



**SUPREME COURT OF CALIFORNIA  
ORAL ARGUMENT CALENDAR  
SPECIAL SESSION — SAN DIEGO  
THURSDAY, SEPTEMBER 29, 2016**

*Case Summaries*

The following summaries are provided for the cases that will be heard by the Supreme Court at its Special Session at the Court of Appeal, Fourth Appellate District, Division One, 750 B Street, Suite 300, San Diego, California, on September 29, 2016.

**THURSDAY, SEPTEMBER 29, 2016 — 10:45 A.M.**

*Opening Remarks: Historic Special Session*

**(1) *Augustus (Jennifer) et al. v. ABM Security Services, Inc.*, S224853**

Former Labor Code section 226.7, subdivision (a), provided, “No employer shall require any employee to work during any . . . rest period mandated by an applicable order of the Industrial Welfare Commission.” Subdivision 12(A) of the applicable order, Industrial Welfare Commission wage order No. 4-2001 (Cal. Code Regs., tit. 8, § 11040), provides, “Every employer shall authorize and permit all employees to take rest periods . . . . Authorized rest period time shall be counted, as hours worked, for which there shall be no deduction from wages.”

The court will consider whether Labor Code section 226.7 and the relevant wage order require that employers permit employees to take off-duty rest periods, and whether employers may require employees to remain “on call” during rest periods.

Plaintiffs worked as security guards for defendant ABM Security Services, Inc. They allege that one requirement of their employment was that they keep their pagers and radio phones on at all times — even during rest periods. Plaintiffs further allege that they had to remain vigilant during rest periods and respond to calls should the need arise. They filed suit, alleging that such a policy was inconsistent with ABM’s duty to provide duty-free rest periods under state law. The trial court granted summary judgment for plaintiffs, awarding approximately \$90 million, but the Court of Appeal reversed, concluding that state law does not require off-duty rest periods and that “simply being on call” does not constitute performing work.

Plaintiffs argue that employees are entitled to duty-free rest periods and that the language of Labor Code section 226.7 and the relevant wage order is incompatible with on-duty or on-call rest periods. Defendants contend that on-call rest periods are not per se invalid under state law and that the mere potential for interruption does not invalidate a rest period.

**1:45 P.M.**

***(2) Orange Citizens For Parks and Recreation et al. v. Superior Court of Orange County (Milan REI IV LLC et al., Real Parties in Interest), S212800***

The Legislature requires that each city and county adopt a long-term general plan for its development. The general plan controls over subsidiary land use plans. During the process of drafting and implementing these general plans, localities must balance numerous competing environmental, social and economic interests while facilitating public participation in the plan's development.

This case concerns the City of Orange's general plan, as it relates to a residential development proposed by real party in interest Milan REI IV LLC. In 2011, the City approved the development even though the City's 2010 General Plan appears to designate the property as "Open Space." At first, the City advanced the development by amending its general plan to expressly permit residential development on the property. But in response, the Orange Parks Association and a political action committee called Orange Citizens for Parks and Recreation (together "Orange Citizens") challenged the City's amendment by referendum. The City then concluded that approving the general plan amendment was unnecessary, because a 1973 resolution permitted the development, and as a result, the referendum, whatever its outcome, would have no effect. In November 2012, the voters rejected the general plan amendment.

The City contends that the 2010 General Plan's "Open Space" designation and the referendum do not render the development inconsistent with the general plan because the 2010 General Plan incorporates another plan, the Orange Park Acres Plan, as a specific plan. Although this plan also describes the property as "Open Space," it was amended by resolution in 1973 to permit residential development on the property. Since that time, the City of Orange's general plan has twice undergone significant revisions — once in 1989 and again in 2010. Because cities are owed the utmost deference in how they organize and interpret their general plans, the City argues, the supreme court must defer to the City's determination that the 1973 resolution permitting residential development is part of the city's general plan. This case first requires the court to decide whether the residential designation from 1973 has been incorporated into the city's general plan, and then whether the development is consistent with that plan.

### **(3) *People v. Miami Nation Enterprises et al.*, S216878**

Indian tribes enjoy sovereign immunity, which means that a tribe generally cannot be sued in federal or state court. The United States Supreme Court has held that this sovereign immunity applies to commercial activity that tribes engage in outside of tribal lands.

This case considers how far sovereign immunity extends. Here, two Indian tribes, Miami Tribe of Oklahoma and the Santee Sioux Nation, each created corporations that among other things, engage in money lending activities. Although the tribes are located in Oklahoma and Nebraska, they offer loans over the Internet to California residents. The State of California alleges that the corporations created by the Indian tribes engage in illegal “payday” lending or “cash advance” lending, also known as short-term deferred deposit lending. The lender loans the borrower a small sum generally due by the borrower’s next payday. In exchange, the borrower provides the lender with a personal check or access to the borrower’s checking account, and the lender charges very high fees for the loan. In 2003, the Legislature enacted the Deferred Deposit Transaction Law, which limited the size of the loan and fees that the lender could charge. The State claims that the tribe’s business entities violated this law. The State filed a civil complaint seeking to stop these entities from continuing their unlawful practices.

The Indian tribes claim sovereign immunity. The state claims that the corporations engaging in the allegedly illegal practices are not sufficiently related to Indian tribes to acquire sovereign immunity, contending among other things that the management of the corporation is by non-Indians and that the tribes only get a small percentage of corporation’s income. This case will require the court to decide what factors determine whether a corporation that a tribe claims it created enjoys tribal sovereign immunity.

### **(4) *In re Transient Occupancy Tax Cases*, S218400**

Like many other communities, the City of San Diego has adopted an ordinance imposing a tax on visitors for the privilege of staying in hotels located within the city. The tax, known as a transient occupancy tax, is calculated as a percentage of the “Rent charged by the Operator” of the hotel. (See San Diego Mun. Code, § 35.0103.) In recent years, many visitors have booked and paid for their hotel reservations online at the websites of online travel companies such as defendants and respondents in this case. The question before the court is whether the San Diego transient occupancy tax is payable on the amount retained by the online travel companies above the amount remitted to the hotels as the agreed wholesale cost of the room rental.

Online travel companies (OTCs) may do business under any of several models; involved here is the one known as the merchant model. Under this model, OTCs contract with hotels to advertise and rent rooms to the general public. OTCs handle all financial transactions related to the hotel reservations and become the “merchant of record” as listed on the customer’s credit card receipt. The price the hotels charge the OTC for the

rooms is the “wholesale” price. The OTC offers the rooms to the public at retail prices, which include a “markup” set by the OTC. The OTC’s charge to the customer includes an amount representing the OTC’s estimate of what the hotel will owe in transient occupancy tax based on the wholesale price of the room as charged by the hotel to the OTC. After the customer checks into the hotel, the hotel bills the OTC for the wholesale price of the room plus the transient occupancy tax the hotel will have to pay based on the room’s wholesale price. The OTC remits the charged amount to the hotel, which in turn remits the tax to San Diego; the OTC retains its markup and service fees.

San Diego contends each OTC is liable for transient occupancy tax on the markup in merchant model transactions, and issued transient occupancy tax assessments against the OTCs, which each OTC timely appealed. A hearing officer conducted a consolidated administrative hearing to determine whether each OTC had obligations and liability under the tax. The officer found that the OTCs owed the tax. The OTCs challenged the hearing officer’s determination by filing a petition for writ of mandate and cross-complaint seeking declaratory relief. The superior court granted the relief sought, reasoning the ordinance imposes tax on rent “charged by the operator”; OTCs are not operators or managing agents of the hotels; and the markup the OTCs charge for their services is not part of the rent subject to the tax. The Court of Appeal affirmed, and San Diego petitioned the Supreme Court for review. The Supreme Court will decide whether the lower court correctly applied San Diego’s transit occupancy tax ordinance on these facts.

###