staff with two pharmacists, now, to  
23 ensure a quality of shift, they need to be able to have flex  
24 scheduling so that, overall, the total number of morning and  
25 evening shifts are the same, each has every other weekend

1 off, and the overall average hours between the two weeks are  
2 even. Now, to do this, because one person is working the  
3 weekend and has the next weekend off, you get into a flex  
4 situation where it is needed that we have a workweek the  
5 first week of, say, 36 hours, and then a second week of 44  
6 hours. But overall, between the two weeks, everything is  
7 averaged out, days, nights, weekends on and off, this type  
8 of thing.

9 In closing my comments, I would simply say that we  
10 at Safeway support the right of our pharmacists to choose  
11 their work schedule, and I would urge the Commission to  
12 maintain that flexibility.

13 MR. MAYES: There's been some discussion earlier  
14 about the notion of caps, and we've heard about alleged  
15 abuses where someone may be working 16 hours, 15 hours a  
16 day. Our perspective is that we want to provide hours to  
17 our pharmacists that also work well for them, because much  
18 like what was said earlier in connection with hospitals and  
19 nurses, pharmacists are in short supply, and so, in order to  
20 keep them, we want to work with them in ways that work well  
21 for ourselves and for them.

22 And so, the whole notion of some reasonable cap is  
23 very reasonable to us. Something in the area of 12 hours is  
24 not unreasonable. As Mr. Bingaman mentioned, 12 hours would  
25 work with us. We've also had conversation with other retail

1 establishments, pharmacists and pharmacy chains; 12 hours  
2 seems to work well for them as well, in terms of a  
3 reasonable cap. And that's what we would propose.

4 COMMISSIONER CENTER: Thank you.

5 Any questions?

6 (No response)

7 COMMISSIONER CENTER: Thank you.

8 Marc Koonin.

9 MR. KOONIN: Good afternoon, Commissioner Center,  
10 the other commissioners. I'm Marc Koonin, and I'm an  
11 associate with the law firm of Steinhart and Falconer, LLP,  
12 here in San Francisco. We represent employers, amongst  
13 other areas, in employment law and wage and hour issues.  
14 And we've had several employers who are, frankly, confused  
15 and concerned because they would like to comply with the  
16 law, portions of which are going to go into effect right  
17 away on January 1, but they are not really sure how they can  
18 do so within a safe harbor.

19 And I have two issues of particular concern. One  
20 issue is that several of our clients run operations in which  
21 they do not currently have an alternate work schedule, but  
22 they would like to have a seamless work schedule that will  
23 go into the next year. However, with the abolition of daily  
24 overtime, of course, all of the old wage order alternate  
25 workweek provisions are out the door and there's no interim

1 guidance. So, what they have asked us to request on their  
2 behalf is that the Commission form some sort of a clause  
3 that will say that elections that are held in the interim  
4 time period will be valid, so long as they meet certain  
5 criteria that were acceptable under the old wage orders and  
6 under the new statute.

7           Of course, the one thing that we're also concerned  
8 about is, under the old wage orders, of course,  
9 manufacturers had to ratify an election, whereas everybody  
10 else had to, in essence, do it in reverse, get the  
11 signatures and then have the election. So, we would like  
12 some flexibility to the extent that manufacturers who do  
13 what would have been valid before in ratifying an election,  
14 so long as they comply with all the other old provisions --  
15 two-thirds vote and registry with the state -- we'd like  
16 that to be deemed valid. And for non-manufacturing  
17 employees (sic) who do it the way that they would have done  
18 it under the old wage orders, we would appreciate some  
19 regulatory guidance that that's also proper, so long as they  
20 hit the key points.

21           Another issue that's come up is the whole issue of  
22 a 12-hour workday, only we would like to take a slightly  
23 different approach. We have several clients who are  
24 manufacturers, and they understand that, pursuant to AB 60,  
25 an alternate work schedule for up to 10 hours per day would

1 be deemed valid. However, they understand that, given the  
2 language, there doesn't seem to be flexibility for 12 hours  
3 of straight time. So, what they would like to do is as  
4 follows: they would like to implement, with their  
5 employees' consent, four 10-hour days, for which there would  
6 be 2 hours of mandatory overtime on three or four of those  
7 days. The reason they would like to do this is to cater to  
8 employee preference.

9 Frankly, several of our clients have employees  
10 who, for reasons discussed here today, would prefer to have  
11 a three 12-hour-day schedule and then have four days off.  
12 However, these -- one of these clients, at least, has been  
13 told by a regional officer of the Division of Labor  
14 Standards Enforcement that that officer would deem such an  
15 alternate work schedule to be invalid.

16 We don't think that it would be invalid because,  
17 historically, employers could require overtime so long as  
18 they were willing to pay for it. And the only practical  
19 alternative is for this employer to go to a swing shift,  
20 because the employer can pay for 6 hours or 8 hours of  
21 weekly overtime, but it just can't pay 12 to 16 hours, which  
22 would be the only other way of maintaining a 12-hour day if  
23 the alternate work schedule was not deemed to be valid on  
24 those terms.

25 And the employer will comply with the law, of

1 course. If it has to, it will go to a swing shift by  
2 January 1st. But this will make a lot of its employees  
3 unhappy and cause serious morale problems.

4 So, we would like the Commission to consider that  
5 seriously.

6 And that's all I have to say this afternoon. And  
7 I thank you for your time.

8 COMMISSIONER BROAD: Yeah. I just had a couple  
9 questions for you.

10 On your first issue, I don't see how the  
11 Commission can declare something valid in advance. In other  
12 words, I don't think we can sort of bless something out  
13 there, because that's really what an enforcement branch  
14 does.

15 I think we can say that you can hold these  
16 elections in the interim. I mean, if the wage orders  
17 restore the provisions that existed before and we do an  
18 interim wage order that says, "Order," you know, "blank-  
19 blank-blank is reinstated, but you -- you know, if you have  
20 an alternative workweek arrangement, you have to file it  
21 with the Division of Labor Statistics and Research," because  
22 that's what AB 60 requires, then it would be valid because  
23 we're saying it's valid.

24 But I don't know that we can -- I don't -- and  
25 maybe this is not what you're looking for, but I don't think

1 we can declare something beyond the sort of reach of the  
2 enforcement branch of government, which we're not.

3 MR. KOONIN: No. We're asking for a safe harbor  
4 provision. We're asking you to, in essence, recognize in  
5 the new wage orders that elections that were held in this  
6 interim period are valid. We believe that there is good  
7 legal argument for that because, in essence, the old wage  
8 orders, to the extent that they do not conflict with AB 60,  
9 go into effect until you adopt something else. So, we think  
10 that we would just like you to explicitly say that, in  
11 essence, to kind of provide a safe harbor so that industry  
12 has a clear signal on that, because it's a lot easier, from  
13 a business perspective, to do something now and continue  
14 into the new year than, in essence, to wait and do it into  
15 next year. It would be better from the point of view of a  
16 business that wants to comply to, in essence, do it  
17 seamlessly.

18 And, in essence, what you'd be doing is assisting  
19 employers who want to comply to comply and have a safe  
20 harbor. Even though you can't do it in advance, you could,  
21 in essence, bless it as of January 1 or whatever date the  
22 new regulations go into effect.

23 COMMISSIONER CENTER: Okay. Thank you.

24 Brad Cinto.

25 MR. CINTO: Good afternoon. My name is Brad

1 Cinto. I'm a registered pharmacist. I'm from Walgreens  
2 Company. Yes, another pharmacist.

3 I think the common thread here today, from  
4 listening and from hearing previous testimony, not only from  
5 pharmacy, but from healthcare professionals in general, is a  
6 stress for flexibility of scheduling, which, in my opinion,  
7 I think to lose that as we have it now, the disadvantages of  
8 that are going to far outweigh any advantages that would be  
9 gained by the implementation of AB 60 into our profession.

10 Luckily, we're in a situation with Walgreens where  
11 we don't see a lot of 12-hour shifts. In fact, no  
12 pharmacist is ever scheduled to work a 12-hour shift. We  
13 have no pharmacists to schedule any longer shift than a 10-  
14 hour shift, which are done by our graveyard pharmacists in  
15 our 24-hour stores. So, in essence, our workday isn't going  
16 to be affected a lot by the amount of hours that we work,  
17 but more so by the loss in the flexibility of scheduling.

18 And I have a couple of questions that I'd like to  
19 get clarification on, as to what the new law will do in  
20 regards to that.

21 First of all, it's very common in the pharmacy  
22 profession -- I think you've heard this point of view  
23 stressed earlier today -- that pharmacists work, and it's a  
24 fact of life, that we work an unbalanced schedule. You  
25 know, we're not lucky enough to be in a situation where you

1 can work a straight 40-hour week and deal with any excess  
2 hours as overtime from that point. We work unbalanced  
3 weeks, where you work an excess of 40 hours one week, less  
4 than that the next. And in a biweekly pay period, that's  
5 going to average out to basically a 40-hour workweek,  
6 although it's not cut-and-dried 8-hour day.

7           With the new law, I think there will be a lot of  
8 restrictions that would really put a lot of pressure on  
9 employees to come up with schedules that are going to work.  
10 And with the current shortage of pharmacists in the state,  
11 it's going to create a situation where you may not have the  
12 bodies to cover those shifts, whereas, with the flexible  
13 schedule, you have the bodies there to cover them now.

14           One of the questions that I'd like to get a  
15 clarification on is, as I read through the bill and you talk  
16 about the workweek and -- what I'd like to find out is what  
17 is the maximum days that could be scheduled for a  
18 pharmacist, running from workweek to workweek, without  
19 running into an overtime situation? Do you know what that  
20 would be?

21           And the reason I ask that is because, in a lot of  
22 situations -- personally, in my situation, my situation is  
23 -- my schedule is where I work seven days in a row, I have  
24 two days off, I work three days, I have two days off, and  
25 then rotate. So, it's every other weekend, and we work that

1 weekend the week before you work the full week, so you are  
2 working seven days in a row, five days in one week and five  
3 days in the second week, but it does run into seven  
4 consecutive days. And my concern would be does that  
5 conflict with the new law? Is that going to put -- you  
6 know, put somebody in a situation where that's no longer  
7 going to be able to be done without having to pay overtime  
8 hours.

9 I read through the bill, and they talk about the  
10 workweek, but they don't make -- they talk about the hours  
11 within the workweek, but they don't talk about -- or not  
12 that I've seen -- how that works with consecutive days. I'd  
13 be interested to know if anybody had information as to what  
14 that would do.

15 COMMISSIONER CENTER: Can you answer the question  
16 about the workweek?

17 COMMISSIONER BROAD: Well, I think the workweek is  
18 seven days. And on the seventh consecutive day of work,  
19 there's a special overtime provision. I think employers  
20 have -- I may have this wrong -- this is an issue that  
21 transcends this bill or existed beforehand, which is when  
22 does the workweek start and end. Generally, the workweek  
23 starts on a day that the employer picks, and then the  
24 workweek ends seven days later, and then it starts the next  
25 day, and it goes on like that.

1           Gentlemen, am I correct?

2           So that they can't, you know, shift that around.  
3   Otherwise you'd be working eighteen days in a row.

4           MR. CINTO:   You know, I'm not saying I think  
5   they're going to shift it around.   We know what the workweek  
6   is.

7           COMMISSIONER BROAD:   Right.

8           MR. CINTO:   But what I'm saying, within the  
9   framework of that, is you're going to run into situations  
10   where you may work seven or ten days in a row, but you're  
11   not going to exceed seven days in a workweek.

12          COMMISSIONER BROAD:   That, I believe, is  
13   permissible.   It -- in other words, you can -- let's say you  
14   have a seven -- you know, seven days, and the first three  
15   days you don't work.   You know, it starts on Monday and it  
16   ends on Sunday, and the first three days you don't work.  
17   You could then work four days, and then you could work five  
18   days, and as long as you didn't exceed -- right, because  
19   that would be the next workweek.

20          COMMISSIONER DOMBROWSKI:   Excuse me, but with all  
21   due respect to Barry, he's not the attorney for the  
22   Commission, I believe.

23          Miles, is that -- could we hear the Department  
24   speak to this?

25          MR. LOCKER:   (Not using microphone)   Well, if you

1 want DLSE to speak on it --

2 THE REPORTER: Come to the mike, please.

3 MR. LOCKER: -- although the Commission does have  
4 an attorney, and I don't want to, you know, overstep our  
5 boundaries, so I'm not sure how you want to proceed with  
6 that.

7 COMMISSIONER CENTER: Go ahead, Miles.

8 MR. LOCKER: (Not using microphone) Basically --

9 COMMISSIONER CENTER: Miles, would you come to the  
10 mike?

11 MR. LOCKER: Yeah. Okay. With respect to, you  
12 know, how DLSE would enforce this and have -- you know, in  
13 -- just in terms of days worked in a workweek, what we look  
14 at is the specific workweek. So, what -- it doesn't matter  
15 the number of days worked consecutively, because you can  
16 switch -- you can have a day off at the start of a workweek,  
17 then six days of work, and then, presumably, some more work,  
18 and then a day off in the next workweek.

19 So, that's -- in terms of the seventh day of work  
20 premium pay, what we're looking at is the seventh day of  
21 work in the workweek.

22 MR. CINTO: Within the framework of that seven --

23 MR. LOCKER: Within the workweek, yeah.

24 MR. CINTO: Once that workweek ends and the new  
25 workweek starts, you can back days up, back to back, without

1 interfering with -- so, what I'm saying is you're going to  
2 work five days, say, in the workweek. That workweek ends on  
3 Day 5. The second and new workweek starts on Day 1. When  
4 you're working those days, that's your sixth day in a row,  
5 and if you work the next day, that's your seventh day in a  
6 row. You're working seven days straight, five days in one  
7 workweek and the sixth and seventh day are Days 1 and 2 of  
8 the new workweek. Is that going to be allowable?

9 MR. LOCKER: It would be allowable because, again,  
10 what we're looking at is for the week. And so, for example,  
11 if you have, let's say, two days off at the start of the  
12 workweek, and then you work the next five days, and the next  
13 workweek, which is the same collection of seventh days,  
14 starting at the same time, ending at the same time, same  
15 workweek structure, but the work schedules shift in that  
16 second workweek so that you're on at the beginning of the  
17 workweek, and your days off happen at the end of that  
18 workweek, then that's okay.

19 COMMISSIONER CENTER: Thank you, Miles.

20 And any other specific enforcement questions from  
21 the industry, Miles is here for a long time today. He'll  
22 talk to you individually.

23 MR. LOCKER: I'll just hang out.

24 COMMISSIONER CENTER: Okay.

25 MR. CINTO: The only other thing I'd like to say

1 in regards to this point is it does seem to be the one issue  
2 that seems to be a sticking point, is the flexible schedule,  
3 is that it really is advantageous in our profession to have  
4 that, for a lot of reasons, some of which are out of our  
5 control.

6           And as I understand it, it is appropriate for you  
7 as the Commission to consider this and consider the  
8 exemption that we're asking for. If I'm understanding what  
9 I've heard today in previous testimony, that is something  
10 that you do have the authority or the power to do. So, I  
11 would ask you respectfully that you consider that very  
12 seriously and take that to heart, because it really will  
13 affect the lives of a lot of people. If -- not necessarily,  
14 we have to work under the new wage requirements, but if it's  
15 structured to where we lose that flexibility, it really does  
16 create a lot of inconvenience for people in their -- not  
17 only their business lives, but their personal lives. And I  
18 would appreciate it if that would be taken into  
19 consideration.

20           COMMISSIONER CENTER: Thank you.

21           MR. CHENG: My name is Francis Cheng, and I have  
22 been a -- have been a pharmacist here since '76, and I have  
23 worked approximately about seven years with a retail clerk  
24 store. And since then, I have been with Longs. And right  
25 now, presently, I'm working as a manager.

1           And basically, I'm supporting the whole thing  
2 about, you know, my own colleagues from Longs, and they were  
3 talking about, you know, the flexibility and the profession.  
4 And I'm not going to go into detail about what we do. You  
5 know, I'm sure that you guys are fully aware of what we do  
6 now, by now. If not, then, I'm inviting the commissioners  
7 to come over to our store, or to Longs, to visit.

8           Unfortunately, I'm sorry that Commissioner Broad  
9 had a bad experience at Rite-Aid.

10           Most of us, we don't work -- the reason why I quit  
11 a union store is basically -- it just doesn't work, the 8-  
12 hour shift and then the mandatory 15 minutes or you go to  
13 lunch. It just doesn't work. My priority is patient. My  
14 patient is my -- is my livelihood. If they don't come, I  
15 don't have a job. And that's what I'm trained for, and  
16 that's why I'm going to take care of them.

17           So, I cannot have an old lady that comes in three  
18 hours in the emergency room and say, "Hey, I'm sorry, I've  
19 got to go to lunch. I've got to close half an hour. When  
20 you come back, then I'll fill the prescription." I will  
21 stay and take care of their business. That's the main  
22 thing.

23           The flexibility will give us that aid that I can.  
24 And I'm also a -- you know, a certified management  
25 consultant for Blue Cross and Blue Shield, and I cannot, I

1 mean, do the job and say, "Hey, this is an 8-hour job and I  
2 can't do it." And I just -- when the patient needs to call  
3 me and I'm there, and I think, you know, the other  
4 healthcare, the nurse, I think testified to that fact, that  
5 they do that. And just like what I said, and I sincerely  
6 request that you guys take it into your heart and, you know,  
7 look into the pharmacy profession, whether this is an  
8 appropriate category to be exempt.

9 Thank you.

10 COMMISSIONER CENTER: Thank you.

11 Patricia Breslin.

12 (No response)

13 COMMISSIONER CENTER: Jim Merrill.

14 MR. MERRILL: Good afternoon, commissioners. I'm  
15 Jim Merrill, and I'm the liaison manager for United Defense,  
16 formerly FMC Corporation, and we have approximately 1,000  
17 workers down in San Jose. And I'm also the past president  
18 of the Santa Clara Valley Chapter of Society of Resource  
19 Management.

20 My questions to you involve the implementation of  
21 AB 60 in a couple of areas.

22 One, in that implementation, does the ultimate  
23 work schedule provide for make-up opportunities for  
24 employees? I wasn't quite clear on that. Is that an  
25 affirmative?

1 MR. BARON: Yeah.

2 MR. MERRILL: So, if someone had a 10 -- four 10-  
3 hour days and worked Monday through Thursday of a given  
4 week, with their manager's approval, they could come in --  
5 take Monday off and work on Friday without any penalty of  
6 overtime. Is that correct?

7 COMMISSIONER CENTER: The existing week, right?

8 MR. BARON: Yeah. If you look at Section 7 of the  
9 bill, 513, it says:

10 "If an employer approves a written request of  
11 an employee to make up work time that is or  
12 would be lost as a result of a personal  
13 obligation of the employee, the hours of that  
14 makeup work time, if performed in the same  
15 workweek in which the work time was lost, may  
16 not be counted towards computing the total  
17 number of hours worked in a day for purposes  
18 of the overtime requirements . . . except for  
19 hours in excess of 11 hours of work in one  
20 day or 40 hours in one workweek."

21 And they talked about a signed written request, and it says  
22 that an employer is -- that comes from the employee, and:

23 "An employer is prohibited from encouraging  
24 or otherwise soliciting an employee to  
25 request the employer's approval to take

1           personal time off and make up the work hours  
2           within the same week pursuant to this  
3           section."

4   There is that opportunity within that same workweek, up to  
5   11 hours and 40 hours in a workweek, to have that kind of  
6   make-up time.

7           MR. MERRILL:   Okay.   Thank you for that  
8   clarification.

9           The second point I wanted to make, get  
10   clarification on, is the seventh workday of the workweek.  
11   Our workweek is Saturday through Friday, and I understand if  
12   you work seven consecutive days, you get paid time and a  
13   half for that seventh day, up to 8 hours, and double time  
14   for over 8.

15           However, is there any penalty for an employee who  
16   works the seventh day of the workweek even though they may  
17   not work up to 40 that week?   There's some ambiguity, as I  
18   understand it, in the text of the law that talks about the  
19   seventh day of the workweek.   And I think it implies that  
20   it's the seventh consecutive day that you would be paid time  
21   and a half or double time.   And it has nothing to do with  
22   the seventh day itself.

23           MR. BARON:   Again, if you look at Section 510,  
24   which, to be frank, there have been clearer sections of  
25   bills in our time, but there is a -- besides the issue of 40

1 hours on a workweek, it also talks about the first 8 hours  
2 worked on the seventh day of work in any one workweek.

3 I don't know if what you were telling me was that  
4 -- is that somebody was working over 8 hours in that -- on  
5 which day.

6 MR. MERRILL: Well, what I was saying is that I  
7 understand that if you work seven consecutive days, that's  
8 there in the law. And when you don't work -- when you don't  
9 work seven consecutive days, is there any penalty that, on  
10 the seventh day of the workweek, which, in our case, would  
11 be Friday, no matter what they worked the other days,  
12 there's some overtime penalty for working that seventh day.

13 COMMISSIONER CENTER: It really would be helpful  
14 -- our last speaker is the sponsor of the bill.

15 MR. MERRILL: Okay.

16 COMMISSIONER CENTER: And some of those gray areas  
17 are things you might want to address to him.

18 MR. MERRILL: Okay. I leave that on the table.  
19 And that's my whole -- my two questions.

20 Thank you very much for your time.

21 COMMISSIONER CENTER: Thank you.

22 Yeah, you want to talk to him outside? All right.

23 MR. LOCKER: Yeah, just real quick on that.

24 Actually, on that last question there, this is  
25 something that -- this is probably one of the most

1 frequently asked questions that DLSE has had on AB 60 in the  
2 past couple months. And we anticipate this is -- we have a  
3 bunch of opinion letters in the pipeline that are about to  
4 be sprung out any day now, and one of these is going to  
5 address this issue. And, you know, so we're moving along.

6 And I can tell you what --

7 COMMISSIONER CENTER: I want to get copies of  
8 those.

9 MR. LOCKER: I can assure you that, pursuant to  
10 what -- I believe it's Labor Code Section 1198.4 says, that  
11 any interpretation of the Labor Commissioner regarding any  
12 IWC order will go directly to the IWC's executive director  
13 there. And hopefully, everyone will get copied with it.

14 COMMISSIONER CENTER: Thank you.

15 MR. LOCKER: So, I don't think we're going to have  
16 any problem. I can assure you of that.

17 To date, we haven't issued any opinion letters on  
18 AB 60, so, you know, there's really nothing yet to go out.

19 But I can say this, because we've been answering  
20 this question to people on the telephone, and I can tell you  
21 what our conclusion is on this, what our view is on this:  
22 that if you look at Section 510, what it talks about is --  
23 and that's Section 4 of AB 60 -- what it talks about is  
24 basically seventh day premium pay, we'll call it, as a  
25 component of overtime. And it talks about, for the seventh

1 day of work in any one workweek, the first 8 hours must be  
2 compensated at the rate of one and a half times the regular  
3 rate of pay.

4           Then, in a little bit of perhaps sloppy drafting,  
5 when it talks about -- it goes on to say any work in excess  
6 of 8 hours on any seventh day of the workweek shall be  
7 compensated at a rate of no less than twice the regular rate  
8 of pay. And the question is, when it talks about the double  
9 time provision on the seventh day of a workweek, are they  
10 talking about the seventh day of work in that workweek? And  
11 our conclusion is yes, they absolutely -- it has to be the  
12 seventh consecutive day of work in that workweek, because,  
13 if you think about it for a minute, it would really make  
14 very little sense, because what you'd be getting then is  
15 you'd be -- on a worker who, let's say, hasn't worked -- a  
16 part-time worker who hasn't worked 40 hours in a week who  
17 happens to -- you know, just a fortuity -- being working on  
18 the seventh day of that workweek. And maybe it's the only  
19 day that worker works. The first 8 hours, he or she would  
20 be paid at straight time, and then it would jump up to  
21 double time, and that really -- that would really be an  
22 anomaly that -- there's just no way that was intended.

23           And we'll completely address this in greater depth  
24 in the letter, but I can assure you that's how we're  
25 interpreting it.

1 COMMISSIONER CENTER: Thank you.

2 Susan Kraft.

3 MS. KRAFT: My name is Susan Kraft, and I'm the HR  
4 manager for a small 50-employee company called Safe,  
5 Incorporated, which stands for Security Loan Financing and  
6 Filers, Incorporated.

7 And I'm here -- actually, I'm going to change the  
8 subject a little bit from the whole entire day, and I want  
9 to talk about the payroll personnel liable for funds.

10 Actually, I'm just going to keep it short. And I  
11 just want to say a couple of concerns that we have. And  
12 that would be, we are very concerned with being able to hire  
13 for the payroll position because we would have to disclose  
14 to a potential candidate the liability involved in their  
15 accepting a payroll position.

16 I might also like to state that if someone  
17 endeavors to perform his or her job with honesty and  
18 integrity, it seems unfair therefore to penalize them for a  
19 simple error or oversight. And I'd really like to know how  
20 this came about, to charge the payroll employee clerk a fine  
21 -- first fine of \$50, which I think everybody knows an  
22 employer is not going to have the employee pay this fine.  
23 You know the employer is going to pay this fine. But how  
24 did this come about? That's what I want to know.

25 COMMISSIONER CENTER: I think our last speaker

1 will address that.

2 (Laughter)

3 MS. KRAFT: Also, I would like to submit today two  
4 signed letters, and then, later on, also, I will be mailing  
5 other letters. And I would like to submit that letter.

6 I really, really would like an answer on this,  
7 because I think everyone is human and I think everyone makes  
8 mistakes.

9 COMMISSIONER CENTER: Thank you.

10 Tom Rankin.

11 MR. RANKIN: Well, it's not surprising that a bill  
12 of this magnitude raises a lot of questions. But I'd like  
13 to begin with a little history of why we're here, because  
14 we're really not here because of -- we're here because what  
15 happened over the last couple of decades, or the last part  
16 of it, the IWC basically forgot what its mission was, which  
17 was to protect the workers of the State of California. And  
18 there were some signs of that, oh --

19 COMMISSIONER CENTER: You might want to identify  
20 yourself.

21 MR. RANKIN: Oh. Tom Rankin, California Labor  
22 Federation.

23 In, for instance, in 1987, when they adopted a  
24 minimum wage, they took it upon -- by "they," I say "they"  
25 because none of you guys were on it then -- they took it

1 upon themselves to try to circumvent the statute, which  
2 prevented tips from being credited against the minimum wage  
3 -- clear -- clearly outside of their authority.

4           Then, in 1989, I think they forgot that the  
5 workers were their clients and not the employers, and they  
6 began to institute 12-hour days in several wage orders.

7           In the 1990's, we went through a period of nine  
8 years without an increase in the minimum wage, even though  
9 the IWC's statutory duty was to review it every couple years  
10 and make sure it was high enough to provide the necessary  
11 costs of proper living. The result there was we had -- the  
12 result of a tip credit was, there was a court action and the  
13 IWC was overturned. Well, the result of not raising the  
14 minimum wage was that we had Proposition 210, which  
15 increased the minimum wage.

16           And then, the final blow was in 1998, when the IWC  
17 basically simply became the tool of the then-Governor of the  
18 State of California and did his bidding and did away with  
19 overtime in five wage orders, basically costing the workers  
20 of this state about a billion dollars a year.

21           That's why we're here. AB 60 was a reaction to  
22 that. AB 60 was the result of the Legislature deciding that  
23 it wasn't going to risk something as important to the  
24 workers of the State of California as overtime pay, it  
25 wasn't going to just leave that up totally to the IWC. So,

1 what it did was it put certain protections into statute, and  
2 it threw a lot of decisions to you to make, as to how the  
3 statute should be implemented and whether or not exemptions  
4 should be made and so forth.

5 But that's why we're here. It's because the IWC  
6 basically forgot who its client was. And now we have a  
7 reconstituted IWC, and I think we'll see a different result.

8 But in terms of the immediate task, we've heard a  
9 lot of talk about problems of the 12-hour day in  
10 manufacturing. That's done. I mean, the Legislature  
11 decided that. The Legislature also decided that pharmacists  
12 were not going to be exempted as professionals, and I find  
13 it absolutely mind-boggling that the industry employing  
14 pharmacists now comes in and says, "Yeah, but we should  
15 exempt them as administrative employees." This is amazing.  
16 Pharmacists are in the same position as nurses. Nurses  
17 specifically are not exempted as professionals. They may,  
18 on a case-by-case basis, be exempted as administrative. But  
19 you're not here -- believe me, if you want to carry out the  
20 intent of the Legislature -- to rewrite the definition of  
21 administrative employee so all the pharmacists, who the  
22 Legislature just decided should get overtime pay, are now  
23 going to be exempted from overtime pay because they're  
24 administrators. It really -- it really -- it really boggles  
25 the mind, that one.

1           But what you have to do immediately, I think, is  
2 to provide clarification for both employees and employers  
3 about what's going to happen January 1st. And there are  
4 certain things that are set in the statute. The Legislature  
5 put them in the statute. That's what those workers need to  
6 know, because a lot of workers were forced, whether they  
7 liked it or not, without any say in it, in the last couple  
8 years, to work 10-hour days, 12-hour days, without overtime.  
9 They're not in that position any more, and they have to know  
10 that they are eligible for overtime if they're working more  
11 than 8 hours a day.

12           So, that, I think, is your main duty. And then  
13 there are other -- so, notice things that need to be done.  
14 I think it's clear from testimony of the Labor Commissioner,  
15 it's also our position and was very clear when this bill was  
16 going through the Legislature, that construction and those  
17 other two or three industries are covered by statutory  
18 overtime effective January 1. Look at the analysis of the  
19 bill. Everyone knew this. The Chamber of Commerce was  
20 complaining about it. This was one of their arguments  
21 against the bill. And we have people now coming here and  
22 saying, "What's going on? We're covered?" Well, of course  
23 they're covered. It's too late to change that one.

24           Now, you know, what happens in the lawsuit saying  
25 that they were covered all along by Wage Order 4 is another

1 thing. But whether the plaintiffs in that suit prevail or  
2 not, the statute says they're covered January 1st. So, I  
3 don't think -- but I do think that they need to be notified,  
4 and the employees in the industries need to be notified that  
5 that's the case, as of January 1st they're entitled to  
6 overtime after 8 hours a day.

7 I think also you need to notify both workers and  
8 employers of the new wage test for the managerial,  
9 professional, and administrative exemptions. And that's the  
10 difference there. The Legislature didn't play around with  
11 the 51 percent rule. The Legislature increased the dollar  
12 amount needed to be a manager, and it said to you, "You  
13 should review the duties." It didn't say you had to change  
14 them, and it certainly did nothing to the 51 percent rule.  
15 The simplest thing there probably is just to leave it alone.  
16 You have to review it.

17 But it wasn't -- there was no intent to have a  
18 wholesale change in that part of the law. That part of the  
19 law is pretty well settled. The main thing to know there is  
20 there's a new wage criteria.

21 Then, I think employees should be informed of the  
22 new rights they have to request what we call make-up time,  
23 to request time off and that they can make it up later in  
24 the week without being paid overtime. And I think it's  
25 important that you do that so that employers don't -- you

1 know, if -- someone testified about their concern because  
2 employers aren't allowed to solicit. Well, the simplest way  
3 to solve that problem is to -- is for an IWC notice to go  
4 out, which employers could post, and the IWC has notified  
5 employers (sic), and then there's no -- employees, and then  
6 there's no question about employers soliciting people to  
7 take make-up time.

8           Finally, I think you need to deal perhaps with the  
9 procedure for an employee to request a continuation of an  
10 alternative workweek that was in place before July 1, 1999.  
11 This provision was put into the bill at a relatively late  
12 date, and it basically says that if the employee was  
13 voluntarily -- and I stress the word "voluntarily" --  
14 working, say, a 10-hour day before July 1st, 1999, they can  
15 go to the employer with a written request and say, "I want  
16 to continue on that 10-hour day," and the employer has to  
17 let them continue a 10-hour day. And, you know, we want --  
18 we want this implemented fairly, and we want it made clear  
19 that employers -- we don't want employers abusing this. So,  
20 if they instituted a change, a 10- or 12-hour day, by fiat,  
21 they're not going to go around to employees and say, "You'd  
22 better sign something asking to continue on that day."  
23 That's not the way this is supposed to work. This provision  
24 was put in to benefit workers, not to benefit employers who  
25 don't want to pay overtime pay.

1           So, you have a lot to do, I think, at your January  
2 meeting and before then, to get these things ready.

3           And all this myriad of other issues, about  
4 exemptions and you have to deal with election procedures and  
5 so forth, that should be your second task. But I think,  
6 right now, you need to concentrate on how to have a smooth  
7 transition to this new situation January 1 of 2000. And it,  
8 I'm sure, will be a smoother transition than the transition  
9 that many employees faced when they were suddenly told, when  
10 the new IWC wage orders went into effect, "You're not  
11 getting overtime and you're not getting double time any more  
12 for working 12 hours a day, you're not getting overtime for  
13 working 8 hours a day, you're out of luck." Employees had  
14 no transition whatsoever.

15           So, I'm looking forward to working on your new  
16 regulations. We will be providing you with our suggestions  
17 in terms of the areas that I mentioned that need  
18 notification on January -- as soon as possible in January.

19           COMMISSIONER BROAD: Tom, would you make sure that  
20 you comment on two things, the collective bargaining  
21 exemption, which has this language in it that says "premium"  
22 -- requires -- "the exemption only applies if the agreement  
23 provides premium pay wage rates for all overtime hours  
24 worked," whereas the old wage orders said "for overtime  
25 hours worked." It's caused a bit of confusion and we'd like

1 your input, I think. At least I would like your input as to  
2 what you meant by that and how we should be interpreting  
3 that, because that's something that goes into effect January  
4 1 as well.

5 And secondly, with respect to those four  
6 industries, I think it would be helpful if the legislative  
7 history suggests that this issue was clear before the  
8 Legislature and the Legislature understood that these  
9 industries would be covered on January 1, that we have in  
10 our record evidence of that legislative history, whether  
11 it's the letters of opposition from the Chamber of Commerce  
12 or committee analyses, or whatever.

13 MR. RANKIN: Okay. Thank you.

14 COMMISSIONER CENTER: Maybe comment here to our  
15 other speaker about the payroll clerk being liable. Is  
16 there a little bit more on that?

17 MR. RANKIN: Oh, yeah. That, I -- I don't think  
18 that's new language in this bill. It's not meant to -- that  
19 a payroll clerk would be liable; it's meant that someone who  
20 acts with a higher degree of authority for the employer than  
21 a payroll clerk. That's at least the Labor Commissioner's  
22 interpretation, and I would agree with that. It's not meant  
23 to someone -- a bookkeeper is personally liable.

24 COMMISSIONER BROAD: So, it would be like if you  
25 are an employer and you use ADP or Paychecks to do your

1 payroll service, and they just stop paying the people the  
2 right wage or don't calculate overtime, that entity could be  
3 -- I'm not sure what it --

4 MR. RANKIN: Well, I hadn't thought of that.  
5 Maybe Miles has an answer to that one.

6 You're saying ADP does this, you give them the --  
7 the employer gives them the right records and they are then  
8 playing games with their payroll?

9 COMMISSIONER BROAD: Something happens where  
10 people are just paid inaccurately for, say, a long period of  
11 time. That could happen easily. You know, they misclassify  
12 someone -- I don't know.

13 MR. LOCKER: Well, I think the intent here, and  
14 the way the Labor Commissioner intends to enforce this is,  
15 first of all, any penalty -- we're primarily going to be  
16 looking at the employer, because the employer is ultimately  
17 liable for payment of proper overtime. I mean, the employer  
18 might delegate it to some outside payroll service, but  
19 ultimately this is a liability on the employer.

20 Now, with respect to the language in AB 60 that  
21 talks about the employer or any agent acting on behalf of  
22 the employer, I think what we're looking at there is, if we  
23 were to take it one step beyond that, I think we'd only be  
24 looking, really, at someone who devises a policy that is an  
25 unlawful policy, someone, for example, let's say, up the

1 corporate chain who says, "I don't care about these  
2 pharmacists and what the law says; we're not paying them  
3 overtime, period; I don't care about the law," as opposed to  
4 the payroll clerk who, you know, is simply being told, "This  
5 is how to do the payroll; don't give these people overtime."  
6 That person doesn't have a significant, meaningful choice in  
7 this matter. So, what we're really looking at is not who  
8 executes the policy, but who would be implementing -- excuse  
9 me -- not who implements the policy, but who devises the  
10 policy, with that regard.

11 COMMISSIONER CENTER: Thank you. Any other  
12 questions?

13 Would you like to make comment or --

14 MR. MILLS: (Not using microphone) It just sounds  
15 like the assumption is that somebody's doing this  
16 intentionally. And I think there's always human error. And  
17 what happens in a situation like that?

18 COMMISSIONER CENTER: You should come up and  
19 identify yourself on that.

20 MR. MILLS: (Not using microphone) I'm Fred  
21 Mills.

22 THE REPORTER: Come up to the mike so we can  
23 record.

24 COMMISSIONER CENTER: We just need the mike to  
25 record.

1           MR. MILLS: I'm Fred Mills, and I was listening to  
2 the response, and it sounded to me like the response was  
3 directed toward somebody making a decision to violate the  
4 law or to not pay overtime. What happens if somebody or a  
5 company makes a mistake?

6           MR. LOCKER: Well, obviously, in enforcing the  
7 penalty provisions of AB 60, this is something that DLSE is  
8 going to have to go out on a case-by-case basis and decide  
9 whether or not it's appropriate to issue a penalty.

10           The law itself, though, provides that an employer  
11 or the person acting on behalf of an employer who violates  
12 or causes to be violated the provisions of this law shall be  
13 subject to a civil penalty. It's similar right now to what  
14 the Labor Code provides, I believe, the civil penalties with  
15 respect to minimum wage violations. There's nothing new  
16 here.

17           And basically, I have to say that ignorance of the  
18 law is not an excuse here. Again, in terms of the  
19 discretion the Labor Commissioner has on a case-by-case  
20 basis to go out and decide whether or not to issue a penalty  
21 or not, that's going to be something that, you know, the  
22 Labor Commissioner will deal with on a case-by-case basis.  
23 But the law is very clear that the penalty, you know,  
24 attaches based on a violation of the law, period.

25           COMMISSIONER BROAD: The one thing that's, you

1 know, from the perspective of the payroll clerk, is we  
2 really don't want employers to create some kind of scheme  
3 where they cook up some thing, wink and a nod, they don't --  
4 you know, "Don't violate the law," but the message is sent  
5 out to a payroll clerk, who then becomes the fall person for  
6 some scheme which they're ordered to do. And that would be  
7 really bad.

8 MR. LOCKER: Well, I think, precisely. That's why  
9 the Labor -- I mean, despite the language in there that  
10 talks about any agent of the employer who causes to be  
11 violated or violates these provisions, clearly what we're  
12 not looking at is -- we're not looking down a chain and  
13 seeing, you know, ultimately someone's told to do something  
14 and they have to do it. The payroll clerk, to keep his or  
15 her job, has to do this. That's not what this penalty is  
16 about. I mean, that's -- I can assure everyone here that  
17 that's not the way the Labor Commissioner intends to enforce  
18 this.

19 COMMISSIONER CENTER: Thank you.

20 And, Tom, you'll get that information to us?

21 MR. RANKIN: Yes.

22 COMMISSIONER CENTER: Anyone else who would like  
23 to address the Commission?

24 MR. EWERT: Chairman Center, members of the  
25 Commission, I'll make this real brief. My name is Jim

1 Ewert, from the California Newspaper Publishers Association.

2           And we just learned today, as everybody did, that  
3 you intend to release the draft regulations for the next  
4 meeting on December 15th. And we just urge you to provide  
5 as much notice as possible and to get those regulations out  
6 so that the public has as much opportunity to review the  
7 draft regulations as they possibly can and provide you with  
8 good, salient comments at that December 15th meeting, even  
9 though you're not going to be voting on it. Otherwise,  
10 you're not going to have the opportunity, as the Commission,  
11 to take into account any of those comments if the  
12 regulations have changed.

13           COMMISSIONER CENTER: Our goal is to release them  
14 December 15th, and you'll have 30 days to provide comment  
15 before we consider them at the January meeting.

16           MR. EWERT: I understand that. But at your  
17 January meeting, if you intend to vote on them at that time,  
18 any comments that someone may have that may result in a  
19 change to the regulation, you won't be giving yourselves the  
20 opportunity to do so.

21           COMMISSIONER CENTER: We can amend at the meeting.  
22 But give us written comments as soon as possible, to the  
23 commissioners through Mr. Baron.

24           MR. EWERT: Okay. Can I also suggest that you  
25 utilize your Web site to post those?

1 COMMISSIONER CENTER: That's our intention.

2 MR. EWERT: That would be great.

3 Thank you.

4 COMMISSIONER CENTER: With that, I'd entertain a  
5 motion to adjourn.

6 COMMISSIONER DOMBROWSKI: So moved.

7 COMMISSIONER CENTER: Second?

8 COMMISSIONER BROAD: Second.

9 COMMISSIONER CENTER: All in favor?

10 (Chorus of "ayes")

11 COMMISSIONER CENTER: Opposed?

12 (No response)

13 COMMISSIONER CENTER: Motion is carried.

14 (Thereupon, at 3:16 p.m., the public  
15 meeting was adjourned.)

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CERTIFICATE OF REPORTER/TRANSCRIBER

--o0o--

I, Cynthia M. Judy, a duly designated reporter and transcriber, do hereby declare and certify under penalty of perjury under the laws of the State of California, that I transcribed the four tapes recorded at the Public Meeting of the Industrial Welfare Commission, held on November 15, 1999, in San Francisco, 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 29, 1999

\_\_\_\_\_  
CYNTHIA M. JUDY  
Reporter/Transcriber