No. E072704

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION TWO

NICOLE WOODWORTH,

Plaintiff-Appellant,

vs.

LOMA LINDA UNIVERSITY MEDICAL CENTER,

Defendant-Respondent.

On Appeal From The Superior Court Of California, San Bernardino
Case No. CIVDS1408640
The Honorable David Cohn, Presiding

AMICUS CURIAE CALIFORNIA HOSPITAL ASSOCIATION'S MOTION FOR JUDICIAL NOTICE IN SUPPORT OF *AMICUS* BRIEF

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MOTION FOR JUDICIAL NOTICE

Pursuant to California Rule of Court 8.252 and California Evidence Code Sections 452, 453 and 459, *amicus curiae* California Hospital Association requests that the Court take judicial notice of the documents attached as Exhibits A through F to the Declaration of Kiran A. Seldon.

- Exhibit A is a true and correct copy of the Statement as to the Basis of Amendments to Sections 2, 3, and 11 of the Industrial Wage Commission (IWC) Order 5-89 (effective August 21, 1993).
- Exhibit B is a true and correct copy of the IWC Statement as to the Basis of various amendments to IWC Wage Orders 1 through 15 (effective January 1, 2001).
- Exhibit C is a true and correct copy of the Notice of Public Hearing of the Industrial Welfare Commission of May 26, 2000 (issued April 25, 2000).
- Exhibit D is a true and correct copy of the Minutes of Public Hearing of the Industrial Welfare Commission of May 26, 2000 (issued July 5, 2000).
- Exhibit E is a true and correct copy of Attachment A to the Transcript of June 30, 2000 IWC Public Hearing.
- Exhibit F is a true and correct copy of relevant excerpts from the Transcript of June 30, 2000 IWC Public Hearing.

The Exhibits are properly the subject of judicial notice and are relevant to the issues before the Court.

Courts may take judicial notice of (1) official acts of the legislative, executive, and judicial departments of the United States, and (2) facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. *See* Cal. Evid. Code Sections 452 (c) and (h). "Official acts" include reports, records, and orders of administrative agencies. *Rodas v. Spiegel*, 87 Cal.App.4th 513, 518 (2001).

The IWC is a state agency that was established to regulate wages, hours, and working conditions in California. *Brinker Rest. Corp. v. Superior Court*, 53 Cal.4th 1004, 1026 (2012). Exhibits A through F, reflecting the IWC's public hearing notices, transcripts, and minutes, as well as Statements as to the Basis for its Wage Orders, are official acts of an administrative agency that are subject to judicial notice. *See e.g. California Sch. of Culinary Arts v. Lujan*, 112 Cal.App.4th 16, 26 (2003) (taking judicial notice of "orders, minutes, and findings of IWC.").

These exhibits also are available on the website of a state agency (the Department of Industrial Relations), and, therefore, are subject to judicial notice as facts "capable of immediate and accurate determination." Cal. Evid. Code Section 452(h); *see e.g. Moehring v. Thomas*, 126

Cal.App.4th 1515, 1523 (2005)(granting judicial notice of reports on federal agency websites).

The above documents are relevant to a number of issues before this Court:

First, plaintiff-appellant Woodworth argues that defendant-respondent Loma Linda University Medical Center's AWS disclosures were insufficiently detailed to satisfy Wage Order 5's election disclosure requirements. Exhibits A through F demonstrate that, even as healthcare industry and labor interests worked together to enact more detailed election procedures, they did *not* amend the written disclosure requirement. The fact that industry and labor interests, along with the IWC, considered and *rejected* a more detailed written disclosure requirement confirms that these disclosures were never intended to be, as Woodworth contends, hyper-technical and detailed recitations of every working condition and contingency.

Second, these exhibits reflect that AWS arrangements in the healthcare sector are popular with and benefit both healthcare employers and employees, which is a relevant policy consideration for the Court to take into account. To overturn these popular and beneficial arrangements based on Woodworth's nit-picking of Loma Linda's detailed disclosures would create a harmful precedent for the healthcare sector.

Third, the exhibits are relevant because they rebut Woodworth's argument that employers have no right to repeal AWS's. Specifically, Exhibit C shows that, at one point, the IWC proposed adding a provision to the Wage Orders that would set limits on an employer's right to repeal an AWS. The IWC ultimately did not include this limitation in the Wage Orders, thus signaling its intent not to regulate employer repeals of AWS's.

CONCLUSION

For the foregoing reasons, the California Hospital Association respectfully requests that the Court take judicial notice of the documents attached hereto as Exhibits A through F.

Dated: May 4, 2021 SEYFARTH SHAW LLP

Kiran Aftab Seldon

Jeffrey A. Berman
Kiran Aftab Seldon
Counsel for *Amicus Curiae*
California Hospital Association

DECLARATION OF KIRAN A. SELDON

1. I am an attorney licensed to practice law in the state of California and before this Court. I am senior counsel in the law firm of Seyfarth Shaw LLP, attorneys of record for *amicus curiae* California Hospital Association ("CHA"). I have personal knowledge of the matters stated herein, and if called upon, I could and would competently testify thereto. I make this declaration in support of CHA's Motion for Judicial Notice.

2. Attached as Exhibit A is a true and correct copy of the Statement as to the Basis of Amendments to Sections 2, 3, and 11 of the Industrial Wage Commission (IWC) Order 5-89 (effective Aug. 21, 1993), which I printed from the website of the Department of Industrial Relations (DIR) at www.dir.ca.gov/iwc/Wageorder5_89_Amendments.html.

3. Attached as Exhibit B is a true and correct copy of the IWC Statement as to the Basis of various amendments to IWC Wage Orders 1 through 15 (effective January 1, 2001), which I printed from the DIR website at https://www.dir.ca.gov/iwc/statementbasis.pdf.

4. Attached as Exhibit C is a true and correct copy of the Notice of Public Hearing of the Industrial Welfare Commission of May 26, 2000 (issued April 25, 2000), which I printed from the DIR website at https://www.dir.ca.gov/iwc/52600hearingnotice.html.

5. Attached as Exhibit D is a true and correct copy of the Minutes of Public Hearing of the Industrial Welfare Commission of May 26, 2000 (issued July 5, 2000), which I printed from the DIR website at https://www.dir.ca.gov/iwc/Minutes52600.html.

6. Attached as Exhibit E is a true and correct copy of Attachment A to the Transcript of June 30, 2000 IWC Public Hearing, which I printed from the DIR website at www.dir.ca.gov/iwc/PUBHRG6302000.pdf.

7. Attached as Exhibit F is a true and correct copy of relevant excerpts from the Transcript of June 30, 2000 IWC Public Hearing, which I printed from the DIR website at www.dir.ca.gov/iwc/PUBHRG6302000.pdf.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct.

Executed on May 4, 2021 at Los Angeles, California.

Kiran A. Seldon
Kiran A. Seldon

EXHIBIT A

Amendments to
Secs. 2, 3, and 11
Order 5-89
Title 8 California Code of Regulations 11050
Effective August 21, 1993

Amendments to Sections 2, 3, and 11 of
INDUSTRIAL WELFARE COMMISSION ORDER NO. 5-89
REGULATING

PUBLIC HOUSEKEEPING INDUSTRY

These changes affect only the health care industry

OFFICIAL NOTICE

To employers and representatives of persons in occupations covered by IWC Order No. 5-89 who work in the health care industry:

The Industrial Welfare Commission (IWC) Of the State of California proceeded according its authority in the Labor Code and the Constitution of California, and concluded that Sections 2, 3, and 11 of its Order 5-89, regulating the Public Housekeeping Industry, should be amended to affect persons who work in the health care industry. The IWC promulgated these amendments to Order 5-89, made pursuant to the special provisions of Labor Code Section 1182.7, on June 29, 1993. The amendments become effective on August 21, 1993. The amendments become effective on August 21, 1993.

All other provisions of Section 2, Definitions, Section 3, Hours and Days of Work, and Section 11, Meal Periods, and all other sections of Order 5-89 remain in full force and effect.

The amendments allow more flexibility with respect to work scheduling, managerial and administrative exemptions and the definition of hours worked for compensation. They apply only to persons covered by this order who work in the health care industry. This includes, but is not limited to, all employees who work for hospitals, skilled nursing facilities, intermediate care and residential care facilities, convalescent care institutions, and similar establishments.

The amendments printed in this mailer must be posted next to the calendar-style poster on which the entire Order 5-89 is printed, and which should already be posted where employees can read it.

The reasons for the changes accompany the amendments in the Statement as to the Basis, provided for you information. If you have any questions on interpreting the amendments or how they apply to you, please contact your nearest Division of Labor Standards Enforcement office, list below. If you need additional copies of this amendment, please write to:

Division of Labor Standards Enforcement,
P. O. Box 420603
San Francisco, CA 94142-0603

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2. **DEFINITIONS**

(The following language is added to Section 2, *Definitions*, subsection (H).)

(H)…Within the health care industry, the term "hours worked" means the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, as interpreted in accordance with the provisions of the Fair Labor Standards Act.

(The following language is added to Section 2, *Definitions*, subsection (L).)

(L)…Within the health care industry, the term "primarily" as used in Section 1, Applicability, means (1) more than one-half the employee's work time as a rule of thumb or, (2) if the employee does not spend over 50 percent of the employee's time performing exempt duties, where other pertinent

(The following language replaces subsection (K) in Section 3, *Hours and Days of Work*.)

K. Employees in the health care industry may work on any days any number of hours a day up to twelve (12) without overtime, as long as the employer and at least two-thirds (2/3) of the affected employees in a work nit agree to this flexible work arrangement, in writing, in a secret ballot election before the performance of work, provided:

(1) An employee who works beyond twelve (12) hours in a workday shall be compensated at double the employee's regular rate of pay for all hours in excess of twelve (12);

(7) For purposes of this subsection, affected employees may include all employees in a readily identifiable work unit, such as a division, a department, a job classification, a shift, a separate physical location, or a recognized subdivision of any such work unit. A work unit may consist of an individual employee as long as the criteria for an identifiable work unit in this subsection are met.

(The following is added to Section 3, *Hours and Days of Work*, as subsection (L).)

(L) When an employee in the health care industry requests in writing, and the employer concurs, the employee shall be permitted to make up work time lost as a result of personal obligations. The amount

factors support the conclusion that management, managerial, and /or administrative duties represent the employee's primary duty. Some of these pertinent factors are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, the employee's relative freedom from supervision, and the relationship between the employee's salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor.

3. HOURS AND DAYS OF WORK

(The following language replaces subsection (C) in Section 3, *Hours and Days of Work*.)

(C) No employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises shall be deemed to have violated any provision of this Section if, pursuant to an agreement or understanding arrived at between the employer and employee before performance of the work, a work period of fourteen (14) consecutive days is accepted in lieu of the workweek of seven consecutive days for purpose of overtime computation and if, for any employment in excess of eight (8) hours in any workday and in excess of eighty (80) hours in such fourteen (14) day period, the employee receives compensation at a rate not less than one and one-half (1) times the regular rate at which the employee is employed., provided:

(1) An employee who works beyond twelve (12) hours in a workday shall be compensated at double the employee's regular rage of pay for all hours in excess of twelve (12);

(2) An employee who works in excess of forty (40) hours in a workweek shall be compensated at one and one-half (1) times the employee's regular rate of pay for all hours over forty (40) hours in a workweek;

(2) An employee who works in excess of forty (40) hours in a workweek shall be compensated at one and one-half (1) times the employee's regular rate of pay for all hours over forty (40) in the workweek;

(3) Prior to the secret ballot vote, any employer who proposes to institute a flexible work arrangement shall make a disclosure in writing to the affected employees, including the effects of the proposed arrangement on the employees' wages, hours, and benefits. Such a disclosure shall include meeting(s), duly noticed, held at least fourteen (14) days prior to voting, for the specific purpose of discussing the effects of the flexible work arrangement. Failure to comply with this section shall make the election null and void;

(4) The same overtime standards shall apply to employees who are temporarily assigned to a work unit covered by this subsection;

(5) Any employer who institutes an arrangement pursuant to this subsection shall make a reasonable effort to find an alternative work assignment for any employee who participated in the secret ballot election and is unable or unwilling to comply with the agreement. An employer shall not be required to offer an alternative work assignment to an employee if an alternative assignment is not available or if the employee was hired after the adoption of the flexible work arrangement. There is no maximum number of employees whom an employer may voluntarily accommodate consistent with its desire and ability to do so;

(6) After a lapse of twelve (12) months and upon petition of a majority of the affected employees, a new secret ballot election shall be held and a two-thirds (2/3) vote of the affected employees shall be required to reverse the arrangement above. If the arrangement is revoked, the employer shall comply within sixty (60) days. Upon a proper showing by the employer of undue hardship, the Division may grant an extension of time for compliance; of make up time shall not exceed two (2) hours in any one workweek or, where applicable, four (4) hours in any one fourteen (14) day work period and must be made up during that workweek or work period, whichever is applicable. With the exception of the make up time authorized in this subsection, the appropriate overtime provisions in Section 3 shall apply to all other excess daily or weekly hours worked in the workweek or fourteen (14) day work period.

11. MEAL PERIODS

(The following is added to Section 11, *Meal Periods*, as subsection (C).)

(C) Notwithstanding any other provision of this order, employees in the health care industry who work shifts in excess of eight (8) total hours in a workday may voluntarily waive their right to a meal period. In order to be valid, any such waiver must be documented in a written agreement that is voluntarily signed by both the employee and the employer. The employee may revoke the waiver at any time by providing the employer at least one day's written notice. The employee shall be fully compensated for all working time, including any on-the-job meal period, while such a waiver is in effect.

Amendments adopted in San Francisco on June 29, 1993. Amendments effective August 21, 1993.

INDUSTRIAL WELFARE COMMISSION STATE OF CALIFORNIA

Lynnel Pollack, Chairperson
James rude
Robert Hanna
Donald Novey
Dorothy Vuksich

Statement as to the Basis of Amendments to Sections 2, 3, and 11 of Industrial Welfare Commission Order No. 5-89

Labor Code Sec. 1182.7 requires Industrial Welfare Commission being devoted to exempt duties. On June 29, 1993, the IWC adopted language consistent with the FLSA, which hours a day under certain protective conditions. The new language

(IWC) to provide accelerated review of petitions filed by organizations recognized in the health care industry who request amendments to an IWC order directly affecting only the health care industry. Under this authority, the California Association of Hospitals and Health Systems (CAHHS) petitioned the IWC to amend and/or clarify certain sections of Order 5, solely for employers and employees in the health care industry. The IWC accepted the petition which proposed to redefine "primarily" and 'hours worked" to parallel federal law in Section 2, *Definitions;* to clarify and expand regulations regarding flexible schedules and overtime in Section 3, *Hours and Days of Work*; and to permit employees to waive meal periods in Section 11, *Meal Periods*. The IWC held three public hearings on its proposals in April 1993.

After deliberating on all the evidence presented with respect to its proposals, the IWC adopted amendments to Order 5 for the health care industry on June 29, 1993, and offers the following statement as to the basis for its actions:

DEFINITIONS

Testimony suggested the current DLSE interpretations of "hours worked" were "unduly narrow" resulting in "substantial confusion and serious technical problems," and consistency with the Fair Labor Standards Act (FLSA) would eliminate this confusion. In response to testimony presented at the public hearings that the reference to "29 CFR Part 785" was unclear, the IWC amended that language and referred to "the Fair Labor Standards Act" instead, a term more easily understood by the public. On June 29, 1993, the IWC adopted language to assure "hours worked" in the health care industry would be interpreted in accordance with the FSLA, the regulations interpreting the FLSA including, but not limited to, those contained in 29 CFR Part 785, and federal court decisions. The clarification confirms the IWC's intention that issues related to working time will be resolved consistently under state and federal law.

With respect to redefining "primarily" for the health care promoted clarity and compliance while providing needed flexibility to allow exempt executive and administrative employees to perform nonexempt duties without losing their exempt status. In response to public comment suggesting the term "other pertinent factors" was unclear and confusing to employees, the IWC clarified the meaning of that item by listing some, but not all, examples of pertinent factors.

HOURS AND DAYS OF WORK

With respect to the petitioner's request to amend Order 5 so that the IWC's standard for a 14-day work period conformed with federal law, the IWC was advised that while such work periods are ordinarily implemented on a departmental-wide or institutional-wide basis, DLSE's interpretation of the current regulation would allow one employee "to destroy the validity of such an arrangement by individually insisting of a seven day workweek standard." Public testimony in favor of the proposal claimed it set a "reasonable standard" one similar to the FLSA. Other arguments suggested a change was necessary to prevent individual employees from "opting in and out" of 14-day work periods because such activity could prove disruptive to established arrangements. Those opposed to the IWC's proposal objected to deleting language referring to a "written agreement or understanding voluntarily arrived at" from the current regulation, protections not found in the FLSA. On June 29, 1993, the IWC adopted its original proposal regarding the 14-day work period because it provided for a more stable working environment by clarifying how 14-day work periods would be consistently calculated and because it confirmed the IWC's intention that the California standard parallels the federal standard. Finally, the WIC stated its intent that flexible work arrangements, such as allowing employees to work up to 12 hours a day without overtime, and 14-day work periods, were mutually exclusive of one another and thus cannot be used simultaneously for the same employees.

Testimony supported the petitioner's claims that DLSE's interpretations regarding the flexible scheduling rules adopted in 1986 and 1988 limited desirable options for employees and frustrated the IWC's intent of more, not less, flexibility. Many at a "reduced rate of pay," with overtime after eight hours a day. Although this practice is permissible, it sometimes adversely affected their benefits and pensions-in order to cope with DLSE's overly "restrictive" policies. Other employees said they preferred to "mix days off" and working the same days each week was an "unrealistic" practice. The revised language clarifies the IWC's original intent to maximize flexibility in scheduling so that the days and hours of work can vary. While some employees argued part-time employees who have flexible work arrangements should be paid premium wages when asked to work beyond their normal part-time arrangements, by the end of the public hearings, most employees agreed requiring premium wages for part-time or temporary employees who work less than 12 hours a day or 40 hours a week is unfair to full-time workers in the same work unit who earn straight time pay for the same daily and weekly hours. While a few employees suggested the "secret ballot election process" allowed under the IWC orders was "flawed" due to "lack of oversight," the Labor Commissioner testified DLSE had received few, if any, complaints regarding the election process.

After evaluating all the evidence, on June 29, 1993, the allowing flexible work arrangements permits employers and employees maximum daily and weekly scheduling flexibility, including but not limited to allowing employees to work overtime on a regular basis, as long as the appropriate premium wages are paid for work after twelve (12) hours a day, or in the case of weekly overtime, forty (40) hours a workweek. Moreover, the final language clarified only one meeting regarding disclosure need be held when not more than one meeting is necessary. The IWC intended the same overtime standards to apply to all employees in a work unit regardless of full-time, part-time, on-call, replacement, permanent, or temporary status. The new rules do not invalidate any arrangement that was implemented prior to their effective date.

With respect to allowing employees in the health care industry to make up work time lost as a result of personal obligations, the IWC proposed and eventually adopted the petitioner's suggested language. The IWC agreed the request was reasonable and balanced the needs of employees and employers. Moreover, the language provided flexibility on an as needed basis without requiring a group vote or long-term schedule change.

MEAL PERIODS

The petitioner requested the IWC to allow employees in the health care industry who work sifts in excess of eight (8) total hours in a workday to waive their right to "any" meal period or meal periods as long as certain protective conditions were met. The vast majority of employees testifying at public hearings supported the IWC's proposal with respect to such a waiver, but only insofar as waiving "a" meal period or "one" meal period, not "any" meal period. Since the waiver of one meal period allows employees freedom of choice combined with the protection of at least one meal period on a long shift, on June 29 1993, the IWC adopted language which permits employees waive a second meal period provided the waiver is documented in a written agreement voluntarily signed by both the employee and the

industry, the IWC decided since it had examined the professional component of the administrative/executive/professional exemption and adopted language to exempt learned and artistic professions as recently as 1989, it was time to respond to demands for a more flexible application of the executive/ administrative exemption than the rigid 51 percent rule. Employees testified current regulations sometimes resulted in treating an employee as nonexempt under a rigid application of a 51 percent rule, such as where emergency or other conditions resulted in less than 51 percent of the time

IWC adopted its proposal to amend flexible scheduling rules

so that an individual employee in the healthcare industry could agree with his or her employer to

work on any days any number of

employer, and the waiver is revocable by the employee at any time by providing the employer at least one day's notice.

INDUSTRIAL WELFARE COMMISSION

EXHIBIT B

STATEMENT AS TO THE BASIS

TAKE NOTICE Pursuant to the "Eight-Hour-Day Restoration and Workplace Flexibility Act," Stats. 1999, ch. 134 (commonly referred to as "AB 60"), the Legislature reaffirmed the State's commitment to the eight-hour workday standard and daily overtime, and authorized workers to adopt regularly scheduled alternative work days and weeks according to statutory and regulatory provisions. The Industrial Welfare Commission of the State of California ("IWC"), in accordance with the authority vested in it by the California Constitution, Article 14, Section 1, as well as Labor Code §§ 500-558, and 1171-1204, held public meetings and investigative hearings during which it received public comment regarding the implementation of AB 60 and, on March 1, 2000, the IWC's Interim Wage Order - 2000 became effective. The IWC subsequently has held additional public meetings and public hearings pursuant to Labor Code §517(a) to further review all of its Wage Orders for purposes of complying with AB 60. The IWC has considered all correspondence, verbal presentations, and other written materials submitted prior to the adoption of amended wage orders. The IWC submits the following statement as to the basis for the various amendments made to sections 1, 2, 3, 4, 7, 9,11, 12, 17, and 20[1] of Wage Orders 1 through 15, and to the Interim Wage Order - 2000. The Statements as to the Basis for the remaining parts of the IWC's wage orders are contained in prior printings of those orders. These remaining parts have not been changed, and there is no need for an explanation because the IWC is continuing in effect regulations that have previously become a part of the standard working conditions of employees in this State.

1. APPLICABILITY OF ORDER

Amendments to this section apply to Wage Orders 1 through 13, 15, and the Interim Wage Order. Generally, the section now provides, in part, that employees employed in administrative, executive, and professional capacities are exempt from Sections 3 through 12 of these wage orders. According to the provisions of Labor Code § 515, the criteria that must be satisfied in order to obtain an exemption from overtime pay requirements based on the fact that an individual is an administrative, executive, or professional employee, are that the particular employee must be primarily engaged in duties which meet the test for the exemption, and earn a monthly salary of no less than two times the state minimum wage for full time employment. Labor Code § 515(e) defines "primarily" as "more than one-half of an employee's work time," and § 515(c) defines "full-time employment" as 40 hours per week.

[1]Please note that not all amendments apply to all of the wage orders, and that the sections of the Interim Wage Order are slightly different from the other wage orders. Please refer to the detailed Statement below.

Thus the Legislature has codified the longstanding IWC regulatory requirement that an employee must spend more than 50% of his or her work time engaged in exempt activity in order to be exempt from receiving overtime pay. The IWC notes that this California "quantitative test" continues to be different from and more protective of employees than, the federal "qualitative" or "primary duty" test. Unlike the California standard, federal law allows an employee that is found to have the "primary duty" of an administrator, executive, or professional to be exempt from overtime pay even though that employee spends most of his or her work time doing nonexempt work. Under California law, one must look to the actual tasks performed by an employee in order to determine whether that employee is exempt. In addition, the statutory threshold for monthly employee remuneration has substantially increased from the amounts set forth in prior IWC wage orders, and that remuneration must be received in the form of a salary.

In addition to the above requirements, Labor Code § 515(f) codified the IWC's existing treatment of registered nurses employed to engage in the practice of nursing. They are not to be considered exempt professional employees, and will not be considered exempt under Labor Code § 515(a) unless they individually meet the criteria established for executive or administrative employees. Similarly, Labor Code § 1186 (enacted by Senate Bill 651, Stats. 1999, ch. 190), provides that pharmacists employed to engage in the practice of pharmacy no longer qualify as exempt professional employees and must individually meet the criteria established for executive or administrative employees in order to be considered exempt under Labor Code § 515(a).

In accordance with the mandate of Labor Code § 515(a) and the expedited process for the promulgation of regulations authorized by § 517, the IWC conducted a review in order to determine the administrative, executive, and professional duties that meet the test of the exemption. The IWC held public meetings and hearings, and received verbal and written public comment in the form of testimony, correspondence, and legal argument regarding various proposals for exempt duties. The bulk of the information came from employers and employees involved in retail, restaurant, and fast food service businesses, as well as representatives of these groups. The IWC also received substantial comment from the legal community. The chief concern of all of these groups related to the distinction between executive managerial employees and nonexempt employees. Employees stated that it was common to have the title of a manager and not be paid overtime, yet perform many of the same tasks as other nonexempt employees during most of the workday. Many employers asked for specific action by the IWC, including the classification of work in settings, such as retail stores, where managers may spend a significant amount of time on the retail floor in the course of managing the operation and directing and supervising the staff. They argued that an employee should not lose his or her exempt manager status merely because he or she sometimes may have to chip in and perform nonexempt work. Attorneys representing employers argued that California should move toward the federal regulatory standards. Other attorneys representing employees reminded the IWC that use of federal regulations might conflict with California's more protective statutory requirement that, in order to be exempt, employees must be "primarily

engaged" in exempt work. The IWC determined that the way to harmonize these various and competing concerns was to focus on identifying the federal regulations that could be used to describe managerial duties within the meaning of California law. The purpose of identifying and referring to such regulations is to more clearly delineate managerial duties that meet the test of the exemption and to promote consistent enforcement practices.

The IWC also received testimony and correspondence from registered nurses regarding the loss of their exempt status as professional employees. The IWC received similar testimony and correspondence from pharmacists and pharmacy representatives. Some testimony reflected the desire to reinstate the professional exemption, while other testimony based on safety and accuracy considerations did not. In addition, advocates seeking an exemption for pharmacists urged that, if the professional exemption could no longer be used, the definition for the administrative exemption should be expanded to include the coverage of pharmacists. Arguments included greater flexibility, professional degrees, and their managerial and advisory duties. Testimony submitted against the allowance of an exemption cited strenuous working conditions, potential jeopardy to the quality of patient care, and the interest of minimizing medical errors. The IWC does not have the power to repeal Labor Code § 515(f) or1186, which explicitly require that registered nurses and pharmacists individually meet the administrative or executive criteria in order to qualify for an exemption. Accordingly, the IWC chose not to address regulations relating to registered nurses and pharmacists.

Advanced practice nurses, which is an umbrella term that includes nurse practitioners, clinical nurse specialists, certified registered nurse anesthetists, and certified nurse-midwives, submitted testimony advocating the continuation of their exempt status as professional employees. They noted, among other things, that they are not employed to engage in the practice of nursing, and they have advanced degrees in specialized areas, and/or special certification by the State of California. They further noted their 24-hour responsibility for patients, independent management duties, and the need for continuity of patient care as justification for status as exempt professionals. Health care organizations and health care employees both submitted comments and correspondence urging an exemption for advanced practice nurses. On the other hand, labor organizations representing advanced practice nurses testified that they should be treated no differently than other nurses. The IWC also received information regarding pending legislation (Senate Bill 88) that would provide exempt professional status to three types of advanced practice nurses. This legislation was enacted and signed by Governor Davis in September 2000. Accordingly, Sections 3-12 the IWC Wage Orders 1-13 and 15, and Sections 4 and 5 of the Interim Wage Order do not apply to certified nurse midwives, certified nurse practitioners, and certified nurse anesthetists, within the meaning of Articles 2.5, 7, and 8, of Business and Professions Code, Division 2, Chapter 6, who otherwise satisfy the requirements for the professional, executive or administrative exemption. (See Stats. 2000, ch. 492, amending Labor Code § 515.)

After digesting all the information received in its review, the IWC chose to adopt regulations for Wage Orders 1 - 13, and 15 that substantially conform to current guidelines in the enforcement of IWC orders, whereby certain Fair Labor Standards Act regulations (Title 29 C.F.R. Part 541) have been used, or where they have been adapted to eliminate provisions that are inconsistent with the more protective provisions of California law. The IWC intends the regulations in these wage orders to provide clarity regarding the federal regulations that can be used describe the duties that meet the test of the exemption under California law, as well as to promote uniformity of enforcement. The IWC deems only those federal regulations specifically cited in its wage orders, and in effect at the time of promulgation of these wage orders, to apply in defining exempt duties under California law.

Executive Exemption. The IWC derived the duties which meet the test for the executive exemption from language in the federal regulation 29 C.F.R. § 541.1(a)-(d), with one important exception. The reference in 29 C.F.R. § 541.1(a) to the phrase "primary duty" is omitted because, as discussed above, that phrase refers to a federal test that provides less protection to employees. Instead section A(1) generally refers to managerial duties and responsibilities, while section A(5) sets forth California's "primarily engaged" requirement. Section A(5) also refers to the federal regulations, 29 C.F.R. §§ 541.102, 541.104-541.111, 541.115-541.116, that may be used to describe exempt duties under California law. Included in these regulations are two which describe work and occasional tasks that are "directly and closely related" to exempt work. (29 C.F.R. §§ 541.108 and 541.110.) For example, time spent by a manager using a computer to prepare a management report should be classified as exempt time where use of the computer is a means for carrying out the exempt task. The IWC recognizes that 29 C.F.R. § 541.110 also refers to "occasional tasks" that are not "directly and closely related." The IWC does not intend for such tasks to be included in the calculation of exempt work. In addition, the last sentence of section A(5) comes from the California Supreme Court's decision in Ramirez v. Yosemite Water Co. (1999) 20 Cal.4th 785, 801-802. Although that case involved the exemption for outside salespersons, the determination of whether an employee is an outside salesperson is also quantitative: the employee must regularly spend more than half of his or her working time engaged in sales activities outside the workplace. In remanding the case back to the Court of Appeal, the California Supreme Court offered the following advice:

> "Having recognized California's distinctive quantitative approach to determining which employees are outside salespersons, we must then address an issue implicitly raised by the parties that caused some confusion in the trial court and the Court of Appeal: Is the number of hours worked in sales-related activities to be determined by the number of hours that the employer, according to its job description or its estimate, claims the employee should be working in sales, or should it be determined by the actual average hours the employee spent on sales activity? The logic inherent in the IWC's quantitative definition of outside salesperson dictates that neither alternative would be wholly satisfactory. On the one hand, if hours worked on sales were determined through an employer's job

> description, then the employer could make an employee exempt from overtime laws solely by fashioning an idealized job description that had little basis in reality. On the other hand, an employee who is supposed to be engaged in sales activities during most of his working hours and falls below the 50 percent mark due to his own substandard performance should not thereby be able to evade a valid exemption. A trial court, in determining whether the employee is an outside salesperson, must steer clear of these two pitfalls by inquiring into the realistic requirements of the job. In so doing, the court should consider, first and foremost, how the employee actually spends his or her time. But the trial court should also consider whether the employee's practice diverges from the employer's realistic expectations, whether there was any concrete expression of employer displeasure over an employee's substandard performance, and whether these expressions were themselves realistic given the actual overall requirements of the job."

The IWC, in summarizing the above language in its wage orders, intends to provide some guidance in the enforcement of its regulations. The IWC does not intend to modify or limit the California Supreme Court's statements or its decision.

Administrative Exemption. The IWC similarly derived the duties that meet the test for the administrative exemption from language in the federal regulation 29 C.F.R. § 541.2(a)-(c), with the exception of the "primary duty" phrase. Section B(1)(b), which restates 29 C.F.R. § 541.2(a)(2), refers to school administration, but is not intended to establish a different test with regard to school administration, or to affect the professional exemption as it relates to teachers, or to otherwise change existing law. Section B(4) sets forth the California "primarily engaged" requirement. That section also sets forth the federal regulations, 29 C.F.R. §§ 541.201-541.205, 541,207-541.208, 541.210, and 541.215, that may be used to describe exempt duties under State law. These regulations include types of administrative employees, categories of administrative work, and a description of what is meant by the phrase "discretion and independent judgment." The last sentence of section B(4) again summarizes the California Supreme Court's decision in Ramirez v. Yosemite Water Co. (1999) 20 Cal.4th at 801-802, quoted above. In summarizing that language, the IWC intends to provide some guidance in the enforcement of its regulations, and does not intend to modify or limit the California Supreme Court's statements or its decision.

Professional Exemption. The IWC developed the duties that meet the test for the professional exemption from the list of recognized professions contained in prior wage orders as well as from language in the federal regulations 29 C.F.R. § 541.3(a)(1), (2), and (4), and 541.3(b). The recognized professions are law, medicine, dentistry, optometry, architecture, engineering, accounting, and teaching. Although registered nurses and pharmacists were previously included in the list of recognized professionals, as discussed above, they can no longer be considered to be exempt as professionals. (Labor Code §§ 515(f) and 1186.) Teaching continues to require a certificate from the Commission for Teacher Preparation and

Licensing, or teaching in an accredited college or university, to be eligible for the professional exemption.

Employees subject to Wage Orders 1, 4, 5, 9, and 10 have had the "learned or artistic" aspect of the professional exemption available to them since 1993. The IWC found no reason to limit this aspect of the exemption to those five wage orders. The IWC therefore decided to include the "learned and artistic" provisions uniformly throughout all the wage orders. Section C(4) sets forth the federal regulations, 29 C.F.R. §§ 541.207, 541.301(a)-(d), 541.302, 541.306, 541.307, 541.308, and 541.310, that may be used to describe exempt duties under State law.

The new regulations in this section of the IWC's wage orders regarding the administrative, executive, and professional exemption are consistent with existing law and enforcement practices.

Recent legislative enactments provide exemptions from some or all of the provisions of the IWC's wage orders. In addition to an exemption for certain advanced practice nurses, SB 88, Stats. 2000, ch. 492, creates an exemption for certain employees in computer software fields. Sections 3-12 of IWC Wage Orders 1-13 and 15, and Sections 4 and 5 of the Interim Wage Order will not apply to employees in computer software fields who 1) earn forty-one dollars ($41.00) or more per hour, 2) are primarily engaged in work that is intellectual or creative and requires the exercise of discretion and independent judgment, and 3) are highly skilled and proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering within the meaning of added Labor Code § 515.5. In addition, effective January 1, 2001, the IWC's orders will not apply to any individual participating in a National Service Program, such as AmeriCorps, AmeriCorps NCCC, and Senior Corps, that carry out services with the assistance of grants from the Corporation for National and Community Service within the meaning of Title 42, United States Code, Section 12571. (See Stats. 2000, ch. 365, amending Labor Code § 1171.)

This section further provides that outside salespersons are exempt from the provisions of the IWC's wage orders. Pursuant to the requirements of Labor Code § 517(d), the IWC conducted a review of the wages, hours, and working conditions of outside salespersons and received testimony and correspondence on these matters. Some witnesses urged the IWC adopt a more expansive definition of an outside salesperson. Others asked the IWC to define more clearly those activities that are not "sales related." After considering proposals by both employers and employees, the IWC determined that it would not change its longstanding definition of "outside salesperson." (See Ramirez v. Yosemite Water Co., 20 Cal.4th 785.) However, the IWC notes that this exception is to be construed narrowly, as a determination that an employee is an outside salesperson deprives that employee of the protections of the wage orders and many other provisions of the Labor Code.

The provisions of Wage Order 10 now apply to all employees employed by an employer operating a business at a horse racing facility, including stable employees. Stable employees include, but are not limited to grooms, hotwalkers,

exercise workers, and any other employees engaged in the raising, feeding, or management of racehorses, employed by a trainer at a racetrack or other non farm training facility. Employees in the commercial fishing industry are now covered by wage orders 10 and 14.

The IWC received no compelling evidence, and concluded there was no reason at this time, to warrant making any other changes in the provisions of this section.

2. DEFINITIONS

Amendments to this section apply to Wage Orders 1 through 13, and 15. The IWC received testimony from employee and employer groups requesting clarification regarding what a workday and a workweek included. There was also confusion regarding the definition of an alternative workweek. The IWC adopted the following language into the Interim Wage Order - 2000: 1) "Workday" and "day" mean any consecutive 24-hour period beginning at the same time each calendar day; 2) "Workweek" and "week" mean any seven (7) consecutive days, starting with the same calendar day each week. "Workweek" is a fixed and regularly recurring period of 168 hours, seven (7) consecutive 24-hour periods; 3) An "Alternative workweek schedule" means any regularly scheduled workweek requiring an employee to work more than eight (8) hours in a 24-hour period. This language will now replace the language in Wage Orders 1 through 13 and 15. The definitions provided in this section for "workday" and "day," "workweek" and "week," and "alternative workweek schedule" are identical to the definitions provided in Labor Code §500.

The IWC determined that an additional definition for a work "shift" should be added to its wage orders. "Shift " means designated hours of work by an employee, with a designated beginning and quitting time.

As discussed below in Section 3, Hours and Days of Work, the IWC also determined that the health care industry should retain the option to adopt alternative workweek schedules with work days of more than 10 but not exceeding 12 hours. The IWC has therefore included definitions in Wage Orders 4 and 5 for the terms "health care industry," "employees in the health care industry" and "health care emergency." These three terms are discussed more fully in Section 3.

The IWC received no compelling evidence, and concluded there was no authority at this time, to warrant making any other change in the provisions of this section other than those required by AB 60.

3. HOURS AND DAYS OF WORK

DAILY OVERTIME - GENERAL PROVISIONS[2]

This portion of Section 3 states the daily overtime provisions mandated by AB 60 and applies to Wage Orders 1 through 13, unless otherwise indicated. This section clarifies that premium pay for the "seventh day of work in any one workweek" refers to the seventh consecutive day of work in a workweek. The IWC received testimony regarding the general provisions of overtime as mandated by AB 60. Both employers and employees testified that they were confused regarding the meaning of the "seventh day of work" in the calculation of premium pay. The time-and-a-half provision in Labor Code §510(a) refers to "seventh day of a workweek," but the double time provision refers to "seventh day of a workweek." This slight difference creates the confusion as to whether AB 60 requires double time pay for any work performed in excess of eight hours on the seventh day of the workweek, even if the employee has not worked on all seven days of that workweek. The IWC found that the purpose of the seventh day premium is to provide extra compensation to workers who are denied the opportunity to have a day off during the workweek. Following a literal interpretation of the double time provision would illogically reward someone who may only be scheduled to work one day, and that day fortuitously happens to be the seventh day of the employer's workweek. To clarify this matter, the IWC inserted the term "consecutive" to specify that an employee must work on all seven days in a designated workweek to receive overtime compensation for the seventh day of work in a workweek.

In determining overtime compensation for nonexempt full-time salaried employees, this section also restates Labor Code § 515 (d), which clarifies that the rate of 1/40th of the employee's weekly salary should be used in the computation.

ALTERNATIVE WORKWEEKS SCHEDULES[3]

This portion of section 3 provides the general guidelines for Wage Orders 1 through 13 for the adoption of employer proposed alternative workweek schedules provided by Labor Code § 511. Section 511 has specific provisions for adopting alternative workweek schedules and sets the standards for determining the overtime compensation for employees who adopt such schedules.

Generally, Wage Orders 1 through 13 provide that an employer does not violate the daily overtime provisions by properly instituting an alternative workweek schedule of up to ten (10) hours per day within a forty (40) hour workweek. Instead, once employees have properly adopted an alternative workweek schedule, an employer must pay one and one-half (1½) times the employees' regular rate of pay for all work performed in any workday beyond that alternative workweek of up to twelve (12) hours a day or beyond forty (40) hours per week, and double the employees' regular

[2] See Section 4 of the Interim Wage Order

[3] See Sections 5-8 of the Interim Wage Order.

rate of pay for all work performed in excess of twelve (12) hours per day and any work in excess of eight (8) hours on those days worked beyond the adopted alternative workweek schedule. Wage Orders 4 and 5 also provide for alternative workweek schedules of up to twelve (12) hours in a workday within a forty (40) hour workweek for employees in the health care industry. In addition, the IWC has provided for special exemptions from daily overtime for organized camp counselors and employees in the ski and commercial fishing industries. These matters are discussed in more detail below.

The IWC notes that Wage Order 1-89, which was reinstated by AB 60, provided for an alternative workweek "of not more than ten (10) hours per day within a workweek of not less than forty (40) hours," as opposed to the language adopted by the IWC that provides for an alternative workweek of not more than ten (10) hours per day within a "within a forty (40) hour workweek," as specified in AB 60. To resolve this conflict, and in the interest of uniformity and greater flexibility in crafting alternative workweek schedules, the IWC adopted the latter language to insert into Wage Orders 1 through 13. Thus, Wage Order 1 now contains language identical to the other wage orders.

The IWC further clarified that hours considered in the calculation of daily overtime pay are not counted in the determination of 40-hour workweek overtime compensation. Basically, there is no "pyramiding" of separate forms of overtime pay for the same hours worked. Once an hour worked is paid at the applicable daily overtime rate, that same hour cannot be used in the computation of forty hours for the purposes of weekly overtime pay.

After receiving testimony and correspondence from employees who sought predictability in work schedules, and employers who sought flexibility in work schedules, the IWC concluded that an employer proposal for an alternative workweek schedule must designate the number of days in the workweek and number of hours in the work shift. The employer does not need to specify the actual days to be worked within that workweek prior to the alternative workweek election. The phrase "regularly scheduled," as set forth in Labor Code § 511(a), means that the employer must schedule the actual work days and the starting and ending time of the shift in advance, providing the employees with reasonable notice of any changes, wherein said changes, if occasional, shall not result in a loss of the overtime exemption. However, in no event does Labor Code § 511(a) authorize an employer to create a system of "on-call" employment in which the days and hours of work are subject to continual changes, depriving employees of a predictable work schedule. Moreover, in Wage Orders 1, 2, 3, 6, 7, 8, 11, 12, and 13, the IWC retained the pre-AB-60 requirement that alternative workweek schedules provide for two (2) consecutive days off for employees.

The IWC received several inquiries concerning flexibility for employees switching alternative workweek options after an election is held. The IWC concluded that upon the approval of the employer, an employee may move from one menu option to another. Additionally, the "menu of options" provision provided in Labor Code § 511(a) provides that an employer may propose "a menu of work schedule options,

from which each employee in the unit would be entitled to choose. "Such choice may be subject to reasonable nondiscriminatory conditions, such as a seniority-based system or a system based on random selection for selection of limited alternative schedules, provided that any limitation imposed upon an employee's ability to choose an alternative schedule is approved as part of the 2/3 vote of the work unit. If the employer's business needs preclude allowing its employees to freely choose among work schedule options, the employer should not propose a menu of work schedule options. Instead, the employer may be able to propose more than one alternative workweek schedule by dividing the workforce into separate work units, and proposing a different alternative workweek schedule for each unit. This method would inform each employee of exactly which schedule would be adopted by the election. In order to provide flexibility in accommodating the personal needs of employees, the IWC further clarified that employers may grant employee requests t switch same-length shifts on an occasional basis.

Based on some of the testimony the IWC received regarding alternative workweek schedules, a question arose as to whether an employer who adopted an alternative workweek arrangement of no greater than ten (10) hours per day could lawfully require employees to work beyond those scheduled hours on a recurring basis with the payment of appropriate overtime compensation. Labor Code §511(a) provides that employees may elect to establish a "regularly scheduled alternative workweek" that authorizes work by the affected employees for no longer than 10 hours within a 40-hour workweek. However, Labor Code § 511(b) provides that an employee working beyond the hours established by the alternative workweek agreement shall be entitled to overtime compensation. The IWC believes that, reading these two provisions of the Labor Code together, an employer who requires an employee to work beyond the number of hours established by the alternative workweek agreement, even if such overtime hours are worked on a recurring basis, does not violate the law if the appropriate overtime compensation is paid.

However, the IWC added a section to its wage orders out of its continued concern that employers could establish alternative workweek agreements and then consistently deviate from the regular schedule approved by the employees without paying overtime compensation for work performed beyond eight hours in a day. Such conduct effectively deprives employees of the right established by Labor Code §511(a) to a "regularly scheduled" alternative workweek and could lead to abuses. To prevent any such abuses, the IWC wage orders now provide that, if an employer sends workers home early on a work day that they are scheduled to work beyond eight hours without the payment of overtime pursuant to an alternative workweek agreement, the employer is required to pay overtime compensation in accordance with the provisions of the Labor Code §511(a) for all hours worked in excess of eight (8) hours on that workday.

The IWC has received questions regarding how part-time employees working in employee units that have adopted alternative workweeks should be paid overtime. It is the IWC's continued intention that a part-time employee be paid overtime in the same manner as other employees in the work unit. Thus if the employee work unit has adopted an alternative work week schedule of four ten-hour days, a part-time

employee working two ten-hour days would not be paid overtime after eight hours; rather, overtime would be paid after working the ten-hour daily shift.

This section echoes Labor Code §511(c), which prohibits employers from reducing an employee's regular rate of hourly pay as the result of the adoption, repeal, or nullification of an alternative workweek schedule. Labor Code §511(c) only applies to reductions in the regular rate of pay that are instituted after January 1, 2000, the effective date of AB 60.

This section also reflects the requirements of Labor Code § 511(d) regarding the required reasonable accommodation of employees who are unable to work alternative workweek schedules that are established through election, the permissible accommodation of employees hired after the election who are unable to work the alternative workweek schedules established through election, and the required exploration of "any available reasonable alternative means" of accommodation of the religious belief of an affected employee that conflicts with the alternative workweek schedule established through election. In addition, this section states the requirements for the employer reporting of alternative workweek election results mandated by Labor Code §511(e), as well as the provisions in Labor Code §554 concerning the accumulation of days of rest. The requirement of one day's rest in seven is mandated by Labor Code §§ 551 and 552.

Notwithstanding the general provisions in its wage orders regarding alternative workweeks, Wage Orders 4 and 5 allow employees in the "health care industry" to adopt employer proposed alternative workweeks of up to twelve (12) hours in a workday within a forty (40) hour workweek. Labor Code § 511(g) and the Interim Wage Order 2000 previously authorized such alternative workweeks if they were adopted according to the election and other requirements contained in those measures. In addition, the Interim Wage Order provides that such alternative workweeks are valid only until the effective date of wage orders promulgated pursuant Labor Code §517. In the meantime, the IWC conducted a review of the health care industry, as required by Labor Code § 517(b), to determine inter alia whether the allowance of twelve hour workdays should continue to be an option for employees, and what employees should be considered a part of the health care industry.

The IWC received testimony and correspondence from numerous employees, employers, and representatives of the health care industry regarding alternative workweeks. Citing personal preference, commuter traffic, mental and physical well-being, family care, and continuity of patient care issues, the vast majority of testimony from health care employees urged the retention of the 12-hour workday. Advocates of 12-hour workdays also noted that 8-hour shifts were impractical for hospital and home health care services, and that their industry should be afforded greater flexibility.

The IWC received additional testimony and correspondence from employees who work eight (8) hour shifts and prefer doing so. These employees also emphasized the need for flexibility in work scheduling, so that eight (8) shifts would not be

eliminated, and so that employees would not be forced to work longer or shorter hours than desired.

The IWC also received testimony concerning patient safety considerations in support of the elimination of 12-hour workdays. These witnesses advised that the last four hours of 12-hour shifts can be exhausting and that exhaustion can result in a greater inclination toward making mistakes.

Based on all the information it received, the IWC determined that the health care industry should retain the option to adopt alternative workweek schedules with work days of more than 10 but not exceeding 12 hours. The IWC further determined that it will retain through its wage orders the provisions of former Labor Code § 1182.9, that employers engaged in the operation of a licensed hospital, or in providing personnel for the operation of a licensed hospital, may propose regularly scheduled alternative workweeks that include no more than three (3) twelve (12)-hour workdays within a 40-hour workweek, and that, if such an alternative workweek is adopted, an employer must make a reasonable effort to find another work assignment for any employee who participated in the vote which authorized the schedule and is unable to work the 12-hour shift. However, an employer is not being required to offer a different work assignment to an employee if such a work assignment is not available or if the employee was hired after the adoption of the twelve (12) hour, three (3) day alternative workweek schedule.

The main question remaining was how the health care industry would be defined. Following several public meetings and hearings, employer and employee representatives decided to work together and attempt to resolve several issues regarding the health care industry and to draft proposed language for consideration by the IWC. Prior to the public hearing on June 30, 2000, these two groups were able to negotiate compromises agreeable to both sides and to propose such language to the IWC. The proposed language, which the IWC adopted, defines the "health care industry" as hospitals, skilled nursing facilities, intermediate care and residential care facilities, convalescent care institutions, home health agencies, clinics operating twenty-four (24) hours per day, and clinics performing surgery, urgent care, radiology, anesthesiology, pathology, neurology, or dialysis. The IWC received testimony and correspondence that in intermediate care and residential care facilities other regulatory agencies use the term "resident" to describe persons receiving medical care in those facilities. The IWC concluded that the term "patient" includes "residents" of those facilities as defined by Health & Safety Code §§ 1250(c), (d), (e), (g), and (h), and 1569.2(k).

The proposal also included language defining the employees that are a part of the health care industry. The IWC adopted this proposal with one amendment regarding animal health care. Employees in the health care industry are now defined as those employees who provide patient care, or work in a clinical or medical department, including pharmacists dispensing prescriptions in any practice setting, or work primarily or regularly as members of a patient care delivery team, or are licensed veterinarians, registered veterinary technicians, and unregistered animal health

assistants and technicians providing patient care in animal hospital settings or facilities equivalent to those described above for people.
The regulations make clear that the phrase "employees in the healthcare industry" does not include those persons primarily engaged in providing meals, performing maintenance or cleaning services, doing business office or other clerical work, or undertakings involving any combination of such duties. Therefore, any alternative workweek schedule that is adopted by employees primarily engaged in these duties, and that provides for workdays in excess of 10 hours, is now null and void.

The IWC intends the definition of employees in the health care industry to encompass pharmacists who dispense prescriptions in all practice settings, including community retail pharmacists. The IWC also intends to include within the definition of the health care industry all employees who primarily or regularly provide hospice care as members of a patient care delivery team.

The IWC further notes that the requirement that an employee work primarily or regularly as a member of a patient care delivery team means that the employee must spend more than one-half of his or her work time engaged in such work. In Wage Orders 4-89 and 5-89, as amended in 1993, the IWC had a different definition of the term "primarily" for employees in the health care industry. According to those orders, "the term 'primarily' as used in section 1, Applicability, means (1) more than one-half the employee's work time as a rule of thumb or, (2) if the employee does not spend more than 50 percent of the employee's time performing exempt duties, where other pertinent factors support the conclusion that management, managerial, and/or administrative duties represent the employee's primary duty." This definition no longer exists. Again, the IWC emphasized that, consistent with Labor Code §515(e), "primarily" means one-half the employee's work time.

With regard to animal health care, the IWC received testimony from veterinarians and the California Veterinary Medical Association which represents approximately 4,500 licensed veterinarians and registered veterinary technicians who own and/or work in some 2,200 hospitals, clinics and independent practices throughout the State. The Association advised the IWC that approximately 50% of the animal care facilities are 24-hour hospitals that provide medical, dental, and surgical care, as well as emergency and critical care for patients. The IWC determined that licensed veterinarians, registered veterinary technicians and unregistered assistants had the same work-related issues and personal concerns regarding alternative workweek schedules as employees providing health care services to humans, and that such employees, who provide patient care within the meaning of Business and Professions Code §§ 4825-4857 in facilities similar to those described above for the treatment of humans, should be included in the health care industry.

The negotiated proposed language that the IWC adopted also includes a few protections for employees working 12-hour shifts. Employees cannot be required to work more than 12 hours in a 24-hour period unless there is a "health care emergency," as that phrase is defined in the regulation, and even though all reasonable steps have been taken to provide otherwise, the continued overtime is

necessary to provide the required staffing. However, an employee may be required to work up to thirteen (13) hours within a 24-hour period if the employee that is supposed to relieve the first employee does not show up for his or her shift on time and does not notify the employer two hours in advance that he or she will not appear for duty as scheduled. Also, no employee can be required to work more than sixteen (16) hours in a 24-hour period unless by a voluntary mutual agreement of the employee and employer, and no employee can work more than 24 consecutive hours until that employee receives 8 consecutive off-duty hours. Finally, the adopted language provides that, if, during the last quarter of 1999, an employer implemented a reduced pay rate for employees choosing to work 12 hour shifts, and desires to reimplement a flexible work arrangement that includes twelve (12) hour shifts at straight time for the same work unit, the employer must pay a base rate to each affected employee in the work unit that is no less than that employee's base rate in 1999 immediately prior to the date of the rate reduction.

The IWC retained the provisions in Wage Order 5 relating to the following method of calculating overtime compensation. An employer engaged in the operation of a hospital or other institution primarily engaged in the care of the sick, aged, or mentally ill or defective in residence may, pursuant to an agreement or understanding arrived at before the performance of work, establish a work period of fourteen (14) consecutive days in lieu of a workweek of seven (7) consecutive days if, for any work in excess of eighty (80) hours in such fourteen (14) day period, the employee receives compensation at a rate of not less than one and one-half (1½) times the employee's regular rate of pay.

ELECTION PROCEDURES

Labor Code 517(a) directed the IWC to adopt regulations before July 1, 2000 regarding "the conduct of employee workweek elections, procedures for employees to petition for and obtain elections to repeal alternative workweek schedules, procedures for implementation of those schedules, conditions under which an adopted alternative workweek schedule can be repealed by the employer, employee disclosures, designations of work, and the processing of workweek election petitions." In accordance with this mandate, this section also lays out the election procedures for the adoption and repeal of alternative workweek schedules. Labor Code § 511(e) requires employers to report the results of any election to the Division of Labor Statistics and Research.

Based on testimony it received during public meetings and hearings, as well as its consideration of proposals of election procedures that were submitted, the IWC determined its wage orders should have more extensive procedures and safeguards than included in the Interim Wage Order - 2000. The language adopted reiterates the two-thirds (b) vote before the performance of work and secret ballot election requirements found in Labor Code § 511(a), and also provides a definition for "affected employees in the work unit." This definition is derived from preexisting language found in Wage Orders 4, 5, 9, and 10.

However, the adopted language also sets up employee disclosure guidelines and mandates that an employer must provide disclosure in a non-English language if at least five (5) percent of the affected employees primarily speak that non-English language. Written disclosure and at least one meeting must be held at least fourteen (14) days prior to the secret ballot vote. This 14-day notice provision was previously applicable only to the health care industry. Failure to abide by these employee disclosure requirements will render the election null and void.
In addition, Wage Order election procedures now require employers to hold elections at the work site of the affected employees, specify that employers must bear any election costs, and authorizes the Labor Commissioner to investigate employee complaints. Following an investigation, an employer may be required to select a neutral third party to conduct the election. In order to provide additional protection for employees, the IWC added language that prohibits employers from intimidating or coercing employees to vote either in support of or in opposition to a proposed alternative workweek. Also, employees cannot be discharged or discriminated against for expressing opinions about elections or for voting to adopt or repeal an alternative workweek agreement.

The procedures further provide for the revocation of an alternative workweek schedule. The one-third (1/3) petition threshold and two-thirds (b) vote required to reverse an alternative workweek agreement reflects language adopted in the Interim Wage Order – 2000. While Wage Orders 1, 9, 10 and non-health care industry employees in Wage Orders 4 and 5 already followed these requirements, Wage Orders 2, 3, 6, 7, 8, 11, 12, 13, and Wage Orders 4 and 5 in the coverage of health care industry employees instead required a majority of employees to petition for an election. In the interest of establishing a universal provision applicable to all wage orders, the IWC decided to defer to the one-third (1/3) standard.

Following the repeal of an alternative workweek schedule, the employer faces a sixty (60) day compliance deadline, but the Division of Labor Standards Enforcement (DLSE) may grant an extension upon showing of undue hardship. This provision merely restates preexisting language from Wage Orders 1 through 13.

The requirements that an election to repeal an alternative workweek agreement must be held within thirty (30) days of an employee petition and on the affected employees' work site fall under the IWC's Labor Code § 517 authority. The prerequisite twelve (12) month lapse after the adoption of an alternative workweek schedule before an election to repeal can be held reflects preexisting language found in Wage Orders 1 through 13.

The adopted language clarifies that the report on election results is a public document, and further specifies the content required for each report. The language also provides for a thirty (30) day grace period before employees are required to work any new alternative workweek schedules adopted through election.

OTHER PROVISIONS[4]

[4] See Sections 6-8 of the Interim Wage Order.

Minors: This section reflects the current penalties for violation of child labor laws. Violators are now subject to civil penalties from $500 to $10,000 as well as to criminal penalties. These increased penalties, initially set forth in the Interim Wage Order - 2000, will now be reflected in all the IWC's wage orders.

Make up Time: This section implements the make up time provisions mandated by Labor Code §513. The statute provides that an employer must approve the written request of an employee on each occasion the employee would like to perform make up time in the same workweek. In the interest of employer and employee convenience, the IWC decided to allow any employee who knows in advance that he or she will be requesting make up over a succession of weeks to request make up work time for up to four weeks in advance.

Collective Bargaining Agreements: This section updates the criteria for the collective bargaining agreement exemption in accordance with Labor Code § 514. Except as provided in subsections referring to overtime for minors 16 and 17 years of age, the availability of a place to eat for workers on night shift, and limits on work over 72 hours, employees working under valid collective bargaining agreements are exempt from the AB 60 overtime provisions if the agreement provides for the wages, hours of work, and working conditions of the employees, premium wage rates are designated for all overtime hours worked, and their regular hourly rate of pay is at least thirty (30) percent more than the state minimum wage.

This provision replaces the previous requirement that employees under collective bargaining agreements must earn at least one-dollar ($1) an hour more than the state minimum wage to qualify for the exemption. Premium wage rates are any rates higher than the regular hourly wage rate. The IWC also adopted language that requires the application of "one day's rest in seven" for employees working under a collective bargaining agreement unless the agreement explicitly states otherwise.

The California Labor Federation submitted testimony that Labor Code §514 was intended to permit the parties to a collective bargaining agreement to define what constitutes "overtime hours" and to determine the rate of premium pay to be paid for all overtime hours worked. The Commission agrees that § 514 permits the parties to a collective bargaining agreement to establish alternative workweek agreements through the collective bargaining process provided certain conditions are met. Thus, so long as the collective bargaining agreement establishes regular and overtime hours within the work week, establishes premium pay for all such hours worked, and the regular rate of pay is more than (30) percent above the minimum wage, then the exemption established by Labor Code § 514 is applicable.

Personal Attendants: Wage Order 5 previously included an exemption from Section 3, Hours and Days of Work, for personal attendants, adult employees or minors who are permitted to work as adults who have direct responsibility for children under eighteen (18) years of age receiving twenty-four (24) hour care, organized camp counselors, and resident managers of homes for the aged having less than eight (8) beds as long as such employees were not employed more than 54 hours nor more than six (6) days in any workweek, except under certain emergency conditions. The

IWC learned, however, that, except for organized camp counselors, the provisions of this exemption violate the requirements of the federal Fair Labor Standards Act. In order to comply with federal law, the IWC reduced the weekly overtime provisions to 40 hours for personal attendants, adult employees or minors who are permitted to work as adults who have direct responsibility for children under eighteen (18) years of age receiving twenty-four (24) hour care, and resident managers of homes for the aged having less than eight (8) beds. It is the IWC's intention is that these employees may work more than eight (8) hours in a day as long as their weekly hours do not exceed 40 and, consistent with prior enforcement practices, any such employees who work more than 40 hours in a workweek must receive overtime pay for any day during that workweek in which they worked more than eight (8) hours. The IWC notes, however, that personal attendants who are also "employees in the health care industry," who also work in facilities within the meaning of the term "health care industry," may elect to work pursuant to an alternative workweek schedule adopted pursuant to the provisions applicable to such employees.

Ski Industry Employees (See Wage Order 10): Pursuant to Labor Code § 517(b), The IWC conducted a review of the wages, hours, and working conditions of employees working at establishments that offer Alpine and Nordic skiing and related recreational activities to the public. The IWC received testimony and written submissions from employees who overwhelmingly disapproved the special exemption from overtime set forth in former Labor Code § 1182.2 whereby employees could be required to work up to 56 hours in a workweek without the payment of overtime. Employees stated that their income is just above the minimum wage, that they have often worked ten (10) to fourteen (14) hours at straight time without breaks or meal periods, and at their income it is difficult to pay rent or otherwise make ends meet. They asked that they receive the same protections as other employees under AB 60. In addition, labor representatives testified that ski facilities in neighboring Nevada are required to pay overtime to employees after eight (8) hours without any apparent financial hardship.

Employers testified that they are a very small industry of 38 facilities, with a low profit margin that is very dependent upon the vagaries of the weather and a primarily seasonal workforce. Employers further stated that, unlike other industries that are dependent on the weather, ski facilities must be cleared for safe public use every day they are open. They also noted that, the under the federal Fair Labor Standards Act, the ski industry is exempt from having to pay weekly overtime after forty (40) hours, and that, if they are required to comply with all the requirements of AB 60, their profit margin will be eliminated. As a compromise, they requested that the IWC issue regulations requiring overtime to be paid after forty-eight (48) hours in a workweek year-round.
The IWC concluded that it would be inconsistent with the health, safety, and welfare of employees to continue the former statutory exemption from daily overtime in a regulation. Instead, Wage Order 10 will now provide that an employer engaged in the operation of a ski establishment as defined in that order will not be in violation of overtime provisions by instituting a regularly scheduled alternative workweek of 48 hours or less during any month of the year when Alpine or Nordic skiing activities are actually being conducted. However, overtime must be paid at the rate of 1 ½

times the regular rate of pay for all hours worked in excess of ten (10) hours in a day or 48 hours in a workweek.

Commercial Fishing Employees (See Wage Orders 10 and 14): The IWC received testimony from persons employed in the commercial passenger fishing industry that, due to the uncertain length of the work day as well as long established customs in the industry, which is highly dependent on the availability of fish, it would be inappropriate to impose a requirement that employees receive overtime pay. In addition, commercial passenger fishing boats are subject to minimum manning requirements regulated by the United States Coast Guard, Title 46, Code of Federal Regulation, Part 15, which limit the number of hours that crew members may work while at sea. There is also an exemption from overtime requirements for commercial fishing vessels under the Fair Labor Standards Act. Therefore, the IWC concluded that it would continue the exemption from Section 3, Hours and Days of Work, formerly set forth in the Labor Code § 1182.3, for employees of commercial passenger fishing boats when they perform duties as licensed crew members. Such an exemption would not apply to other employees in the industry, such as clerical or maintenance personnel, who do not perform duties as licensed crew members on fishing boats.

The IWC received no compelling evidence to warrant making any other changes in the provisions of Section 3, Hours and Days of Work.

4. MINIMUM WAGES

While there are no changes to present minimum wage levels, the IWC currently is conducting its minimum wage review. A new minimum wage may become effective January 1, 2001. If there is a new minimum wage, it will, in turn, affect the level of meal and lodging credits.

Commercial Fishing: Under former Labor Code § 1182.3 employees in this industry were exempt from the minimum wage. The IWC conducted a review of this industry pursuant to Labor Code § 517(b), and received testimony from representatives of the commercial passenger fishing industry that the custom in the industry was to pay crew members on the basis of "one-half day," "three-quarter day," "full day," or "overnight" trips. These employers wished to continue this custom consistent with their present obligation to pay the minimum wage for all hours worked. The provisions of Section 4 (E) would allow employers to record pay of crew members in accordance with a formula based on the length of the trip. However, if the trip exceeds the defined hours of the formula, the additional hours would have to be recorded as additional hours worked and compensated accordingly. In practice, this alternative record keeping system may result in employees being paid more than the actual hours worked, but can never result in them being paid less than the actual hours worked. It is, therefore, primarily established as a convenience for employers. It is noted that regulations of the United States Coast Guard establish minimum crew standards which are intended to insure that, when boats are at sea for protracted periods, they receive adequate rest periods.

9. UNIFORMS AND EQUIPMENT

The IWC retained its longstanding policy of requiring employers to provide uniforms, tools and equipment necessary for the performance of a job. Subsection (B) permits an exception to the general rule by allowing an employee who earns more than twice the State minimum wage to be required to provide hand tools and equipment where such tools and equipment are customarily required in a trade or craft. This exception is quite narrow and is limited to hand (as opposed to power) tools and personal equipment, such as tool belts or tool boxes, that are needed by the employee to secure those hand tools. Moreover, such hand tools and equipment must be customarily required in a recognized trade or craft.

11. MEAL PERIODS[5]

Wage Orders 1, 2, 3, 6, 7, 8, 9, 10, 11, 13 and 15 continue the preexisting requirement of a meal period for an employee working for a period of more than five (5) hours, and provide for a second meal period in accordance with Labor Code §512(a).

Senate Bill 88, Stats. 2000, chapter 492, added subsection (b) to Labor Code § 512, which provides that, notwithstanding subsection (a), the IWC may adopt a working condition order that allows a meal period to begin after six hours of work if it determines that the order is consistent with the health and welfare of the affected employees. The IWC made such a determination with regard to Wage Order 12 and continued the existing language providing for a first meal for an employee working for a period of more than six (6) hours, and for a second meal period in accordance with Labor Code §512.

Consistent with the health, safety, and welfare of employees in the health care industry, the IWC determined that Wage Orders 4 and 5 should have somewhat different language regarding meal periods. The IWC received correspondence from members of the health care industry requesting the right to waive a meal period if an employee
works more than a 12-hour shift. The IWC notes that Labor Code § 512 explicitly states that, whenever an employee works for more than twelve hours in a day, the second meal period cannot be waived. However, Labor Code § 516 authorizes the IWC to adopt or amend the orders with respect to break periods, meal periods, and days of rest for all California workers consistent with the health and welfare of those workers.

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[5] See Section 9 of the Interim Wage Order.

The IWC received several comments concerning the potential prohibition of on-duty meal periods. Under the current IWC wage orders, an "on-duty meal period" is permitted only when (1) the nature of the work prevents the employee from being relieved of all duty, and (2) the employee and employer have entered into a written agreement permitting an on-duty meal period. An employee must be paid for the entire on-duty meal period since it is considered time worked.

Any employee who works more than six hours in a workday must receive a 30-minute meal period. If an employee works more than five hours but less than six hours in a day, the meal period may be waived by the mutual consent of the employer and employee.

Notwithstanding other provisions regarding meal periods, the IWC adopted proposed language prepared for its consideration by employee and employer representatives of the health care industry. This language provides that employees in the health care industry covered by Wage Orders 4 and 5 who work shifts in excess of eight (8) hours in a workday may voluntarily waive their right to one of their two meal periods, provided that the waiver is in writing and voluntarily signed by the employer and employee. The employee may revoke the waiver at any time by providing the employer with at least one (1) day's written notice of the revocation. However, while the waiver is in effect, the employee must be paid for all working time, including an on-the-job meal period.

During its review of its wage orders and of various industries pursuant to the provisions of AB 60, the IWC heard testimony and received correspondence regarding the lack of employer compliance with the meal and rest period requirements of its wage orders. The IWC therefore added a provision to this section that requires an employer to pay an employee one additional hour of pay at the employee's regular rate of pay for each work day that a meal period is not provided. An employer shall not count the additional hour of pay as "hours worked" for purposes of calculating overtime pay.

The IWC received no compelling evidence, and concluded there was no authority at this time, to warrant making any other change in the provisions of this section other than those required by AB 60.

12. REST PERIODS

As discussed above in Section 11, Meal Periods, the IWC heard testimony and received correspondence regarding the lack of employer compliance with the meal and rest period requirements of its wage orders. The IWC therefore added a provision to this section that requires an employer to pay an employee one additional hour of pay at the employee's regular rate of pay for each work day that a rest period is not provided. An employer shall not count the additional hour of pay as "hours worked" for purposes of calculating overtime pay.

Commercial Fishing Employees: The IWC added the last paragraph of Section 12 to insure that crew members on commercial passenger fishing boats are at sea for periods of twenty-four (24) hours or longer receive no less than eight (8) hours off-duty within each twenty-four (24) hour period to permit the employee to sleep. This rest period is in addition to the meal and rest periods otherwise required under Section 12.

17. EXEMPTIONS

This section previously allowed the Division of Labor Standards Enforcement, after an investigation and finding that enforcement would not materially affect the welfare or comfort of employees and would work an undue hardship on the employer, to exempt the employer and employees from the requirements of certain sections of the IWC's wage orders. After considering the testimony and correspondence it received with regard to meal periods, and in light of the mandatory provisions of Labor Code § 512, the IWC decided to remove Section 11, Meal Periods, from the list of sections that can be exempt from enforcement.

20. PENALTIES [6]

This section sets forth the provisions of Labor Code § 558, which specifies penalties for initial and subsequent violations. In accordance with that section, the IWC voted to extend the penalties provisions to Wage Order 14. The IWC received inquiries as to whether "willfulness" is a required element for the issuance of a civil penalty. There were also concerns over the assessment of penalties against an employer's payroll clerk, payroll supervisor, or a payroll processing service for failure to issue checks reflecting the required overtime compensation. AB 60 fails to address these issues, but the IWC noted that there is no intent to penalize individuals that are merely carrying out policies formulated by an employer.

[6] See Section 10 of the Interim Wage Order.

EXHIBIT C

State of California GRAY DAVIS, Governor
Department of Industrial Relations
INDUSTRIAL WELFARE COMMISSION
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~~Sacramento, CA 95814~~
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April 25, 2000

NOTICE OF PUBLIC HEARING
of the
INDUSTRIAL WELFARE COMMISSION
May 26, 2000
Sacramento

In accordance with the "Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999," commonly known as AB 60, as well as Labor Code §1181, the Industrial Welfare Commission ("IWC") will be considering the adoption of amendments to the Interim Wage Order 2000, as well as Wage Orders 1 through 14. A public hearing will therefore be held on May 26, 2000, in Sacramento, at the State Capitol, Room 4202, to consider amendments proposed by one or more of the commissioners. The meeting will commence at 10:00 a.m.

1. Approval of Minutes
2. Consideration of and public comment on the following proposed amendments to Wage Orders 1 through 13, offered by Commissioner Broad, regarding alternative workweek schedules and election procedures:

Alternative Workweeks

Wage Orders 4 and 5 are amended as follows:

> (A) No employer shall be deemed to have violated the daily overtime provisions by instituting, pursuant to a voluntary written agreement proposed by the employer and ratified in a secret ballot election held in accordance election procedures required by this Order by at least two-thirds (2/3) vote of the affected employees in the work unit, a regularly scheduled alternative work week schedule of not more than ten (10) hours per day within a forty (40) hour workweek without the payment of an overtime rate of compensation, provided that all work performed in any workday beyond the schedule established by the agreement up to twelve (12) hours a day or beyond forty (40) hours per week shall be paid at one and one-half (1½) times the employee's regular rate of pay. All work performed in excess of twelve hours (12) hours per day and any work in excess of eight (8) hours on those days worked beyond the regularly scheduled workdays established by the alternative workweek agreement shall be paid at a rate of twice the employee's regular rate of pay.
>
> (B) No employer shall be deemed to have violated the daily overtime provisions by instituting, pursuant to a voluntary written agreement proposed by the employer and ratified in a secret ballot election held in accordance election procedures required by this Order by at least two-thirds (2/3) vote of the affected employees in the work unit, a regularly scheduled alternative workweek of twelve (12) hours per day within a thirty-six (36) hour workweek without the payment of an overtime rate of compensation if, in addition to the other requirements of this section, the following conditions are met:
>
> > (1) An alternative workweek consisting of three 12-hour shifts, shall be limited to licensed or certified healthcare personnel employed by a licensed hospital, who are engaged in patient care, or pharmacists dispensing prescriptions in any practice setting where they are required to engage in direct patient care.

(2) All hours worked in excess of thirty-six (36) hours in a workweek shall be compensated at a rate of not less than one and one-half (1½) times the employee's regular rate of pay and all hours worked in excess of twelve (12) hours in a work day or in excess of eight (8) hours on any workday beyond three days in any workweek shall be compensated at a rate of twice the employee's regular rate of pay.

(3) Employees working three, 12-hour shifts per week shall be paid not less than the equivalent of forty (40) hours in a week at the regular hourly rate of pay. Part-time employees working 12-hour shifts composed of fewer than three workdays shall be paid at prorated rates consistent with this provision.

(4) No employees assigned to work a 12-hour shift established pursuant to this section shall be required to work more than 12 hours in a 24-hour period or more than 40 hours in a workweek.

(5) Employees assigned to work a 12-hour shift established pursuant to this section may voluntarily work an additional four hours of overtime in the same 24-hour period; provided, however, that every employee shall be entitled to not less than eight (8) consecutive hours off-duty within a 24-hour period.

(6) Every employee assigned to work a 12-hour shift established pursuant to this section shall be entitled to not less than one duty-free meal period during the shift, which may not be waived. However, an employee shall be entitled to a second meal period, which may be taken as an on-duty meal period by mutual consent of the employer and the employee consistent with the provisions of this Order.

(7) Any employer who reduced hourly wage rates between July 8, 1999 and January 1, 2000, for the purpose of continuing shifts which included regularly scheduled 12-hour days, shall restore that base rate of pay as a precondition to adopting an alternative workweek composed of three, 12-hour days.

(C) For the purposes of this section, "regularly scheduled" means a schedule where the length of the shift and the days of work are predesignated pursuant to a valid alternative workweek agreement.

(D) The regularly scheduled alternative workweek proposed by an employer for adoption by employees may be a single work schedule that would become the standard schedule for workers in the work unit, or a menu of work schedule options, from which each employee in the unit would be entitled to choose. If the employer proposes a menu of work schedule options, the employee may, with the approval of the employer, move from one menu option to another.

(E) Any alternative workweek agreement adopted pursuant to this section shall provide for not less than two consecutive days off within a workweek and shall not provide for less than four (4) hours of work in any workday.

(F) Nothing in this section shall prohibit an employer, at the request of the employee, to substitute one day of work for another day of the same length in the shift provided by the alternative workweek agreement on an occasional basis to meet the personal needs of the employee without the payment of overtime.

(G) If an employer, whose employees have adopted an alternative workweek agreement permitted by this Order requires an employee to work fewer hours than those that are regularly scheduled by the agreement, the employer shall pay the employee overtime compensation at a rate of one and one-half (1½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours, and double the employee's regular rate of pay for all hours worked in excess of twelve (12).

(H) An employer shall not reduce an employee's regular rate of hourly pay as a result of the adoption, repeal or nullification of an alternative workweek schedule.

(I) An employer shall make a reasonable effort to find a work schedule not to exceed eight hours in a workday, in order to accommodate any affected employee who was eligible to vote in an election authorized by this section and who is unable to work the alternative schedule hours established as the result of that election. At a minimum, an employer shall give an employee who is unable to work the alternative workweek schedule first priority to work an eight-hour shift in any department within the facility where the employee regularly works or any other facility operated by the employer. Nothing in this section shall prohibit an employer from permitting employees who are unable to work the hours established by the alternative workweek agreement to work 8-hour shifts within the same work unit covered by the agreement. An employer shall be permitted, but is not required, to accommodate any employee who was hired after the date of the election and who is unable to work the alternative schedule established as the result of that election. An employer shall explore any available reasonable alternative means of accommodating the religious beliefs or observance of an affected employee that conflicts with an adopted alternative workweek schedule in the manner provided by subdivision (j) of Section 12940 of the Government Code.

(J) Nothing in this section requires an employer to combine more than one rate of overtime in order to calculate the amount to be paid to an employee for any hour of overtime work.

(K) If an employee was voluntarily working an alternative workweek schedule as of July 1, 1999, that was an individual agreement made after January 1, 1998 between the employee and employer, and that agreement provides for a workday of not more than ten (10) hours, that employee may continue to work that alternative workweek schedule without payment of an overtime rate of compensation for the hours provided in that schedule if the employee submits, and the employer approves, a written request to do so. Such a written request and approval shall have been made by May 31, 2000. An employee may revoke his or her voluntary authorization to continue such a schedule with thirty (30) days written notice to the employer.

Wage Orders 1, 7, and 9 are amended as set forth above, except that Section (B) shall not apply, and Sections (C) through (K) will be designated Sections (B) through (J), respectively. Wage Orders 2, 3, 6, 8, 10, 11, 12, and 13 are amended as set forth above, except that Sections (B) and (K) shall not apply, and Sections (C) through (J) will be designated Sections (B) through (I), respectively.

Election Procedures

Wage Orders 4 and 5 are amended as follows:

(A) An employer may submit a proposal to hold an election seeking the adoption of an alternative workweek schedule no less than 12 months after a prior election to establish or repeal an alternative workweek schedule.

(B) All elections held pursuant to this section shall be based on a secret ballot election.

(C) Except as provided by the Alternative Workweeks Section (B)(1), for the purposes of this section, a "work unit" may include all nonexempt employees in a division, department, job classification, or shift sharing a community of interest concerning the conditions of their employment in a readily identifiable work group. A work unit may consist of an individual employee as long as the criteria for an identifiable work unit in this subsection is met.

(D) At least fourteen (14) days prior to an election on a proposal to adopt or repeal an alternative work schedule, the employer shall provide each affected employee with a written disclosure of the time and location of balloting, the effects of the adoption of the proposal on the wages, hours, and benefits of the employee, the right of employees to repeal the proposal, the neutral party selected to

conduct the election pursuant to subsection (G) and the right of employees to request review by the Labor Commissioner of the appropriateness of any designated work unit. This written disclosure shall be distributed at a meeting held during the regular work hours and at the work site of the affected employees. An employer shall provide that disclosure in a non-English language, as well as in English, if at least five percent of the affected employees primarily speak that non-English language. The employer shall mail the written disclosure to employees who do not attend the meeting. The failure by the employer to distribute this written disclosure at the meeting and by mail renders the adoption of an employer-proposed alternative workweek schedule null and void.

(E) Upon the submission to the employer of a petition signed by at least one-third (1/3) of all affected employees requesting an election to repeal an alternative workweek schedule, a new secret ballot election shall be held and a majority vote of the affected employees shall be required to reverse the alternative workweek schedule. If the alternative workweek schedule is revoked, the employer shall comply within sixty (60) days. Upon proper showing of undue hardship, the Division of Labor Standards Enforcement may grant a temporary extension not to exceed ninety (90) days for compliance. The election to repeal an alternative workweek schedule shall be held not more than 30 days after the petition is submitted to the employer, except that the election shall be held not less than 12 months after the date that the same group of employees voted in an election held to adopt or repeal an alternative workweek schedule. Failure by an employer to have an election conducted following receipt of a petition to repeal an alternative workweek, as provided in this subsection, renders the alternative workweek schedule null and void.

(F) Only employees who have been hired on a permanent full-time or permanent part-time basis or who have worked at least eight hours per week in the 13 weeks preceding the election shall be eligible to vote.

(G) Any election to establish or repeal an alternative workweek schedule shall be held during regular working hours at the worksite of the affected employees. The employer shall bear the costs of conducting any election held pursuant to this section. The employer shall select a neutral third party to conduct the election from a list maintained by the Labor Commissioner of approved neutral third party organizations.

(H) Employees affected by a change in work hours resulting from the adoption of an alternative workweek schedule may not be required to work those new work hours for at least thirty (30) days after the announcement of the final results of the election.

(I) No work unit may be established by an employer solely for purposes of adopting or repealing an alternative workweek schedule. The Labor Commissioner shall review and approve, reject, or modify the designation of any work unit of affected employees by an employer if a written request is made to the commissioner by an employee of the employer at least seven days prior to the date of the election held on the proposed adoption of an alternative workweek schedule.

(J) The employer shall maintain an atmosphere of neutrality regarding the election and employees shall be free from intimidation and coercion. No employee shall be discharged or discriminated against for expressing opinions concerning the alternative workweek election or for opposing or supporting its adoption or repeal. Violation of this subsection shall render the alternative workweek schedule null and void.

(K) The results of any election conducted pursuant to this section shall be reported by an employer to the Division of Labor Statistics and Research within thirty (30) days after the results are final, and the report of election results shall be a public document. The report shall include the final tally of the vote, the size of the unit, and the nature of the business of the employer. The Division of Labor Statistics and Research shall develop a standard reporting form for employers to use for compliance with this section.

(L) In addition to the provisions of subsection E, an employer may repeal an alternative workweek schedule based on business necessity. If an employer unilaterally repeals an alternative workweek schedule, it must give employees forty-five (45) days written notice. No alternative workweek election may be held for at least one year following repeal. The employer shall report the repeal of the alternative workweek schedule to the Division of Labor Statistics and Research within thirty (30) days following repeal.

Wage Orders 1, 2, 3, 6, 7, 8, 9, 10, 11, 12, and 13 are amended as set forth above, except that the phrase "Except as provided by the Alternative Workweeks Section (B)(1)" shall not be included in Section (C).

3. Consideration of an amendment to Wage Order 5, deleting personal attendants, resident managers and employees who have direct responsibility for children in 24-hour care from Section 3(D) of that Order to comply with pertinent federal regulations.

4. In accordance with the provisions of Labor Code §§554 and 558, consideration of and public comment on an amendment to Wage Order 14, to add the language in Section 10 of Interim Wage Order 2000 (Civil Penalties) to Section 17 of Wage Order 14.

5. Further consideration of managerial duties.

6. Consideration of whether to extend the provisions of Interim Wage Order - 2000 to the effective date of amendments adopted at this hearing or at a hearing concluded on or before July 1, 2000, pursuant to Labor Code §517(a).

7. Consideration of appointment of members to the Wage Board established to review the adequacy of the minimum wage, in accordance with Labor Code §1178.5.

8. Reconsideration of actions whereby the IWC voted to convene a wage board regarding employees who work as certain computer industry consultants, and voted to appoint wage board members.

9. Further review of the wages, hours and conditions of labor and employment of stable employees in the horseracing industry, in accordance with §§517(b), 1173 and 1182.10.

In order for the IWC to provide an opportunity for those interested in speaking at the public hearing, the amount of time within which each speaker will be allowed to address the IWC may be limited. Accordingly, the public is urged to submit written statements to the IWC regarding items on the agenda in advance of the hearing. The IWC may by a majority vote of commissioners when a quorum is present, approve amendment(s) to its Wage Orders, including an effective date for the amendment(s).

For further information, contact Andrew R. Baron, Executive Officer, or other staff members of the IWC, at ~~(916) 322-0167~~.

INDUSTRIAL WELFARE COMMISSION

Bill Dombrowski, Chair
Doug Bosco, Commissioner
Barry Broad, Commissioner
Leslee Coleman, Commissioner
Harold Rose, Commissioner

EXHIBIT D

State of California GRAY DAVIS, Governor
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INDUSTRIAL WELFARE COMMISSION
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July 5, 2000

MINUTES of PUBLIC HEARING
OF THE
INDUSTRIAL WELFARE COMMISSION

May 26, 2000
Sacramento

In accordance with the "Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999," commonly known as AB 60, as well as Labor Code §1181, the Industrial Welfare Commission (IWC) will be considering the adoption of amendments to the Interim Wage Order 2000, as well as Wage Orders 1 through 14. A public hearing was held on May 26, 2000, in Sacramento, at the State Capitol, Room 4202, to consider amendments proposed by one or more of the commissioners.

Chairman Bill Dombrowski opened the hearing at 10:20 a.m. Commissioners Barry Broad, Leslee Coleman, Bill Dombrowski and Doug Bosco were present. Commissioner Harold Rose was absent. The IWC's staff, including, Executive Officer Andrew Baron, Principal Analyst Michael Moreno, Analyst Nikki Verrett, Analyst Donna Scotti as well as the IWC's legal counsel, Deputy Attorney General Molly Mosley, were also present.

Commissioner Broad moved to approve the minutes from the April 14 and May 5 meetings. Commissioner Coleman seconded the motion, which passed unanimously.

Commissioner Broad proposed an amendment to language in the agenda, (attached) on the first page, (B)(1): " -- limited to licensed and certified healthcare personnel employed by a licensed, 24-hour health facility or licensed dialysis clinic, who are engaged in direct patient care, or pharmacists dispensing prescriptions in any practice setting where they are required to engage in direct patient care." Motion died for want of a second.

Commissioner Broad proposed as a substitute for language in the agenda, (attached): "All hours worked in excess of 36 hours in a workweek shall be compensated at a rate of not less than one and a half times the employee's regular rate of pay and all hours worked in excess of 12 hours in a day or in excess of 8 hours on any workday beyond three days in any workweek shall be compensated at a rate of twice the employee's regular rate of pay." Motion died for want of a second.

Commissioner Broad proposed for language in attached agenda: (B)(4: "No employees assigned to work a 12-hour shift established pursuant to this section shall be require to work more than 12 hours in a 24-hour period or more than 40 hours in a workweek, except under the conditions provided in Subsection (b). Prior to mandating overtime pursuant to this section, an employer shall exhaust all reasonable staffing alternatives, including soliciting off-duty employees to report voluntarily to work, soliciting on-duty employees to volunteer to work overtime, and recruiting per-diem and registry employees to report to work. And then (b) An employee may be required to work overtime if either of the following conditions are met: 1) a state of emergency declared by a county, state, or federal authority is in effect in the county in which the healthcare facility is located; or 2) in unanticipated and nonrecurring event which imperils patient care at the healthcare facility. An employee shall not be required to work overtime under this subsection on more than three occasions in a twelve-month period." Motion died for want of a second.

Commissioner Broad proposed as language to attached agenda: "Paragraph (5): Employees assigned to work a 12-hour shift established pursuant to this section may voluntarily work an additional 4 hours of overtime in the same 24-hour period, provided, however, that every employee shall be entitled to not less than 8 consecutive

hours off-duty within a 24-hour period. That essentially caps the amount of overtime at 4 hours so that they would work a 16-hour day, maximum. Assuming that they're working other 12-hour days in the same workweek, it's possible that within a 48-hour period, they could work 32 hours, under this proposal, as opposed to 48 hours or 72 hours consecutively." Commissioner Bosco seconded the motion. Vote was two in favor and two opposed. The IWC will revisit the motion next month.

Commissioner Broad proposed as language to attached agenda: "Every employee assigned to work a 12-hour shift established pursuant to this section shall be entitled to not less than one duty-free meal period during the shift, which may not be waived. However, an employee shall be entitled to a second meal period, which may be taken as an on-duty meal period by mutual consent of the employer and the employee consistent with the provisions of this Order. The purpose here is that when you have 12-hour -- employees on 12-hour shifts, that they do have an off-duty meal period, a time which is free. Otherwise, what they would be essentially required to do is work all 12 hours and try to catch a meal period during that time." Commissioner Bosco seconded the motion. Vote was two in favor and two opposed.

Commissioner Broad proposed as language to attached agenda: "Any alternative workweek agreement adopted pursuant to this section shall provide for not less than two days off within a workweek and shall provide for not less than 4 hours of work in any workday." The motion died for want of a second.

Commissioner Broad proposed as language to attached agenda: "Paragraph (F):

Nothing in this section shall prohibit an employer and an employee, by mutual consent, to substitute one day of work for another day of the same length in the shift provided by the alternative workweek agreement on an occasional basis to meet the personal needs of the employee without the payment of overtime." Commissioner Bosco seconded. The proposal passed by a vote of three to one.

Commissioner Broad proposed as substitute for attached language proposed by Chairman Dombrowski: "..in the section of Mr. Dombrowski's that refers to a reasonable (sic) operated by the employer, provided the employee meets the qualifications of this position. Nothing in this section shall prohibit an employer from permitting employees who are unable to work the hours established by the alternative workweek agreement to work 8-hour shifts within the same work unit covered by the agreement. An employer shall be permitted, but is not required, to accommodate any employee who is hired after the date of the election and who is unable to work the alternative schedule established as a result of that election. An employer shall explore any available reasonable alternative means of accommodating the religious beliefs or observance of an affected employee that conflicts with an adopted alternative workweek schedule, in a manner provided by subdivision (j) of Section 12940 of the Government Code." The motion died for want of a second.

Commissioner Broad proposed as language to attached agenda: "Paragraph (C) The one that begins, For the purposes of this section, 'regularly scheduled' And the difference is that that means that they have to name - they're voting on the days of the week of their schedule as opposed to number of days. And I would sort of add to that that you would also change that in Paragraph (A). Or actually, you could leave it as scheduled workdays, actually the way it is, in your proposal. His proposal, if I understand it right, would have you designate the specific days. In other words, you would be voting on a four-10 arrangement Monday through Friday, or a menu of alternatives that the employer would propose, but that they would name the days of your schedule. The language that we adopted a moment ago allowing the employee -- in combination with what I'm just proposing and the language we adopted a moment ago, a person would have a regularly scheduled workweek, and by mutual consent with the employer, they could switch the days of the week. That's the -- that would be the effect of that." The motion died for want of a second.

Commissioner Broad proposed as language to attached agenda: "Paragraph (C) would provide that except for the alternative workweeks with regard to healthcare employees that are doing 12-hour shifts, -- for the purposes of this section, a 'work unit' may include all nonexempt employees in a division, department, job classification, or shift sharing a community of interest concerning the conditions of their employment in a readily identifiable work group. Or shift sharing a community of interest concerning the conditions of their employment in a readily identifiable work group is what is added. The existing rule has no concept in it that the employees have to be

somehow related in some way to one another. And I think employers should -- it's very wide- ranging language as it is, but at least suggests that the employer -- and it can be down to one individual -- however, the employees need to be somehow related to one another. It does not make sense for an employer to have an alternative workweek schedule that has, the janitors in one facility and the television engineers in another facility of the same employer voting together." Commissioner Bosco seconded. The vote was two in favor and two opposed.

Commissioner Broad proposed as language to the attached agenda: "Paragraph (D) -- says that, At least 14 days prior to an election on a proposal to adopt or repeal an alternative workweek schedule, the employer shall provide each affected employee with a written disclosure of the time and location of the balloting, the effects of the adoption of the proposal on the wages, hours, and benefits of the employee, the rights of employees to repeal the proposal" -- and the new -- and then I will strike "the neutral party selected to conduct the election pursuant to (D), and the right of employees to request of the Labor Commissioner of the appropriateness of a designated work unit. This written disclosure shall be distributed at a meeting held during the regular work hours and at the work site of the affected employees. An employer shall provide that disclosure in a non-English language as well as English if at least 5 percent of the affected employees primarily speak that non-English language. The employer shall mail the written disclosure to employees who do not attend the meeting. The failure by an employer to distribute this written disclosure at the meeting and by mail renders the adoption of an employer-proposed alternative workweek schedule null and void. The difference here is -- actually, it just sort of fleshes out what the requirement is. Right now there is nothing that -- the employer has to hold a meeting, as I understand it, under Mr. Dombrowski's proposal, but doesn't -- it's not clear what happens to people who can't -- who are not there that day at work, or who are sick. This requires them to just mail the written notice that's already required to them and to provide -- where you have non-English-speaking employees, to provide it in that language so that they can understand what they're voting on. I think that would be the only significant changes from the current requirement." The motion died for want of a second.

Commissioner Broad proposed as language to attached agenda: "Paragraph (G): Any election to establish or repeal an alternative workweek schedule shall be held during the regular working hours at the work site of the affected employees. The employer shall bear the costs of conducting an election held pursuant to this section is current law, but is not in the wage orders, and I think should be specified. They can't charge the employees for the costs of conducting an election. Upon complaint by an affected employee and after investigation by the Labor Commissioner, the Labor Commissioner may require the employer to select a neutral third party to conduct the election." Commissioner Dombrowski seconded the motion. The motion unanimously carried.

Commissioner Broad proposed as language to attached agenda: "Paragraph (H): Employees affected by the change in any work hours resulting from the adoption of an alternative workweek schedule may not be required to work those new hours for at least 30 days after the announcement of the final results of the election. The purpose of this is to ensure that people can rearrange their lives to do this. We heard a great deal of testimony about family matters and childcare and other concerns that are raised. Going from an 8-hour shift to -- you know, five 8-hour days to three 12-hour days, would necessarily require major changes in things like childcare and transportation. So I think this is a very reasonable proposal." Commissioner Bosco seconded the motion. The motion unanimously carried.

Commissioner Broad proposed as language to attached agenda: "Paragraph (I), it's already in the proposal, and it is in the statute, I believe, as well as in the proposal -- correct me if I'm wrong -- I know it's in the statute -- I'm not sure if it's in Mr. Dombrowski's proposal -- but:

No work unit may be established by an employer solely for the purposes of adopting or repealing an alternative workweek schedule. The Labor Commissioner ---- and this is new -- -- shall review and approve, reject, or modify the designation of any work unit of affected employees by an employer if a written request is made to the commissioner by an employee of the employer at least seven days prior to the date of the election held on the proposed adoption of an alternative workweek schedule. The Labor Commissioner's determination shall be final and binding. This allows employees who feel like this is a bizarre or inappropriate work unit, where people do not belong together in any logical way, to make a request to the Labor Commissioner. The Labor Commissioner -- the Labor Commissioner's determination would settle the matter for all purposes for that election." Commissioner Bosco seconded the motion. The vote was two in favor and two opposed.

Mr. Baron clarified that all issues that received two-to-two votes will be noted for reconsideration.

Commissioner Bosco moved to adopt the chair's amended proposal. Commissioner Coleman seconded the motion. The motion passed by three to one vote.

Commissioner Dombrowski moved that Item 3 of the Agenda, consideration of Wage Order 5 deleting personal attendants, resident managers, and employees who have direct responsibility for children in 24-hour care from Section 3 (D) of that order to comply with the federal regulations, be put over until the next hearing. Commissioner Coleman seconded the motion, which then passed unanimously.

Commissioner Bosco moved to adopt Item 4 of the Agenda. Commissioner Coleman seconded, which then passed unanimously.

Commissioner Broad moved to adopt Item 6 of the Agenda with the amendment "Be no later than October 1, 2000" Commissioner Coleman seconded, and it passed unanimously.

Commissioner Broad moved to accept named members to the Minimum Wage Board. Commissioner Coleman seconded. The motion unanimously carried.

Commissioner Broad moved to accept the charge to the Minimum Wage Board. Commissioner Bosco seconded. The motion unanimously carried.

Commissioner Coleman moved to reconsider Item 8. Commissioner Broad seconded. The motion unanimously carried.

Commissioner Broad moved to close the investigation of wages, hours, and conditions of labor and employment of stables employees in the horseracing industry. Commissioner Bosco seconded it, which was unanimously adopted.

The following individuals presented testimony:

<u>Alternative Workweek Schedules & Election Procedures</u>

DON MADDY, George Steffes, Inc.; California Healthcare Association
KERRY RODRIGUEZ MESSER, California Association of Health Facilities
KATHY REES, California Assisted Living Facilities Association
RICHARD SIMMONS, Sheppard, Mullin, Richter & Hampton; California Healthcare Association
TOM LUEVANO, Sutter Health
MICHAEL ARNOLD California Dialysis Council
DENYNE KOWALEWSKI, California Association for Health Services at Home
HOLLY SWIGER, Vitas Healthcare; California Hospice and Palliative Care Association
ROBYN BLACK, Aaron Reed & Associates; California Society for Respiratory Care
RANDY CLARK, California Respiratory Care Therapists
CINDY LAUBACHER, California Veterinary Medical Association
CHARLES SKOIEN, JR., Community Residence Care Facilities of California
WARDELL JACKSON, Association of California Care Home Operators
TONY MARTINNO, Association of California Care Home Operators
LILA SMITH, respiratory therapist
PATRICIA HARDER, registered nurse
TOM RANKIN, California Labor Federation, AFL-CIO
RICHARD HOLOBER, California Nurses Association
TOM RANKIN, California Labor Federation, AFL-CIO
GLENDA CANFIELD, Service Employees International Union
RICHARD HOLOBER, California Nurses Association
PATRICIA GATES, Van Bourg, Weinberg, Roger & Rosenfeld

GLENDA CANFIELD, Service Employees International Union
DEBORAH BAYER, registered nurse; California Nurses Association
TOM RANKIN, California Labor Federation, AFL-CIO
MICHELLE CHINARD, registered nurse, County of Marin Psychiatric Emergency Service
ALLEN DAVENPORT, Service Employees International Union
MIKE ZACKOS, United Nurses Associations of California
BILL CAMP, Sacramento Central Labor Council
BARBARA DENT, registered nurse
CHERYL OBASIH-WILLIAMS, Tenet employee
CAROL SWEET, Tenet employee

Managerial Duties

BRUCE YOUNG, California Retailers Association
LYNN THOMPSON, Law Firm of Brian Kays
JAMES ABRAMS, California Hotel and Motel Association
TOM RANKIN, California Labor Federation, AFL-CIO
MARCIE BERMAN, California Employment Lawyers Association
SCOTT WETCH, State Building and Construction Trades Council of California, AFL-CIO

MATTHEW McKINNON, California Conference of Machinists
PATRICIA GATES, Van Bourg, Weinberg, Roger & Rosenfeld
RICHARD HOLOBER, California Nurses Association
BILL CAMP, Sacramento Central Labor Council

Minimum Wage - Appointment of Wage Board Members

TOM RANKIN, California Labor Federation, AFL-CIO
JULIANNE BROYLES, California Chamber of Commerce

Stable Employees in the Horseracing Industry

ALLEN DAVENPORT, Service Employees International Union

Other Business

JAMES ABRAMS, California Hotel and Motel Association
TIMOTHY HUET, Association of Arizmendi Cooperatives, Rainbow Grocery Cooperative

After the IWC determined that no one present wished to give further testimony, it was agreed by common consent to adjourn the public hearing at 4:34 p.m. Commissioner Broad moved to adjourn. Commissioner Coleman seconded. Motion was unanimously passed.

Respectfully Submitted,

_____

Andrew R. Baron
Executive Officer

Approved:

_____

Bill Dombrowski, Chairperson

EXHIBIT E

Attachment A

ALTERNATIVE WORKWEEKS

Wage Orders 4 and 5 are amended as follows:

(A) No employer shall be deemed to have violated the daily overtime provisions by instituting, pursuant to the election procedures set forth in this wage order, a regularly scheduled alternative workweek schedule of not more than ten (10) hours per day within a forty (40) hour workweek without the payment of an overtime rate of compensation. All work performed in any workday beyond the schedule established by the agreement up to twelve (12) hours a day or beyond forty (40) hours per week shall be paid at one and one-half (1 ½) times the employee's regular rate of pay. All work performed in excess of twelve (12) hours per day and any work in excess of eight (8) hours on those days worked beyond the regularly scheduled number of workdays established by the alternative workweek agreement shall be paid at double the employee's regular rate of pay. Nothing in this section shall prohibit an employer, at the request of the employee, to substitute one day of work for another day of the same length in the shift provided by the alternative workweek agreement on an occasional basis to meet the personal needs of the employee without the payment of overtime. No hours paid at either one and one-half (1 ½) or double the regular rate of pay shall be included in determining when forty (40) hours have been worked for the purpose of computing overtime compensation.

(B) If an employer, whose employees have adopted an alternative workweek agreement permitted by this order requires an employee to work fewer hours than those that are regularly scheduled by the agreement, the employer shall pay the employee overtime compensation at a rate of one and one-half (1 ½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours, and double the employee's regular rate of pay for all hours worked in excess of twelve (12) hours for the day the employee is required to work the reduced hours.

(C) An employer shall not reduce an employee's regular rate of hourly pay as a result of the adoption, repeal or nullification of an alternative workweek schedule.

(D) An employer shall explore any available reasonable alternative means of accommodating the religious belief or observance of an affected employee that conflicts with an adopted alternative workweek schedule, in the manner provided by subdivision (j) of Section 12940 of the Government Code.

(E) An employer shall make a reasonable effort to find a work schedule not to exceed eight (8) hours in a workday, in order to accommodate any affected employee who was eligible to vote in an election authorized by this Section and who is unable to work the alternative workweek schedule established as the result of that election.

(F) An employer shall be permitted, but not required, to provide a work schedule not to exceed eight (8) hours in a workday to accommodate any employee who is hired after the date of the election and who is unable to work the alternative workweek schedule established by the election.

(G) The provisions of Labor Code §§ 551 and 552 regarding one (1) day's rest in seven (7) shall not be construed to prevent an accumulation of days of rest when the nature of the employment reasonably requires the employee to work seven (7) or more consecutive days; provided, however, that in each calendar month, the employee shall receive the equivalent of one (1) day's rest in seven (7).

(H) Notwithstanding the above provisions regarding alternative workweek schedules, no employer of employees in the health care industry shall be deemed to have violated the daily overtime provisions by instituting, pursuant to the election procedures set forth in this wage order a regularly scheduled alternative workweek schedule that includes work days exceeding ten (10) hours but not more than twelve (12) hours within a 40-hour workweek without the payment of overtime compensation, provided that:

(1) An employee who works beyond twelve (12) hours in a workday shall be compensated at double the employee's regular rate of pay for all hours in excess of twelve (12);

(2) An employee who works in excess of forty (40) hours in a workweek shall be compensated at one and one-half (1 ½) times the employee's regular rate of pay for all hours over forty (40) hours in the workweek;

(3) The same overtime standards shall apply to employees who are temporarily assigned to a work unit covered by this subsection;

(4) Any employer who instituted an alternative workweek schedule pursuant to this subsection shall make a reasonable effort to find another work assignment for any employee who participated in a valid election prior to 1998 pursuant to the provisions of Wage Orders 4 and 5 and who is unable to

work the alternative workweek schedule established.

(5) An employer engaged in the operation of a licensed hospital or in providing personnel for the operation of a licensed hospital who institutes, pursuant to a valid order of the Commission, a regularly scheduled alternative workweek that includes no more than three (3) 12-hour workdays, shall make a reasonable effort to find another work assignment for any employee who participated in the vote which authorized the schedule and is unable to work the 12-hour shifts. An employer shall not be required to offer a different work assignment to an employee if such a work assignment is not available or if the employee was hired after the adoption of the 12-hour, 3-day alternative workweek schedule.

For purposes of this order, the term "health care industry" is intended to cover, employees who work at or for facilities or organizations that provide health care services of any kind including pharmacists dispensing prescriptions in any practice setting, employees who work in ancillary fields, or employees who perform services in patient care areas. Said facilities or organizations include, but are not limited to, a hospital, convalescent facility, residential care facility, medical office, doctor's office, dentist's office, patient's home, clinic, office, ambulance, dispensary, laboratory, veterinary facilities, or other facility where health care services of any kind are provided.

(I) If an employee was voluntarily working an alternative workweek schedule as of July 1, 1999, that was an individual agreement made after January 1, 1998 between the employee and employer, and that agreement provides for a workday of not more than ten (10) hours, that employee may continue to work that alternative workweek schedule without payment of an overtime rate of compensation for the hours provided in that schedule if the employee submits, and the employer approves, a written request to do so. Any such request and approval must be made on or before May 30, 2000. An employee may revoke his or her voluntary authorization to continue such a schedule with thirty (30) days written notice to the employer.

(J) No employee assigned to work a twelve (12) hour shift established pursuant to this Order shall be required to work more than thirteen (13) hours in any 24-hour period unless the Chief Nursing Officer or authorized executive declares that:

1) An emergency or unplanned circumstance exists, and
2) All reasonable steps have been taken to provide required staffing, and
3) Considering overall operational status and staffing needs, continued overtime is necessary to provide

required staffing.

(K) Arrangements adopted in a secret ballot election held pursuant to this order prior to 1998, or under the rules in effect prior to 1998, and before the performance of the work, shall remain valid after July 1, 2000. As of July 1, 2000, new arrangements can be entered into pursuant to the provisions of this section. Notwithstanding the foregoing, if a health care industry employer implemented a reduced rate for twelve (12) hour shift employees in the last quarter of 1999 and desires to reimplement a flexible work arrangement that includes twelve (12) hour shifts at straight time for the same work unit, the employer must pay a base rate to each affected employee in the work unit that is no less than that employee's base rate in 1999 immediately prior to the date of the rate reduction.

Wage Orders 1, 7, and 9 are amended as set forth above, except that Sections (H), (J), and (K) shall not apply, and Section (I), above shall become Sections (H) for those Wage Orders. Wage Orders 2, 3, 6, 8, 10, 11, 12, and 13 are amended as set forth above, except that Sections (H) through (K) shall not apply.

ELECTION PROCEDURES

Wage Orders 4 and 5 are amended as follows:

(A) Each proposal for an alternative workweek schedule shall be in the form of a written agreement proposed by the employer. The proposed agreement must designate a regularly scheduled alternative workweek in which the specified number of work days and work hours are regularly recurring. The actual days worked within that alternative workweek schedule need not be specified. The employer may propose a single work schedule that would become the standard schedule for workers in the work unit, or a menu of work schedule options, from which each employee in the unit would be entitled to choose. If the employer proposes a menu of work schedule options, the employee may, with the approval of the employer, move from one menu option to another.

(B) In order to be valid, the proposed alternative workweek schedule must be adopted in a secret ballot election, before the performance of work, by at least a two-thirds (2/3) vote of the affected employees in the work unit. The election shall be held during regular working hours at the employees' work site. For purposes of this subsection, "affected employees in the work unit" may include all employees in a readily identifiable work unit, such as a division, a department, a job classification, a shift, a separate physical location, or a recognized

subdivision of any such work unit. A work unit may consist of an individual employee as long as the criteria for an identifiable work unit in this subsection is met.

(C) Prior to the secret ballot vote, any employer who proposed to institute an alternative workweek schedule shall have made a disclosure in writing to the affected employees, including the effects of the proposed arrangement on the employees' wages, hours, and benefits. Such a disclosure shall include meeting(s), duly noticed, held at least fourteen (14) days prior to voting, for the specific purpose of discussing the effects of the alternative workweek schedule. Failure to comply with this Section shall make the election null and void;

(D) Any election to establish or repeal an alternative workweek schedule shall be held during regular working hours at the worksite of the affected employees. The employer shall bear the costs of conducting any election held pursuant to this section Upon a complaint by an affected employee, and after an investigation by the Labor Commissioner, the Labor Commissioner may require the employer to select a neutral third party to conduct the election.

(E) Any type of alternative workweek schedule that is authorized by the Labor Code may be repealed by the affected employees. Upon a petition of one-third (1/3) of the affected employees, a new secret ballot election shall be held and a two-thirds (2/3) vote of the affected employees shall be required to reverse the alternative workweek schedule. The election to repeal the alternative workweek schedule shall be held not more than 30 days after the petition is submitted to the employer, except that the election shall be held not less that twelve (12) months after the date that the same group of employees voted in an election held to adopt or repeal an alternative workweek schedule. However, where an alternative workweek schedule was adopted between October 1, 1999 and the effective date of this Order, a new secret ballot election to repeal that alternative workweek schedule shall not be subject to the 12-month interval between elections. The election shall take place during regular working hours at the employees' work site. If the alternative workweek schedule is revoked, the employer shall comply within sixty (60) days. Upon proper showing of undue hardship, the Division of Labor Standards Enforcement may grant an extension of time for compliance.

(F) Only secret ballots may be cast by affected employees in the work unit at any election held pursuant to this Section. The results of any election conducted pursuant to this Section shall be reported by the employer to the Division of Labor Statistics and Research within thirty (30) days after the results are final.

(G) Employees affected by a change in work hours resulting from the adoption of an alternative workweek

schedule may not be required to work those new work hours for at least thirty (30) days after the announcement of the final results of the election.

An employer shall not reduce an employee's regular rate of hourly pay as a result of the adoption, repeal or nullification of an alternative workweek schedule.

Wage Orders 1, 2, 3, 6, 7, 8, 9, 10, 11, 12, and 13, are amended as set forth above, except for subsection E which will read as follows:

(E) Any type of alternative workweek schedule that is authorized by the Labor Code may be repealed by the affected employees. Upon a petition of one-third (1/3) of the affected employees, a new secret ballot election shall be held and a two-thirds (2/3) vote of the affected employees shall be required to reverse the alternative workweek schedule. The election to repeal the alternative workweek schedule shall be held not more than 30 days after the petition is submitted to the employer, except that the election shall be held not less that twelve (12) months after the date that the same group of employees voted in an election held to adopt or repeal an alternative workweek schedule. The election shall take place during regular working hours at the employees' work site. If the alternative workweek schedule is revoked, the employer shall comply within sixty (60) days. Upon proper showing of undue hardship, the Division of Labor Standards Enforcement may grant an extension of time for compliance.

MEAL PERIODS

Pursuant to the provisions of Labor Code § 516, and notwithstanding the provisions of Labor Code § 512, Wage Orders 4 and 5 should continue to read as follows:

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than thirty (30) minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of employer and employee. Unless an employee is relieved of all duty during a thirty (30) minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when the employee and employer agree in writing to an on-the-job paid meal period.

(B) In all places of employment where employees are required to eat on the premises, the employer shall designate a suitable place for that purpose.

(C) Notwithstanding any other provision of this order, employees in the health care industry who work shifts in excess of eight (8) hours total in a workday may voluntarily waive their right to a meal period. In order to be valid, any such waiver must be documented in a written agreement that is voluntarily signed by both the employee and the employer. The employee may revoke the waiver at any time by providing the employer at least one (1) day's written notice. The employee shall be fully compensated for all working time, including an on-the-job meal period, while such a waiver is in effect.

Otherwise employees covered by Wage Orders 1, 2, 3, 6, 7, 8, 9, 10, 11, 12, and 13 are subject to the provisions of Labor Code § 512 until further regulations are promulgated by the IWC.

Revised 6/12/00

EXHIBIT F

STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

INDUSTRIAL WELFARE COMMISSION

Public Hearing

June 30, 2000

State capitol, Room 4202

Sacramento, California

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

--o0o--

Industrial Welfare Commission

BILL DOMBROWSKI, Chair

BARRY BROAD

LESLEE COLEMAN

DOUG BOSCO

HAROLD ROSE

Staff

ANDREW R. BARON, Executive Officer

MARGUERITE STRICKLIN, Legal Counsel

RANDALL BORCHERDING, Legal Counsel

MICHAEL MORENO, Principal Analyst

DONNA SCOTTI, Administrative Analyst

NIKKI VERRETT, Analyst

COMMISSIONER BOSCO: Aye.

MR. BARON: Broad.

COMMISSIONER BROAD: Aye.

MR. BARON: Coleman.

COMMISSIONER COLEMAN: Aye.

MR. BARON: Rose.

COMMISSIONER ROSE: Aye.

COMMISSIONER DOMBROWSKI: That item is adopted, five to zero.

Let's go to Item 3, which is the review of the language adopted at the May 26 public hearing on the healthcare industry.

I would like to point out that we have -- I believe there are still copies at the desk of an alternative compromise that the industry and its participants and labor have reached. I think it demonstrates very good faith on the part of both sides on some very difficult issues. It does provide for a further refinement of the definition of the healthcare industry and which industry employees are eligible for a 12-hour shift. It addresses the issue of mandatory overtime after 12 hours and what conditions would dictate that. It provides for some restrictions in terms of after 16 hours, and the employee having to -- can only be

-- volunteer to work overtime, no mandatory overtime after 16 hours. And in other areas, it provides for other disclosures in other items that we -- that we were addressing.

Commissioner Broad, I don't know you want to make any other comments.

COMMISSIONER BROAD: Yes. I'd just like to say that Chairman Dombrowski and I were present at some of the negotiations which occurred. It was an example of how the various interests involved in these issues can get together and negotiate something that works for everyone. And I -- it's the way the process should go forward.

So, I support this amended draft of Attachment A and would urge my fellow commissioners to support it as well.

COMMISSIONER DOMBROWSKI: Commissioner Bosco?

COMMISSIONER BOSCO: Mr. Chairman, I also want to reflect what Commissioner Broad has just said. I think, if you look back at our last meeting and the contentiousness that we faced then and see now that almost all these issues are resolved, I think it is to the credit of you, Mr. Chairman, and Mr. Broad, and the representatives from management and organized labor that

we can be here today in relative quietude on this matter.

Having said that, though, I may disrupt things a bit because I do want to offer an amendment. I don't know if the chair wants to entertain it at this time or --

COMMISSIONER DOMBROWSKI: Yes.

COMMISSIONER BOSCO: Okay. And I noted that in the agreement that had been reached, veterinary care and veterinary establishments had been left out. I haven't made a lifetime of animal rights or that type of thing. I do love pets and I kind of unwittingly stepped into this issue, thanks to local veterinarians contacting me. But I do think it's important that those clinics that want to keep 24-hour emergency service, as many of them do now in each community, be able to adjust their work hours accordingly. And although all of us, I think, view human healthcare issues as perhaps more important, I don't think we should forget that there are healthcare needs out there for animals through these veterinary clinics.

And so, I would like to make an amendment to the draft that we have before us, and that be a new amendment, Item 1(B)(4), that "licensed veterinarians, registered veterinary technicians, and registered animal

that's -- I wanted to make that clear. And it also, in a concession to the hospitals, does allow for a 13-hour period of work in certain circumstances where an employee scheduled to relieve the other employee does not report for duty and doesn't inform the employer more than two hours before the employee is scheduled to report. And this is designed to give a one-hour period to find someone else to do that work.

So, both sides made some concessions here. We worked hard, and we think this is an agreement that you should approve.

Just one comment on the issue that was just raised. We really don't believe that animal care falls within the definition of healthcare.

COMMISSIONER DOMBROWSKI: Mr. Davenport?

MR. DAVENPORT: Mr. Chairman, Allen Davenport, with the Service Employees International Union, the largest union of healthcare workers in California and in the nation.

We're very pleased that Mr. Broad and yourself were able to bring us together with the management side of the operation and that we were able to create an agreement that I think accomplishes our major goals, in terms of a prohibition on mandatory overtime and in

creating fairness in the election process. We didn't achieve everything that we asked for, but I think we're satisfied that this is a much improved version over the current state of affairs. There will be more fairness in the elections. There will be a prohibition on mandatory overtime.

And we're very grateful to you and Mr. Broad for the work that you put into doing this.

We would also say that animal care is not healthcare. And while there may be an interest in this industry in doing this, the appropriate way to do that is not by calling it healthcare, but by creating a wage board and going -- and going through the same kind of exercise that we all went through here, as people in the healthcare industry. And that's -- that's the course of action I'd recommend to Mr. Bosco and the people who are appealing to him.

MS. BLAKE: Barbara Blake, United Nurses Associations of California, AFSCME.

We urge the Commission to accept the amendments as they're written. This took a lot of time, patience, hard work on everyone's part. And we're pleased, as Allen said, with the amendments as written, and we would appreciate approval of this.

So, given those shortcomings, we respectfully do not support that language.

We also do appreciate, you know, all the work that was put into this. We recognize that in some of the election procedures, there are some improvements. But we do believe that the language regarding mandatory overtime falls short of protection for our nurses.

Thank you.

MR. MADDY: Mr. Chairman and members, Don Maddy, representing the California Healthcare Association.

We were also a party to the compromise. We think this is a good balance between the goals the Legislature and the Governor had with respect to AB 60 and patient care issues. We brought a lot of patient care issues to the table.

With respect to the mandatory overtime issue, we wanted to have some triggers in there that would protect in the case of emergency so patients aren't left without care. That was the goal of both sides, and I think that we -- and both sides wanted to make sure patients were protected as well as having some employees and management have some flexibility and some -- some way to work out problems among themselves, as opposed to going to outside parties and third parties for every single dispute.

So I think this is a very good compromise that's been reached. I think it is very fair with respect to election procedures, gives some remedies when employers are not operating properly with respect to the goals of the legislation. And I think it also is a testament to where cooperation can take you.

Your help, Mr. Chairman, and Mr. Broad's, since you sat through the meetings, were particularly helpful to us. This is a -- this was a tough road. It was a tough road for us to go down. We didn't have -- we didn't really have a good understanding of each other's needs at the beginning, and I think at the last meeting it kind of showed that. There was a lot of misunderstandings. And I think we reached some understandings through last month that are going to be very productive and helpful to all concerned.

I also want to thank Mr. Baron for his participation, because he was a good person to bounce things off of and to also help communicate between the sides during this process.

So, we support it and we appreciate your help.

Thank you.

COMMISSIONER BROAD: Mr. Chairman?

COMMISSIONER DOMBROWSKI: Barry.

COMMISSIONER BROAD: Mr. Maddy, I just wanted to particularly express my appreciation for your role in this process. You showed tremendous leadership. And as someone who's a professional advocate myself, I sort of admire -- I very much admire the way you handled yourself in this process. Thank you.

MR. MADDY: Thank you very much.

COMMISSIONER DOMBROWSKI: And I'd like to echo the compliments to the staff and Mr. Baron for the work they did on this. It was -- it was very, very helpful.

Any other comments?

(No response)

COMMISSIONER DOMBROWSKI: Okay. I believe we have a motion on the table from Commissioner Bosco. Do we have a second?

COMMISSIONER COLEMAN: I'll second that.

I've thought about this quite a bit and we have received, I think, more correspondence on this topic than just about anything else. But I think the key thing to keep in mind is the flexibility that this affords not only, I think, helps the industry, but it is flexibility for the -- for the workforce to be able to do this. So, I think this is a human issue, not just an issue about service to the animals that are being served through the

industry.

COMMISSIONER DOMBROWSKI: Mr. Broad.

COMMISSIONER BROAD: Very quickly, with all due respect to Mr. Bosco, I feel like the intent of the Legislature in passing AB 60 was to restore -- or give us the authority to maintain 12-hour days in the healthcare industry as they existed prior to the 1998 wage orders. And I do not believe the veterinary industry was ever included previously. So just -- everyone should understand that what we're doing here is expanding something that was never there prior to 1998.

So, I must respectfully vote no on this particular issue.

Thank you.

COMMISSIONER DOMBROWSKI: Any other comments?

(No response)

COMMISSIONER DOMBROWSKI: Okay. Let's call the roll.

MR. BARON: On the amendment, right?

COMMISSIONER BROAD: On the amendment.

COMMISSIONER DOMBROWSKI: On the amendment.

MR. BARON: Dombrowski.

COMMISSIONER DOMBROWSKI: Aye.

MR. BARON: Bosco.

PROOF OF SERVICE

Nicole Woodworth v. Loma Linda University Medical Center

Appeal Case Number E072704

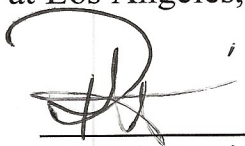
I, Rachel D. Victor, state:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 2029 Century Park East, Suite 3500, Los Angeles, California 92101.

On May 3, 2021, I served the following document described as ***AMICUS CURIAE*** **CALIFORNIA HOSPITAL ASSOCIATION'S MOTION FOR JUDICIAL NOTICE IN SUPPORT OF *AMICUS* BRIEF** by placing a true copy enclosed in a sealed envelope addressed as stated on the attached service list. I am readily familiar with the firm's practice for collection and processing correspondence for regular and overnight mailing. Under that practice, this document will be deposited with the Overnight Mail provider on this date with postage thereon fully prepaid at Los Angeles, California to address listed on the attached service list in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 3, 2021, at Los Angeles, California.



Rachel D. Victor

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Nicole Woodworth v. Loma Linda University Medical Center.
Appeal Case Number E072704

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