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DEPARTMENT OF INDUSTRIAL RELATIONS
INDUSTRIAL WELFARE COMMISSION

Public Meeting

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

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Industrial Welfare Commission

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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