4th Civil No. E03579

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

MARIA LETICIA BANDA, et al.,

Plaintiffs and Appellants,

vs.

RICHARD BAGDASARIAN, INC.,

Defendant and Respondent,

APPEAL FROM THE SUPERIOR COURT FOR RIVERSIDE COUNTY,
CASE NO. RIC407038
HONORABLE CHRISTOPHER J. SHELDON

Unfair Competition Case

AMICUS BRIEF OF THE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFFS AND APPELLANTS MARIA LETICIA BANDA, ET AL.

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

California Employment Lawyers Association (CELA) submits this amicus curiae brief supporting Plaintiffs' efforts to obtain reversal of the trial court decision. CELA will focus on the applicable statutes of limitations for employee claims for rest and meal period pay arising under Labor Code section 226.7,[1] Sections 11 and 12 of the IWC wage orders, and the UCL. The brief will also address employees' private right of action for rest and meal period violations.

Whether the claims are subject to a four-year statute of limitations for restitution claims under the UCL or a one-year statute of limitations for statutory penalties depends on an evaluation of how an employer's obligation to pay operates. If, like other direct payment obligations to the employee under the wage orders and Labor Code, the employer has an affirmative obligation to pay the employee the hour of pay upon the occurrence of an unprovided rest or meal period, the employee possesses an ownership interest in the pay and may therefore seek restitution from an employer who fails to pay. If the employer is subject to paying a penalty after an employee initiates an administrative or judicial enforcement proceeding, then the right to the funds does not vest until the employer is ordered to pay, and restitution may not be appropriate.

As well, harmonizing the entire statutory and regulatory scheme relating to rest and meal periods, the Court must assess the degree to which

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[1] CELA refers to Labor Code section 226.7 as "Section 226.7," the Industrial Welfare Commission as "IWC," the Department of Industrial Relations as "DIR," the Division of Labor Standards Enforcement as "DLSE," and the Unfair Competition Law under Business & Professions Code section 17200 et seq. as "UCL." Unspecified section references are to the Labor Code.

the hour of pay owed functions as compensation to the employee for unprovided rest or meal periods or a penalty on the employer for failing to comply with the wage order rest and meal period requirements.

There are no published appellate decisions on the statute of limitations issue. This Court examined the statute of limitations issue recently in its Tentative Opinion in the *Orco Block v. Superior Court* mandamus proceeding, currently under stay. (*Orco Block v. Superior Court*, Case No. E036955, Tentative Opinion ["*Orco Block*"], Exhibit 1 to CELA Motion for Judicial Notice ["MJN"][2].) The decision concluded that the hour of pay is a non-restitutionary penalty subject to a one-year statute of limitations. After setting the matter for oral argument on the June 7, 2005 calendar, the Court stayed the proceeding to enable the parties to process a settlement of the underlying action in the trial court.

Orco Block did not discuss the United States District Court decision in *Tomlinson v. Indymac Bank F.S.B* (C.D. Cal. 2005) 359 F.Supp.2d 891 ("*Tomlinson*"), published near the time of the Tentative Opinion. Interpreting California law, *Tomlinson* found that claims under Section 226.7 are governed by a four-year statute of limitations and properly the subject of restitution under the UCL. (*Id. at 898.*)

Another case decided subsequent to *Orco Block* providing relevant analysis is the California Supreme Court decision in *Coachella Valley Mosquito & Vector Control Dist. v. California School Employees Association* (June 9, 2005) ___ Cal.4th___, 2005 Cal. LEXIS 5953 ("*Coachella Valley*"). In a case not arising under the Labor Code, the Court construed the entire statutory scheme to determine the applicable statute of limitations for certain

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[2] The opinion does not indicate the assigned panel.

employee administrative claims.

Without setting out the full details of *Orco Block*, it is fair to state that the Court reached two key conclusions: (1) Whether the hour of pay is subject to a claim of restitution under the UCL (governed by a four-year statute of limitations) depends on whether it constitutes "compensation" or "penalties"; (2) "Although the hour of pay *is* tied to the employee's wage, the amount, being computed by day, really bears no necessary relationship at all to the hypothetical or potential detriment to the employee who misses one, two, or three breaks during the day. Accordingly, it appears *primarily* designed to encourage the employer to provide the mandated breaks. It therefore acts primarily as a penalty and should be so characterized." (*Orco Block*, pp. 5, 16, original emphasis.)

Though *Orco Block* is under stay, CELA believes it is useful to address the decision and posit some alternative considerations for the Court. CELA will address the following:

1. Because the employer has an affirmative obligation under Section 226.7 and sections 11 and 12 of the wage orders[3] to directly pay the hour of pay to the employee when incurred, it does not function as a penalty because the employee is owed the pay and thereby has an immediate possessory right and ownership interest subject to a claim of restitution against the non-paying employer;
2. The statutory scheme governing rest and meal period requirements already provided for penalties under Labor Code

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[3] Wage Order 14, at issue in this appeal, is the sole wage order that does not include the hour of pay provision to employees who do not receive rest or meal periods.

section 558, and the legislature's amendment of AB 2509 to drop statutory penalties to match the hour of pay provision provided under the wage orders can be interpreted as an intention to compliment the extant employer penalty with a compensatory employee remedy;

3. The hour of pay is compensatory under traditional penalty analysis;

4. The DLSE's contrary positions and insupportable shifts should be given no deference; and

5. Employees possess a private right of action to bring claims for rest and meal period violations under Labor Code section 218 and as breach of contract claims carrying either a two or four-year statute of limitations.

II. CLAIMS FOR THE HOUR OF PAY FOR MISSED REST AND MEAL PERIODS CARRY A FOUR-YEAR STATUTE AS RESTITUTION CLAIMS UNDER THE UCL

A. RESTITUTION CLAIMS UNDER THE UCL ARE PROPER TO RECOVER AMOUNTS OWING FOR WAGE ORDER REST AND MEAL PERIOD VIOLATIONS

1. The Hour of Pay is Owed When Incurred.

Whether an employer has an affirmative obligation to pay an employee the hour of pay owed for denied rest or meal periods when incurred is critical to determining whether an employee has a claim to restore unpaid sums as restitution. If so, the employee has an ownership interest in the pay that is owed, subject to a restitution action. If so, the hour of pay is "self-enforcing" and does not function as a penalty, which much be enforced by the recipient.

The language of Section 226.7 provides that the employer has an affirmative obligation to pay the employee. It does not envision the necessity of an enforcement action by the employee.

Section 226.7(b) provides:

> If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.

This section sets up an immediate payment obligation. If an employer fails to provide any rest or meal period required, "the employer shall pay the employee" an additional hour of pay for that workday. The intent is that an employer owes the hour of pay when the employee misses the rest or meal period and must include payment for each work day the breaks are unprovided in the next pay check. As with overtime, minimum wage, and other payment obligations, employees do not need to bring claims against employers to receive these amounts owing.

An example of a pay check providing pay at the employee's regular rate of $20.20 per hour for seven missed meal periods during the preceding two-week period is provided as MJN Exhibit 2. An example of a company's instructions provided to store managers discussing rest and meal period guidelines also demonstrates that the hour of pay is owed to the employee when it is incurred and is intended to be self-operating. (See Exhibit 3 to MJN ["For each workday you fail to provide an employee a meal break as required, you owe the employee one additional hour of pay at the employee's regular rate"].)

This intended operation of Section 226.7 thus indicates that the

employee has an immediate possessory right, and ownership interest, in the funds owed.

Supreme Court authority holds that the right to restitution hinges on either the return of monies improperly held or restoration of sums in which a party has an ownership interest. (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 177-178 ["*Cortez*"]; *Korea Supply Co. v. Lockheed Martin Co.* (2003) 29 Cal.4th 1134, 1144 ["*Korea Supply*"].)

In the simplest sense, if the employer fails to pay the hour of pay, the employee is entitled to a claim for backpay. Claims for backpay are restitutionary payable under the Court's equitable power in a UCL action. (*Cortez, supra*, 23 Cal.4th at 177-178.)

Key language defining restitution appears in *Cortez*:

> The concept of restoration or restitution, as used in the UCL, is not limited only to the return of money or property that was once in the possession of that person. The commonly understood meaning of "restore" includes a return of property to a person from whom it was acquired (see Webster's New Internat. Dict. (2d ed. 1958) p. 2125), but earned wages that are due and payable pursuant to section 200 et seq. of the Labor Code are as much the property of the employee who has given his or her labor to the employer in exchange for that property as is property a person surrenders through an unfair business practice. An order that earned wages be paid is therefore a restitutionary remedy authorized by the UCL.

(*Cortez, supra*, 23 Cal.4th 178; see, also, *Loehr v. Ventura County Community College Dist.* (1983) 147 Cal.App.3d 1071, 1080 ["Earned but unpaid salary or wages are vested property rights, claims for which may not be properly characterized as actions for monetary damages"]; *Walnut Creek Manor v. Fair Employment & Housing Com.* (1991) 54 Cal.3d 245, 263 [restitutionary awards encompass quantifiable sums one person owes to another].)

The key to restitution is restoring money or property to someone with an "ownership interest." (*Kraus v. Trinity Management Services* (2000) 23 Cal.4th 116, 126-127; *Korea Supply*, *supra*, 29 Cal.4th at 1148 [unfairly obtained profits recoverable only "to the extent that these profits represent monies given to the defendant or benefits in which the plaintiff has an ownership interest"].) A "vested interest" qualifies. (*Id.* at 1149 ["restitution is broad enough to allow a plaintiff to recover money or property in which he or she has a vested interest"].)

The employer's obligation to pay the employee (as distinguished from the employee's obligation to bring an action to enforce the payment) is pivotal to the determination that the hour of pay is restitutionary. If an individual possesses an immediate right to funds and has an ownership interest in them, they are subject to restitution under the UCL, as set forth in *Cortez*.

One of the primary arguments advanced by Defendant and its supporting amici is that the hour of pay *functions* as a penalty though not denominated as such in Section 226.7. However, if an employer has an affirmative obligation to pay the sum owed the hour and an employee need not bring an action to enforce the obligation because it is self-operational, then the hour of pay *does not function as a penalty*. This is because the right to penalty sums does not accrue or vest until it has been enforced. (See *Anderson v. Byrnes* (1898) 122 Cal. 272, 274 ["no person has a vested right in an unenforced penalty"]; *Jones v. Shore's Ex'r* (1816) 14 U.S. 462, 476; 4 L.Ed.2d 136, 1 Wheat 462 ["The court are clearly of opinion, that the right of the collector to forfeitures *in rem* attaches on seizure, and to personal penalties on suits brought, and in each case it is ascertained and consummated by the judgment"].)

Korea Supply, though stating general restitution principles, is actually

inapposite. The Court held nonrestitutionary disgorgement of potential profits under a contract awarded to a higher bidder not recoverable under the UCL. "Unlike *Cortez*, then, the monetary relief requested by KSC does not represent a quantifiable sum owed by defendants to plaintiff. Instead, it is a contingent expectancy of payment from a third party." (*Korea Supply*, *supra*, 29 Cal.4th at 1150.) By contrast here, the hour of pay is an easily quantifiable sum owed by the employer to the employee and not an attenuated expectancy.

To avoid the conclusion that the hour of pay is subject to equitable restitution, employers argue that there is no vested right in a penalty. This is circular reasoning: "there is no vested right in a penalty so there is no vested right in the hour of pay." But functionally, that is not how the hour of pay operates. It is owed by the employer, who "shall pay the employee." The employee has an immediate possessory ownership interest in the sum and is not required to initiate litigation to enforce the violation. Thus, the opposite reasoning is appropriate: because the hour of pay is owed immediately and thereby creates an ownership interest on the employee, it is not a penalty and is subject to restitution.

Accepting the employers' arguments requires a finding that the legislature, in stating "the employer shall pay the employee . . . for each work day," intended to mean instead that the employer is merely "*subject to*" the obligation to pay and *pays only* if the employee brings suit. Aside from defying common sense, this statutory construction would not result in a very efficient or effective deterrent or disincentive. Employers would feel much safer about not providing rest or meal periods knowing that their obligation to pay requires employees to sue them. Many currently-employed workers likely would forego pursuing claims in the face of retaliation or discomfort in the workplace.

The better analysis–and more likely legislative intent–is that the hour of pay is "self-enforcing," thereby vesting an ownership interest in the employee when incurred due to an employer's failure to pay, and subject to a restitution claim under the UCL. Such claims are governed by a four-year statute of limitations. (Bus. & Prof. Code § 17208.)

Finally, penalties involving unfair competition may be enforced by a specific performance order under Business and Professions Code section 17202: "Notwithstanding Section 3369 of the Civil Code, specific or preventive relief may be granted to enforce a penalty, forfeiture, or penal law in a case of unfair competition." Thus, whether the hour of pay is compensatory or a penalty, relief may be sought under the UCL with a four-year liability period.

2. The IWC Intended the Hour of Pay to be Self-Enforcing.

In its final version, AB 2509 enacted the hour of pay provision to match that adopted by the IWC in wage orders 1-13, 15, and 17 at the June 30, 2000 hearing. (Industrial Wage Commission Public Hearing Transcript, MJN Exhibit 4) The transcript of this hearing shows the IWC intended the hour of pay to function as a retrospective "remedy" to the employee beyond the existing right to prospectively enjoin compliance. Also, the IWC envisioned an affirmative obligation on an employer to pay the employee one hour "on any day" that an employer does not provide a rest or meal period.

The critical language is as follows:

> This is a rather -- a relatively small issue, but I think a significant one, and that is we received testimony that despite the fact that employees are entitled to a meal period or rest period, that **there really is no incentive as we establish it, for example, in overtime or other areas, for employers to ensure that people are given their rights to a meal period and rest period. At this point, if they are not giving a meal period or**

> **rest period, the only remedy is an injunction against the employer or -- saying they must give them.** And what I wanted to do, and I'd to sort of amend the language that's in there to make it clearer, that what it would require is that **on any day that an employer does not provide a meal period or rest period in accordance with our regulations, that it shall pay the employee one hour** -- one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest period is not provided. I believe that this will ensure that people do get proper meal periods and rest periods.

(*Id.* At 25 [emphasis added].)

The IWC thus states that the hour of pay was provided to correct the problem that the only "remedy" for an employee was an injunction, indicating that the hour of pay was intended to be an additional compensatory remedy for the employee, not an employer penalty.

Then Commissioner Broad continues the analogy to overtime:

> The employer who, under our regulations, lawfully establishes an on-duty meal period would not be affected if the employee then takes the on-duty meal period. This is an employer who says, "You do not get lunch today, you do not get your rest break, you must work now." That is -- that is the intent. Let me respond, if I may. Clearly, I don't intend this to be an hour counted towards hours worked any more than the overtime penalty. And, of course, the courts have long construed overtime as a penalty, in effect, on employers for working people more than full -- you know, that is how it's been construed, as more than the -- the daily normal workday. It is viewed as a penalty and a disincentive in order to encourage employers not to. So, it is in the same authority that we provide overtime pay that we provide this extra hour of pay.

(*Id.* at 30.)

This comment suggests that the IWC intended the hour of pay to function as a continuing obligation, operating prospectively to require an employer to pay the hour of pay each time a day goes by in which an employee

is not provided a rest or meal period. The fact that there is a discussion as to whether the hour of pay will be counted towards the day's hours worked for purposes of an employee's entitlement to overtime for working over eight hours underscores the intention that the employer's obligation would be affirmative and continuing. There would be no need to discuss this issue if an employee were required to bring an enforcement action looking backward in time unless for some reason it was contemplated that the employee could re-construct the hours worked that day and also make a claim for overtime. That would be stretching the analysis far beyond what was likely considered by the IWC.

Commissioner Broad analogizes the need for an incentive to provide the hour of pay similar to that provided for overtime. *Orco Block* rejected the analogy to overtime because the overtime premium pay had, to the court, an unquestionable compensatory aspect in addition to the deterrent and compliance incentive the court found lacking in the hour of pay. The IWC saw the overtime analogy as appropriate. Both remedies are self-enforcing.

3. All Other Provisions Under the Wage Order are Self-Enforcing.

Sections 11 and 12 of each of the wage orders except Wage Order 14 also include provisions requiring employers to pay the hour of pay for unprovided rest or meal periods. These provisions mirror Section 226.7. Typical language is found in Wage Order 5, the order governing workers in restaurants, hotels, hospitals, and related occupations. Section 11(B) states:

> If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the meal period is not provided.

Section 12(B) states:

> If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the rest period is not provided.

The IWC began promulgating wage orders governing wages, hours, and working conditions in 1916. (*Industrial Welfare Com. v. Superior Court of Kern County* (1980) 27 Cal.3d 690, 700 ["*Industrial Welfare Commission*"]). The seventeen orders appear at 8 Cal.Code Regs. sections 11010 et seq.

It is well known that the original intent of these provisions was to protect women and minors. (*Id.* 27 Cal.3d at 700.) In the early 1970's, the legislature expanded the IWC's jurisdiction to include all employees. (*Id.* at 700-701, citing Stats. 1972, ch. 1122, §§ 2-6, pp. 2153-2155; Stats. 1973, ch. 1007, §§ 1.5-4, pp. 2002-2003.) The Supreme Court has consistently upheld the IWC's constitutional and statutory authority to create the wage orders. (See, *Kerr's Catering Service v. Department of Industrial Relations* (1962) 57 Cal.2d 319, 325; *Industrial Wage Commission, supra,* 27 Cal.3d at 725-729; *Ramirez v. Yosemite Water Company, Inc.* (1999) 20 Cal.4th 785, 799-800; *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575; *Cuadra v. Millan* (1988) 17 Cal.4th 855, 858, disapproved in part on different grounds in *Samuels v. Mix* (1999) 22 Cal.4th 1, 16)

The current wage orders have been in effect in essentially the same form since the last major revisions in 2000. They contain multiple minimum employer payment obligations, including provisions establishing overtime

premium pay requirements and exemptions (Sec. 3), minimum wages and split shift premiums (Sec. 4), minimum reporting pay requirements (Sec. 5), rest and meal period pay (Sec. 11 and 12), as well as prohibitions against deductions for cash shortages and breakage (Sec. 8), requirements that employers bear the expense of furnishing and maintaining required uniforms (Sec. 9), maximum lodging and meal charge credits against minimum wage (Sec. 10), as well as other non-monetary provisions governing working conditions. (See, e.g., Wage Order 5-2001, MJN Exhibit 5.) These provisions are all mandatory minimum requirements.

All of the provisions in the wage orders are "self-enforcing." That is, employers are obligated to post the orders in the workplace (Sec. 22) and follow their terms. As with rest and meal period pay, an employee is not required to initiate an enforcement proceeding to receive minimum wages, overtime, split-shift-premiums[4], reporting pay, or any other requirement under the wage orders. As an example, overtime requirements were historically founded solely upon the IWC orders until 1999 the Legislature enacted AB 60, which restored daily overtime after a period in which the wage orders provided only weekly overtime and codified the basic overtime requirements. (See Labor Code §§ 510-511, 515, 1198, and section 3 of IWC wage orders 1-17.)

Rest and meal period pay under Sections 11 and 12 of the wage order function similar to split shift premiums and reporting pay obligations[5]. The

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[4] For example, See MJN Exhibit 3, a company directive to managers advising them that the employee must receive one hour's pay for split shifts.

[5] In *Kerr's*, *supra*, 57 Cal.2d at 330, the Supreme Court upheld these provisions as within the IWC authority to promulgate regulations "affecting

fact that none of these items counts toward daily hours worked for purposes of entitlement to overtime does not define them as penalties. The intention is that the employer provide these minimum obligations without employee enforcement proceedings, functioning as compensation. Rest and meal period pay functions identically and so may also be fairly classified as compensation.

4. *Tomlinson* Finds Claims Under Section 226.7 Restitutionary.

Subsequent to *Orco Block*, a district court decision analyzing California law in *Tomlinson* found that claims under Section 226.7 are restitutionary. *Tomlinson* based its ruling on the broad definition of wages under the Labor Code[6] and the analogy of rest and meal period pay to

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wages." (*Ibid.*) The Supreme Court did not analyze whether split-shift premiums and minimum reporting pay constitute "wages" under Section 200.

[6] Labor Code section 200 provides: "As used in this article: (a) "Wages" includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation." Courts construe this section broadly. "Wages" includes compensation measured by any standard. (*Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1972) 24 Cal.App.3d 35, 44.) In its legal sense, the word "wage" has been given a broad, general definition so as to include compensation for services rendered without regard to the manner in which such compensation is computed. (*In re Hollingsworth's Estate* (1940) 37 Cal.App.2d 432, 436.) This includes "periodic monetary earnings" plus all other benefits. (*Wise v. Southern Pac. Co*. (1970) 1 Cal.3d 600, 607.) A bonus, offered as an incentive to attract employees, has been held to be wages. (*Hunter* v. *Ryan* (1930) 109 Cal.App. 736, 738.) Payments to a health and welfare fund by an employer (*People* v. *Alves* (1957) 155 Cal.App.2d Supp. 870, 872), payment of insurance premiums by an employer (*Foremost Dairies* v. *Industrial Acc. Com*. (1965) 237 Cal.App.2d 560, 580), payments to an unemployment insurance fund (*People* v. *Dennis* (1967) 253 Cal.App.2d Supp. 1075, 1077), and pension plan benefits (*Hunter* v. *Sparling* (1948)

overtime:

> The Court agrees with Plaintiffs that payments under Section 226.7 are restitutionary because they are akin to payment of overtime wages to an employee; both are 'earned' wages and thus recoverable under the UCL... Just as an understaffed company may make the conscious decision to pay its employees time and a half to work overtime, the same understaffed company also can decide to have its employees forego their meal and rest breaks if it compensates them at a higher rate. In both instances, the employee earns the higher wage by working additional time.

(*Tomlinson*, *supra*, 359 F.Supp.2d at 896.)

Tomlinson also states:

> Indymac argues that the remedy for meal break violations is a penalty because employees are only entitled to a half-hour meal break, but the remedy under section 226.7 is a 'punitive full hour'... The Court agrees with Plaintiffs that payments under Section 226.7 are restitutionary... The minor potential variability in relation to time worked does not undermine the basic concept of paying workers a premium for time worked without a meal break or rest breaks.
>
> Moreover, the Court notes that its conclusion is consistent with the Labor Code's definition of 'wages', which is 'all amounts for labor performed by employees.' [citations omitted]. Under Section 226.7, the employees paid an amount (equal to one hour of regular pay) for labor performed during his meal break or rest period. For these reasons, the Court finds that an employee earns the additional hour of pay when he is not given a meal

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87 Cal.App.2d 711, 725) are wages within the meaning of the statute. Demonstrating the broad sweep of employee remuneration classified as "wages," Section 200 even includes payments for uniform expenses as wages. (*Department of Industrial Relations v. UI Video Stores, Inc.* (1997) 55 Cal.App.4th 1084, 1091.)

> break or rest period. An award under Section 226.7 thus is restitutionary and may be recovered under the UCL...

(*Id.* at 896 [emphasis added].)[7] That reasoning applies directly to this case.

B. HARMONIZING THE STATUTORY SCHEME SUPPORTS A FINDING THAT SECTION 226.7 PROVIDES A COMPENSATORY REMEDY.

This gravamen of the action dictates the applicable statute of limitations.

> To determine the statute of limitations which applies to a cause of action it is necessary to identify the nature of the cause of action, i.e., the 'gravamen' of the cause of action. [Citations.] '[T]he nature of the right sued upon and not the form of action nor the relief demanded determines the applicability of the statute of limitations under our code.' [Citation.]"

(*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 22-23.)

Thus, the relief provided under Section 226.7, whether characterized as compensatory or penal, is not determinative; the nature of the right sued upon dictates the statute of limitations. The gravamen of the action for rest and meal period pay under Section 226.7 is to compel employer compliance to pay an employee who was not provided breaks mandated by the IWC and not paid the hour of pay owed. Therefore, the action is a liability created by statute, governed by Code of Civil Procedure section 338, subdivision (a). (See *People ex rel. Department of Conservation v. Triplett* (1996) 48

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[7] *Tomlinson* found that monetary penalties are not recoverable under Business & Professions Code section 17202. The court held that this section provides only for a court to enjoin unfair competition practices. However, *Tomlinson* did not consider whether sums employers are obligated to pay rather than being subject to enforcement may be considered restitutionary under this section regardless of being facially classified as penalties.

Cal.App.4th 233, 251 [gravamen of action challenging assessor's valuation was to compel compliance with re-assessment statute, governed by Code of Civil Procedure section 338, subdivision (a)].)

This Court is called upon to construe Section 226.7 under accepted principles of statutory construction.

> The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.] In order to determine this intent, we begin by examining the language of the statute. [Citations.] But '[i]t is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend.' [Citations.] . . . Thus, '[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.' [Citation.] Finally, we do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.' [Citation.]

(*People v. Pieters* (1991) 52 Cal.3d 894, 898-899, fn. omitted.) In addition to the language of the statute and the rules of statutory construction, a third applicable consideration is public policy. (*Steketee v. Lintz, Williams & Rothberg* (1985) 38 Cal.3d 46, 57.)

Supreme Court cases describe the public policy concerns regarding employment claims:

> [I]n light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection.

(*Ramirez v. Yosemite Water Co., supra,* 20 Cal.4th at 794, quoting *Industrial*

Welfare Commission, supra, 27 Cal.3d at 702.)

In *Industrial Welfare Commision*, the Supreme Court specifically found that rest and meal requirements in the wage orders (those requiring them but not at that time providing a remedy for non-compliance) concern the "health and welfare" of employees. The Court found these requirements were not superseded or preempted by Cal/OSHA provisions, in light of public policy to protect workers:

> Finally, the interpretation of the statute urged by the IWC is sustained by the general principle of statutory interpretation, noted at the outset of this opinion, that remedial legislation of this nature is to be liberally construed in favor of accomplishing the principal objective of the legislation, i.e., protecting workers. Under the employers' interpretation of the statute, employees would be deprived of the benefits of health- and safety-related regulations of the IWC even though Cal/OSHA had not yet acted on the subject to protect the workers' interests. Such a construction is clearly at odds with the remedial purpose of the entire statutory framework.

(*Id.* at 724.) The rest and meal provisions carry a similar remedial component as part of the statutory scheme.

Recently, the Supreme Court examined statutes of limitation for certain employee claims in *Coachella Valley*. Because, as here, there was no specific discussion of the statute of limitations in the legislative history, the Court based its ruling on examining the entire statutory scheme: "perhaps most importantly, we do not construe statutes in isolation; rather, we construe every statute with reference to the whole system of law of which it is a part, so that all may be harmonized and anomalies avoided." (*Coachella Valley, supra*, ___ Cal.4th ___, 2005 LEXIS 5953 at p. 38, citing *In re Marriage of Harris* (2004) 34 Cal.4th 210, 222; *Mejia v. Reed* (2003) 31 Cal.4th 657, 663.)

Coachella Valley involved a public employees union claim of

discrimination against a school district. The union brought an administrative unfair practice charge under the Government Code Meyers-Milias-Brown Act (MMBA) with the Public Employment Relations Board (PERB). PERB argued for a three-year statute of limitations for labor claims.

The Supreme Court noted authority finding, in non-MMBA cases, *all* state labor law claims governed by three-year statute of limitations under Code of Civil Procedure section 338, subdivision (a): "the Court of Appeal in *Giffin v. United Transportation Union* (1987) 190 Cal.App.3d 1359, 1365 had held that three years was the statute of limitations for an alleged violation of a state labor law." (*Coachella Valley, supra,* ___ Cal.4th ___, 2005 LEXIS 5953 at pp. 3, 20, 29[8].)

However, harmonizing the entire statutory scheme produced a different result. The statutory scheme had previously provided judicial jurisdiction for MMBA charges, which were governed by a three-year statute of limitations. The legislature subsequently vested jurisdiction in PERB. "By changing the forum--vesting an administrative agency (the PERB) rather than the courts

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[8] The holding in *Giffin v. United Transportation Union, supra,* 190 Cal.App.3d at 1365 was not as quite as broad one might interpret the Supreme Court's description. CELA has not located cases finding other than a three-year statute of limitations for violations of state labor law involving payments to employees. There is a reference in *State Comp. Ins. Fund v. Workers Comp. Appeals Board* (1998) 18 Cal.4th 1029 noting that the 10% penalty an employer pays to an employee whose workers compensation benefits are unreasonably delayed falls constitutes a penalty but no mention of the statute of limitations. In *Cuadra*, *supra*, 17 Cal.4th at 870, the Supreme Court in dicta adopted the position advanced by the Labor Commissioner that all amounts employees recover in administrative proceedings before the Commissioner are recoverable for "four years for a claim on a written contract, two years for a claim on an oral contract, and three years for a claim on a statutory liability." (*Cuadra v. Millan*, *supra*, 17 Cal.4th at 866.)

with initial jurisdiction over MMBA charges--the Legislature abrogated the three-year statute of limitations under section 338(a), and we assume that this abrogation was intentional and not inadvertent." (*Id.* at 33.) Thus, the Court found that a different statute of limitations applied to administrative proceedings under the MMBA. (*Id.* at 37-38.) It determined not to apply the three-year limitations period generally applicable to labor claims, as the specific claim involved an administrative proceeding with a six-month filing deadline.

Applying that standard here, and harmonizing the various statutes affecting rest and meal period violations, the hour of pay owed under Section 226.7 is employee compensation governed by a four-year statute of limitations, not a penalty. The following is the relevant chronology:

1. The IWC promulgated rest and meal period requirements in 1947 and 1932, respectively. These provisions, calling for paid 10-minute rest periods for every four hours worked and an unpaid 30-minute meal period for work periods exceeding five hours, have not changed. The Labor Code provided no specific compensatory remedy for the employee or penalty on the employer for non-compliance with Sections 11 and 12 of the wage orders; however, the wage orders referenced Section 1199 providing for misdemeanor fines for violations of any provision of an IWC order (See Wage Order 5, Section 20, MJN Exhibit 5 [which now includes additional penalty language taken directly from Labor Code section 558]);
2. In 1999, the legislature enacted Labor Code section 558 as part of AB

60 (effective January 1, 2000), which establishes civil penalties[9] against employers who violate any provision of an Industrial Welfare Commission (IWC) wage order in the amount of $50 per "underpaid" employee per pay period for the first violation and $100 for subsequent violations. At the time, only the Labor Commissioner had standing to bring actions to enforce these penalties, and Labor Code section 558 (a)(3) provided that wages collected along with penalties would be paid over to the employee;

3. On June 30, 2000, the IWC adopted the hour of pay remedy for violations of rest and meal period requirements, effective October 1, 2000 (See MJN Exhibit 4; MJN Exhibit 5, p.1);

4. As of the adoption of the hour of pay provision, Section 558 civil underpayment penalties[10] applied to violations of the wage order rest

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[9] Misdemeanor criminal penalties for violations of the wage orders already existed under Labor Code section 1199.

[10] The subsequent adoption of the hour of pay remedy by the IWC explains why the Department of Industrial Relations Enrolled Bill Report, dated prior to the date the wage orders were revised to add the hour of pay, states that Labor Code section 558 penalties do not apply to meal period claims. Since the legislative history reflects that the legislature adopted the IWC's hour of pay remedy, it is assumed under principles of statutory construction that the legislature was aware that Labor Code section 558 penalties applied to violations of the hour of pay requirement under new Sections 11 and 12 of the wage orders. (MJN Exhibit 6, Enrolled Bill Report, September 13, 2000) The DLSE issued an interpretative memorandum of AB 60, with the proviso that its issuance predated the adoption of the IWC Interim Wage Order, and that wage order provisions would prevail over any inconsistent analysis in the memorandum. (MJN Exhibit 7, December 23, 1999 Memorandum.) DLSE's analysis concluded that Section 558 penalties did not apply to rest and meal period violations because the penalties only were payable to "underpaid" employees. With the addition of the hour of pay provision to the wage orders and Labor

and meal period payment requirements;

5. In 2000, the legislature enacted Section 226.7 as part of AB 2509, effective January 1, 2001[11].

6. AB 2509 also enacted Section 226 providing specifically designated employer "penalties" for record-keeping violations providing the greater of either "actual damages" [such as any benefits lost] or a "penalty" of $50 for the first violation and $100 for succeeding violations; and

7. In 2003, the legislature enacted SB 796 (the Private Attorney General

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Code in 2000 and 2001, respectively, employees denied rest or meal period pay are "underpaid," hence Section 558 penalties obtain.

[11] *Orco Block* concluded the legislative history is indeterminative as to the statute of limitations. The legislative history has been comprehensively briefed by Plaintiffs, and CELA notes only certain highlights. *Orco Block* recognized the legislature's abandonment in the final version of AB 2509 of a true civil penalty: "for whatever reason, the eventual version enacted as Section 226.7 omitted the $50 payment– clearly a penalty–and included no characterization of the pay-related amount." (*Orco Block*, p. 10.) One reason may be found in the characterization made by the Senate that *Orco Block* did not note. When the Senate removed the penalty, it replaced it with an hour of "wages." (MJN Exhibit 8, p. 4) Subsequently, however, the Assembly referred to replacing the prior penalty with "the lower penalty amounts adopted by the IWC." (MJN Exhibit 9, p. 2.) The IWC had referred to the "penalty" in the same nature, however, as what it called the "overtime penalty," which is subject to restitution claims. (MJN, Exhibit 4 p. 30). A DIR Enrolled Bill Report dated September 13, 2000 observed that an employee's only previous recourse was an action for injunctive relief to compel *prospective compliance* with the law. Its statement "of course, an injunction does nothing to remedy past noncompliance" indicates that Section 226.7 is intended to provide employees a retrospective compensatory remedy to compliment the right to an injunction. (See Enrolled Bill Report, MJN Exhibit 6);

Statute [PAGA]), which provided employees a private right of action to sue for penalties under the Labor Code, 25% of which is retained by the employee with the remainder being paid to the state.

Harmonizing these provisions, the legislative intent is to provide a compensatory remedy for employees (an hour of pay, covered by a four year liability period) and a penalty against employers ($50 for initial and $100 for subsequent violations, covered by a one-year liability period). If the employer pays the required extra compensation on the pay day for the pay period for which the meal and rest period violations took place, there would be no underpayment and thus, no penalty under Section 558. Thus, the Section 558 penalty would function to foster prompt payment of meal or rest period premium pay, the same way it functions to foster prompt payment of required overtime premium pay.

The legislature clearly knew that the IWC had adopted the hour of pay provision, as it co-opted this remedy into Section 226.7. It is also assumed that the legislature was aware that an employer's failure to pay the hour of pay under the wage orders constituted underpayment subjecting the employer to penalties under Labor Code section 558. The "[l]egislature is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof." (*County of Los Angeles v. Superior Court* (2005) 127 Cal.App.4th 1263, 1269 (quoting *People v. McGuire* (1993) 14 Cal.App.4th 687, 694.)[12]

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[12] *Orco Block* addressed subsequent, unenacted legislation that would have clarified that the hour of pay is compensation or wages but found it subject to differing inferences as to the penalty/compensation interpretation. Moreover, proposed legislation that the Governor vetoed is not indicative of legislative intent. Evidence of unenacted legislation has been repeatedly rejected as a basis for establishing the intent of enacted

It is unlikely that the legislature would have felt the need to establish *two penalties* on the employer. It is true that Section 558(c) states that the penalties provided are in addition to existing civil and criminal penalties. However, it is more likely that the removal of the prior "civil penalties" provision and replacement with the IWC hour of "pay" was intentional and is explained as an effort to provide a compensatory remedy to the employee along with the extant employer penalty. The legislature's inclusion in the same bill of a dedicated statutory "penalty" for record-keeping violations supports this conclusion.

The enactment of PAGA is further proof that the hour of pay is not a penalty. A private right of action already existed under Section 218 to bring claims for rest and meal period violations, so there was no need to create a special statute. Further, 100% of the pay goes to the employee, while PAGA provides that just 25% is retained.

Perhaps the most anomalous result to be avoided by a construction that the hour of pay is a penalty is the fact that it would mean the legislature failed in what it set out to do in enacting AB 2509. The express purpose of the provision was to provide a remedy where one did not exist before. (See MJN Exhibit 6, Enrolled Bill Report, p. 9.) (*Barquis v. Merchs. Collection Assn.* (1972) 7 Cal.3d 94, 112 ["there is a maxim as old as law that there can be no

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legislation. (See, e.g., *Cuadra*, *supra*, 17 Cal.4th at 870 [bills the legislature failed to enact regarding the commencement date for calculating back pay "are of little if any value in determining legislative intent"] *People v. Escobar* (1992) 3 Cal.4th 740, 751, 837 P.2d 1100 [" 'weak reed upon which to lean' "]; *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal.4th 991, 1003, 945 P.2d 781 [same]; *id.* at p. 1003, fn. 4 [vetoed statute overturning prior decision "provided no guidance"]; *Baldwin v. County of Tehama* (1994) 31 Cal.App.4th 166, 181, fn. 10 ["legislative history tea leaves"] [denying judicial notice of unenacted legislation].)

right without a remedy"].) The employee would be left with no compensatory remedy for past non-compliance and only an injunction to prevent future violations. Any statutory construction tending to frustrate the legislative purpose cannot be supported.

Neither the legislative history nor the statutory scheme support the conclusion that the legislature intended Section 226.7 to be governed by the statute of limitations for statutory penalties over the limitations period for obligations created by statute. Its primary concern was protecting employees and providing them a remedy for employer non-compliance. A statute designed to compelling compliance with another law or statute produces an obligation created by statute, governed by the three-year limitations period. (See *People ex rel. Department of Conservation v. Triplett*, *supra*, 48 Cal.App.4th at 251.)

C. THE HOUR OF PAY IS NOT A PENALTY UNDER TRADITIONAL ANALYSIS

1. The Hour of Pay is Compensatory and is a Deterrent.

Overtime laws provide both extra compensation to the employee and are the primary enforcement mechanism to compel employer compliance with the eight hour workday requirements. (*Skyline Homes Inc. v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239, 250-251; *Monzon v. Schaefer Ambulance Service, Inc.* (1990) 224 Cal.App.3d 16; *Industrial Welfare Com.*, *supra*, 27 Cal.3d at 724.)

Like overtime, Section 226.7 has both a compensatory aspect, providing an hour's pay directly to the employee, and a deterrent feature, designed to compel employer compliance with rest and meal period requirements.

An employee is entitled to compensation for being required to work

through rest or meal periods. An employee working a typical eight-hour day receives two paid ten minute breaks. Because rest periods are paid, the employee works 7 hours and 40 minutes but is paid for 8 hours. An employee required to work the full eight hours is entitled to additional compensation. Similarly, an employee deprived of an unpaid 30 minute meal break is also entitled to compensation. The legislature has set that compensation at "one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided." (Section 226.7, subd. (b).) There are no other monetary damages provided by law.

Orco Block disagreed that the loss of a rest or meal period causes a "detriment that can reasonably be quantified." (*Orco Block*, p. 18.) The Court observed that the overtime scheme is punitive to the employer and designed as a means of enforcing the eight-hour workday but also has a compensatory purpose related to the extra work performed. (*Id.* at 18-19.) The Court found rest and meal periods to be different:

> It is far less easy to see the need to provide monetary compensation to the employee deprived of a rest or meal period, and thus it is not unreasonable to suppose that the Legislature elected only to provide the coercive penalty.

(*Id.* at 19.)

CELA questions the conclusion that no compensation is necessary to the employee required to work through rest or meal periods. If that were the case, the Section 558 penalties of $50 per employee for the first violation and $100 for successive violations would be sufficient. Moreover, daily meal period requirements in Section 512 were enacted as part of AB 60, the "Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999" (Stats 1999 ch.

134 § 6)[13]. This indicates a legislative intent to include meal breaks with employee protections for working long work hours and spending time away from family. Deprivation of these breaks does cause a detriment that should be compensated. That it is difficult to quantify does not make the hour of pay an unreasonable legislative calculation. (See *Rivera v. Anaya* (9th Cir. 1984) 726 F.2d 564, 579-569 [Labor Code sections1682-1699 calling for actual damages or statutory damages of $500 "obscure and difficult to prove" fall under three-year statute of limitations as remedial liability created by statute and not one year for statutory penalty under California Code of Civil Procedure].)

Further, it cannot be questioned that an employee missing two paid breaks has provided an extra 20 minutes of services. Since there is no remedy providing the right to recover 20 minutes of wages, the legislature has provided an hour's pay to cover both the extra services rendered and the intangible detriment associated with the lack of rest.

The acknowledged purpose of rest and meal period requirements is to foster the general health and welfare of the employees. (*Kerr's, supra*, 57 Cal.2d at 330.) Employees deprived of these benefits should be compensated Aside from the obvious reasons for providing employees opportunity for nourishment during meal periods, there are a myriad of other reasons for breaks associated with their general health and welfare. In addition to the traditional notion of "resting" for purposes of elimination, employees may

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[13] The pertinent preamble to AB 60 is as follows:
SEC. 2. The Legislature hereby finds and declares all of the following:
(d) Numerous studies have linked long work hours to increased rates of accident and injury.
(e) Family life suffers when either or both parents are kept away from home for an extended period of time on a daily basis.

need to place calls to family members or others that would be forbidden during work hours, diabetics may need to take snacks to regulate blood sugar levels and many employers expressly forbid all eating during working hours, employees may simply need to stop activities to regenerate strength, as well as many other activities and uses for rest periods. Being deprived of these uses is compensable.

Orco Block also found a compensatory element of the hour of pay "tenuous" as lacking a "necessary relationship" between the amount owed and the break time missed:

> In our view, the compensatory element of the payment is at best tenuous. Although the payment is tied to the employee's wage, the amount being computed by day, really bears no relationship at all to the hypothetical or potential detriment suffered by an employee who misses one, two, or three breaks during the day.

(*Orco Block* at 15.)

The concern that the hour of pay is owed "per day" regardless of whether employers fail to provide just one or more mandated breaks does not transform compensation into a penalty governed by a one-year statute. The gravamen of the action remains seeking payment for missed rest or meal periods and compliance with the hour of pay obligation, a statutory remedy. That the amount owed is tied to wages and varies depending on the employee's rate of compensation also establishes the compensatory nature of the remedy. It would make no sense to penalize a ready-mix company paying $20 per hour more than an agricultural company paying minimum wage.

Even penalties denominated as "civil penalties" may be seen to be "not essentially penal in nature but remedial." (*Cal. Ass'n of Health Facilities v. Dep't of Health Servs.* (1997) 16 Cal.4th 284, 294.) It follows logically that statutes providing remedies other than penalties may contain a penal

component, or even be weighted more penal than remedial, without being limited to a one-year statute of limitations for a true statutory penalty. What governs is the legislative intent.

It cannot be overemphasized that the legislature enacting AB 2509 did not address the statute of limitations. It is assumed the legislature was aware the statute of limitations for statutory "penalties" is one year and three years for obligations created by statute *other* than penalties. When the legislature dropped the dedicated "penalty" under Section 226.7 and elected not to include the word "penalty" in the final version of the statute, a reasonable inference arises that the intention was to create a statutory obligation other than a penalty. This remains true regardless of whether the hour of pay functions like a penalty, "walks and talks" like a penalty *(People ex rel. Lockyer v. Pacific Gaming Technologies* (2000) 82 Cal.App.4th 699, 701), or is primarily penal rather than compensatory.

The primary argument advanced to support a characterization of the hour of pay as a penalty is the long line of California cases holding the one-year statute of limitations applies to recovery of statutory damages calculated "without reference" to actual harm. (See, e.g., *Prudential Home Mortgage Co. v. Superior Court* (1998) 66 Cal.App.4th 1236, 1245.) Note that this does not require a "proportional relationship." The leap that has to be made to apply this rule is that the hour of pay has *nothing whatsoever* to do with the actual detriment suffered in missing one or more breaks. As argued above, difficulty in quantifying damages for missing breaks does not mean that the hour of pay bears no relationship to the harm suffered. An entirely reasonable inference is that it is the legislature's attempt to create the most appropriate remedy under the circumstances to monetize the harm suffered. This is why a high-paying employee is compensated more than an employee earning less.

Orco Block relied upon the definition of a penalty set forth in the seminal Supreme Court case:

> [A] statutory penalty . . . is one in which an individual is allowed to recover against a wrong-doer, as a satisfaction for the wrong or injury suffered, and without reference to the actual damage sustained, or one which is given to the individual and the state as a punishment for some act which is in the nature of a public wrong.

(*Orco Block*, at 12, quoting *County of Los Angeles v. Ballerino* (1893) 99 Cal. 593, 596 [*Ballerino*].)

Ballerino and similar cases held Code of Civil Procedure section 340, subdivision (a) inapplicable to a county's statutory action to recover delinquent taxes plus interest and a 5 percent "penalty." (*Id.* at 594, 596.)

Cases subsequent to *Ballerino* have amplified its theme:

> "Where the damages are given wholly to the party injured as compensation for the wrong and injury, the statute having for its object more the indemnification of the plaintiff than the punishment of the defendant, the action is not penal, properly so called, but remedial." (1 Am. Jur. 89.)

(*Agudo v. County of Monterey* (1939) 13 Cal.2d 285, 289-290.)

Courts apply the following analysis in distinguishing between obligations created by statute other than a penalty and statutory penalties:

> "**The test generally underlying most of the cases, however, is that a 'penalty' includes any law compelling a defendant to pay a plaintiff other than what is necessary to compensate him for a legal damage done him by the former.**" (*Miller v. Municipal Court* (1943) 22 Cal. 2d 818, 837 [142 P.2d 297].) This would include statutes which provide for mandatory double or treble damages.

(*People ex rel. Department of Conservation v. Triplett, supra*, 48 Cal.App.4th

at 251-252, citations omitted, emphasis added.)

Thus, the critical component of a penalty is that it requires a defendant to pay something *other* than what it takes to compensate a plaintiff for the wrong suffered. (*Miller v. Municipal Court* (1943) 22 Cal.2d 818, 837.) This would include "an arbitrary sum in addition and unrelated to actual damages." (*Prudential Home Mortgage Co. v. Superior Court, supra,* 66 Cal.App.4th at 1242, 1243.) A common example is double or treble damages, not at issue here[14]. Examples specific to employee claims include Labor Code section 203 [waiting time penalties of a full day's pay for up to 30 days provided in addition to wages owed]; Labor Code section 226 [record-keeping violations providing for greater of actual damages (such as lost benefits based on time accrual) or penalties of $50 for the first pay period and $100 for subsequent pay periods up to $4000], and Labor Code section 558 [wage order violations of $50 for the first pay period and $100 for subsequent pay periods for underpaid employees in addition to underpayments owed].

Orco Block stated that if the hour of pay seems reasonably computed to compensate the employee for the actual damage or detriment, it is unlikely to be a penalty. (*Orco Block,* at 13.)

And here is where reasonable minds seem to differ. On one hand, as argued above, employees consider the hour of pay to be compensation for the break time they miss and the extra time they are required to work. On the other

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[14] Even liquidated damages *paid to employees* above actual damages, are governed by a three-year statute. For example, two cases deciding the applicable statute of limitations under California law for employee claims of double damages under the Fair Labor Standards Act held the claims governed by the three-year statute of limitations. (See *Hays v. Bank of America National Trust & Savings Assn.* (1945) 71 Cal.App.2d 301, 304; *Culver v. Bell & Loffland* (9th Cir. 1944) 146 F.2d 29.)

hand, *Orco Block* concluded, and employers argue, that the hour of pay does not constitute compensation. *Orco Block* seemed to turn on the conclusion that one hour of pay is owed regardless of whether the employee misses one, two, or three breaks in a given day. The implication is that the hour of pay does not function as compensation unless it varies proportionally to match the number of missed rest or meal periods.

However, the hour of pay is not the only employee compensation that is not tied precisely to the detriment suffered. For example, Section 5 of the wage orders provides that employees who report to work but are not furnished at least half their scheduled hours must be paid for half their shift, a minimum of two and a maximum of four hour's pay. Under this requirement, an employee scheduled to work eight hours receives four hour's pay, irrespective of whether no time, ten minutes, or 3.5 hours are worked before being relieved of duty. The IWC set a half day's pay as the reasonable measure of the detriment suffered for not receiving a day's work and wages. Like the hour of pay, the compensation is uniform and set by day regardless of the actual work time missed.

Another example is the split-shift premium provided under Section 4 of the wage orders. Employees who work multiple shifts in the same day separated by more than an hour are owed one hour of *minimum* wage. Thus, even a $20 per hour worker receives just the current minium established by the legislature or IWC. Yet the amount is nevertheless considered wages, included in the section of the wage order provisions setting forth minimum wage obligations, to compensate the employee for the intangible detriment suffered in returning to work a second time in the same work day.

It could be argued, then, that minimum reporting pay and split-shift premiums are not compensatory and are primarily penal, to ensure employees

receive their full scheduled shift and are not required to leave and return to work. The fact that these amounts are owed to employees as remuneration for detriment related to wages, hours, and working conditions militates against such a finding. Further, since employers have affirmative obligations to pay out the sums required by the wage orders, they share the characteristics of ownership rights subject to restitution discussed above as to rest and meal period pay.

The conclusion that Section 226.7 does not provide compensation also raises the important question of what *is* an employee to be paid as compensation for the detriment suffered? And if the only pre-AB 2509 employee remedy was a prospective injunction and the legislature recognized the need for retrospective employee compensatory relief, how could it have failed to create what it set out to create and instead provided no compensation to the employee?

These questions remain unanswered by a penalty finding but do not arise upon a ruling that the hour of pay is compensatory.

Non-labor cases stating general principles characterizing statutory penalties that *might* apply to Section 226.7 make the issue of the governing statute of limitation a closer question.

It is thus appropriate to determine the issue on the basis of the overarching public policy favoring broad construction of statutes in favor of employee protections, giving them recovery for four years of violations rather than just one. It is appropriate to find that employees deserve to be compensated for the extra work time and intangible detriment suffered by missing breaks. It is appropriate to find the hour of pay compensatory in light of the overall statutory scheme and the presence of other civil and criminal employer penalties already on the books. Finally, it is appropriate to

differentiate the hour of pay in Section 226.7 from other Labor Code sections providing true civil penalties in addition to wages owed (Section 203), record-keeping damages (Section 226(e)), underpayments owed (Section 558(a)), or PAGA civil penalties, rather than making the determination solely using principles borrowed from inapposite, non-labor cases.

The analogies to overtime, reporting pay, split shift premiums, and even wages in general may be inexact. But they come far closer than the generic penalty cases, e.g., involving liquidated damages to stockholders accusing corporations of shoddy record-keeping (*Anderson v. Byrnes*, *supra*, 122 Cal. at 275-276), court-reporter fee deductions for submit transcripts in felony cases within a specified time period (*San Diego County v. Milotz* (1956) 46 Cal.2d 761, 766-767), or fees for delays in title reconveyances to borrowers who had repaid loans under a statute specifically calling for the lender to "forfeit" $300 (*Prudential Home Mortgage Co., Inc. v Superior Court* (1998) 66 Cal.App.4th 1236, 1242).

Based on these considerations, CELA submits that the hour of pay is compensatory even under traditional, non-labor case standards.

D. THE DLSE INTERPRETATIONS ARE INCONSISTENT AND SHOULD BE GIVEN NO DEFERENCE

Under dubious authority, the DLSE has issued proposed regulations classifying the hour of pay under Section 226.7 as a penalty, not wages. The regulations will be scrutinized in an immediate judicial challenge by state labor interests.

DLSE has also recently issued a "precedent decision" reaching the same result. (MJN Exhibit 10.) DLSE issued the decision to provide guidance to deputy labor commissioners in administrative proceedings.

A review of the DLSE's flip-flop history on this issue reveals its conclusions and actions are entirely untrustworthy and entitled to no deference by the Court[15].

The DLSE and IWC both operate under the auspices of the DIR. Statements by all three of these entities are addressed.

DIR's initial reference to the hour of pay came when the IWC proposed the addition of the hour of pay to the wage orders on June 30, 2000. (MJN Exhibit 4, pp.25-26.) As discussed above, the IWC saw the hour of pay operating as a continuing obligation which employers were expected to pay out each time an employee worked a day without a required rest or meal period. The IWC described the "penalty" operating in the same way as "overtime penalty pay." (*Id.* p. 30) There was no discussion of limiting liability to one year.

DIR issued an Enrolled Bill Report in September 2000 in connection with AB 2509, discussed above. The DIR refers to the hour of pay as a "penalty" but does not state that it is not intended to be compensation to the employee or intended to operate as a statutory penalty subject to one year of liability.

After the IWC added the provision to the wage orders, the DLSE began assessing the hour of pay in administrative claims, opinion letters, and its enforcement manual. CELA notes that the DLSE made occasional reference to the hour of pay in opinion letters and its enforcement manual, calling it a

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[15] *Orco Block* remarked at the "shifting stance" of the DLSE and refused to follow the its interpretation. The Court stated "we do not consider it has any particular expertise on the issue [and] we would hesitate to give much weight to an opinion which evidently lacks stability." (*Orco Block* at pp. 8-9.)

"penalty."[16]

DLSE's use of the term "penalty" in this way cannot be given any weight. DLSE did not advance the term as a *statutory interpretation* of Section 226.7 or as evidence of legislative intent.

It is noteworthy that employers consistently argue that the legislature's failure to identify the hour of pay as a "penalty" in the statute is not determinative. Out of the other side of their mouth, they argue that the DLSE's use of the word "penalty" should be given weight. This uncritical argument fails to grasp that DLSE's early use of the term "penalty" did not include any analysis that the hour of pay was not employee compensation or functioned as a statutory penalty that would be governed by a one-year statute of limitation. The term was used as an expediency, not a legal conclusion.[17]

Recently, the Ninth Circuit Court of Appeals issued a definitive ruling that statutory claims under Section 226.7 are not preempted by the Labor Management Relations Act even where collective bargaining agreements contain rest and meal period protections. (*Valles v. Ivy Hill Corp.* (June 6, 2005) 2005 U.S. App. LEXIS 10408]; 177 L.R.R.M. 2475.) The Court

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[16]DLSE in support of its proposed regulations also submits a letter from the sponsor of AB 2509 [using the term "penalty" but not as a term of art carrying a one-year statute of limitations], which is not properly considered as part of the legislative history. (*Myers v. Philip Morris Cos., Inc.* (2002) 28 Cal.4th 828, 845 ["we have repeatedly declined to discern legislative intent from comments by a bill's author because they reflect only the views of a single legislator instead of those of the Legislature as a whole."].)

[17] If there were any doubt about this, one need only examine a typical DLSE ruling, awarding "penalties" *from October 1, 2000 to February 7, 2003.* (See July 8, 2003 DLSE order, Exhibit 12 to MJN.)

referred in passing to hour of pay as a "penalty." (See, e.g., *Id.*, at 12.) However, there is no indication whatsoever that its use indicated a statutory interpretation concluding the hour of pay is a civil penalty subject to one year of liability. If anything, the tenor of the opinion suggests the Court favored employee's rights over limiting employer liability.

The opposite is also true with regard to labeling the remedy. The Supreme Court has used the term "monetary penalties" to refer to amounts restored as restitution under Business & Professions Code section 17203 subject to a four-year statute of limitations under section 17208 of the UCL. (*Korea Supply*, 29 Cal.4th at 1148 ["The fact that the "restore" prong of section 17203 is the only reference to monetary penalties in this section indicates that the Legislature intended to limit the available monetary remedies under the act."] CELA does not assert that this statement in passing brings all manner of penalties under the UCL.

When DLSE ultimately engaged in a dedicated statutory analysis of the applicable statute of limitations, it came down squarely in support of a three-year statute. In a May 2, 2002 internal memorandum and June 11, 2003 opinion letter (Exhibits 13 and 14 to MJN), DLSE provided a comprehensive legal analysis of the statute of limitation question and concluded that the hour of pay functions as "premium pay" subject to the limitations period under Code of Civil Procedure section 338, subdivision (a). Countless administrative rulings applying this standard followed, including a detailed Order Decision and Award setting out a three-year statute of limitations analysis (See, e.g., MJN Exhibit 15, *Cocuera v. DHL*, April 27, 2004). Of course, employers rejected the DLSE conclusions at the time, just as they have embraced them now.

Just a few months later, DLSE reversed its position when it

promulgated ill-fated "emergency regulations," which it withdrew in the face of substantial opposition. DLSE then issued the current proposed regulations (which have undergone two revisions on separate issues) re-characterizing the hour of pay as a penalty. It also withdrew the June 11, 2003 opinion letter.

In other words, DLSE lacks credibility.

Most recently, after holding rest and meal period pay awards in abeyance pending the adoption of its proposed regulations until a suit was brought to enjoin this practice[18], DLSE issued its "precedent decision" finding the hour of pay to be a penalty subject to a one-year liability period. (MJN Exhibit 10.) This is *administrative* precedent, not judicial precedent, issued to advise DLSE's hearing officers how to rule in proceedings before the Labor Commissioner. (See June 17, 2005 memorandum, MJN Exhibit 11.)

The precedent decision followed a DLSE memorandum to its hearing officers on April 26, 2005 advising them to resume issuing decisions and noting the uncertain state of the law. (Exhibit 16 to MJN.) Commissioner Dell stated "I know the difficulties in proceeding with these decisions given the current state of the law. I ask you to bear with me until such time as a binding appellate decision is issued, the regulations become final or a precedential decision has been issued." (*Id.*, p.2.)

A precedent decision is not considered "rulemaking" and, like an advisory opinion letter, does not require compliance with the Administrative Procedure Act necessary for the enactment of state regulations under the California Code of Regulations. (Gov. Code § 11425.60, subd. (b).) The decision essentially has the same force and effect of an opinion letter.

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[18] (*Corrales et al. v. Donna Dell, Labor Commissioner for the State of California*, Sacramento Superior Court Case No. 05CS0042).

Since the DLSE does not adjudicate unfair competition law claims, the precedent decision includes no analysis whatsoever addressing the restitutionary nature of Section 226.7 and the employee's ownership interest in the hour of pay owed. Otherwise, the decision is premised on the dually erroneous analysis that the pay is not intended to compensate employees for extra work and missed break time because the same amount is payable regardless of the number of daily breaks missed and is a penalty solely because of its deterrent incentive.

DLSE's new position and its ultra vires effort to enact regulations and issue so-called "precedent decisions" that are the diametric opposite of prior interpretations and decisions, should not be given much weight. The regulatory authority asserted is dicta from *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 569-570, 576. The Supreme Court acknowledged DLSE's authority to make decisions that assist its governance of administrative proceedings. It is highly doubtful that the Supreme Court would recognize regulatory authority to interpret statutes, a function of the judiciary, for the purposes of controlling litigation outside Labor Commissioner proceedings.

The IWC, not the DLSE, was established as the quasi-legislative body with constitutional and statutory authority to promulgate regulations pertaining to wages, hours and working conditions. (*Industrial Welfare Commission, supra,* 27 Cal.3d at 697-698; Cal. Const., art. XIV, § 1; Lab. Code, §§ 70-74, 1171-1204.) The IWC has not chosen to exercise that authority in the four years since the wage orders and statutes providing for monetary remedies for meal and rest period violations were first enacted.

Neutrality and equality of representation are built in to the formulation of the IWC, having two labor, two management, and one neutral or public

commissioner. (Labor Code, §§ 70, 70.1.) It must follow strict statutory procedures to convene for the purpose of promulgating regulations. The Labor Code provisions dictating these procedures reflect the objective of employee protection. (See, e.g., Labor Code § 1178.)

DLSE is not created or operated under the auspices of neutrality. Unlike the IWC, DLSE lacks authority to promulgate regulations generally interpreting Labor Code provisions. DLSE has only limited authority under Section 55 to make rules and regulations necessary to carry out the provisions of Chapter 1 of the Labor Code (Sections 50-64)[19], and under Section 98.8 to carry out the provisions of Chapter 4 (Sections 79-107), which involve matters such as forms for filing complaints, providing for subpoena power relative to Berman Hearings, and other rules and regulations necessary to operational matters, not interpretation of substantive law. In almost seventy years (since 1937), the DLSE Director has only enacted one regulation to interpret a law prior to this attempt, to define the word "willful" (C.C.R. section 13520).

In any event, only the judiciary may interpret a statute, not a legislative or regulatory body. (*McClung v. Employment Development Department* (2004) 34 Cal.4th 467, 470.)

> Although we give the Department's interpretation great weight (e.g., *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 309), this court bears the ultimate responsibility for construing the statute. "When an administrative agency construes a statute in adopting a regulation or formulating a policy, the court will respect the agency interpretation as one of several interpretive tools that may be helpful. In the end, however, '[the court] must . . . independently judge the text of the statute.' " (*Agnew v. State Bd. of Equalization* (1999) 21

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[19] These provisions do not concern interpretation or enforcement of California wage provisions.

> Cal.4th 310, 322, quoting *Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 7-8.).

(*City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, 951.)

Therefore any regulation, if adopted, could only change, not clarify, existing law, and would apply prospectively, not retroactively. Further, DLSE's new analysis is based on a flawed and incomplete legislative history analysis (See MJN Exhibit 17, p. 2, "Initial Statement of Reasons," failing to note, for example, the Senate's reference to the hour of pay as "wages") and its remaining reasons are suspect.

DLSE's statement that courts have relied on its opinion letters in finding the hour of pay to be wages (see, e.g., *Id.* at p. 2) precludes it from now reversing its position. "An administrative agency is precluded from changing its mind when the construction that it would reject has been definitively adopted by a court as its own." (*Henning v. Industrial Welfare Com.* (1988) 46 Cal.3d 1262, 1278.)

DLSE's complete about-face also erodes any deference the Court should afford its new position:

> In the abstract, a current administrative interpretation would ordinarily be entitled to great weight. (See *Industrial Welfare Com.* v. *Superior Court, supra*, 27 Cal.3d at p. 724.) But when as here the construction in question is not "a contemporaneous interpretation" of the relevant statute and in fact "flatly contradicts the position which the agency had enunciated at an earlier date, closer to the enactment of the . . . statute[,]" it cannot command significant deference. (*General Electric Co. v. Gilbert* (1976) 429 U.S. 125, 142 [50 L.Ed.2d 343, 358, 97 S.Ct. 401].)

(*Henning v. Industrial Welfare Com.*, *supra*, 46 Cal.3d at 1278.)

DLSE's "flat contradiction" of some four years of proceedings it conducted under a three-year statute of limitations should be ignored. (See *Bonnell v. Medical Board of California* (2003) 31 Cal.4th 1255, 1264 ["agency interpretations are not binding or . . . authoritative" and "[c]ourts must, in short, independently judge the text of a statute"]; *Tomlinson,* 359 F.Supp.2d at 896 n.3 [rejecting DLSE proposed regulations classifying Section 226.7 pay as a penalty, stating that the court "disagrees with the reasoning and examples provided by the DIR-DLSE and thus does not find its statement persuasive"].)

III. THE TRIAL COURT ERRED IN RULING EMPLOYEES LACK A PRIVATE RIGHT OF ACTION FOR REST AND MEAL PERIOD CLAIMS

Labor Code section 218 definitively provides an employee private right of action for all claims for wages or penalties. This section states, in pertinent part, "[N]othing in this article shall limit the right of any wage claimant to sue directly or through an assignee for any wages or penalty due him under this article."

Section 226.7 is included within Division Two, Chapter One, Article One of the Labor Code, encompassing Labor Code sections 200-243. It is thus under the ambit of Section 218, authorizing private suits for violations.

Nowhere in Section 226.7 does it state that it is an exception to Section 218's grant of a private right of action. If the legislature wanted to avoid having employees sue their employers in court, it could have either enacted Section 226.7 in a different Article uncontrolled by Section 218, or given it a specific provision that relief could only be sought through the Labor Commissioner. (*See e.g.*, Labor Code §§ 210, 226.3.). By including Section 226.7 within Article 1, and by avoiding any limitation to an employee's right

to sue for a statutory violation, the legislature clearly intended that a private right of action would be an option.

Crusader Insurance Company v.Scottsdale Insurance Company (1997) 54 Cal.App.4th 121 does not dictate a different result *Crusader* held that the legislature, in enacting Insurance Code section1763, did not create a new private right to sue, and that a statute does not create a private right of action in the absence of legislative intent to do so.

In affirming the trial court's order sustaining a demurrer to a lawsuit filed by an admitted insurer against surplus line brokers and non-admitted insurers for damages resulting from alleged violations of Insurance Code section 1763, the court observed:

> Crusader ... had no relationship or transaction with any defendant out of which any common law duty enforceable by Crusader could arise. Crusader therefore had no common law causes of action to allege, such as ... breach of contract.... Instead, Crusader's suit depends wholly upon the proposition that Insurance Code section 1763 gives Crusader (and hence every other admitted insurer in California) a new private right to sue on the claim that California risks have been placed on a surplus line basis without an adequately diligent search.

(*Id.* at 124-125.)

The most important distinctions between *Crusdaer* and Section 226.7 claims is the specific statute providing a private right to sue (Section 218) and the fact that Section 226.7 specifically provides for payment directly to the employee. A right to payment with no right of private enforcement is barley more than an illusory protection. Moreover, unlike the non-relationship between Crusader and the targets of its lawsuit, an employee has "a relationship or transaction with [the employer] out of which any common law duty enforceable by [the employee] could arise."

Without a private right to sue, the inference is that the Legislature and the IWC vested exclusive authority in the California Labor Commissioner to enforce meal and rest period penalty provisions.

However, under California law, if an employee desires to make a claim for unpaid wages or benefits against an employer, he/she may do so *either* by filing an administrative claim with the Commissioner, *or* by filing a civil case in court. (*Cuadra v. Millan, supra,* 17 Cal.4th at 858 ["The employee may seek *judicial* relief by filing an ordinary civil action against the employer for breach of contract and/or for the wages prescribed by statute. (Labor Code §§ 218, 1194.) Or the employee may seek *administrative* relief by filing a wage claim with the commissioner pursuant to a special statutory scheme codified in sections 98 to 98.8."[Original emphasis].])

Wages and benefits have been held recoverable in private civil actions, though there is no express right of action delineated in the statute. (*See, e.g., Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal.3d 774 (unpaid vacation pay is recoverable in a private civil suit under Section 227.3).) The absence of a sentence in Section 226.7 specifically providing a private right of action is unnecessary, in light of Section 218.

In *Bender v. Darden Rests., Inc.* (9th Cir. 2002) 26 Fed.Appx. 726 [20] the

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[20] Citation of this federal opinion does not contravene Rule 977(a), California Rules of Court, as it is not an unpublished decision of a state Court of Appeal or superior court appellate department. The California Supreme Court has cited to unpublished Ninth Circuit cases, and at least one Court of Appeal supports citation to unpublished federal case law.(See, e.g., *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 828, citing to unpublished Ninth Circuit authority in *Harding v. Summit Med. Ctr.* (9th Cir. 2002) 41 Fed. Appx. 83; see also *Bowen v. Ziasun Technologies, Inc.* (2004) 116 Cal. App. 4th 777, 787, n.6, indicating it is appropriate to cite unpublished federal authority.)

Ninth Circuit concluded that employees have a private right of action to sue for compensation for unprovided rest or meal periods under Labor Code section 226.7:

> Appellants had a cause of action under California Labor Code sections 226.7(b) (mandating payment of "one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided") and 218 (authorizing employees to "sue directly . . . for any wages or penalty due him under [the Labor Code]").

(*Id.* at 729.)

Accordingly, the trial court's finding was in error.

IV. CLAIMS FOR BREACH OF CONTRACT LIE FOR WAGE ORDER AND LABOR CODE VIOLATIONS, CARRYING TWO OR FOUR YEAR LIMITATIONS PERIODS

All employees work under agreement, either express or oral, and that contract is deemed to include all provisions of existing law. *Lockheed Aircraft Corp. v. Superior Court of Los Angeles County* (1946) 28 Cal.2d 481, 486 ["The contract of employment must be held to have been made in the light of, and to have incorporated, the provisions of existing law"].

Employees may therefore maintain actions for breach of contact for recovery of the hour of pay provided by law under Section 226.7. Such claims are governed by the four-year statute of limitations for written employment contracts (Code of Civil Procedure section 337) or two years for oral contracts (Code of Civil Procedure section 339).

Plaintiffs' Third Cause of Action can be construed as a breach of contract cause of action, based on prior allegations setting forth the elements of the employment agreement with defendants. The reviewing court must reverse the judgment if (1) the plaintiff has stated a cause of action under any

possible legal theory, or (2) the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

V. CONCLUSION

Based on the foregoing, CELA respectfully requests that the Court reverse the trial court and find that employees have a private right to sue for rest and meal period pay under claims of restitution governed by the four year statute of limitations for UCL claims.

DATED: July 1, 2005

Respectfully submitted,
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CERTIFICATION OF WORD COUNT

Pursuant to Cal. Rules of Court, Rule 14(c)(1), Amicus Curiae hereby certify that the text of the Amicus Brief of California Employment Lawyers Association, to be filed on July 1, 2005, contains 13,707 words as counted by Corel WordPerfect, the word processing program used to generate the brief.

Dated: July 1, 2005

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PROOF OF SERVICE

I, Brian Cramer, am a resident of the State of California, over the age of 18 years, and not a party to the within action. My business address is Cohelan & Khoury, 605 "C" Street, Suite 200, San Diego, California 92101-5305.

On July 1, 2005, I served the foregoing document described as:

AMICUS BRIEF OF THE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFFS AND APPELLANTS MARIA LETICIA BANDA, ET AL.

on the interested parties in this action by placing a true copy thereof in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

I then served each document in the manner described below:

[ ] **BY MAIL**: I placed each for deposit in the United States Postal Service this same day, at my business address shown above, following ordinary business practices.

[ ] **BY FAX**: I transmitted the foregoing document(s) by facsimile to the party identified above by using the facsimile number indicated. Said transmission(s) were verified as complete and without error.

[XX] **BY UNITED PARCEL SERVICE:** I placed each envelope for deposit in the nearest United Parcel Service drop box for pick up this same day and for "next day air" delivery.

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

Executed July 1, 2005 at San Diego, California.

Brian Cramer

SERVICE LIST

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