4th Civil No. E036955
Riverside Sup.Ct. Case No. RIC407038

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

ORCO BLOCK CO., INC.,

Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
IN AND FOR THE COUNTY OF RIVERSIDE,

Respondent,

MICHAEL DeGONIA AND FRANK GOMEZ,
Real Parties in Interest.

FROM THE SUPERIOR COURT FOR RIVERSIDE COUNTY, CASE NO. RIC407038
HONORABLE PATTI RICH, JUDGE PRO TEM

AMICUS BRIEF OF THE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF/REAL PARTY IN INTEREST MICHAEL DEGONIA AND FRANK GOMEZ

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

STATE STATUTES

I.

INTRODUCTION AND SUMMARY OF ARGUMENT

The issue in this case is whether the hour of pay owed to employees required to work through rest or meal periods is a liability created by statute, allowing recovery for three-years, or statutory penalties limited to one year.

Generally, employers must provide employees meal periods of at least 30 minutes and paid ten minute rest periods for every four hours worked. Labor Code[1] section 226.7 and Sections 11 and 12 of the Industrial Welfare Commission (IWC) wage orders governing the various occupations provide that employers must provide remuneration of an hour of pay to any employee who works through or does not receive a rest or meal period required under an IWC wage order. These provisions do not include clauses limiting the time within which employees may bring a claim.

Our Supreme Court has long recognized that the statutory and regulatory scheme governing wages, hours and working conditions exists for the protection and benefit of employees and is liberally construed with an eye to promoting such protection. Thus, the guiding consideration here is which statute of limitations promotes the prevailing public policy of protecting employees.

A three-year recovery period for rest or meal period violations is consistent with other statutory employee remedies and with the goal of protecting the health and welfare of employees. Limiting employer liability to

---

[1] All Section references are to the Labor Code unless otherwise specified.

one year promotes the interests of non-complying employers over the protection of employees.

Against these public policy guidelines for interpreting the statute, fundamental principles of statutory construction and interpretation support a finding that the appropriate liability period is three years.

Wage and hour violations are liabilities created by statute, thus covered by the three-year statute of limitations. Included are claims for liquidated damages or double damages above wages owed which function like penalties on the employer.

The legislative history of Section 226.7 specifically indicates that the hour of pay is a "wage," intended to function like overtime penalty pay.

The plain language of Section 226.7 calls for an hour of "pay," not "penalties," as the wage remedy for *working* through the break. The definition of wages under the Labor Code is extremely broad. When the legislature wishes to enact a penalty, it does so expressly, not by implication.

The hour of pay does not function as a penalty, nor would it be subject to a one-year recovery period even if it is classified as a penalty. The legislature has set the hour of pay as the actual damages suffered by the employee for the extra time spent working and the extra stress and labor endured in working without respite.

The primary purposes underlying statutes of limitation of preventing stale claims and providing notice to the defendant do not support a one year statute.

Finally, a determination that the hour of pay is a penalty invokes a myriad of inconsistent and unintended consequences. These include inconsistent standards between civil actions and Berman Hearings, less

revenue to the State, and the continued ability to seek relief for four years under the Unfair Competition Laws.

In sum, there is no rationale or justification for applying a one-year statute, aside from giving non-complying employers a free ride for years of violations at the expense of aggrieved employees. Charged with statutory construction emphasizing employee protection, such an interpretation cannot stand. Accordingly, the Petition should be denied.

II.

ARGUMENT

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

Long-standing public policy favoring worker's rights guides this Court's determination of the applicable statute of limitations. Supreme Court cases are legion in declaring the public policy considerations that support liberally construing legislation regarding wages and working conditions in favor of 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.)

The impact of this broad policy is nothing less than a mandate that the Court interpret wage and hour statutes and regulations by deeming the health and welfare of the employees paramount over the business interests of the employer. Any judicial interpretation of Section 226.7 must be undertaken in the context of liberal construction and public policy concerns favoring employees. Thus, the question that must be asked is which statute of limitations promotes the goals of protecting employees, the three-year provision in Code of Civil Procedure section 338, subdivision (a), for liability created by statute or the one-year provision in Code of Civil Procedure section 340, subdivision (a), for statutory penalties.

As noted by both the Division of Labor Standards Enforcement (DLSE)[2] and the IWC[3], 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*

---

[2] See October 17, 2003 opinion letter, Exhibit 1 to Amicus Motion for Judicial Notice [MJN]; see also, DLSE Enforcement Policies and Interpretations Manual, Section 45.2.7, 45.2.8, 45.2.9, and 45.3.7, Exhibit 2 to MJN; but cf. proposed DLSE regulations, Exhibit 3 to MJN, expressing reversal of DLSE position and discussion herein at Section H, subd. 2, *infra*.

[3] See excerpts from June 2000 IWC public hearing transcript, Exhibit 4 to MJN.

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.

Virtually *all* employee wage and hour claims involve recovery periods for three years as liabilities created by statute. Included are claims for liquidated damages or double damages above wages owed which function like penalties on the employer. 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.

The power to enforce minimum requirements for meals and rest periods in real world employer-employee relationships is indisputably in the control of the employer and not the employee. Fear of the loss of employment needed to support oneself and family is an acknowledged deterrent to complaints by hourly workers dependent on their jobs for survival. California employers' financial motivation to understaff their companies, which results in employees working through meal and rest periods, is routinely confirmed in awards in DLSE hearings and settlements.

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. The only possible rationalization would be that to do so might improve the business "climate" in California. In reality, however it clearly provides the greatest economic benefit to the most offending employer to the detriment of those employers who do care about and act to preserve the health and welfare of their employees by complying with rest and meal period requirements.

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. Not the law-breaking employer.

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 5 to MJN.) As such, it falls under remedial legislation governing

wages, hours and working conditions for the protection and benefit of employees. It is thus to be "liberally construed with an eye to promoting such protection." (*Industrial Welfare Com. v. Superior Court, supra*, 27 Cal.3d at 702.) A three-year recovery period protects employees from employers violating the laws in order to gain a competitive advantage over others who are in compliance.

B. THE HOUR OF PAY REMEDY IS A LIABILITY CREATED BY STATUTE

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.) Omitted from the wage orders, however, was any remedy for employees required to work through, or deprived of, meal and rest periods.

In 2000, the IWC enacted Sections 11 and 12 of the wage orders and the legislature enacted Section 226.7[4] as a remedial provision to protect employees and inspire compliance with rest and meal period requirements by providing employees an hour of pay for violations. These provisions do not codify or refine existing law but create new obligations by statute.

Like virtually all other Labor Code provisions affecting wages and hours, 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).)

---

[4] Sections 11 and 12 of the wage orders became effective October 1, 2000. Section 226.7 became effective January 1, 2001.

> 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. Under this definition plaintiff's cause of action to recover overtime is based on a liability created by statute. . . . An employer's obligation to pay overtime wages would not exist but for the Labor Code. 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].)

Thus, 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.

Similarly, the obligation to pay the hour of pay for unprovided rest or meal periods would not exist but for the Labor Code and wage orders. It is a liability created by statute subject to a three-year limitations period, as is any emolument owed employees.

C. THE LEGISLATIVE HISTORY OF SECTION 226.7 REVEALS THAT THE REMEDY INTENDED IS AN HOUR OF "WAGES"

In assessing the legislative history of Section 226.7, Petitioner advances the fallacy that the legislature intentionally classified the hour of pay as a penalty, intended it to be recoverable for a single year, and in referring to the "lower penalty amounts adopted by the IWC" inferred that the IWC classified the hour of pay as the type of civil penalty carrying a one-year statute of limitations. Close examination of the legislative history reveals that this analysis is incomplete and inaccurate. There is utterly nothing in the

legislative history indicating any specific discussion or intent to limit recovery to a single year.

The remedy originally provided for a "civil penalty" calling for $50 to be paid to the Commissioner for the first violation and $100 for succeeding violations, as well as double the amount of lost wages. (Exhibit 6 to MJN.) The Senate on August 25, 2000 amended the statute, **removed the penalty**, and changed it to one hour of *"wages"*:

> **Failure to provide such meal and rest periods would subject an employer to paying the worker one hour of <u>wages</u> for each workday when rest periods were not offered.**

(See August 28, 2000 Senate Floor Analysis [Exhibit 7 to MJN, p. 4], emphasis added.)

Elsewhere in this analysis, the Senate refers to the "penalty" for 30 days wages, as well as "penal damages" of $50 per violation and $100 for subsequent violations for Section 226 record-keeping violations. The Senate was careful not to call Section 226.7 compensation "penalties" and instead called it "wages."

Subsequently, the September 7, 2000 Assembly Floor Analysis (Exhibit 8 to MJN, p. 2) describes the August 30, 2000 Senate amendment as codifying the lower "penalty" amounts adopted by the IWC: "Delete the provisions related to penalties for an employer who fails to provide a meal or rest period, and instead codify the lower penalty amounts adopted by the Industrial Welfare Commission (IWC)."

In fact, the lower "penalty" amounts adopted by the IWC were not statutory penalties but were in the nature of overtime penalties, with no intention of a one-year statute. This issue traces back to where IWC Commissioner Broad described the compensation as a "penalty" in discussing

that the hour does not count toward overtime hours but operates like the overtime "penalty":

> Commissioner Broad: 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 the intent. Let me respond, if I may. Clearly, I don't intend this to be an hour counted towards hours worked [for calculating entitlement to overtime] 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 has been construed, as more than the—the normal daily workday. It is viewed as a penalty and a disincentive in order to encourage employers not to do so. So, it is in the same authority that we provide overtime pay that we provide the extra hour of pay.

(June 30, 2000 hearing (Exhibit 4 to MJN, p. 30.)

Commissioner Broad's analysis is supported by case law which describes overtime pay as providing for "premium" or "penalty" wages. (*Industrial Welfare Commission v. Superior Court, supra*, 27 Cal.3d at 713; *Keyes Motors, Inc. v. Division of Labor Standards Enforcement, supra*, 197 Cal.App.3d at 56.) Overtime and all other statutory wage claims arise under the three-year limitations period for obligations founded on statute, Code of Civil Procedure section 338, subdivision (a). (*Aubry v Goldhor, supra*, 201 Cal.App.3d at 404.) Thus, the legislative history[5] indicates an intent that the

---

[5] Petitioner has erroneously cited proposed legislation that the Governor vetoed as indicative of legislative intent. Evidence of unenacted legislation has been repeatedly rejected as a basis for establishing the intent of enacted legislation. (See, e.g., *Cuadra v. Millan* (1988) 17 Cal.4th 855, 870, disapproved in part on different grounds in *Samuels v. Mix* (1999) 22 Cal.4th 1, 16 [bills the legislature failed to enact regarding the commencement date for calculating back pay "are of little if any value in determining legislative intent"] *People v. Escobar* (1992) 3 Cal.4th 740, 751, 837 P.2d

hour of pay under Section 226.7 be considered "wages" that function like overtime "premium" or "penalty pay," subject to a three-year recovery period.

C. THE PLAIN LANGUAGE OF SECTION 226.7 SUPPORTS A FINDING THAT THE HOUR OF PAY IS WAGES, NOT A PENALTY SUBJECT TO A ONE-YEAR STATUTE

Statutes of limitation are the prerogative of the Legislature. (*Valley Circle Estates v. VTN Consolidated, Inc.* (1983) 33 Cal.3d 604, 615.) When interpreting them, courts are obligated to give effect to the plain meaning of statutory language. (*O'Neill v. Tichy* (1993) 19 Cal.App.4th 114, 120.)

In this case, the plain meaning of "pay" is wages.

Section 226.7, subdivision (a), forbids an employer from requiring an employee to "work" during (or without) any required rest or meal period. Subdivision (b) provides the hour of pay as the remedy for failing to provide the rest or meal period and requiring the employee to *work* through the break time. Pay for work performed is wages.

Section 200 broadly defines wages as "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." Section 226.7 appears in Labor Code Division 2 "Employment Regulation and Supervision", Part 1 "Compensation", Chapter 1, **"Payment of Wages"** (emphasis added). This dispels any claim that the hour of pay is anything other than "compensation" classified as "wages."

1100 [" 'weak reed upon which to lean' "]; *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal.4th 991, 1003, 945 P.2d 781 [same]; *id.* at p. 1003, fn. 4 [vetoed statute overturning prior decision "provided no guidance"]; *Baldwin v. County of Tehama* (1994) 31 Cal.App.4th 166, 181, fn. 10 ["legislative history tea leaves"] [denying judicial notice of unenacted legislation].)

"Wages" includes compensation measured by any standard. (*Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1972) 24 Cal.App.3d 35, 44.) In its legal sense, the word "wage" has been given a broad, general definition so as to include compensation for services rendered without regard to the manner in which such compensation is computed. (*Estate of Hollingsworth* (1940) 37 Cal.App.2d 432, 436.) This includes "periodic monetary earnings" plus all other benefits. (*Wise v. Southern Pac. Co.* (1970) 1 Cal.3d 600, 607.) A bonus, offered as an incentive to attract employees, has been held to be wages. (*Hunter* v. *Ryan* (1930) 109 Cal.App. 736, 738.) Payments to a health and welfare fund by an employer (*People* v. *Alves* (1957) 155 Cal.App.2d Supp. 870, 872), payment of insurance premiums by an employer (*Foremost Dairies* v. *Industrial Acc. Com.* (1965) 237 Cal.App.2d 560, 580), payments to an unemployment insurance fund (*People* v. *Dennis* (1967) 253 Cal.App.2d Supp. 1075, 1077), and pension plan benefits (*Hunter* v. *Sparling* (1948) 87 Cal.App.2d 711, 725) are wages within the meaning of the statute.

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

The hour of pay also constitutes "wages" as remuneration required by statute as that term is defined under Unemployment Insurance Code section 926 as "all remuneration payable to an employee for personal services whether by private agreement or consent or by force of statute. . .."

Section 226.7 remuneration functions as wages. It is owed when incurred. If paid correctly, an employee receives the payment the next payday. If not timely paid, a cause of action accrues.

> A cause of action for unpaid wages *accrues* when the wages first become legally due, i.e., on the regular payday for the pay period in which the employee performed the work. It follows that such an action is timely as to all paydays falling within the relevant limitations period. For the same reason, in calculating the amount of unpaid wages due in such an action the court will count back from the filing of the complaint to the beginning of the limitations period--e.g., for three years on a statutory liability--and will award all unpaid wages earned during that period.

(*Cuadra v. Millan*, *supra*, 17 Cal.4th at 859.)

Thus, broadly construing Section 226.7 and Section 200, 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).

E. THE HOUR OF PAY IS NOT A PENALTY DESPITE NOT BEING PRECISELY TIED TO LOST TIME

Though Section 226.7 does not state that the hour of pay is a "penalty," Petitioner claims that it functions like a penalty, arguing it is not precisely tied to the ten or thirty minutes of lost break time. Therefore, Petitioner argues the hour of pay is a penalty or forfeiture governed by the one-year statute of limitations for statutory penalties under Code of Civil Procedure section 340, subdivision (a).

This argument is unavailing. The legislature knows how to classify Labor Code remedies that are penalties and in each instance identifies them as "penalties" in the language of the statute. (See, e.g., Sections 558 [penalties in addition to wages] and 1197.1 [penalties in addition to wages owed for failure to pay minimum wages].) *Without exception*, the statutes include the term "penalty." These statutory penalties typically function by penalizing the employer $50 per employee for the first violation and $100 for each successive violation. The primary characteristic of civil penalties under

the Labor Code is that the penalties are assessed and collected by the Labor and Workforce Development Agency, and its departments, divisions, boards, and agencies.[6] *County of San Diego v. Milotz* (1956) 46 Cal.2d 761, 766, cited by Petitioner, involved a statutory penalty that allows *the county* to recover one half the fees paid if the court transcripts are not timely filed. Section 226.7 remuneration is paid to the employee.

Moreover, many forms of compensation under the labor laws are not mathematically tied precisely to hours of service. Examples include vacation pay (considered "wages" under case law, *Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal.3d 774, 780), the premium hour of minimum wages paid to certain employees working split shifts (Section 4 of the wage orders) and reporting pay premiums (Section 5 of the wage orders).

Aside from being inaccurate, the hour of pay would not constitute the type of penalty warranting a one-year limitations period even if functioned as Petitioner argues. Petitioners claim that the pay functions as a penalty because it is not related to the value of services provided. But this claim is based on principles borrowed from inapposite penalty cases not arising under the Labor

---

[6] Beginning January 1, 2004, employees may bring private actions under the Private Attorneys General Act (PAGA) for civil penalties under the Labor Code and are entitled to retain 25% of the collected penalties. Uniformly, these penalties, which previously inured solely to the Labor and Workforce Development Agency, accrue for each pay period the employer violates the Labor Code and are assessed *in addition to amounts owed to employees.* By contrast, employees are entitled to 100% of Section 226.7 compensation. "Waiting time" penalties under Section 203, which accrue for each day an employee is not paid wages due after termination from employment, are also paid to the employee. However, both the statute and case law describe these sums as "penalty wages." (See e.g., Section 203 ["the wages of the employee shall continue as a penalty"]; *Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc.* (2002)102 Cal.App.4th 765, 781 [using the term "penalty wages"].)

Code nor related to provisions involving employees and working conditions. These cases provide that penal provisions involve recovery *in addition to* and unrelated to actual damages a plaintiff might otherwise recover. (*Prudential Home Mortgage Co. v. Superior Court* (1998) 66 Cal. App. 4th 1236, 1242 [applying one-year limitations to Civil Code section 2941, subdivision (d) where statute specifically called for untimely reconveying trust deed holder to "forfeit" $300 to the beneficiary and legislative history referred to the sum imposed as a "forfeiture or civil penalty"].) "Case law has consistently applied the one-year limitations period to statutes that provide for recovery of actual damages and a mandatory additional penalty." (*Id.*)

Section 226.7 sets the damage for the violation as an hour of pay; there is no other damages an employee may recover. It is not "an arbitrary sum in addition and unrelated to actual damages." (*Prudential Home Mortgage Co. v. Superior Court, supra*, 66 Cal. App. 4th at 1243.) It is not calculated "without any reference" to the question of actual damage. (*Id.* at 1245.) The hour of pay reflects both the actual extra labor time the employee is suffered to work, as well as the additional expended energy of working and the depletion of energy and stress employees incur working through breaks.

For example, consider a cashier who is required to stand for long stretches without respite. The hour of pay sets the compensation for the extra time working as well as the additional stress, energy expended, and fatigue from standing for so long. *There are no other monetary "damages" that employees recover when employers require them to work through a rest or meal period.*

Because the actual damages for unprovided rest and meal period is, in some measure "obscure and difficult to prove," the three-year statute applies. (See *Rivera v. Anaya* (9th Cir. 1984) 726 F.2d 564, 579-569 [California Farm

Labor Contractor Registration Act (Labor Code sections1682-1699) calling for actual damages or statutory damages $500 falls under three-year statute of limitations as liability created by statute and not one year for statutory penalty under California Code of Civil Procedure].)

F. WHERE RECOVERY IS TO AN EMPLOYEE, EVEN REMEDIES FUNCTIONING AS PENALTIES FALL UNDER THE THREE-YEAR STATUTE.

Further demonstrating that Labor Code actions broadly concern statutory violations other than penalties, all amounts employees recover in Berman Hearings are recoverable for "four years for a claim on a written contract, two years for a claim on an oral contract, and three years for a claim on a statutory liability." (*Cuadra v. Millan*, *supra*, 17 Cal.4th at 866.) Note that this encompasses all employee recovery, including penalties, described by the Supreme Court as:

> the wide range of monetary sanctions that the statute expressly authorizes [the Labor Commissioner] to impose, i.e., the award of 'any sums found owing, damages proved, and **any penalties awarded pursuant to this [Labor] code**' (§ 98.1, subd. (b)), together with 'accrue[d] interest on all due and unpaid wages' (*id.*, subd. (c)).

(*Id.* 17 Cal.4th at 860 [emphasis added].) The Commissioner has for years issued citations for rest and meal period violations covering three year periods.

Just because a statute is classified as a penalty does not necessarily mean it is a statutory penalty with a one-year statute of limitations. When it comes to an employee's remedies to recover for wage and hour violations, three years of recovery apply regardless of whether classified as a wage or a penalty. Nowhere do we find case law classifying wage and hour claims as penalties and limiting them to a one-year liability period.

In fact, even liquidated damages providing additional recovery under the Fair Labor Standards Act to employees not paid the required minimum wage for overtime work does not constitute a penalty under Code of Civil Procedure section 340, subdivision (a). (*Hays v. Bank of America National Trust & Savings Assn.* (1945) 71 Cal.App.2d 301, 304; *Culver v. Bell & Loffland*, 146 F.2d 29 (9th Cir. 1944); see, also *Chavarria v. Superior Court of Fresno* (1974) 40 Cal.App.3d 1073, 1077 [employees suing for "double damages" under Labor Code provision not suing for "penalty" and case governed instead by three-year statute]; see also *Medrano v D'Arrigo Bros. Co.* (2000, N.D. Cal.) 125 F.Supp.2d 1163, 1169-1170 [three-year statute of limitations under Code of Civil Procedure section 338, subdivision (a), applied to statutory damage claim (in addition to wages) for failure to pay off the clock time under Migrant and Seasonal Agricultural Worker Protection Act and state law; statutory damages under Act were intended to compensate plaintiffs for not receiving "timely payment" and to "deter the defendants from withholding timely payment in the future"].)

The legislature enacted a specific three-year limitations period for waiting time penalty wages under Section 203. As with the overtime penalty, obligations to pay wage-related penalties are enforceable over a three-year recovery period. If the legislature wanted to restrict an employee's recovery to a single year, it would had to have done so expressly. It did not. A one-year period unfairly penalizes employees, contrary to the goal, objective, and mandate of liberally construing remedial wage and hour legislation to protect and benefit the health and welfare of employees.

G. 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.

H. APPLYING A ONE-YEAR STATUTE CREATES INCONSISTENCIES AND UNINTENDED CONSEQUENCES.

A determination that the hour of pay is subject to a one-year statute of limitations invokes several inconsistent and unintended consequences that are better avoided.

1. A One-year Civil Recovery Period Would Be Inconsistent With DLSE Berman Actions.

As noted above, the Labor Commissioner has previously applied a three-year recovery period to all manner of remedies in Berman actions under Section 98, including any penalties. (*Cuadra v. Millan, supra,* 17 Cal.4th at 860.) The commissioner has enforced rest and meal period liability for three years. *Cuadra* (which did not specifically involve rest and meal period violations) overruled DLSE's position that the recovery period for Berman Hearings commenced as of the hearing date rather than the filing date, in part, to avoid the anomalous result that a claimant would have a longer period in a civil action commenced as of filing than a Berman hearing. Similarly, a judicial ruling that Section 226.7 is subject to a one-year period would result in a different time period for the same claim subject to three years in Berman proceedings.

2. The DLSE Reversal of Position is Not Entitled to Deference.

Plaintiffs' initial Return noted DLSE's then-current position that Section 226.7 compensation is premium pay subject to a three-year recovery period, not a penalty. Though DLSE had applied this standard to countless

enforcement proceedings since the statute became effective January 1, 2001, DLSE recently reversed its position. On December 10, 2004, DLSE proposed emergency regulations purporting to clarify, among other things, that the hour of pay under Section 226.7 is a "penalty," not a wage. (See Petitioner's Motion for Judicial Notice.) After receiving unprecedented opposition to this effort, DLSE withdrew the emergency regulations.

On December 20, 2004, DLSE proposed essentially the same regulations and scheduled public hearings for February, 2005. (See Exhibit 3 to MJN.) DLSE also withdrew certain opinion letters classifying LC226.7 compensation for rest and meal period violations as "premium pay" and discussing timing of meal periods. (See Exhibit 9 to MJN.) However, DLSE did not withdraw the October 17, 2003 letter finding a private right of action for violations of 226.7 and the rest and meal provisions of the wage orders and describing the hour of pay as "premium pay." (Exhibit 1 to MJN, p. 6.)

DLSE's new position and its ultra vires effort to enact regulations that are the diametric opposite of prior interpretations, should not be given much weight.

The IWC was established as a quasi-legislative body with constitutional and statutory authority to promulgate regulations pertaining to wages, hours and working conditions. (*Industrial Welfare Com. v. Superior Court, 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. For example, before the IWC can promulgate new regulations pertaining to wages or working conditions, Section 1178 requires it first to conduct an investigation. If it determines "that in any occupation, trade, or industry, the wages paid to employees may be inadequate to supply the proper cost of living, or that the hours or conditions of labor may be prejudicial to the health, morals, or welfare of employees," then it must under Section 1178.5 "select one wage board composed of an equal number of representatives of employers and employees, and a nonvoting representative of the commission, designated by the commission, who shall act as chairperson." Any proposed regulations that arise from this action "shall include any recommendation of the wage board which received the support of at least two-thirds of the members of the wage board." (*Id.* Section 1178.5, subd. (c).) Finally, the IWC must conduct public hearings public on the proposed regulations in at least three cities. (*Id.*)

As is apparent from its shifting of position in the political winds, the 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)[7], and under Section 98.8 to carry out the provisions of Chapter 4 (Sections 79-107), which involve matters such as

---

[7] These provisions regard such matters as enforcement of the Fair Labor Standards Act, the state plan for the development and enforcement of occupational safety and health standards, upgrading and expanding the resources of the State of California in the area of occupational health and medicine, and levying fraud assessments for worker's compensation fraud

forms for filing complaints, providing for subpoena power relative to Berman Hearings, and other rules and regulations necessary to operational matters, not interpretation of substantive law. In almost seventy years (since 1937), the DLSE Director has only enacted one regulation to interpret a law prior to this attempt, to define the word "willful" (C.C.R. section 13520).

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

> Although we give the Department's interpretation great weight (e.g., *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 309), this court bears the ultimate responsibility for construing the statute. "When an administrative agency construes a statute in adopting a regulation or formulating a policy, the court will respect the agency interpretation as one of several interpretive tools that may be helpful. In the end, however, '[the court] must . . . independently judge the text of the statute.' " (*Agnew v. State Bd. of Equalization* (1999) 21 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* (December 20, 2004) ___Cal.4th ___ [2004 Cal. LEXIS 11908, p. 8].)

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 10, 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., Order Granting Part and Denying in Part the Motion of Defendant for Summary Adjudication on the

Meal Period Money Claims, p. 10, *Savaglio v. Wal-Mart* [July 20, 2004, Alameda Superior Court Case No. C-835687] [writ denied September 1, 2004 (*Wal-Mart v. Superior Court*, First District Court of Appeal Case No. A107511)], Exs. 10 and 11 to MJN) 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.) This rule also applies to preclude DLSE's reversal of position on the application of the three-year statute of limitations to Berman hearing recoveries, including penalties, adopted by the Supreme Court in *Cuadra v. Millan, supra,* 17 Cal.4th at 860.

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

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

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

DLSE's "flat contradiction" of some four years of proceedings it conducted under a three-year statute of limitations should be ignored.

3. The State Would Receives Less Revenue If The Hour of Pay is Classified A Penalty.

Classification of the hour of pay as a "penalty" would result in less income to the State through payroll tax withholdings. The Employment

Development Department would receive less in unemployment insurance contributions.

4. Recovery is permitted for four years under the UCL.

Regardless of whether the hour of pay is considered wages or penalties, recovery is permitted under UCL for a period of four years. "Unlawful business activity" proscribed under the UCL includes "'any thing that can properly be called a business practice and that at the same time is forbidden by law.'" (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 113.) The remuneration is owed to the employee when it is incurred and is subject to a restitution order under Business and Professions Code section 17203 for non-payment. (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 178 ["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"] [emphasis added])

Penalties involving unfair competition may be enforced by specific performance order under Business and Professions Code section 17202: "Notwithstanding Section 3369 of the Civil Code, specific or preventive relief may be granted to enforce a penalty, forfeiture, or penal law in a case of unfair competition."

Either ground supports the trial court order herein.

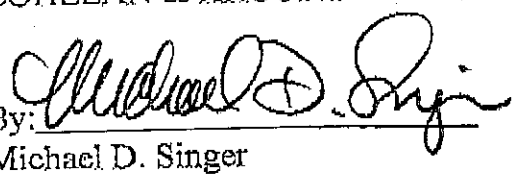
III.

CONCLUSION

Petitioner's effort is not concerned with defining the scope of employee rights for employer's failure to abide by the law. Instead, it is an attempt by an employer to erase liability without justification and contrary to nearly every principle of statutory construction and interpretation of Labor Code provisions. Rather than countenance such an undertaking, amicus respectfully request that the Court deny the Petition.

DATED: January 10, 2004

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 January 10, 2005, contains 6,892 words as counted by Corel WordPerfect, the word processing program used to generate the brief.

Dated: January 10, 2005

Respectfully submitted,
COHELAN & KHOURY

By: Michael D. Singer
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 January 10, 2005, I served the foregoing document described as **AMICUS BRIEF OF THE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF/REAL PARTY IN INTEREST MICHAEL DeGONIA AND FRANK GOMEZ** 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 January 10, 2005at San Diego, California.

Amber Worden

Amber Worden

SERVICE LIST

Degonia, er t al. v. Orco Block Co., Inc.
4th Civil No. E036955

Superior Court Clerk Riverside County P.O. Box 431-Appeals Riverside, CA 92502	Clerk of the Superior Court
Richard S. Ruben, Esq. Rose Marie Hartwig, Esq. PILLSBURY WINTHROP LLP 650 Town Center Drive, 7th Floor Costa Mesa, CA 92626	Attorneys for Defendant Orco Block Co., Inc.
G. Allen McNamee, Esq. PILLSBURY WINTHROP LLP 725 S. Figueroa Street, #2800 Los Angeles, CA 90017	Attorneys for Defendant Orco Block Co., Inc.
Andy Birnbaum, Esq. REICH, ADELL, CROST & CVITAN A Professional Law Corporation 3550 Wilshire Blvd., Suite 2000 Los Angeles, CA 90010	Attorney for Real Parties in Interest Michael DeGonia and Frank Gomez