No. D046692

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT
DIVISION ONE

NATIONAL STEEL AND SHIPBUILDING COMPANY,

Petitioner

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,

COUNTY OF SAN DIEGO

Respondent

ROBERT GODINEZ, INDALECIO PARRA, JOHN PETERSEN

Real Parties In Interest.

FROM THE SUPERIOR COURT FOR SAN DIEGO COUNTY,
CASE NO. GIC 840471
Honorable Patricia A.Y. Cowett, Judge, Department 67

AMICUS BRIEF OF THE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF REAL PARTIES IN INTEREST ROBERT GODINEZ, INDALECIO PARRA, AND JOHN PETERSEN

MICHAEL D. SINGER, ESQ. (SBN 115301)
COHELAN & KHOURY
605 "C" Street, Suite 200
San Diego, CA 92101-5305
Tel: (619) 595-3001
Fax: (619) 595-3000
Attorney for Amicus Curiae
California Employment Lawyers Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CALIFORNIA CASES

FEDERAL CASES

CALIFORNIA STATUTES

CALIFORNIA RULES OF COURT

I. INTRODUCTION

California Employment Lawyers Association (CELA) submits this amicus curiae brief supporting the trial court decision in favor of Plaintiffs and Real Parties in Interest Robert Godinez, Indalecio Parra, and John Petersen.

The issue is the appropriate liability period for employers who fail to provide pay to employees for denied rest and meal periods pursuant to Labor Code section 226.7,[1] Sections 11 and 12 of the IWC wage orders, and the UCL.

II. SUMMARY OF ARGUMENT

But for an argument fabricated by employers as a desperate defense to strict liability for failing to provide the hour's pay owed to employees for denied rest or meal periods, there would be no question that the liability period is three years for obligations created by statute, extended to four years for restitution claims under the UCL. The statute itself–Section 226.7–is plain and clear. It states that the employer owes an "hour of pay" for each day an employer fails to provide a rest or meal period required under an IWC wage order. An employee's "pay" is his or her wages. The obligation to provide the hour of pay would not exist but for the statute and wage order provisions requiring it. Therefore, a three-year statute of limitations applies.

Statutory wage and hour claims involve recovery periods for three years as liabilities created by statute. Payment obligations to employees arise either by statute, by written contract, or by oral contract. Employee have an ownership right in pay owed them, giving rise to restitution claims carrying a four-year liability period.

---

[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.

Unable to offer a substantive defense to years of continuous non-compliance with this law, employers created a procedural contrivance to truncate the liability period from four years to one. Thus was hatched the "penalty" theory.

The argument goes like this. Even though Section 226.7 provides for an hour of "pay" to the employee, not a penalty on the employer, courts should nevertheless cut the liability period from four years to one because this pay could be recast as a "penalty" by applying principles from non-labor cases. Employers rest their entire defense on this single bit of rhetoric, that the hour of pay is a statutory penalty on the employer masquerading as pay to the employee.

To make such a ruling, they ask the Court to do the following:

- ignore the rules of broad construction in favor of employees;
- ignore the plain meaning of the word "pay";
- ignore the fact that the legislature knows how to call something a "penalty," specifically labeled other provisions of AB 2509 "penalties," but intentionally chose not to do so in Section 226.7;
- ignore the fact that labor code penalty citations are assessed by the Labor Commissioner and paid to the state, not employees;
- apply inapposite principles from non-labor analysis that a statutory "penalty" is created where the amount assessed has no relation to actual damages;
- require the amount owed to be mathematically tied to the amount of break time missed, ignoring the intangible, unmeasurable damage to health and welfare for the fatigue from working without breaks;
- ignore the fact that the legislature set the hour of pay as the measure of damage to the employee;

- ignore the legislative history in which the "civil penalty" (described as such) was removed and replaced with "an hour of pay" described in Senate Floor analysis as "an hour of wages";
- determine that the legislature had failed in setting out to rectify the problem of the right to rest and meal periods with no remedy against employers who do not provide them;
- ignore the broad definition of wages under the Labor Code;
- ignore the fact that the hour of pay is self-enforcing and owed to the employee immediately, rather than requiring an enforcement action;
- ignore the fact that the legislature already created a penalty against employers who fail to comply with rest and meal period pay requirements in Section 558;
- ignore the fact that punitive damages may only be predicated on actual damages and are appropriate for denied rest and meal periods;
- ignore the fact that the DLSE is entitled to no deference because it takes diametrically opposite positions on the wage vs. penalty issue; and
- ignore the traditional underpinnings for statutes of limitation.

Rather than doing all that, CELA suggests that the Court affirm the trial court.

III. ARGUMENT

Section 226.7 and corresponding Sections 11 and 12 of the wage orders provide an hour of pay for each day employees are denied rest or meal periods. Any court examining these provisions would see nothing more than an obligation to provide an hour of pay. There would be no questioning whether to classify the amount owed as wages, earnings, income, fees, penalties or anything else. The language of the provisions speaks for itself. And the

liability for pay owed to employees is three years for labor law claims and four years for UCL claims.

Creating a dispute where really none should exist, employers manufactured a procedural defense built on an inapposite body of penalty law. Since they were unquestionably (and often intentionally) not complying with the requirements to both provide breaks and pay when they didn't, they could not defend the substance of the claims against them. Instead, they fabricated a theory designed to cut off a few years of liability by claiming that the hour of pay is not really pay at all. The hour of pay, it is claimed, is completely different. Even though it calls itself "pay" its real name is "penalty."

For all the following reasons, CELA requests the Court apply a four-year statute of limitations rather than accept the employers' inapposite arguments.

A. STATUTES GOVERNING CONDITIONS OF EMPLOYMENT ARE CONSTRUED BROADLY IN FAVOR OF EMPLOYEES.

Any statutory interpretation involving employee rights must follow powerful public policy liberally construing legislation regarding wages and working conditions ***in favor of protecting employees***.

> [t]he Legislature has declared that it is the public policy of California 'to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions, and to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards.'

(*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 985 [quoting Labor Code § 90.5, subd. (a)].)

> [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.* (1999) 20 Cal.4th 785, 794, quoting *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 702 (*IWC v. Superior Court*).)

Indications are that the Supreme Court would consider this broad public policy protecting employee rights in construing the applicable liability period for employer statutory wage and hour violations. In one of its most recent opinions, the Supreme Court acknowledged that recognized public policy considerations and liberal construction of the Act play a critical role in analyzing the statute of limitations in employment cases arising under the Fair Housing and Employment Act (FEHA). The Court noted that "FEHA advances the fundamental public policy of eliminating discrimination in the workplace, and the provisions of the act are to be construed broadly and liberally in order to accomplish its purposes." (*Yanowitz v. L'Oreal USA., Inc.* (2005) 36 Cal.4th 1028, 1054, fn. 14.) The Court applied this policy to assessing the statute of limitations:

> Moreover, as we previously have stressed, the liberal construction mandated by the FEHA extends to interpretations of the FEHA's statute of limitations: "In order to carry out the purpose of the FEHA to safeguard the employee's right to hold employment without experiencing discrimination, the limitations period set out in the FEHA should be interpreted so as to promote the resolution of potentially meritorious claims on the merits."

(*Id.* at 1058 fn. 17; [quoting *Richards v. CH2M Hill Inc.* (2001) 26 Cal.4th 798, 819].)

Public policy ***protecting workers*** has primacy in guiding this proceeding. Specifically, remedial legislation protecting workers rights to pay for denied rest and meal periods informs the applicable liability period, not the health and welfare of businesses that fail to comply with California law.

Meal period requirements date back to 1916, rest periods to 1932. (*California Manufacturers Ass'n v. Industrial Welfare Com.* (1980) 109 Cal.App.3d 95, 114-115.) In *IWC v. Superior Court*, 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.

(*IWC v. Superior Court*, *supra*, 27 Cal.3d at 724.) The revised rest and meal provisions include the employee remedy for unprovided breaks and carry a similar remedial component as part of the statutory scheme.

Section 226.7 was enacted to codify IWC wage order provisions promulgated as a response to a growing problem of non-compliance by employers with rest and meal period requirements. (See IWC Statement as to the Basis to 2000 amendments to Sections 11 and 12 of Wage Orders 1-15, Exhibit 1 to Motion for Judicial Notice [MJN].)

Section 226.7 thus provides an obligation "created by statute," which is governed by the three-year statute of limitations. (Code Civ. Proc. § 338, subd. (a).)

> An obligation is created by statute for purposes of applying the three-year statute of limitations if the liability would not exist but for the statute, and the obligation is created by law in the

> absence of an agreement. The action must be of a type that did not exist at common law . . . An action to enforce that obligation is governed by the three-year statute of limitations.

(*Aubry v. Goldhor* (1988) 201 Cal.App.3d 399, 404 [internal citations omitted].)

Wage and hour actions for minimum wages, overtime, vacation pay, split shift premium and minimum reporting pay are all based on obligations arising by statute or regulation subject to a three-year limitations period. The hour of pay for denied breaks operates identically.

The hour of pay for working during or without rest or meal periods is a premium similar to overtime "premium" or "penalty" pay. The IWC's "purpose in imposing penalty pay for overtime [recoverable for three-years] . . . is to foster the health and welfare of employees." (*Keyes Motors, Inc. v. Division of Labor Standards Enforcement* (1987) 197 Cal.App.3d 557, 562.)

> The purpose of premium pay for overtime hours is to "regulate maximum hours consistent with the health and welfare of employees'" covered by the order . . . it is crucial for their health and safety and for the quality of the crucial work they are performing that they not be overtired.

(*Id.* at 564.)

The same reasoning applies to rest and meal periods. The requirement for these breaks is to create working conditions in which health and welfare of employees is promoted by ensuring they are sufficiently rested and nourished to perform their work.

A three-year recovery period for rest or meal period violations is consistent with the goal of protecting the health and welfare of employees. Limiting employer liability to one year promotes the interests of non-complying employers over the protection of employees.

As a matter of common sense, the goal of protecting employees is only served by permitting them to recover for amounts owed for three years of rest

and meal period violations. The countervailing concern is whether the employer's exposure should be reduced and it granted limited liability--essentially a free ride--for two years of violations. The result would be a terrible disincentive for employers to ensure they provide rest and meal periods to employees. An employer would be better served by opting to understaff its facility and forego providing breaks until an employee brought suit. Such misconduct would benefit employers through lower overhead and increased employee hours worked over two years at the expense of employees deprived of amounts owed for rest and meal period pay during the period. The legislature cannot have intended such a highly prejudicial result.

Requiring employers to provide minimum rest and meal breaks is the law of California. There is no reason that workers who, through fear or intimidation, fail to register formal complaints should lose compensation and be limited to only the most recent year of such harm.

These laws were created to protect people such as struggling garment workers, factory workers, field workers, office workers, bus drivers, restaurant and hotel employees, and retail employees. Employers offer no reason whatsoever why they should be absolved of liability, other than calling the hour of pay a "penalty." But one cannot simply conflate inapposite principles of non-labor statutory penalties with labor code employee protections as a basis for evading responsibility for continuously violating the law.

Simply put, calling the hour of pay a "penalty" to protect businesses from their own culpable acts would contravene public policy. Our system deems the health and welfare of the employees paramount over the business interests of the employer.

If the Court were not construing an obligation created by statute broadly in favor of employees, it might be appropriate to borrow principles from an inapposite body of non-employment penalty law to re-characterize the language of Section 226.7. It is definitely not appropriate here.

Thus, broadly construing Section 226.7, the hour of pay constitutes a wage liability created by statute subject to a three year recovery period under Code of Civil Procedure section 338, subdivision (a).[2]

B. "PAY" MEANS "PAY," NOT PENALTIES

Construing Section 226.7 is the quickest and most definitive way of establishing that the hour of pay is a wage subject to a three-year liability period for non-payment. Subsection (a) states that "no employer shall require any employee to work" during a rest or meal period. Subsection (b) then provides the remedy of an hour's pay for employees who must work through rest or meal periods. "Pay" for "working" is wages.

Further grammatical parsing provides further support. Under Section 226.7, "the employer shall pay [*verb*] the employee one additional hour of pay [*noun*]." CELA is confident that the Court can go to any dictionary or thesaurus ever published and will never find the word "penalty" among any of the terms listed for the noun "pay." It *will* find words like "earnings," "remuneration," "salary," and "wages."

Employers refuse to abide by dictionary definitions and common usage. To employers, "pay" means "penalty" if it helps the employer save on damage awards. Pushing, pounding, and squeezing definitions of square "penalties" to fit them into the round hole of "pay," employers have attempted to recast rest and meal period pay as something it is not. Penalties are an entirely separate concept.

---

[2] The statute of limitations may also be based on oral (two years) or written (four years) contract. 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"].) Thus, the obligation to pay the hour of pay is a matter of contract subject to the corresponding statute of limitations.

When an employer is subject to liability for statutory penalties, the Labor Commissioner is empowered to issue a penalty citation. The amount owed is paid to the State. (See, e.g., Labor Code §210, 558.)

The exceptions are statutes specifically assessing "penalties" and providing payment directly to the employee. These include waiting time penalty wages under Section 203 and record-keeping penalties under Section 226. Beginning January 1, 2004, employees may sue to retain 25% of other Labor Code penalties under the Private Attorney General Act (PAGA).

The legislature knows how to call something a penalty. Penalties are uniformly called "penalties." And when the legislature enacted AB 2509, the bill including Section 226.7, it concurrently enacted Section 226. That section provides for "penalties" and the legislature described them as such. It must be inferred that legislators knew not to call Section 226.7 pay "penalties" because they intended them not to be penalties.

Continuing their efforts to transmute "pay" into "penalties," employers argue that the hour of pay "functions" as a penalty. Actually, that's false.

Where an employer has an affirmative obligation to pay the sum owed 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, 474; [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"].) In other words, an employee would not be paid the hour of pay for breaks violations but must act affirmatively to enforce the violation in order to be paid.

But the hour of pay is **owed** *when it is incurred.*

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"].)

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.

Accepting the employers' arguments requires a finding that the legislature, in stating "the employer shall pay the employee . . . for each work day," intended 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 differentiating it from a penalty.

This conclusion finds support in the IWC regulatory history.

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. Both remedies are self-enforcing.

Along with providing the hour of pay requirement, the other remedies provided under the wage orders are similarly self-enforcing.

The IWC began promulgating wage orders governing wages, hours, and working conditions in 1916. (*IWC v. Superior Court, supra*, 27 Cal.3d at 700). 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. (*IWC v. Superior Court, supra*, 27 Cal.3d at 700.) In the early 1970's, the legislature expanded the IWC's jurisdiction to include all employees. (*Id.* at pp. 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; *IWC v. Superior Court, supra*, 27 Cal.3d at pp. 725-729; *Ramirez v. Yosemite Water Company, Inc., supra*, 20 Cal.4th at pp. 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 1-2001, 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,[3] 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

---

[3] 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.

function similar to split shift premiums and reporting pay obligations.[4] The 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.

Tomlinson v. Indymac Bank F.S.B. (C.D. Cal. 2005) 359 F.Supp.2d 891 (*Tomlinson*) found that claims under Section 226.7 are restitutionary, thus subject to the longer liability period. The court did not buy into the employer argument that the hour of pay is a penalty. The Court based its ruling on the broad definition of wages under the Labor Code[5] and the analogy of rest and

---

[4] In *Kerr's*, *supra*, 57 Cal.2d at 330, the Supreme Court upheld these provisions as within the IWC authority to promulgate regulations "affecting wages." (*Ibid.*) The Supreme Court did not analyze whether split-shift premiums and minimum reporting pay constitute "wages" under Section 200.

[5] 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) 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; *Hunter* v. *Ryan* (1930) 109 Cal.App. 736, 738 [bonuses]; *People* v. *Alves* (1957) 155 Cal.App.2d Supp. 870, 872 [health plan payments]; *Foremost Dairies* v. *Industrial Acc. Com.* (1965) 237 Cal.App.2d 560, 580 [insurance premiums]; (*People* v. *Dennis* (1967) 253 Cal.App.2d Supp. 1075, 1077 [unemployment insurance fund payments]; *Hunter* v. *Sparling* (1948) 87 Cal.App.2d 711, 725 [pension payments].) 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.)

meal period pay to 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 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].) That reasoning applies directly to this case.

Employers argue that the hour of pay does not constitute wages under Section 200 because it is purportedly not paid "for labor performed." But the cases interpreting Section 200 are not so strict. They find that any

compensation provided to employees constitutes wages. (See footnote ___, ante.) One could argue that paying employee health insurance premiums is not directly tied to specific hours of "labor performed." But it is still wages. (*Id.*) The point is that sums paid to employees in connection with their working conditions are construed as wages.

C. 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 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)].)

Recently, the Supreme Court examined statutes of limitation for certain employee claims in *Coachella Valley Mosquito and Vector Control District v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072

(*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." (*Id.* at 1089 [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* statutory 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*, 35 Cal.4th at pp. 1077, 1084, 1088.[6]) However, harmonizing the entire statutory scheme produced a different

---

[6] 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

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 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 pp. 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 an obligation created by statute other than 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

---

three years for a claim on a statutory liability." (*Cuadra v. Millan, supra*, 17 Cal.4th at 866.)

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[7] 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[8] applied to violations of the wage order rest

---

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

[8] 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 Code

and meal period payment requirements;

5. In 2000, the legislature enacted Section 226.7 as part of AB 2509, effective January 1, 2001[9].

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 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 three-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

---

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

[9]The legislative history has been comprehensively briefed by Plaintiffs and their amici, and CELA notes only certain highlights. 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);

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].)

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.

In addition, an employer may be liable for punitive damages for violations of Section 226.7. (*Bender v. Darden Rests., Inc.* (9th Cir. 2002) 26

Fed.Appx. 726, 729.[10]) Punitive damages are only recoverable upon underlying *actual* damages. *Bender* notes that punitive damages could properly be predicated on denial of breaks due to the underlying actual harm:

> To sustain an award of punitive damages, a plaintiff need only prove a prima facie case of liability and show actual injury as a result of the wrongful conduct. . . . 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]"). They also suffered actual economic harm as a result of being denied rest and meal breaks. Therefore, the punitive damages award was properly predicated on the denial of breaks.

(*Id.*)

Thus, the statutory scheme provides the hour of pay as the employee's actual damages for the economic harm as a result of being denied rest and meal breaks, Section 558 penalties upon the employer for underpayment, and punitive damages as a further penal remedy where appropriate.

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.*

---

[10] 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, fn.6 [indicating it is appropriate to cite unpublished federal authority].)

(1972) 7 Cal.3d 94, 112 ["there is a maxim as old as law that there can be no right without a remedy"].) If Section 226.7 is an employer penalty rather than an employee remedy, employees would be left just as they were prior to the enactment of the statute–with no compensatory remedy for past non-compliance and only an injunction remedy available 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 p. 251.)

D. THE HOUR OF PAY IS NOT A PENALTY EVEN UNDER TRADITIONAL PENALTY-CASE ANALYSIS

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. In addition to the lost break time, employees suffer the intangible damage of having to work straight through long, fatiguing shifts without the ability to stop to eat and recharge. The legislature has set the compensation for these losses 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.

This compensation is a necessary companion for employees to Section 558 penalties imposed on employers who deprive employees of breaks. 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).[11] 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"

---

[11] 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.

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 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.

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 or discuss liability periods. 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 non-labor 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.) There is no authority for the proposition that principles from these cases may be engrafted onto non-labor cases.

Regardless, the requirement of "reference" to actual harm does not require the "proportional relationship" employers claim. 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.

The seminal Supreme Court case on statutory penalties describes them as follows:

> [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.

(*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 pp. 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 pp. 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 pp. 1242, 1243.) A common example is double or treble damages, not at issue here.[12] 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).

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 hand, employers argue that the hour of pay does not constitute compensation. Employers stress that one hour of pay is owed regardless of whether the

---

[12] 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.*, *supra*, 71 Cal.App.2d at pp. 301, 304; *Culver v. Bell & Loffland*, *supra*, 146 F.2d at 29.)

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.

CELA submits that the entire penalty argument be rejected as completely inapplicable. It is nothing more than an effort by businesses to evade responsibility for culpable acts for which it can offer no defense of substance. They offer no justification for their misconduct and instead offer general principles having nothing to do with the facts and circumstances behind these rampant labor violations. It should not even be a close question in the Court's analysis.

If it is close, however, it is 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 appropriated 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 pp. 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*, *supra*, 66 Cal.App.4th at 1242).

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

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

Dubiously relying on questionable 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 concerns.

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. It has no persuasive value here.

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.

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.* at 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 "penalty."[13]

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

---

[13] These off-hand references are the primary argument asserted without critical analysis by amicus California Hospital Association in prior cases. 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."].)

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.[14]

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.* (9th Cir. 2005) 410 F.3d 1071 [177 L.R.R.M. 2475].) The Court 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, supra*, 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

---

[14] 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 11 to MJN.)

under the act."].) Employers certainly could not assert with credibility that this statement in passing renders UCL "monetary penalties" statutory penalties subject to a one-year liability period. Nor would CELA argue that it makes all manner of penalties recoverable 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 12 and 13 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 14, *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[15].

In other words, DLSE lacks credibility.

---

[15] The Sacramento Superior Court recently determined the DLSE's "withdrawal" of the June 11, 2003 opinion letter constituted an "underground regulation" in violation of the APA. (August 11, 2005, *Corrales et al. v. Donna Dell, Labor Commissioner for the State of California*, Super. Ct. Sac. 2005 No. 05CS0042.) Moreover, the authority DLSE cited for withdrawing the opinion letter, *Westside Concrete Co., Inc. v. Department of Industrial Relations* (2004) 123 Cal.App.4th 1317, was later depublished by the Supreme Court.

Most recently, 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 15.)

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.* at 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.

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.

The most contradictory aspect of the precedent decision is that it looks identical factually to the decision DLSE issued against DHL just about a year ago, except the result is exactly opposite (Exhibit 14 to MJN). Same issue. Same statute. Different day. Different interpretation. No credibility.

DLSE's new position and its ultra vires effort to enact back-door 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),[16] 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

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

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" (Cal. Code Reg. 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 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 2), although unsupported, 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 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, fn.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"].)

F. THE PURPOSES UNDERLYING STATUTES OF LIMITATIONS DO NOT WARRANT A ONE-YEAR PERIOD

As stated by Justice Holmes, the primary purpose of statutes of limitations is to "[prevent] surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." (*Elkins v. Derby* (1974) 12 Cal.3d 410, 417, [quoting *Telegraphers* v. *Ry. Express Agency* (1944) 321 U.S. 342, 348-349 (88 L.Ed. 788, 792, 64 S.Ct. 582)]. A fundamental purpose is to insure timely

notice to an adverse party so that he can assemble a defense when the facts are still fresh. (*Id.* at 412.) A subsidiary aim is to resolve disputes promptly in order that commercial and other activities can continue unencumbered by the threat of litigation. (*Id.* at 417.)

None of these concerns is implicated in regard to Section 226.7.

First, Section 7(A)(3) of the wage orders requires employers to record employee meal periods, and Section 7(C) requires these records to be maintained for three years. Thus, a documentary record of all meal period violations exists covering the three year period at issue.

Notice to the violating employer for the purposes of assembling a defense is inapplicable here. Since employers are charged with knowledge of the labor laws under which they operate, they are on notice when they intentionally violate such laws. Employers are fully aware if they are requiring employees to work through or without rest or meal periods. If they are not, it is likely the employees are also unaware their rights are being violated, and their cause of action would not accrue. Moreover, there is no "defense" to the statutory obligation, as liability obtains under Section 226.7, subdivision (b), when an employer "fails to provide an employee a meal period or rest period."

Finally, the need for employees to have redress against an employer's knowing violations of wage and hour protections far outweighs the employer's interests in unencumbered commercial activity, especially where non-complying employers gain a commercial advantage over employers who obey labor laws.

///

///

///

///

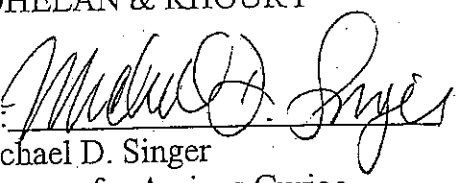
///

IV. CONCLUSION

Based on the foregoing, CELA respectfully requests that the Court deny the Petition and thereby affirm the trial court.

DATED: October 5, 2005

Respectfully submitted,
COHELAN & KHOURY

By: 
Michael D. Singer
Attorney for Amicus Curiae
California Employment Lawyers Assoc.

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 October 6, 2005, contains 13,999 words as counted by Corel WordPerfect, the word processing program used to generate the brief.

Dated: October 5, 2005

Respectfully submitted,
COHELAN & KHOURY

By: _____
Michael D. Singer
Attorney for Amicus Curiae
California Employment Lawyers
Assoc.

PROOF OF SERVICE

I 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 October 6, 2005, I served the foregoing document described as **AMICUS BRIEF OF THE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF REAL PARTIES IN INTEREST ROBERT GODINEZ, INDALECIO PARRA, AND JOHN PETERSEN** 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:

[XX] **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.

[ ] **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 October 6, 2005 at San Diego, California.

_____

Amber Worden

SERVICE LIST

No. D046692

San Diego Superior Court
The Hon. Patricia A.Y. Cowett
Department 67
330 West Broadway
San Diego, CA 92101

Clerk of the Superior Court

Gordon E. Krischer, Esq.
Larry Walraven, Esq.
Brian Selvan, Esq.
O'Melveny & Myers LLP
610 Newport Center Drive, 17th Floor
Newport Beach, CA 92660
(949) 760-9600 telephone;
(949) 823-6994 fax

Attorney for Petitioner National Steel and Shipbuilding Company

Steven Drapkin, Esq.
Law Offices of Steven Drapkin
11377 W. Olympic Boulevard, Ste. 900
Los Angeles, CA 90064-1683
Telephone: (310) 914-7909
Facsimile: (310) 914-7959

Attorneys for *Amicus Curiae* the Employers Group, the California Employment Law Council, the California Restaurant Association, the Alliance of Motion Picture & Television Producers, the Airline Labor Relations Conference and the California Lodging Industry Association

John L. Anderson, Esq.
Scott M. De Nardo, Esq.
Neyhart, Anderson, Flynn & Grosboll
44 Montgomery Street, Suite 2080
San Francisco, CA 94104
Telephone: (415) 677-9440

Attorneys for California Teamster Public Affairs Council and California Conference Board of the Amalgamated Transit Union

Ronald A. Reiter
Supervising Deputy Attorney General
Consumer Law Section
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102

District Attorney
Hall of Justice
330 W. Broadway
San Diego, CA 92101

California Supreme Court
350 McAllister Street
San Francisco, CA 94102

(5 copies)

AMENDED PROOF OF SERVICE

I 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 October 6, 2005, I served the foregoing document described as **AMICUS BRIEF OF THE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF REAL PARTIES IN INTEREST ROBERT GODINEZ, INDALECIO PARRA, AND JOHN PETERSEN** 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:

[XX] **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.

[ ] **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 October 6, 2005 at San Diego, California.

Amber Worden

Amber Worden

SERVICE LIST

No. D046692

San Diego Superior Court
The Hon. Patricia A.Y. Cowett
Department 67
330 West Broadway
San Diego, CA 92101

Clerk of the Superior Court

Gordon E. Krischer, Esq.
Larry Walraven, Esq.
Brian Selvan, Esq.
O'Melveny & Myers LLP
610 Newport Center Drive, 17th Floor
Newport Beach, CA 92660
(949) 760-9600 telephone;
(949) 823-6994 fax

Attorney for Petitioner National Steel and Shipbuilding Company

Thomas Tosdal, Esq.
Fern M. Steiner, Esq.
Tosdal, Smith, Steiner & Wax
600 B Street, Suite 2100
San Diego, CA 92101

Attorneys for Real Parties in Interest Robert Godinez, Indalecio Parra, and John Petersen

Steven Drapkin, Esq.
Law Offices of Steven Drapkin
11377 W. Olympic Boulevard, Ste. 900
Los Angeles, CA 90064-1683
Telephone: (310) 914-7909
Facsimile: (310) 914-7959

Attorneys for *Amicus Curiae* the Employers Group, the California Employment Law Council, the California Restaurant Association, the Alliance of Motion Picture & Television Producers, the Airline Labor Relations Conference and the California Lodging Industry Association

John L. Anderson, Esq.
Scott M. De Nardo, Esq.
Neyhart, Anderson, Flynn & Grosboll
44 Montgomery Street, Suite 2080
San Francisco, CA 94104
Telephone: (415) 677-9440

Attorneys for California Teamster Public Affairs Council and California Conference Board of the Amalgamated Transit Union

David A. Rosenfeld, Esq.
M. Suzanne Murphy, Esq.
Anne I. Yen, Esq.
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501
Telephone: (510) 337-1001

Ronald A. Reiter
Supervising Deputy Attorney General
Consumer Law Section
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102

District Attorney
Hall of Justice
330 W. Broadway
San Diego, CA 92101

California Supreme Court (5 copies)
350 McAllister Street
San Francisco, CA 94102