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SUPREME COURT
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In The Supreme Court of the State of California

JAZMINA GERARD, KRISTIANE McELROY AND JEFFERY CARL
Plaintiffs and Appellants,

v.

ORANGE COAST MEMORIAL MEDICAL CENTER
Defendant and Respondent.

On Review From the Court of Appeal for the Fourth Appellate District, Division Three
4th Civil No. G048039

After an Appeal from the Superior Court of Orange County
Honorable Nancy Wieben Stock, Judge
Case Number 30-2008-00096591

ANSWER BRIEF ON THE MERITS

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rule of Court 8.208, defendant and respondent Orange Coast Memorial Medical Center (Orange Coast) states that it is a not-for-profit organization and knows of no entity or person that has at least a 10 percent ownership interest in Orange Coast or of any other person or entity that has a financial or other interest in the outcome of the proceeding that Orange Coast reasonably believes the justices should consider in determining whether to disqualify themselves from this matter.

Dated: October 13, 2017

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By Richard J. Simmons by RJS

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ORANGE COAST MEMORIAL MEDICAL CENTER

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INTRODUCTION

Plaintiffs and appellants Jazmina Gerard, Kristiane McElroy, and Jeffery Carl (Plaintiffs) present two issues for review relating to the Legislature's enactment of Senate Bill No. 327 (2015-2016 Reg. Sess.) (SB 327):

> 1. Did the Legislature usurp the power of the Judiciary to interpret laws enacted and amended by a prior Legislature when it declared in October 2015 that Industrial Welfare Commission Wage Orders 4 and 5 were valid and enforceable on and after October 1, 2000?
>
> 2. When the Legislature declared in October 2015 that Industrial Welfare Commission Wage Orders 4 and 5 were valid and enforceable on and after October 1, 2000, did it retroactively deprive healthcare workers of their vested rights to millions of dollars of premium pay under Labor Code section 226.7 without due process of law?

Both issues are anomalous in two respects. First, the court of appeal did not base its holding on SB 327. Its opinion was based on its own independent analysis and conclusions, including its analysis of the "subtle but critical distinction in administrative law—the date an agency regulation or order is *adopted* is not the same as the date it becomes *effective*." (*Gerard v. Orange Coast Memorial Center* (2017) 9 Cal.App.5th 1204, 1210 (*Gerard II*), original italics.) After reaching this conclusion, the court observed that SB 327 merely "reinforces our conclusion section 11(D) is valid." (*Id.* at p. 1211.) The court would have upheld the meal period waiver even if the Legislature had not enacted SB 327. Yet both issues Plaintiffs present center exclusively on SB 327, and neither addresses the actual basis of the court of appeal's holding.

Second, as phrased, both issues Plaintiffs raise have obvious and unremarkable answers. Of course the Legislature cannot "usurp the power

of the Judiciary" or "dictate to the courts." As the court of appeal observed, "[u]ltimately, the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts." (*Gerard II, supra*, 9 Cal.App.5th at p. 1212.) And of course the Legislature cannot "retroactively deprive workers of vested rights without due process." Moreover, neither issue exists here because the Legislature did not usurp the power of the Judiciary, dictate the court of appeal's interpretation of the law, or retroactively deprive workers of vested rights without due process.

Instead, the dispositive issue is whether the Industrial Welfare Commission (IWC) had the authority to adopt the meal period waiver provision in subdivision 11(D) of Wage Order 5 when it did so on June 30, 2000. The court of appeal correctly concluded the answer is yes – a conclusion that comports with the plain meaning of the key statutes and their legislative history, the position of the Division of Labor Standards Enforcement (DLSE), and established practice for hospitals and health care unions throughout California for more than 25 years.

SB 327, which the Legislature approved unanimously as urgency legislation and which confirmed the IWC's authority to issue the meal period waiver provision at issue, thus constitutes a clarification, not a change, in the law. IWC Wage Order No. 5, subdivision 11(D), is valid and enforceable in authorizing health care workers to voluntarily choose to waive one of their two meal periods on shifts that exceed 12 hours.

For decades, the option to sign a meal period waiver has enjoyed strong support from health care employees, labor organizations, and hospitals because it promotes the health and welfare of those workers. Hundreds of employees, organized labor, hospital, and industry representatives testified about the benefits to employees and patients promoted by such waivers when the IWC first adopted them in 1993, and again in 1999-2000, when the IWC conducted hearings throughout

California to determine whether the waiver provisions should be retained under Assembly Bill 60 (1999-2000 Reg. Sess.) (AB 60).

For these reasons, the Court should hold the court of appeal correctly concluded the meal period waiver provisions in Wage Order 5-2001 are valid and enforceable and affirm the trial court's order granting summary judgment and denying class certification. Should the Court decide otherwise, it should hold its ruling does not apply retroactively in light of the long reliance health care employees, employers, and labor organizations have placed on established practice and pronouncements from the IWC and DLSE that uniformly confirm the validity of the waiver provisions.

BACKGROUND

The Complaint

Plaintiffs were employed by Orange Coast as health care employees in the health care industry. (1 Appellants' Appendix (AA) 208, 282; 8 AA 2139-40, 2228; 9 AA 2324, 2348.) As is common, all three were scheduled to work three 12-hour shifts each week and take four days off. (1 AA 208, 282; 8 AA 2158; 9 AA 2374-76.) Orange Coast's meal period policy provides a 30-minute, uninterrupted meal period for each day of work over five hours. It also provides a second 30-minute, uninterrupted meal period for each day of work over 10 hours. (5 AA 1424, 1426, 1432-33.) For shifts longer than 10 hours, Orange Coast permits employees to voluntarily waive one of their two meal periods in the manner Wage Order 5-2001 authorizes. Employees are free to revoke their waiver at any time. (5 AA 1426-27.)

Many employees choose to sign waivers so they can complete their work day earlier. (1 AA 210.) If employees waive one of two meal periods in a 12-hour shift, their work day is 12.5 hours (12 hours of work, plus one off-duty 30-minute meal period). (*Ibid.*) If employees desire two meal periods, their work day is 13 hours (12 hours of work, plus two off-duty 30-

minute meal periods). (1 AA 210-11.) Whether employees elect one or two meal periods, they work and are paid for 12 hours. The decision to waive a meal period does not change the number of hours employees work or their total pay for a day's work. All three Plaintiffs voluntarily signed meal waivers during their employment, and none revoked his or her waiver. (8 AA 2035:11-19, 2115-2118, 2182:13-2183:13; 2245; 9 AA 2364:3-2366:4, 2372.)

In August 2008, Plaintiff Gerard filed this purported class action alleging various wage and hour violations. In her first amended complaint, Gerard added a claim for penalties under the Private Attorneys General Act of 2004 (PAGA) (Lab. Code, §§ 2698-2699.5). After the trial court ruled Gerard's claims were not typical of the proposed class, McElroy and Carl joined as plaintiffs for all but the PAGA claim. (See, e.g., 1 AA 50-51.) Plaintiffs' meal period cause of action alleges:

> 51. During the relevant time period, Plaintiffs and other class members who were scheduled to work for a period of time in excess of twelve (12) hours were required to work for periods longer than ten (10) hours without a second uninterrupted meal period of not less than thirty (30) minutes.
> [¶] . . . [¶]
> 54. Defendant's conduct violates the applicable IWC Wage Orders and California Labor Code sections 226.7 and 512(a).

(1 AA 60.)

Plaintiffs have never alleged their meal waivers were not entirely voluntary, that they did not have the opportunity to revoke them at any time, or that they ever attempted to exercise their right to revoke them. Instead, they allege they worked slightly over 12 hours on a handful of occasions and that their waivers were not permissible on such shifts even though the waivers comported with Wage Order 5-2001. Plaintiffs do not

allege they were not paid properly for the time they worked more than 12 hours.

The Trial Court's Rulings

After four years of litigation, the trial court granted Orange Coast's motion for summary judgment, dismissing Plaintiffs' individual and PAGA claims. The court stated there were no disputed issues of material fact that Plaintiffs were provided with all required meal periods and that their illegal meal period waiver theory was "incorrect per *Brinker* [*Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*)]." (RT 138:11-12.) The court also granted Orange Coast's motion to deny class certification and strike all of Plaintiffs' class allegations because, among other things, Plaintiffs "have failed to show that they have any claim against the Defendant . . . ." (10 AA 2823.) The order denying class certification encompassed all of Plaintiffs' claims, including their meal period, rest period, reimbursement, and final pay claims, among others. Plaintiffs appealed but limited their appeal to their meal period claim.

The Court of Appeal's First Opinion (*Gerard I*)

In February 2015, the court of appeal reversed and directed the trial court to deny Orange Coast's motion for summary judgment and consider Orange Coast's other grounds for denying class certification. (*Gerard v. Orange Coast Memorial Medical Center* (2015) 234 Cal.App.4th 285 (*Gerard I*).) Fundamental to both rulings was the court's holding that IWC Wage Order 5-2001 was partially invalid to the extent it allows health care employees to waive their second meal period on shifts longer than 12 hours. The court of appeal observed that subdivision 11(D), which "permits health care workers to waive their second meal periods, even on shifts in excess of 12 hours," conflicts with Labor Code section 512(a), "which limits second period meal waivers to shifts of 12 hours or less." (*Gerard I, supra*, 234 Cal.App.4th at p. 294.)

The court reasoned that although the Legislature had enacted Labor Code section 516 to empower the IWC to *adopt* new wage orders by July 1, 2000 "[n]otwithstanding any other provision of law," it retroactively nullified this grant of authority just ten weeks later when Senate Bill 88 (1999-2000 Reg. Sess.) § 4 (SB 88) amended this introductory phrase in section 516 to read, "*Except as provided in Section 512*" (section 512 limits second meal period waivers to shifts of not more than 12 hours). (*Gerard I*, *supra*, 234 Cal.App.4th at pp. 294-298.) In *Gerard II*, the court recognized it was mistaken because the IWC validly adopted the meal waiver provision on June 30, 2000, as required by AB 60 and section 517, before SB 88 was passed.

The court ruled that with one exception, the retroactivity of its decision partially invalidating subdivision 11(D) of the Wage Order must be litigated on remand. The exception was Plaintiffs' premium wage claims based on Labor Code section 226.7, which generally renders employers who fail to provide a required meal period liable for one hour of pay at the employee's regular rate of compensation. As to those claims, the court found there was no compelling reason of fairness or public policy to warrant an exception to the general rule of retroactivity for its decision partially invalidating subdivision 11(D). (*Gerard I, supra,* 234 Cal.App.4th at pp. 298-302.)

This Court's First Grant of Review

Orange Coast filed a petition asking this Court to review two issues: (1) Is the authority for meal period waivers in subdivision 11(D) of Wage Order 5-2001 valid for work shifts of more than 12 hours? (2) If not, should the opinion of the court of appeal partially invalidating the waiver be applied retroactively? The Court granted the petition.

In August 2016, after briefing was completed, the Court issued an order transferring this matter to the court of appeal with directions "to

vacate its decision and to reconsider the cause in light of the enactment of Statutes 2015, Chapter 505 (Sen. Bill No. 327 (2015-2016 reg. sess.))."

The Court of Appeal's Second Opinion (*Gerard II*)

On remand, after receiving the parties' supplemental briefing, the court of appeal issued its opinion concluding, "it appears we erred" in *Gerard I* because the court "failed to account" for the "critical" fact that on June 30, 2000, the date the IWC adopted subdivision 11(D), it had the authority to do so. (*Gerard II*, 9 Cal.App.5th at pp. 1210-1211.) In holding the meal period waiver provision in Wage Order 5-2001 was valid the court noted the "lynchpin of our analysis [in *Gerard I*] was the conclusion that Wage Order No. 5, section 11(D) conflicts with section 512(a). .However, in reaching this conclusion we failed to account for a subtle but critical distinction in administrative law—the date an agency regulation is *adopted* is not the same as the date it becomes *effective*." (*Id.* at p. 1210, original italics.) The court noted that "[l]ong-settled case law validates the distinction between the adoption date and the effective date." (See, e.g., *Ross v. Bd. Of Retirement of Alameda County Employees' Retirement Assn.* (1949) 92 Cal.App.2d 188, 193, 206 P.2d 903.)[1]

Contrary to Plaintiffs' assertions, this holding was not "dictated" by SB 327, which does not mention when Wage Order 5-2001 was adopted or what role that date played in clarifying that subdivision 11(D) was "valid

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[1] The California Administrative Procedures Act (APA) sets forth a three-step process: first, Article 5 describes the "Procedure for *Adoption* of Regulations" by an administrative agency. (APA §§11346-11348, (italics added)); second, the Office of Administrative Law (OAL) must "review all regulations *adopted* [by the agency]." (*Id.*, §11349.1 (italics added)); and third, once approved by the OAL and filed with the Secretary of State, adopted regulations "*become effective*" in accordance with a prescribed quarterly schedule. (*Id.*, §11343,4 (italics added).) Thus, under the APA "adoption" precedes and has a distinct legal meaning from "effectiveness."

and enforceable" on and after October 1, 2000 when the Wage Order took effect. With this distinction in mind, the court noted "the SB 88 amendment to section 516(a) took away the IWC's authority to *adopt* wage orders inconsistent with the second meal period requirements of section 512(a) as of September 19, 2000. But the IWC had already adopted section 11(D) on June 30, 2000, under the AB 60 version of section 516(a) which authorized the IWC to do so 'notwithstanding' section 512(a).[2] Thus, the SB 88 amended version of section 516(a) should have been irrelevant to our analysis in *Gerard I*. Instead, it became dispositive. We concluded section 11(D) is subject to the SB 88 amended version of section 516(a). It isn't." (*Gerard II, supra*, 9 Cal.App.5th at p. 1211.)

The court concluded that Wage Order No. 5 "section 11(D) is valid—not invalid. It was specifically authorized by the AB 60 version of section 516(a) in effect on the date it was adopted, even though it conflicts with section 512(a) to the extent it sanctions second meal period waivers for health care employees on shifts of more than 12 hours. [Citation.] Therefore, the IWC did not exceed its authority by adopting section 11(D), and hospital's second meal period waiver policy does not violate section 512(a)." (*Ibid.*)

The court reached this conclusion independently of SB 327, but added that "SB 327 reinforces our conclusion section 11(D) is valid." (*Ibid.*) Applying the principles in this Court's opinion in *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, the court noted "it is apparent SB 327 merely clarified rather than changed the meaning of

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[2] Because the Legislature simultaneously enacted section 512(a) and the "notwithstanding" language in section 516 as part of AB 60, it must have intended to authorize the IWC to make exceptions to section 512 the IWC deemed appropriate.

sections 512(a) and 516(a). Our opinion in *Gerard I* concerned a novel question of statutory interpretation. No prior published opinion had considered the validity of section 11(D) in relation to sections 512(a) and 516(a). SB 327 was enacted soon after *Gerard I*, and in direct response to the controversy our opinion created regarding the validity of section 11(D)." (*Gerard II, supra*, 9 Cal.App.5th at p. 1212.)

On remand, Plaintiffs argued SB 327 changed, rather than clarified the law. Plaintiffs' argument is rooted in the fallacy that "the IWC *never had* the authority to adopt wage orders inconsistent with section 512[(a)]." (See *id.* at p. 1213, original italics; see also Plaintiffs' Opening Brief [OB] at 26.) The court of appeal was not persuaded. (*Ibid.*) It explained that Plaintiffs' argument ignored the differences between the AB 60 version and SB 88 version of section 516: "SB 88 definitely changed the law. Before SB 88, the IWC had unlimited authority under section 516(a) to adopt wage orders like section 11(D), notwithstanding any other provision of law, including section 512(a). [Citation.] After SB 88, the IWC had no authority under section 516(a) to adopt wage orders like section 11(D) which are inconsistent with section 512(a)." (*Gerard II, supra*, 9 Cal.App.5th at p. 1213.)

The court of appeal also observed that "nothing in the legislative history of SB 88 suggests the Legislature intended to invalidate wage orders like section 11(D), which were adopted under the AB 60 version of section 516(a) before July 1, 2000 as required by section 517." (*Ibid.*)

For these reasons, the court "accept[ed] SB 327 as the 'legislative declaration of the meaning' of sections 512(a) and 516(a) and 'g[ave] the Legislature's action its intended effect.'" (*Gerard II, supra*, 9 Cal.App.5th at p. 1214, citing *Western Security v. Superior Court, supra*, 15 Cal.4th at pp. 243, 246.)

The Meal Period Waiver Provision: A Short History

1. Origins in 1993 and Health, Safety, and Welfare Considerations

"The IWC is a five-member appointive board initially established by the Legislature in 1913." (*Collins v. Overnite Transportation Co.* (2003) 105 Cal.App.4th 171, 174.) The Labor Code authorizes the IWC "to establish minimum wages, maximum hours and standard conditions of employment for *all* employees in the state." (*Id.*, original italics.) Its authority is enshrined in California Constitution Article XIV, Section 1.

In establishing rules regarding wages, hours and the conditions of labor and employment, the IWC has the duty under Labor Code section 1173 "to investigate the health, safety, and welfare" of employees. The duty to protect the health, safety, and welfare of employees was also part of the standards created under AB 60 that applied to the IWC's rules for the health care industry to be published before July 1, 2000. (See Labor Code § 517(b).) The duty to protect the health, safety, and welfare of employees was thus of paramount importance when the IWC first adopted the meal period waiver provision in 1993 and when it preserved the provision on June 30, 2000.

"[T]he IWC's wage orders are entitled to 'extraordinary deference, both in upholding their validity and in enforcing their specific terms.'" (*Brinker, supra*, 53 Cal.4th at p. 1027, citation omitted.) They "are to be accorded the same dignity as statutes. They are 'presumptively valid' legislative regulations." (*Id.*, citation omitted.) Under a unique statutory mandate in Labor Code section 517(a), the rules the IWC adopted by July 1, 2000 under AB 60, including the meal period waiver provision at issue, were "final and conclusive" for all purposes, and the IWC's findings of fact are conclusive in the absence of fraud under section 1187. That includes its findings regarding the health, safety, and welfare of employees.

In June 1993, the IWC amended Wage Order 5-1989 to add subdivision 11(C) to permit employees in the health care industry who worked shifts longer than eight hours (including shifts over 12 hours) to waive their right to a meal period:

> (C) Notwithstanding any other provision of this order, employees in the health care industry who work shifts in excess of eight (8) total hours in a workday may voluntarily waive their right to a meal period. In order to be valid, any such waiver must be documented in a written agreement that is voluntarily signed by both the employee and the employer. The employee may revoke the waiver at any time by providing the employer at least one day's written notice. The employee shall be fully compensated for all working time, including any on-the-job meal period, while such a waiver is in effect.

(See Orange Coast's Request for Judicial Notice (RJN), Ex. A at p. 2, 5.)

Before promulgating this meal period waiver provision, the IWC held hearings throughout California to receive testimony and evidence to meet its duty to investigate the impact the proposed meal period waiver provision would have on the health, safety, and welfare of health care workers. The IWC's Statement as to the Basis regarding the 1993 amendments explained this meal period waiver provision was supported by the "vast majority of employees testifying at public hearings" and "allows employees freedom of choice combined with the protection of at least one meal period on a long shift":

> The petitioner requested the IWC to allow employees in the health care industry who work shifts in excess of eight (8) total hours in a workday to waive their right to "any" meal period or meal periods as long as certain protective conditions were met. The vast majority of employees testifying at public hearings supported the IWC's proposal with respect to such a waiver, but only insofar as waiving "a" meal period or "one" meal period, not "any" meal period. Since the waiver of one meal period allows employees freedom of choice combined with the protection of at least one meal period on a long shift,

> on June 29, 1993, the IWC adopted language which permits [the waiver with the protections in subdivision 11(C)].

(See RJN, Ex. A at p. 9.)

The meal period waiver in Wage Order 5-1993, subdivision (C), was made available and applied by health care employees and employers for the next six and a half years without change. Moreover, it always authorized meal period waivers on shifts longer than 12 hours.

2. Assembly Bill 60

In 1998, the IWC issued Wage Orders that eliminated daily overtime requirements and made other changes to California's wage and hour rules. In response, in July 1999, the Legislature enacted AB 60, effective January 1, 2000, which added three sections to the Labor Code that are relevant to this dispute:

- Section 512, which provided that "[a]n employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived." (See RJN, Ex. B at p. 18.) This 12-hour limit became known as the "12-hour meal waiver cap."

- Section 516, which empowered the IWC to "adopt or amend working condition orders with respect to . . . meal periods . . . for any workers in California consistent with the health and welfare of those workers." (*Id.* at p. 19.) The first words of section 516 provided that the IWC had the power to adopt such rules "[n]otwithstanding any other provision of law," which would include the 12-hour meal waiver cap in section 512. (*Ibid.*)

- Section 517, which directed the IWC to adopt, "at a public hearing to be concluded by July 1, 2000, [ ] wage, hours, and working conditions orders consistent with this chapter without convening wage boards," which "shall be final and conclusive for all purposes." (*Id.* at pp. 19-20 [section 517(a)].) AB 60 specified that such hearings must include "a review of wages, hours, and working conditions in the . . . health care industry." (*Id.* at p. 20 [section 517(b)].) In directing the IWC to review the wages, hours, and working conditions of several industries, including the health care industry, section 517(b) reiterated the IWC could adopt or modify regulations "consistent with its duty to protect the health, safety, and welfare of workers pursuant to section 1173." (*Ibid.*)

AB 60 also reinstated Wage Order "5-89 as amended in 1993 . . . until the effective date of wage orders issued pursuant to Section 517." (*Id.* at p. 22 [SEC. 21].) In enacting AB 60, the legislature noted its concern that "[f]amily life suffers when either or both parents are kept away from home for an extended period of time on a daily basis." (*Id.* at p. 13 [SEC. 2(e)].)

3. The Meal Period Waiver Provision

Between October 1, 1999 and June 30, 2000, in accordance with the directive in section 517, the IWC held 11 public meetings to implement AB 60's directives. (See RJN, Ex. C at pp. 26-60.) At these meetings, the IWC received evidence and heard testimony from hundreds of witnesses, including health care workers and labor organizations. (*Ibid.*; see also Labor Code § 70.1 (the IWC's five-member board must include two representatives of organized labor).)

On June 30, 2000, the last day pursuant to AB 60's mandate, the IWC adopted 15 new Wage Orders, including Wage Order 5-2001. Subdivision 11(D) of Wage Order 5 maintained (with minor revisions) the special meal period rules the IWC first promulgated following multiple

hearings as subdivision 11(C) in 1993. New subdivision 11(D), which remains in the current version of this Wage Order, permits second meal period waivers for employees who work shifts longer than eight hours:

> (D) Notwithstanding any other provision of this order, employees in the health care industry who work shifts in excess of eight (8) total hours in a workday may voluntarily waive their right to one of their two meal periods. In order to be valid, any such waiver must be documented in a written agreement that is voluntarily signed by both the employee and the employer. The employee may revoke the waiver at any time by providing the employer at least one day's written notice. The employee shall be fully compensated for all working time, including any on-the-job meal period, while such a waiver is in effect.

(RJN, Ex. F at p. 83.)

In accordance with section 517, which empowered the IWC to adopt new Wage Orders by July 1, 2000, this waiver provision was "final and conclusive for all purposes" at the time the IWC adopted it on June 30, 2000. The IWC's findings of fact, including its findings that the meal period waiver was consistent with the health, safety, and welfare of employees and patients, were conclusive under section 1187.

4. Senate Bill 88

On September 19, 2000, almost three months after the IWC adopted Wage Order 5-2001, the Legislature enacted SB 88, which among other things amended the first line in Labor Code section 516. In an about face, it replaced "Notwithstanding any other provision of law" with "Except as provided in Section 512," the IWC "may adopt or amend working condition orders with respect to . . . meal periods . . . for any workers in California." (RJN, Ex. G at p. 108.) In short, SB 88 replaced the AB 60 version of section 516 with the SB 88 version that changed it, as the court of appeal acknowledged in its second opinion. (*Gerard II, supra*, 9 Cal.App.5th at p. 1213.)

SB 88 provided that if enacted, section 512 "*would* prohibit the commission from *adopting* a working condition order that conflicts with those 30-minute meal period requirements. . . ." (RJN, Ex. G at p. 105, italics added.) Thus, on September 19, 2000, the Legislature changed the law for the first time to restrict the IWC's authority to deviate from the meal period rules in Labor Code section 512. The IWC had adopted the meal period waiver provision for health care employees on June 30, 2000, almost three months earlier. As a result, under Wage Order 5-2001, subdivision (D), health care employees and employers continued to utilize the meal period waiver that was first adopted by the IWC in Wage Order 5-1993, subdivision (C), consistent with AB 60 and SB 88.

5. Senate Bill 327

By unanimous vote on September 11, 2015, with strong support from both labor organizations representing health care employees and hospitals, the Legislature enacted SB 327, amending section 516 of the Labor Code as an urgency measure. (RJN, Ex. H at pp. 110-111.) In section 2(b), SB 327 declared the validity and enforceability of the health care employee meal period waiver provision on and after October 1, 2000, when subdivision 11(D) of Wage Order 5 became effective: "Notwithstanding subdivision (a), or any other law, including Section 512 [of the Labor Code], the health care employee meal period waiver provisions in Section 11(D) of Industrial Welfare Commission Wage Orders 4 and 5 were valid and enforceable on and after October 1, 2000, and continue to be valid and enforceable." (RJN, Ex. H at p. 111.) Section 2(b) adds that "[t]his subdivision is declarative of, and clarifies, existing law." (*Ibid.*)

The legislative history of SB 327 describes the support for the bill. There was no registered opposition. (See, e.g., RJN, Ex. K at p. 117-145.) Management, represented by the California Hospital Association, noted that

unless there was clarification that the meal period wavier for health care employees in section 11(D) has been valid since the IWC adopted it in 2000, "hospitals will be liable for a missed meal period premium on any day an employee worked even 1 minute over the 12-hour mark. This could result in millions of dollars in liability, as well as scheduling changes throughout the hospital industry . . . ." (*Id.* at p. 119.)

Two unions—the United Nurses Association of California/Union of Health Care Professionals (UNAC) and Service Employees International Union, United Healthcare Workers West (SEIU-UHW)—also supported SB 327 from the perspective of health care employees. (*Id.* at p. 121.) They explained how patients benefit dramatically "where the nurses and other health care professionals can place priority on the needs of their patients without interruption by an arbitrary meal period when the shift runs long. (RNs are generally able to eat during work time in break rooms.) In addition, allowing health care workers the option of working longer shifts enables them to take extra days off during the work week, which in turn ensures that they are fully rested when they return to work to provide better patient care." (*Ibid.*) The unions also noted the 12 hour shifts and meal period waiver allows employees to "spend less time commuting and more time with family and friends," resulting in "enhanced work-life balance" that "increases job satisfaction and less burn-out." (*Ibid.*) They concluded that "[r]ather than risk overturning 22 years of settled regulation we are asking for a legislative solution that would simply codify the existing regulation into law." (*Ibid.*)

The uncodified preamble in SB 327 provides that:

- "Existing wage orders of the [IWC] provide that employees in the health care industry who work shifts in excess of 8 total hours in a workday may voluntarily waive their right to 1 of their 2 meal periods in a prescribed manner." (RJN, Ex. H at p. 110.)