No. S244751

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

KURT STOETZL, *et al.*

Plaintiffs, Appellants and Respondents,

v.

STATE OF CALIFORNIA, *et al.*

Defendants, Respondents and Petitioners.

On Review From The Court of Appeal for the First Appellate District, Division Four, No. A142832

After an Appeal From the Superior Court for the State of California, County of San Francisco, Case No. CJC11004661, Hon. John E. Munter

Coordination Proceeding Special Title: CALIFORNIA CORRECTIONAL EMPLOYEES WAGE AND HOUR CASES

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CONSTITUTIONAL PROVISIONS

I

INTRODUCTION

The gaping flaw in the State's Brief is its unwillingness to countenance that state minimum wage standards can function alongside federal overtime standards for state employees. Yet other California employers routinely comply with federal law standards *and* more protective state wage and hour laws. This dual system, with federal law setting a floor above which California frequently sets standards more protective of employees, reflects deliberate policy determinations by the Legislature. As this Court recognizes, those policy determinations were routinely effectuated through Industrial Welfare Commission ("IWC") wage orders.

This flaw leads the State to repeatedly overstretch the meaning and purpose of the regulatory scheme governing the compensation of the unrepresented correctional peace officer employee subclass (the "Unrepresented Employees" or the "subclass"), whose rights are at issue in the State's Petition. The State correctly observes that in the 1980's the Legislature delegated authority to the California Department of Human Resources ("CalHR") to ensure compliance with the federal Fair Labor Standards Act, 29 U.S.C. section 201 *et seq.* ("FLSA"). But it greatly overreaches when it asserts that the Legislature intended federal law to preempt more favorable state standards, circumscribing the explicit authority it delegated to the IWC. The State offers no support for this

radical view beyond reading every reference to the FLSA in statutes, regulations and even an agency manual as *impliedly* eviscerating state law protections for these state employees. But this Court has repeatedly refused to allow state wage and hour protections to be overridden by federal law through implication. It should hold that line here.

Indeed, it would be very odd if the California Legislature, which has so often diverged from the FLSA, including in the more employee favorable minimum wage standards at issue in this case, applied only federal law to the state's own workforce. Put another way, the State never explains why it, alone amongst California employers, should be exempt from its own minimum wage laws.

Ultimately, though, this Court is not faced with an either/or decision because both federal and state standards can and do both apply. The FLSA sets a nationwide floor of overtime and minimum wage standards. Federal law allows states to provide greater protections—which this Court recognizes California has done. The Court of Appeal therefore rightly harmonized federal overtime laws and state minimum wage standards to give effect to both.

The Court of Appeal also easily and correctly rejected the State's argument that the Unrepresented Employees could not state a claim for breach of contract based on work they had already performed. Under a series of decisions by this Court, the Unrepresented Employees have a

contractual right to compensation for hours actually worked under then-prevailing compensation standards. The law the State relies on to contest this point addresses vested *future* benefits (e.g., retirement benefits), which are not at issue here.

It is important to remember that this appeal follows from only phase one of a trifurcated trial and concerns only "threshold legal issues," not whether the uncompensated time at issue will ultimately be found to be compensable. (Slip Op. at pp. 3–4.) Accordingly, this Court should affirm the Court of Appeal's decision to the extent it permitted the Unrepresented Employees to proceed with their California minimum wage and overtime claims.

II

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This petition concerns whether the Court of Appeal properly harmonized Wage Order 4 with the policies and regulations of CalHR. The Court of Appeal held that Wage Order 4, governing state minimum wage and the definition of compensable "hours worked," and CalHR's regulations, governing the setting of salary ranges and compliance with federal overtime laws, could and should be harmonized for the Unrepresented Employee subclass. It held subclass members could pursue claims that the State failed to pay them for all hours worked under their

employer's control at the greater of the state minimum wage rate or their premium overtime rates.

A. Brief Restatement of Relevant Facts

The State's Petition turns on the legal consequences of undisputed facts.[1] A more detailed factual summary of the case is presented in Plaintiffs' Opening Brief on the Merits filed March 5, 2018 in support of Plaintiffs' own Petition ("Plaintiffs' Opening Brief") at pages 13–26.

There are two primary factual distinctions for the subclass of sergeants and lieutenants. First, unlike the correctional officer class in this case, they are not subject to the Ralph C. Dills Act (Gov. Code § 3512 *et seq.*). Consequently, whereas the Court of Appeal concluded that the issue of the applicability of the California minimum wage to correctional officers turned on the existence of a memorandum of understanding, the subclass of sergeants and lieutenants do not have collective bargaining rights and are not subject to a memorandum of understanding.

Second, the State has never exercised its rights under 29 U.S.C. section 207(k) to apply higher FLSA overtime thresholds to sergeants and lieutenants. Consequently, unlike the correctional officers, who during the pendency of the litigation were subject to overtime thresholds of 168 hours in 28 days and then 164 hours in 28 days, the Unrepresented Employees

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[1] Plaintiffs therefore agree with the State that the standard of review is de novo. (See State's Opening Br. on the Merits at p. 25.)

were entitled to overtime pay when they worked in excess of 40 hours in any seven-day work period.

B. Summary of Unrepresented Employee Subclass Claims

The Unrepresented Employees' uncompensated time allegations mirror those set forth in detail in Section III.A of the Plaintiffs' Opening Brief on the Merits. Plaintiffs seek remuneration for uncompensated time employees spend at their post and traveling within correctional facilities before and after their time at their assigned post begins and ends. Plaintiffs contend that such time is invariably spent under the control of their employer and is therefore compensable under the General Minimum Wage Order, Wage Order 4[2], Labor Code section 223[3], and the State's own overtime policies. The State does not dispute that the IWC amended its Wage Orders to apply their minimum wage provisions to state and other public employees on January 1, 2001.

Plaintiffs contend that *both* federal and state standards apply. In other words, the State must comply with its obligations under the FLSA *and*, where applicable, California wage and hour law. In practice, this means that compensable time *for purposes of complying with federal law* is

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[2] The General Minimum Wage Order applies to all non-exempt employees in California. Throughout this litigation, the State has not disputed that Wage Order 4 also applies to the subclass.

[3] The claims of the Unrepresented Employees to be compensated at their regular hourly rate pursuant to Labor Code section 223 is addressed in Plaintiffs' Opening Brief on the Merits at pages 62–67.

measured under federal standards. And compensable time *for purposes of complying with state law* is measured under applicable state standards.

The point at which employees in the subclass come under the "control" of their employer and how many "hours worked" went uncompensated are factual questions that will be litigated before the trial court on remand. Hypothetically, if a correctional sergeant works her standard 40-hour workweek but also spends one hour per week of uncompensated time performing the duties described above, Plaintiffs will seek to establish, upon remand to the trial court, that the time qualifies as "hours worked" under Wage Order 4's definition and consequently must be compensated at either the California minimum wage, the employee's regular hourly rate, or her premium overtime rate.

Indeed, it is worth noting that, at trial, the State admitted that time spent between tool pick-up and post and vice-versa constitutes "hours worked" even under the FLSA's more restrictive compensability standards. (RT Vol. III, 434:8–435:9; RT Vol. IV 593:14–595:8.) And it conceded that Unrepresented Employees received no compensation for any of that time. (RT Vol. IV 599:2–599:13; see also RT Vol. III 481:10–489:23.)

C. The Court of Appeal's Decision as to the Unrepresented Employees

The Court of Appeal, agreeing with Plaintiffs and reversing the trial court, held that the Unrepresented Employees' claims could proceed

because the California minimum wage and the definition of "hours worked" contained in Wage Order 4 apply to members of the subclass.

First, the Court of Appeal held that Unrepresented Employees were entitled to the protection of the California minimum wage for uncompensated time that constituted "hours worked" under the "control" test provided for in Wage Order 4. (Slip Op. at pp. 19–21.) In doing so, the Court of Appeal recognized the extraordinary deference afforded Wage Orders by this Court. (Slip Op. at pp. 9–11, 19–21, citing *Brinker Rest. Corp. v. Superior Court (Hohnbaum)* (2012) 53 Cal.4th 1004, 1027.)

Second, the Court of Appeal concluded that "it is possible to harmonize the California Pay Scale Manual and Wage Order 4, as we must seek to do under *Brinker*." (*Id.* at p. 21.) "We may reasonably construe the regulatory schemes to mean that entitlement to overtime compensation is controlled by the FLSA but that the meaning of 'hours worked' is governed by Wage Order 4. Such a construction does violence to neither regulatory scheme." (*Ibid.*)

Third, the Court of Appeal rejected the State's argument that the Unrepresented Employees could not state a claim for breach of contract for uncompensated overtime hours worked. (Slip Op. at pp. 21–24.) The Court of Appeal agreed with Plaintiffs that this Court's decisions in *Madera Police Officers Association v. City of Madera* (1984) 36 Cal.3d 403 and *White v. Davis* (2003) 30 Cal.4th 528 control. Consequently, it

held that state employees earn contractual rights when they perform work under the terms of the statutes and regulations that apply to them at the time they performed the work. (Slip Op. at p. 24.) This includes "hours worked" as defined by Wage Order 4 that exceed CalHR's threshold for when overtime compensation begins; i.e., here more than 40 hours worked in any seven-day period. (See *ibid.*)

III

THE COURT OF APPEAL PROPERLY HARMONIZED WAGE ORDER 4'S MINIMUM WAGE PROVISION AND DEFINITION OF "HOURS WORKED" WITH CALHR REGULATIONS TO GIVE EFFECT TO BOTH

The State is wrong to assert that CalHR regulations and the Pay Scales Manual are entitled to greater deference than Wage Order 4 in deciding whether California minimum wage standards apply to state employees. Moreover, the pecking order is ultimately irrelevant here because the statutes, regulations and manual the State relies on do not conflict with Wage Order 4. They address related but different subjects, like setting salary ranges for state employees and ensuring the State complies with the FLSA. The regulations express no intent to supersede or exempt the State as an employer from California minimum wage standards. Absent *specific* statutory language making Wage Order 4's minimum wage provision and definition of "hours worked" non-applicable to the State, this

Court should decline the State's invitation to find them nullified *sub silentio*.

Ultimately, this Court need not decide between federal overtime laws and state wage and hour standards because, as the Court of Appeal explained, the two sets of laws can be harmonized to give both effect.

A. There Is no Precedent for Giving CalHR Regulations Greater Deference than Wage Orders

The State concedes, as it must, that "the IWC's wage orders are entitled to 'extraordinary deference, both in upholding their validity and in enforcing their specific terms.'" (State's Opening Br. on the Merits ("State's Opening Br.") at p. 35, quoting *Brinker*, *supra*, 53 Cal.4th at 1027 [citation omitted].) Yet it asserts that a smorgasbord of CalHR statutes, regulations and even an agency manual warrant greater deference and should be read to invalidate Wage Order 4's protections to the subclass. (State's Opening Br. at pp. 35–39.)

Not so. The IWC's role in regulating wages and hours has explicit constitutional pedigree. The California Constitution gives the Legislature power to confer "legislative, executive, and judicial powers" on a "commission" for the purpose of "provid[ing] for minimum wages and for the general welfare of employees." (Cal. Const., art. XIV, § 1.) Plaintiffs summarized this extensive history at pages 27 to 29 of their Opening Brief on the Merits. (Citing *Brinker*, *supra*, 53 Cal.4th at p. 1026, *Industrial*

Welfare Comm. v. Superior Court (1980) 27 Cal.3d 690, 701 and especially *Martinez v. Combs* (2010) 49 Cal.4th 35, 54 & fn.20.)

The Legislature exercised this constitutional authority by charging the IWC with "ascertain[ing] the wages paid to all employees in th[e] state." (Labor Code § 1173; see also *Guerrero v. Superior Court (Weber)* (2013) 213 Cal.App.4th 912, 954 [public agencies are covered by wage orders unless expressly exempted]; *Sheppard v. North Orange County Regional Occupational Program* (2010) 191 Cal.App.4th 289, 304–307 [Labor Code § 1173's delegation of authority to IWC over "all employees" necessarily includes public employees].) "[S]pecific employers and employees still become subject to the minimum wage only through, and under the terms of, the IWC's applicable wage orders." (*Martinez*, *supra*, 49 Cal.4th at p. 55.)

The Legislature delegated specific authority to the IWC to create laws that have a "direct relation to minimum wages" so long as they are "reasonably necessary to effectuate the purposes of the" delegation. (*Id.* at p. 62 [citations omitted].) These wage orders are "to be accorded the same dignity as statutes"; are "'presumptively valid' legislative regulations of the employment relationship . . . that must be given 'independent effect'"; are harmonized with any other arguably overlapping statute (*Brinker*, *supra*, 53 Cal.4th at p. 1027); and "are to be liberally construed with an eye to" protecting employees. (*Martinez*, *supra*, 49 Cal.4th at p. 61.) Therefore,

for terms like "hours worked," the judiciary gives "extraordinary deference" to the IWC definition in Wage Order 4. (*Id.* at pp. 61–62, citing *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 581–595.)

This Court has consistently rejected challenges to the IWC's authority to adopt relevant provisions in wage orders. In *Martinez*, for example, this Court gave effect to the IWC's deliberate choice to set the state law definitions of what it means to "employ" and who constitutes an "employer" more expansively than the federal definition. (49 Cal.4th at pp. 67–68.) These precedents, deferences, and presumptions apply to the IWC's decision to make the minimum wage provisions of the Wage Orders applicable to state employees on January 1, 2001.

Flouting these precedents, the State argues at length that its regulations and even its Pay Scales Manual should be given equal or greater deference than Wage Order 4. (State's Opening Br. at pp. 35–39.) However, unlike the well-developed body of law giving extraordinary deference to wage orders, there is no precedent giving CalHR regulations similar deference. As this Court explained in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557 and reiterated in *Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 7, manuals of the sort relied on by the State receive limited, if any, deference by this Court.

But this case does not turn on whether Wage Order 4 or the CalHR regulations are entitled to greater deference because, as described next, the two regulatory schemes do not conflict.

B. The Statutes and Regulations Cited by the State Address Different Subjects Than Does Wage Order 4

Although the State is wrong with respect to their relative weight, the Court need not weigh the statutes and regulations cited by the State against Wage Order 4 because they address different subjects. The regulations govern salary rates and ranges for state employees and delegate authority to CalHR to comply with federal overtime law. The sections of Wage Order 4 at issue govern minimum wage rates and the definition of "hours worked."

1. The statutes and regulations cited by the State do not address minimum wage or hours worked standards

The State cites two groups of statutes and regulations. The first deals broadly with CalHR's authority to set salary ranges (Gov. Code § 19826, subd. (a)) and overtime thresholds and rates (§ 19843, subd. (a); § 19844, subd. (a)), and its obligation to keep accurate time records and adopt work schedules and overtime compensation (§ 19849, subd. (a)). Those statutes spawned regulations which further establish workweeks (Cal. Code Regs., tit. 2, §§ 599.671, 599.701); set up the system by which employees receive authorization to work overtime (Cal. Code Regs., tit. 2, §§ 599.702, 599.704); and define the State's "pay plan" as consisting of "the salary ranges and rates established by [CalHR]." (Cal. Code Regs., tit.

2, § 599.666.1.) None of these address the applicability of the California state minimum wage or define "hours worked."

The second group addresses the State's compliance with the FLSA. Government Code section 19845, subd. (a), gives CalHR authority to disburse monies necessary to make "overtime payments as prescribed by the Federal Fair Labor Standards Act." The State admits these regulations were promulgated "pursuant to the express delegation of authority . . . to provide for overtime payment *as prescribed by the FLSA*." (State's Opening Br. at p. 16 [emphasis added].)

But establishing that the Legislature delegated authority to CalHR to ensure compliance with the FLSA does not establish that the Legislature intended that *only* federal standards apply to state employees. Nor does it give CalHR authority to disregard Wage Order 4. "It is well settled that federal law does not preempt state law in this area, and therefore state law is controlling to the extent it is more protective of workers than federal law." (*Alvarado v. Dart Container Corp. of California* (2018) 4 Cal.5th 542, 553–554, citing, *inter alia*, *Morillion*, *supra*, 22 Cal.4th at 592; *Tidewater*, *supra*, 14 Cal.4th at 566–568; see also *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 323 [the California Legislature's "intent to protect the minimum wage rights of California employees to a greater extent than federally" is well-established].) The Court should resist the

invitation of the State to weave scattered references to the FLSA into an evisceration of state law protections.

Indeed, the FLSA itself recognizes that its standards may be superseded by more protective state law. (29 U.S.C. § 218, subd. (a)); see *Newton v. Parker Drilling Mgmt. Svs., Ltd.* (9th Cir. 2018) 881 F.3d 1078, 1097 ["FLSA 'establish(es) a national *floor* under which wage protections cannot drop'" (quoting *Pac. Merchant Shipping Assn. v. Aubry* (9th Cir. 1990) 918 F.2d 1409, 1425)].)

This is not a close call. Nothing says the FLSA is "adopted" (the Supremacy Clause surely takes care of that), "occupies the field," or "exclusively" sets compensability standards for state employees, notwithstanding the State's loose and unsupported claim that it does. (See State's Opening Br. at p. 45.) No statute or regulation says the State's responsibilities stop once it ensures compliance with the floor provided by the FLSA. Nor does any statute or regulation the State cites define "hours worked." Neither federal nor state minimum wage is even mentioned. The State cannot credibly assert that its regulations nullify the state minimum wage when they do not even mention that central tenet of California wage and hour law. (See *Sheppard, supra*, 191 Cal.App.4th at p. 308 [rejecting claim that California minimum wage does not apply because employer "has not cited any provision in the Education Code proving that the Education

Code is the exclusive source of regulation regarding wages and conditions of employment for public school teachers"].)

The State attempts to salvage its interpretation by asserting that CalHR has more specific delegated authority than the IWC. (State's Opening Br. at p. 38, citing *San Francisco Taxpayers Assn. v. Bd. of Supervisors* (1992) 2 Cal.4th 571.) But this Court has already decided which agency has been delegated legislative authority to establish state minimum wage standards – the IWC. (*Martinez, supra,* 49 Cal.4th at p. 62.) The real question is not which agency has more specific authority, but whether CalHR actually enacted regulations inconsistent with Wage Order 4. As explained, it has not.

2. The Pay Scale Manual neither conflicts with nor supersedes Wage Order 4

Finally, the State argues that CalHR's Pay Scales Manual deserves greater deference than, and is inconsistent with, Wage Order 4. Within the 800-page Manual (AA Vols. 11-13), the State latches onto a single reference to the FLSA's standard for determining "hours worked," claiming that the mere recital of the FLSA standard (which the State is bound to comply with) controls any IWC promulgation. The Court of Appeal correctly rejected this argument.

While the Court of Appeal found "at least some tension between Wage Order 4 and CalHR's definition of Work Week Group 2, which relies

upon the FLSA" (Slip Op. at p. 19), it pointed out that the creation of the Pay Scale Manual was not an agency legislative act and therefore could not be accorded more deference than the wage order. (*Ibid.*) More importantly, the Court of Appeal concluded that Wage Order 4 and CalHR's Manual did not in fact conflict in any relevant respect. (*Id.* at p. 21.)

The State acknowledges that the sections of the Pay Scales Manual upon which it relies were adopted pursuant to Government Code section 19845 to provide for the circumstances under which *overtime pursuant to the FLSA* is compensated. (State's Opening Br. at pp. 16–18 [describing the creation and purpose of Section 10 of the Pay Scales Manual].) Moreover, the references to the FLSA in the Pay Scale Manual are "*[f]or the purpose of identifying hours worked under the provisions of the FLSA* ...." (11 AA at p. 2996 [emphasis added].) This is consistent with Plaintiffs' reading: The regulations are designed to ensure compliance with the FLSA, not to supersede the wage order. As the Court of Appeal held, the Pay Scales Manual does not provide an "express[] state[ment] that law enforcement employees are not subject to the provisions of the wage orders applicable to their job classifications[.]" (Slip Op. at p. 21.)

Nothing here changes CalHR's obligation to comply with federal overtime standards applying federal "hours worked" standards. Rather, for the same reasons discussed above, it is more reasonable and in accord with

well-established California wage and hour law to read the Pay Scales Manual as providing guidance on how to comply with the FLSA rather than as nullifying the IWC's authority. (See, e.g., *Mendoza v. Nordstrom, Inc.* (2017) 2 Cal.5th 1074, 1087 [state's labor laws are to be liberally construed in favor of worker protection]; *Brinker*, *supra*, 53 Cal.4th at pp. 1026–1027 [same].)

C. The State's Reading Would Repeal Application of Wage Order 4 to These State Employees by Implication, Which Is Heavily Disfavored

This Court has steadfastly refused to allow federal law to nullify more protective California wage and hour law by implication. As *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833 teaches, Wage Order provisions are construed, if possible, to "avoid creating exceptions by implication." (*Augustus v. ABM Security Servs., Inc.* (2016) 2 Cal.5th 257, 266.) In *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 592, too, this Court held that, "[a]bsent convincing evidence of the IWC's intent to adopt the federal standard for determining whether time spent traveling is compensable under state law," it declined to import by implication a federal standard that expressly eliminated substantial employee protections.

The State cites no explicit repeal of Wage Order 4's minimum wage standards with respect to state employees. Nor does it seek to harmonize or reconcile these regulations. Rather, it seeks complete repeal by implication of Wage Order 4's minimum wage standards as applied to all non-exempt

state employees not covered by the Dills Act. But, as noted, repeal by implication is heavily disfavored. (See, e.g., *Prof'l Engineers in Cal. Gov't v. Kempton* (2007) 40 Cal.4th 1016, 1038; *Santa Cruz Rock-Pavement Co. v. Lyons* (1901) 133 Cal. 114, 116; *Scofield v. White* (1857) 7 Cal. 400, 401 ["It may be premised that the law does not favor repeals by implication[.]"].)

The presumption against repeal by implication can be overcome only when "(1) 'the two acts are so inconsistent that there is no possibility of concurrent operation,' or (2) 'the later provision gives undebatable evidence of an intent to supersede the earlier' provision." (*Prof'l Engineers, supra*, 40 Cal.4th at p. 1038 [citation omitted].) As explained here and in the next section, the first exception does not apply because the pertinent provisions of Wage Order 4 are not inconsistent with the regulations upon which the State relies, and the Court of Appeal properly harmonized them.

Nor does the second exception apply. Among other things, all of the CalHR regulations cited by the State *predate* Wage Order 4 (from 2001)[4]. Furthermore, as discussed *supra* at pages 16–17, there is *no* evidence (much less "undebatable" evidence) that the Legislature intended the

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[4] Notably, at the same time the IWC first applied state minimum wage standards to state employees, the Legislature itself was amending Labor Code section 220(a) to apply more of the Labor Code's wage and hour provisions to the State as an employer. (10 AA at pp. 2790-2793 [Pltfs' Exh. XX, CalHR Memorandum Addressing the Amendment of Labor Code section 220(a)].)

statutes and regulations the State cites to supersede Wage Order 4. On the contrary, the Legislature appears fully cognizant of the application of the California minimum wage to the State. For example, in 2007 and 2008, when the Legislature raised the California minimum wage, it directly recognized that law's application to the State as an employer. (19 AA at pp. 5151–5152; 5176 [Pltfs' Exh. JJJ, Legislative History of Labor Code §§ 1182.12, 1182.13].) The fiscal summaries of these laws explain that the State's decision to raise the minimum wage would apply to a number of state employees who were then earning minimum wage, and would increase the State's costs. This analysis makes sense only if the Legislature understood that state employees were subject to the state minimum wage.

Absent clear statutory language supporting the State's arguments, this Court should leave to the Legislature the task of expressly exempting state employees from the minimum wage provisions of Wage Order 4.

D. CalHR's Regulations Can and Must Be Harmonized with Wage Order 4

In *Brinker Restaurant Corp. v. Superior Court*, *supra,* 53 Cal.4th at p. 1027, this Court recognized that "[t]o the extent a wage order and a statute overlap, we will seek to harmonize them, as we would with any two statutes." (See also *California Correctional Peace Officers Association v. State* (2010) 181 Cal.App.4th 1454, 1464, quoting *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 778–779 ["When two statutes touch upon a