No. S166350

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BRINKER RESTAURANT CORPORATION, BRINKER INTERNATIONAL, INC., and BRINKER INTERNATIONAL PAYROLL COMPANY, L.P.
Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO,
Respondent.

ADAM HOHNBAUM, ILLYA HAASE, ROMEO OSORIO, AMANDA JUNE RADER and SANTANA ALVARADO,
Real Parties in Interest.

Petition for Review of a Decision of the Court of Appeal, Fourth Appellate District, Division One, Case No. D049331, Granting a Writ of Mandate to the Superior Court for the County of San Diego, Case No. GIC834348
Honorable Patricia A.Y. Cowett, Judge

SUPPLEMENTAL MOTION FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS AND AUTHORITIES AND DECLARATION IN SUPPORT; PROPOSED ORDER

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Attorneys for Plaintiffs, Real Parties in Interest, and Petitioners

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SUPPLEMENTAL MOTION FOR JUDICIAL NOTICE

Please take notice that, pursuant to Evidence Code §§ 459, 451, 452 (a)-(c) and (h) and California Rules of Court, rules 8.520(g) and 8.252(a), plaintiffs/real parties Adam Hohnbaum, Illya Haase, Romeo Osorio, Amanda June Bader, and Santana Alvarado ("plaintiffs") hereby move for an order granting judicial notice of the four documents attached hereto, all of which are true and correct copies of the documents listed. The motion is based on this notice and the memorandum of points and authorities below.

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs respectfully ask the Court to take judicial notice of four documents (Exhibits 380-383, attached) needed to effectively respond to points made in Brinker's Answer Brief on the Merits and to complete the record of historical Wage Orders before the Court. These documents are cited and discussed in plaintiffs' Reply Brief on the Merits filed concurrently herewith.

The first document (Exhibit 380) is a DLSE Opinion Letter addressing California's meal period and rest break requirements. Judicial notice is routinely taken of official DLSE records such as Opinion Letters. *Cicairos v. Summit Logistics, Inc.*, 133 Cal.App.4th 949, 956 fn. 1 (2005); *Church v. Jamison*, 143 Cal.App.4th 1568, 1579 fn. 19 (2006). Plaintiffs were unaware of the existence of this specific letter until it was cited in a judicial opinion in March 2009.

The second and third documents (Exhibits 381-382) are a Senate Floor Analysis dated Sept. 8, 2003 for AB 1723 (2003-2004 Reg. Sess.), and a copy of SB 1539 (2007-2008 Reg. Sess.), as introduced on Feb. 22, 2008. Courts routinely hold that published legislative history materials such as these two exhibits fall within the scope of Evidence

Code section 452(c). *In re S.B.*, 32 Cal.4th 1287, 1296, n.3 (2004) (Assembly Bill No. 2807 & analysis of the Assembly Committee on Judiciary); *Intel Corp. v. Hamidi*, 30 Cal.4th 1342, 1350 fn.3 (2003) (legislative history materials); *Ketchum v. Moses,* 24 Cal.4th 1122, 1135 n. 1 (2001) (Senate bill analysis; proposed legislation analysis). These documents are relevant to refute Brinker's reliance in its Answer on an unenacted version of AB 1723.

The fourth document (Exhibit 383) is a copy of Wage Order 5-2000 from the IWC's website, and was inadvertently omitted from plaintiffs' prior motions for judicial notice. Historical Wage Orders are judicially noticeable under Evidence Code section 452(b). *Reynolds v. Bement*, 36 Cal.4th 1075, 1083 n.33 (2005); *see also* Evidence Code §451(b).

For these reasons, plaintiffs respectfully ask the Court to grant this supplemental motion for judicial notice.

Dated: July 6, 2009

LORENS & ASSOCIATES, APLC
L. Tracee Lorens

SCHUBERT JONCKHEER KOLBE & KRALOWEC LLP
Kimberly A. Kralowec

COHELAN KHOURY & SINGER
Michael D. Singer

THE TURLEY LAW FIRM, APLC
William Turley

By 
Kimberly A. Kralowec

Attorneys for Plaintiffs, Real Parties in Interest and Petitioners Adam Hohnbaum et al.

DECLARATION OF KIMBERLY A. KRALOWEC

I, Kimberly A. Kralowec, declare as follows:

1. I am co-counsel of record for plaintiffs, real parties in interest, and petitioners in the above-referenced case. I have personal knowledge of the matters stated below, and if called upon to testify, would testify competently as to them.

2. Exhibits 380-384 attached hereto are true and correct copies of the documents described in the Table of Contents.

3. I was unaware of the existence of DLSE Op.Ltr. 2003.08.13 until it was cited in a recent case, *Valenzuela v. Giumarra Vineyards Corp.*, ___ F.Supp.2d ___, 2009 WL 900735 at *5 (E.D. Cal. Mar. 31, 2009). For unknown reasons, the letter is not available with the other opinion letters on the DLSE's website.

4. Through inadvertence, a copy of Wage Order 5-2000 was not attached to our prior motions for judicial notice. Exhibit 383 hereto is a true and correct copy of the document identified on the IWC's webpage as "Wage Order 5-2000." The copy from the IWC's website is labeled (on the first page) "Order No. 5-2001 (Effective October 1, 2000 as amended)" but it is in fact Order 5-2000, as can be confirmed by visiting the IWC's index page: http://www.dir.ca.gov/iwc/wageorderindustriesprior.htm. Wage Order 5-2001 is available at a separate link on that page.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed at San Francisco, California on July 6, 2009.

Kimberly A. Kralowec

PROPOSED ORDER GRANTING REAL PARTIES' MOTION FOR JUDICIAL NOTICE

The Motion for Judicial Notice filed by real parties Adam Hohnbaum, Illya Haase, Romeo Osorio, Amanda June Bader, and Santana Alvarado, having been filed, and grounds for judicial notice appearing warranted under Evidence Code §§ 459, § 451 and/or § 452,

IT IS ORDERED that Real Parties' Motion is granted in full and the Court takes judicial notice of all the documents identified in and attached to the motion.

[alternatively]

IT IS ORDERED that Real Parties' Motion is granted, in part, and the Court takes judicial notice of the documents that are at located behind the following tabs:

_____

_____

_____

____

Date: _____ _____

Chief Justice

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 Schubert Jonckheer Kolbe & Kralowec LLP, 3 Embarcadero Center, Suite 1650, San Francisco, CA 94111.

On July 6, 2009, I served the foregoing document(s) described as

SUPPLEMENTAL MOTION FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS AND AUTHORITIES AND DECLARATIONS IN SUPPORT; PROPOSED ORDER

on the person listed below by placing a copy in a sealed envelope and delivering, by hand, to the address below:

Karen J. Kubin, Esq. MORRISON & FOERSTER, LLP 425 Market Street San Francisco, CA 94105	Counsel for Defendants and Petitioners Brinker Restaurant Corp. et al.

and on the person(s) listed below by placing said copy with postage thereon fully prepaid, in the United States mailbox at San Francisco, California, addressed as follows:

Rex S. Heinke, Esq. Joanna R. Shargel, Esq. AKIN GUMP STRAUSS HAUER FELD 2029 Century Park East, Suite 2400 Los Angeles, CA 90067	Counsel for Defendants and Petitioners Brinker Restaurant Corp. et al.
Laura M. Franze, Esq. M. Brett Burns, Esq. HUNTON & WILLIAMS LLP 550 South Hope Street, Suite 2000 Los Angeles, CA 90071-2627	Counsel for Defendants and Petitioners Brinker Restaurant Corp. et al.

Hon. David B. Oberholtzer Trial Court Judge
San Diego County Superior Court
Hall of Justice, Department 67
330 W. Broadway
San Diego, CA 92101

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed July 6, 2009 at San Francisco, California.

Jason Dang

TABLE OF CONTENTS

STATE OF CALIFORNIA
GRAY DAVIS, Governor
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
Santa Rosa Legal Section
50 D Street, Suite 360
Santa Rosa, CA 95404
(707) 576-6788

H. THOMAS CADELL, *Of Counsel*

August 13, 2003

Robert P. Roy
President/General Counsel
Ventura County Agricultural Assn.
P.O. Box 3117
Camarillo, CA 93011-3117

Re: **Meal Periods Under IWC Order No. 14-2001** (313)

Dear Mr. Roy:

Your letter of April 21, 2003, directed to Arthur Lujan, State Labor Commissioner, concerning the above-referenced subject has been assigned to this office for response on behalf of the Division of Labor Standards Enforcement.

In your letter, you ask that the DLSE opine on the issue of whether the provisions of Order 14 meal period requirements differ from the requirements contained in the other IWC Orders. The answer is that in the opinion of the DLSE the provisions of Section 11 of Order 14 do differ substantially from the meal period requirements of the other IWC Orders and from the requirements of Labor Code § 512.

As you point out in your letter, IWC Order 14, Section 11, provides:

> "Every employer shall authorize and permit all employees after a work period of not more than five (5) hours to take a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of employer and employee. Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an 'on duty' meal period and counted as time worked. An 'on duty' meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to." (Emphasis added)

In contrast, Section 11 of each of the other orders reflects the mandatory language contained in Labor Code § 512 which provides, *inter alia*:

"An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes..."

The DLSE has consistently taken the position (see O.L. 2002.06.14) that the language contained in Labor Code § 512 and repeated in most of the wage orders:

"...is clear and unambiguous:

'No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes'..."

However, as you point out, Labor Code § 554 specifically excludes "persons employed in agricultural occupations" from the protections provided by AB 60. Consequently, while the employer must affirmatively "authorize and permit" a worker in the agricultural occupations[1] to take a meal period within each five-hour period, the employer is under no obligation to compel the worker to do so.

While the pre-1980 Orders had contained the meal period language "No employer shall employ any person...", currently contained in Labor Code § 512 and the other wage orders, that provision was amended in the 1980 Agricultural Wage Order (14-80) to provide that the employer must "authorize and permit" a meal period. The prohibitive language remained the same in all of the other wage orders.

The meal period requirements are contained in the wage orders to protect the health of the workers. This public policy issue must be enforced in such a way as to insure that these health concerns are adequately addressed. The current language of Order 14, Section 11, creates an affirmative duty on the employer of agricultural employees to "authorize and permit" those workers to take a 30-minute meal period within each five-hour time frame. The right of the employee to take the meal period is, thus, statutorily protected. In the event such a meal period is not taken by the employee, the burden is on the employer to show that the agricultural employee had been advised of his or her legal right to take a meal period and has knowingly and voluntarily decided not to take the meal period. Again, we emphasize, the burden is on the employer.

As a statutorily protected right, the decision to forego a meal period must be made personally by each worker on a daily basis. The decision to forego a meal period may not, therefore, be

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[1] As that term is defined in Wage Order 14 operative January 1, 1998 (See Labor Code § 554)

based on a specific requirement of the employer or on a policy or practice which could reasonably be perceived to be a condition of employment. Therefore, blanket "waivers" of meal periods or "group" agreements to forego or forestall meal periods until later in the work day, whether written or oral, will not be considered valid.

Orders 8[2] and 13[3], two wage orders closely related to the agriculture work covered by Order 14, do provide (as Labor Code § 512 requires) that the employer is required to provide the employee with a meal period within the five-hour limit. We mention this only as a caution. Experience teaches that it is not unusual for agricultural workers to also be employed part of the day performing work covered by Order 13 or even Order 8. Those employees are protected by the provisions of Labor Code § 512 and the mandatory provisions of the applicable IWC Order.

We also point out that the provisions of IWC Order 14, Section 7(A)(3) provide that required time records must include:

> "Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which, operations cease and authorized rest periods need not be recorded."

Assuming that any agricultural employee, as defined in the Orders, chooses not to take a meal period despite the fact that they have been authorized and permitted to do so, the record must reflect the time in and out of those workers who did choose to take a meal period since all of the operations did not cease.

We hope this adequately addresses the issues you raised in your letter. Thank you for the reasoned arguments set out in your letter and your continued interest in California labor law.

Yours truly,

H. Thomas Cadell, Jr.

H. THOMAS CADELL, JR.
Attorney for the Labor Commissioner

---

[2] Industries Handling Products After Harvest.

[3] Industries Preparing Agricultural Products for Market, on the Farm.

c.c. Arthur Lujan, State Labor Commissioner
Sam Rodriguez, Chief Deputy Labor Commissioner
Anne Stevason, Chief Counsel
Assistant Labor Commissioners
Regional Managers
Carl Borden, Calif. Farm Bureau Federation
Jasper Hempel, Western Growers Assn.

SENATE RULES COMMITTEE Office of Senate Floor Analyses 1020 N Street, Suite 524 (916) 445-6614 Fax: (916) 327-4478	AB 1723

THIRD READING

Bill No: AB 1723
Author: Assembly Labor and Employment Committee
Amended: 9/8/03 in Senate
Vote: 21

SENATE LABOR & INDUSTRIAL RELATIONS COMM. : 5-3, 7/9/03
AYES: Alarcon, Dunn, Figueroa, Kuehl, Romero
NOES: Oller, Margett, McClintock

SENATE APPROPRIATIONS COMMITTEE : Senate Rule 28.8

ASSEMBLY FLOOR : 49-29, 5/27/03 - See last page for vote

SUBJECT : Mass layoffs, relocations, and terminations

SOURCE : Author

DIGEST : This bill requires the Employment Development Department to make available information relating to mass-layoffs, relocations, and terminations in its monthly report on labor market conditions and on its web site. This bill also places an affirmative obligation on employers to provide rest periods.

Senate Floor Amendments of 9/8/03 amend other sections of the Labor Code: (a) to require employers to affirmatively provide rest periods to employees, and (b) to provide a right of private action for employees to recover wages due for an employer's failure to provide meal and rest periods.

ANALYSIS : Information Requirement

CONTINUED

Existing law:

1. Precludes employers from ordering a mass layoff, relocation, or termination, of an industrial or commercial facility employing a prescribed number of people, without first giving 60 days' notice to affected employees and specified government agencies.

2. Provides that the notification requirement applies to any industrial or commercial facility that employs 75 or more employees.

3. Defines a mass layoff as including any layoff of 50 or more persons that have been employed for at least six of the last 12 months prior to the notice date.

4. Requires employers giving notice to include information mandated by the federal Worker Adjustment and Retraining Notification (WARN) Act (29 U.S.C. Sec. 2101 et seq.), which has other reporting criteria, but applies to situations of 500 or more employees, comprising of at least one third of the workforce. Such elements include, but are not limited to:

   A. The name and address of the relevant employment site.

   B. A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect.

   C. The expected date of the first separation, and the anticipated separation schedule.

   D. The number of affected employees in each job classification.

In California, employers send the required notices to the State Dislocated Worker Unit in the Employment Development Department (EDD), which currently posts the information it receives pursuant to the federal WARN Act, but not information of the broader state law.

This bill would require EDD to make all the available notice information required by state and federal law relating to mass-layoffs, relocations, and terminations in its monthly report on labor market conditions and on its web site.

Rest Periods

Existing law provides that employees are entitled to specified meal and rest periods:

1. For meal periods, 30 minutes for all hours worked over 5 hours per day.

2. For rest periods, 10 minutes every 4 hours.

Employers that fail to provide meal and rest periods, must pay 1 hour's pay for every missed period.

However, employers have an affirmative obligation to provide meal periods. For rest periods, employers only have to "authorize and permit" a rest to be taken.

This bill:

1. Places an affirmative obligation on employers to provide rest periods.

2. Grants injured workers a right of private action to recover the wage amounts due for failure to provide meal or rest periods.

Comments

The Assembly Committee on Labor and Employment, author of this measure, indicates that AB 2957 (Koretz) of 2002 [Chapter 780, Statues of 2002] provided broader coverage than the federal law, and that the information gathered by the notification requirements should be exhibited to as broad an audience as possible through EDD's monthly publication and its web site.

Proponents state that this measure is intended to ensure

that, by providing the most inclusive and most up-to-date information, local communities, the state, and dislocated workers themselves can best respond to large-scale job loss. Timely dissemination of this information can be of assistance to both government and the state's workforce.

FISCAL EFFECT : Appropriation: No Fiscal Com.: Yes Local: No

SUPPORT : (Verified 7/21/03)

California Labor Federation, AFL-CIO
United Nurses Associations of California
Union of Health Care Professionals

ASSEMBLY FLOOR :
AYES: Berg, Bermudez, Calderon, Canciamilla, Chan, Chavez, Chu, Cohn, Corbett, Correa, Diaz, Dutra, Dymally, Firebaugh, Frommer, Goldberg, Hancock, Jerome Horton, Jackson, Kehoe, Koretz, Laird, Leno, Levine, Lieber, Liu, Longville, Lowenthal, Matthews, Montanez, Mountjoy, Mullin, Nakano, Nation, Negrete McLeod, Nunez, Oropeza, Parra, Pavley, Reyes, Ridley-Thomas, Salinas, Simitian, Steinberg, Vargas, Wiggins, Wolk, Yee, Wesson
NOES: Aghazarian, Bates, Benoit, Bogh, Cogdill, Cox, Daucher, Dutton, Garcia, Harman, Haynes, Shirley Horton, Houston, Keene, La Malfa, La Suer, Leslie, Maddox, Maldonado, Maze, McCarthy, Nakanishi, Plescia, Richman, Runner, Samuelian, Spitzer, Strickland, Wyland

NC:nl 9/8/03 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

SENATE BILL No. 1539

Introduced by Senator Calderon

February 22, 2008

An act to amend Section 512 of the Labor Code, relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

SB 1539, as introduced, Calderon. Meal periods.

Existing law requires an employer to provide an employee who works more than 5 hours in a workday with a meal period of not less than 30 minutes, unless the employee works no more than 6 hours in a workday and the meal period is waived by mutual consent. An employer also is required to provide an employee who works more than 10 hours in a workday with a second meal period of not less than 30 minutes, unless the employee works no more than 12 hours, the first meal period was not waived, and the second meal period is waived by mutual consent. The Industrial Welfare Commission (IWC) of the Department of Industrial Relations adopts and amends wage orders that, among other things, specify how meal periods are required to be provided to covered employees within various industries, including the procedures for providing employees with on-duty meal periods.

This bill would revise the statutory requirements for the provision of meal periods to specify that the requirements apply only to employees subject to the meal period provisions of an order of the IWC. The statutory requirements for providing the meal periods would be revised to specify that a meal period based on working more than 5 hours in a workday is required to be provided before the employee completes 6 hours of work, unless the existing waiver provision is invoked. The waiver provision for the 2nd meal period would be changed to provide an exception for different provisions within IWC wage orders in effect

as of January 1, 2008, and to permit the employer and employee to agree to waive either the first or the 2nd meal period if the employee otherwise is entitled to 2 meal periods. The bill also would specify conditions under which on-duty meal periods are permitted rather than meal periods in which the employee is relieved of all duty. The meal period provisions of a valid collective bargaining agreement would be required to be implemented for covered employees rather than the statutory requirements.

The bill would require that orders of the IWC be interpreted in a manner consistent with this section, and would require the Department of Industrial Relations to amend and republish specified IWC wage orders to be consistent with the revised meal period requirements.

The bill also would declare that all those provisions are declaratory and not amendatory of existing law.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 512 of the Labor Code is amended to read:

512. (a) An employer ~~may~~ *shall* not employ an employee ~~for a work period of~~ *who is subject to the meal period provisions of an order of the Industrial Welfare Commission and who works* more than five hours ~~per day~~ *in a workday* without providing the employee with ~~a~~ *one off-duty* meal period ~~of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee~~ *per workday before the employee completes six hours of work. If an employee works no more than six hours per workday, the employer and employee may agree to waive the employer's duty of providing the employee with a meal period.* An employer ~~may~~ *shall* not employ an employee ~~for a work period of~~ *who is subject to the meal period provisions of an order of the Industrial Welfare Commission and who works* more than 10 hours ~~per day~~ *in a workday* without providing the employee with a second *off-duty* 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.~~ *Except as authorized by an Industrial Welfare Commission wage order in effect as of January 1, 2008, if an employee works no more than 12 hours in a workday, the employer and employee may agree to waive the employer's duty of providing the employee with either the first or the second meal period, but not both.*

(b) For purposes of this section, the following terms shall have the following meanings:

(1) "Off-duty meal period" means a meal period of not less than 30 minutes during which the employee is relieved of all duty.

(2) "Providing the employee with" means giving the employee an opportunity to take.

(c) Notwithstanding subdivision (a), an on-duty meal period shall be permitted for an employee covered by an order of the Industrial Welfare Commission that authorizes an on-duty meal period if the employer and the employee have entered into a written agreement for an on-duty meal period, the employee has an opportunity to eat while on duty, the on-duty meal period is counted as time worked, and the nature of the work prevents the employee from being relieved of all duty based on at least one of the following conditions:

(1) The employee works alone or is the only person in the employee's job classification who is on duty at the location or in the department, or there are no other qualified employees who can reasonably relieve the employee of all duty.

(2) State or federal law imposes a requirement that the employee remain on duty at all times.

(3) The nature of the work or the relevant circumstances make it unreasonable or unsafe for the employee to be relieved of all duty.

(4) The work product or process will be destroyed or damaged by relieving the employee of all duty.

(5) The employee works with perishable products, including the transport and delivery of those products, and therefore cannot reasonably be relieved of all duty.

(6) The employee has direct responsibility for children who are under 18 years of age or who are not emancipated from the foster care system and who, in either case, are receiving 24-hour residential care, or is an employee of a 24-hour residential care

facility for the elderly, blind, or developmentally disabled individuals.

(d) If an employee is entitled to two meal periods pursuant to subdivision (a), both meal periods may be on-duty meal periods if the requirements of subdivision (c) are met.

(e) This section shall not apply to an employee covered by a collective bargaining agreement that provides for meal periods. The terms, conditions, and remedies of the valid collective bargaining agreement pertaining to meal periods shall apply instead of this section.

(f) All orders of the Industrial Welfare Commission shall be interpreted in a manner consistent with this section, and the Department of Industrial Relations shall amend and republish Industrial Welfare Commission Wage Order Numbers 1 to 13, inclusive, and 15 to 17, inclusive, to be consistent with this section, but shall make no other changes to the wage orders.

~~(b)~~

(g) Notwithstanding subdivision (a), the Industrial Welfare Commission may adopt a working condition order permitting a meal period to commence after six hours of work if the commission determines that the order is consistent with the health and welfare of the affected employees.

~~(c)~~

(h) Subdivision (a) does not apply to an employee in the wholesale baking industry who is subject to an Industrial Welfare Commission wage order and who is covered by a valid collective bargaining agreement that provides for a 35-hour workweek consisting of five ~~seven-hour~~ *7-hour* days, payment of ~~1 and ½~~ *one and one-half times* the regular rate of pay for time worked in excess of seven hours per day, and a rest period of not less than 10 minutes every two hours.

~~(d)~~

(i) If an employee in the motion picture industry or the broadcasting industry, as those industries are defined in Industrial Welfare Commission Wage ~~Orders~~ *Order Numbers* 11 and 12, is covered by a valid collective bargaining agreement that provides for meal periods and includes a monetary remedy if the employee does not receive a meal period required by the agreement, then the terms, conditions, and remedies of the agreement pertaining to meal periods apply in lieu of the applicable provisions pertaining

to meal periods of subdivision (a) of this section, Section 226.7, and Industrial Welfare Commission Wage ~~Orders~~ *Order Numbers* 11 and 12.

(j) This section is declaratory and not amendatory of existing law.

O

NOTE: The Internet version of this Industrial Welfare Commission Order may be posted as is required at places of employment. To obtain the official printed Order, you may call 415.703.5070 and it will be mailed to you free of charge. You may also request copies by writing to the Department of Industrial Relations, Public Information Office, P.O. Box 420603, San Francisco, CA 94142-0603.

INDUSTRIAL WELFARE COMMISSION
ORDER NO. 5-2001
REGULATING
WAGES, HOURS AND WORKING CONDITIONS IN THE PUBLIC HOUSEKEEPING INDUSTRY
(Effective October 1, 2000 as amended)

1. Applicability of Order.

This order shall apply to all persons employed in the public housekeeping industry whether paid on a time, piece rate, commission, or other basis, except that:

(A) The provisions of this Order shall not apply to student nurses in a school accredited by the California Board of Registered Nursing or by the Board of Vocational Nurse and Psychiatric Technician Examiners or exempted by the provisions of sections 2789 or 2884 of the Business and Professions Code;

(B) Provisions of sections 3 through 12 shall not apply to persons employed in administrative, executive, or professional capacities. The following requirements shall apply in determining whether an employee's duties meet the test to qualify for an exemption to those sections:

(1) Executive Exemption. A person employed in an executive capacity means any employee:

(a) Whose duties and responsibilities involve the management of the enterprise in which he or she is employed or of a customarily recognized department or subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretion and independent judgment; and

(e) Who is primarily engaged in duties which meet the test of the exemption. The activities constituting exempt work and non-exempt work shall be construed in the same manner as such items are construed in the following regulations under the Fair Labor Standards Act effective as of the date of this order: 29 C.F.R. §§ 541.102, 541.104-111, 541.115-116. Exempt work shall include, for example, all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions. The work actually performed by the employee during the course of the work week must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee satisfies this requirement.

(f) Such an employee must also earn a monthly salary equivalent to no less than two times the state minimum wage for full-time employment. Full-time employment is defined in Labor Code § 515(c) as 40 hours per week.

(2) Administrative Exemption. A person employed in an administrative capacity means any employee:

(a) Whose duties and responsibilities involve either:

(1) The performance of office or non-manual work directly related to management policies or general business operations of his employer or his employer's customers, or

(2) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department of subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c) (1) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined for purposes of this section) , or

(2) who performs under only general supervision

work along specialized or technical lines requiring special training, experience, or knowledge, or

(3) who executes under only general supervision special assignments and tasks, and

(d) Who is primarily engaged in duties which meet the test of the exemption. The activities constituting exempt work and non-exempt work shall be construed in the same manner as such terms are construed in the following regulations under the Fair Labor Standards Act effective as of the date of this order: 29 C.F.R. §§ 541.201-205, 541.207-208, 541.210, 541.215. Exempt work shall include, for example, all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions. The work actually performed by the employee during the course of the work week must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee satisfies this requirement.

(e) Such employee must also earn a monthly salary equivalent to no less than two times the state minimum wage for full-time employment. Full -time employment is defined in Labor Code § 515(c) as 40 hours per week.

(3) Professional Exemption. A person employed in a professional capacity means any employee who meets all of the following requirements:

(a)(1) Who is licensed or certified by the State of

California and is primarily engaged in the practice of one of the following recognized professions: law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting; or

(2) Who is primarily engaged in an occupation commonly recognized as a learned or artistic profession. For the purposes of this subsection, "learned or artistic profession" means an employee who is primarily engaged in the performance of:

(i) Work requiring knowledge of an advanced type in a field or science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or work that is an

essential part of or necessarily incident to any of the above work; or

(ii) Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training) , and the result of which depends primarily on the invention, imagination, or talent of the employee or work that is an essential part of or necessarily incident to any of the above work; and

(iii) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

(b) Who customarily and regularly exercises discretion and independent judgment in the performance of duties set forth in paragraph (a) .

(c) Who earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment. Full-time employment is defined in Labor Code §515 (c) as 40 hours per week.

(d) Subsection (a)(2) above is intended to be construed in accordance with the following provisions of federal law as they existed as of the date of this Wage Order: 29 C.F.R. §§ 541.207, 541.301(a) -(d) , 541.302, 541.306, 541.307, 541.308, and 541.310.

(e) Notwithstanding the provisions of this subsection, pharmacists employed to engage in the practice of pharmacy, and registered nurses employed to engage in the practice of nursing, shall not be considered exempt professional employees, nor shall they be considered exempt from coverage for the purposes of this subsection unless they individually meet the criteria established for exemption as executive or administrative employees.

(f) Subsection (e) above, shall not apply to the following advanced practice nurses:

(1) Certified nurse midwives who are primarily engaged in performing duties for which certification is required pursuant to Article 2.5 (commencing with

Section 2746) of Chapter 6 of Division 2 of the Business and Professions Code.

(2) Certified nurse anesthetists who are primarily engaged in performing duties for which certification is required pursuant to Article 7 (commencing with Section 2825) of Chapter 6 of Division 2 of the Business and Professions Code.

(3) Certified nurse practitioners who are primarily engaged in performing duties for which certification is required pursuant to Article 8 (commencing with Section 2834) of Chapter 6 of Division 2 of the Business and Professions Code.

(4) Nothing in this paragraph shall exempt the occupations set forth in subparagraphs (1) , (2) , and (3) from meeting the requirements of subsection 1(A)(3)(a) - (c) , above.

(g) Except as provided in subsection (h) , an employee in the computer software field shall be exempt, if all of the following apply:

(1) The employee is primarily engaged in work that is intellectual or creative and that requires the exercise of discretion and independent judgment, and the employee is primarily engaged in duties that consist of one or more of the following:

(i) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications.

(ii) The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to, user or system design specifications.

(iii) The documentation, testing, creation, or modification of computer programs related to the design of software or hardware for computer operating systems.

(2) The employee is highly skilled and is proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering. A job title shall not be determinative of the applicability of this exemption.

(3) The employee's hourly rate of pay is not less than forty-one dollars ($41.00) . The Division of Labor Statistics and Research shall adjust this pay rate on October 1 of each year to be effective on January 1 of the following year by an amount equal to the percentage increase in the California Consumer Price Index for Urban Wage Earners and Clerical Workers.

(h) The exemption provided in subsection (g) does not apply to an employee if any of the following apply:

(1) The employee is a trainee or employee in an entry-level position who is learning to become proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering.

(2) The employee is in a computer-related occupation but has not attained the level of skill and expertise necessary to work independently and without close supervision.

(3) The employee is engaged in the operation of computers or in the manufacture, repair, or maintenance of computer hardware and related equipment.

(4) The employee is an engineer, drafter, machinist, or other professional whose work is highly dependent upon or facilitated by the use of computers and computer software programs and who is skilled in computer-aided design software, including CAD/CAM, but who is not in a computer systems analysis or programming occupation.

(5) The employee is a writer engaged in writing material, including box labels, product descriptions, documentation, promotional material, setup and installation instructions, and other similar written information, either for print or for onscreen media or

who writes or provides content material intended to be read by customers, subscribers, or visitors to computer-related media such as the World Wide Web or CD-ROMs.

(6) The employee is engaged in any of the activities set forth in subsection (g) for the purpose of creating imagery for effects used in the motion picture, television, or theatrical industry.

(C) The provisions of this Order shall not apply to employees directly employed by the State or any county, incorporated city or town or other municipal corporation, or to outside salespersons.

(D) Provisions of this Order shall not apply to any individual who is the parent, spouse, child, or legally adopted child of the employer.

(E) Effective January 1, 2001, the provisions of this Order shall not apply to any individual participating in a national service program, such as AmeriCorps, carried out using assistance provided under Section 12571 of Title 42 of the United States Code. (See Stats. 2000, ch. 365, amending Labor Code § 1171.)

2. Definitions.

(A) "Commission" means the Industrial Welfare Commission of the State of California.

(B) "Division" means the Division of Labor Standards Enforcement of the State of California.

(C) "Public Housekeeping Industry" means any industry, business, or establishment which provides meals, housing, or maintenance services whether operated as a primary business or when incidental to other operations in an establishment not covered by and industry order of the Commission, and includes, but is not limited to the following:

(1) Restaurants, night clubs, taverns, bars, cocktail lounges, lunch counters, cafeterias, boarding houses, clubs, and all similar establishments where food in either sold or liquid form is prepared and served to be consumed on the premises;

(2) Catering, banquet, box lunch service, and similar establishments which prepare food for consumption on or off the premises;

(3) Hotels, motels, apartment houses, rooming houses, camps, clubs, trailer parks, office or loft buildings, and similar establishments offering rental of living, business, or commercial quarters;

(4) Hospitals, sanitariums, rest homes, child nurseries, child care institutions, homes for the aged, and similar establishments offering board or lodging in addition to medical, surgical, nursing, convalescent, aged, or child care;

(5) Private schools, colleges, or universities, and similar establishments which provide board or lodging in additional to educational facilities;

(6) Establishments contracting for development, maintenance or cleaning of grounds; maintenance or cleaning of facilities and/or quarters of commercial units and living units; and

(7) Establishments providing veterinary or other animal care services.

(D) An "alternative workweek schedule" means any regularly scheduled workweek requiring an employee to work more than eight (8) hours in a 24-hour period.

(E) "Emergency" means an unpredictable or unavoidable occurrence at unscheduled intervals requiring immediate action.

(F) "Employ" means to engage, suffer, or permit to work.

(G) "Employee" means any person employed by an employer, and includes any lessee who is charged rent, or who pays rent for a chair, booth, or space and

(1) who does not use his or her own funds to purchase requisite supplies, and

(2) who does not maintain an appointment book separate and distinct from that of the establishment in which the space is located, and

(3) who does not have a business license where applicable.

(H) "Employees in the Healthcare Industry" means any of the following:

(1) Employees in the healthcare industry providing patient care; or

(2) Employees in the healthcare industry working in a clinical or medical department, including pharmacists dispensing prescriptions in any practice setting; or

(3) Employees in the healthcare industry working primarily or regularly as a member of a patient care delivery team

(4) Licensed veterinarians, registered veterinary technicians and unregistered animal health technicians providing patient care.

(I) "Employer" means any person as defined in Section 18 of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person.

(J) "Healthcare Emergency" consists of an unpredictable or unavoidable occurrence at unscheduled intervals relating to healthcare delivery, requiring immediate action.

(K) "Healthcare Industry" is defined as hospitals, skilled nursing facilities, intermediate care and residential care facilities, convalescent care institutions, home health agencies, clinics operating twenty-four (24) hours per day, and clinics performing surgery, urgent care, radiology, anesthesiology, pathology, neurology or dialysis.

(L) "Hours worked" means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so, and in the case of an employee who is required to reside on the employment premises, that time spent carrying out assigned duties shall be counted as hours worked. Within the health care industry, the term "hours worked" means the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, as interpreted in accordance with the provisions of the Fair Labor Standards Act.

(M) "Minor" means, for the purpose of this Order, any person under the age of eighteen (18) years.

(N) "Outside Salesperson" means any person, 18 years if age or over, who customarily and regularly works more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities.

(O) "Personal attendant" includes baby sitters and means any person employed by a non-profit organization covered by this order to supervise, feed or dress a child or person who by reason of advanced age, physical disability or mental deficiency needs supervision. The status of "personal attendant" shall apply when no significant amount of work other than the foregoing is required.

(P) "Primarily" as used in section 1, Applicability, means more than one-half the employee's work time.

(Q) "Shift" means designated hours of work by an employee, with a designated beginning time and quitting time.

(R) "Split shift" means a work schedule which is interrupted by non-paid non-working periods established by the employer, other than bona fide rest or meal periods.

(S) "Teaching" means, for the purpose of section 1 of this Order, the profession of teaching under a certificate from the Commission for Teacher Preparation and

Licensing or teaching in an accredited college or university.

(T) "Wages" (See California Labor Code, section 200)

(U) "Workday" and "day" mean any consecutive 24-hour period beginning at the same time each calendar day.

(V) "Workweek" and "week" mean any seven (7) consecutive days, starting with the same calendar day each week. "Workweek" is a fixed and regularly recurring period of 168 hours, seven (7) consecutive 24-hour periods.

3. Hours and Days of Work.

Daily Overtime- General Provisions

(A) The following overtime provisions are applicable to employees eighteen (18) years of age or over and to employees sixteen (16) or seventeen (17) years of age who are not required by law to attend school and are not otherwise prohibited by law from engaging in the subject work. Such employees shall not be employed more than eight (8) hours in any workday or more than forty (40) hours in any workweek unless the employee receives one and one-half (1 ½) times such employee's regular rate of pay for all hours worked over forty (40) hours in the workweek. Eight (8) hours of labor constitutes a day's work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

(1) One and one-half (1 ½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including twelve (12) hours in any workday, and for the first eight (8) hours worked on the seventh (7^{th}) consecutive day of work in a workweek; and

(2) Double the employee's regular rate of pay for all hours worked in excess of twelve (12) hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7^{th}) consecutive day of work in a workweek.

(3) The overtime rate of compensation required to be paid to a nonexempt full-time salaried employee shall be computed by using the employee's regular hourly salary as one fortieth (1/40) of the employee's weekly salary.

Alternative Workweek Schedules

(B1) No employer shall be deemed to have violated the daily overtime

provisions by instituting, pursuant to the election procedures set forth in this wage order, a regularly scheduled alternative workweek schedule of not more than ten (10) hours per day within a forty (40) hour workweek without the payment of an overtime rate of compensation. All work performed in any workday beyond the schedule established by the agreement up to twelve (12) hours a day or beyond forty (40) hours per week shall be paid at one and one-half (1 ½) times the employee's regular rate of pay. All work performed in excess of twelve (12) hours per day and any work in excess of eight (8) hours on those days worked beyond the regularly scheduled number of workdays established by the alternative workweek agreement shall be paid at double the employee's regular rate of pay. Any alternative workweek agreement adopted pursuant to this section shall provide for not less than four (4) hours of work in any shift. Nothing in this section shall prohibit an employer, at the request of the employee, to substitute one day of work for another day of the same length in the shift provided by the alternative workweek agreement on an occasional basis to meet the personal needs of the employee without the payment of overtime. No hours paid at either one and one-half (1 ½) or double the regular rate of pay shall be included in determining when forty (40) hours have been worked for the purpose of computing overtime compensation.

(1) If an employer, whose employees have adopted an alternative workweek agreement permitted by this order requires an employee to work fewer hours than those that are regularly scheduled by the agreement, the employer shall pay the employee overtime compensation at a rate of one and one-half (1 ½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours, and double the employee's regular rate of pay for all hours worked in excess of twelve (12) hours for the day the employee is required to work the reduced hours.

(2) An employer shall not reduce an employee's regular rate of hourly pay as a result of the adoption, repeal or nullification of an alternative workweek schedule.

(3) An employer shall explore any available reasonable alternative means of accommodating the religious belief or observance of an affected employee that conflicts with an adopted alternative workweek schedule, in the manner provided by subdivision (j) of Section 12940 of the Government Code.

(4) An employer shall make a reasonable effort to find a work schedule not to exceed eight (8) hours in a workday, in order to accommodate any affected employee who was eligible to vote in an election authorized by this Section and who is unable to work the alternative workweek schedule established as the result of that election.

(5) An employer shall be permitted, but not required, to provide a work schedule not to exceed eight (8) hours in a workday to accommodate any employee who is hired after the date of the election and who is unable to work the alternative workweek schedule established by the election.

(6) Arrangements adopted in a secret ballot election held pursuant to this order prior to 1998, or under the rules in effect prior to 1998, and before the performance of the work, shall remain valid after July 1, 2000 provided that the results of the election are reported by the employer to the Division of Labor Statistics and Research by January 1, 2001, in accordance with the requirements of Section B2 below (Election Procedures) . New arrangements can be entered into pursuant to the provisions of this section. Notwithstanding the foregoing, if a health care industry employer implemented a reduced rate for twelve (12) hour shift employees in the last quarter of 1999 and desires to reimplement a flexible work arrangement that includes twelve (12) hour shifts at straight time for the same work unit, the employer must pay a base rate to each affected employee in the work unit that is no less than that employee's base rate in 1999 immediately prior to the date of the rate reduction.

(7) Notwithstanding the above provisions regarding alternative workweek schedules, no employer of employees in the healthcare industry shall be deemed to have violated the daily overtime provisions by instituting, pursuant to the election procedures set forth in this wage order a regularly scheduled alternative workweek schedule that includes work days exceeding ten (10) hours but not more than twelve (12) hours within a forty 40-hour workweek without the payment of overtime compensation, provided that:

(a) An employee who works beyond twelve (12) hours in a workday shall be compensated at double the employee's regular rate of pay for all hours in excess of twelve (12) ;

(b) An employee who works in excess of forty (40) hours in a workweek shall be compensated at one and one-half (1½) times the employee's regular rate of pay for all hours over forty (40) hours in the workweek;

(c) Any alternative workweek agreement adopted pursuant to this section shall provide for not less

than four (4) hours of work in any shift.

(d) The same overtime standards shall apply to employees who are temporarily assigned to a work unit covered by this subsection;

(e) Any employer who instituted an alternative workweek schedule pursuant to this subsection shall make a reasonable effort to find another work assignment for any employee who participated in a valid election prior to 1998 pursuant to the provisions of Wage Orders 4 and 5 and who is unable to work the alternative workweek schedule established.

(f) An employer engaged in the operation of a licensed hospital or in providing personnel for the operation of a licensed hospital who institutes, pursuant to a valid order of the Commission, a regularly scheduled alternative workweek that includes no more than three (3) twelve (12) -hour workdays, shall make a reasonable effort to find another work assignment for any employee who participated in the vote which authorized the schedule and is unable to work the 12-hour shifts. An employer shall not be required to offer a different work assignment to an employee if such a work assignment is not available or if the employee was hired after the adoption of the twelve (12) hour, three (3) day alternative workweek schedule.

(8) No employee assigned to work a twelve (12) hour shift established pursuant to this Order shall be required to work more than twelve (12) hours in any twenty-four (24) hour period unless the Chief Nursing Officer or authorized executive declares that:

(a) A "healthcare emergency", as defined above, exists in this Order, and

(b) All reasonable steps have been taken to provide required staffing, and

(c) Considering overall operational status needs, continued overtime is necessary to provide required staffing.

Provided further that no employee shall be required to work more than sixteen (16) hours in a 24-hour period unless by

voluntary mutual agreement of the employee and the employer, and no employee shall work more than twenty-four (24) consecutive hours until said employee receives not less than eight (8) consecutive hours off-duty immediately following the twenty-four consecutive hours of work.

(9) Notwithstanding section (B2)(8) above, an employee may be required to work up to thirteen (13) hours in any 24-hour period if the employee scheduled to relieve the subject employee does not report for duty as scheduled and does not inform the employer more than two hours in advance of that scheduled shift that he/she will not be appearing for duty as scheduled.

Election Procedures

(B2) Election procedures for the adoption and repeal of alternative workweek schedules require the following:

(1) Each proposal for an alternative workweek schedule shall be in the form of a written agreement proposed by the employer. The proposed agreement must designate a regularly scheduled alternative workweek in which the specified number of work days and work hours are regularly recurring. The actual days worked within that alternative workweek schedule need not be specified. The employer may propose a single work schedule that would become the standard schedule for workers in the work unit, or a menu of work schedule options, from which each employee in the unit would be entitled to choose. If the employer proposes a menu of work schedule options, the employee may, with the approval of the employer, move from one menu option to another.

(2) In order to be valid, the proposed alternative workweek schedule must be adopted in a secret ballot election, before the performance of work, by at least a two-thirds (2/3) vote of the affected employees in the work unit. The election shall be held during regular working hours at the employees' work site. For purposes of this subsection, "affected employees in the work unit" may include all employees in a readily identifiable work unit, such as a division, a department, a job classification, a shift, a separate physical location, or a recognized subdivision of any such work unit. A work unit may consist of an individual employee as long as the criteria for an identifiable work unit in this subsection is met.

(3) Prior to the secret ballot vote, any employer who proposed to institute an alternative workweek schedule shall have made a disclosure in writing to the affected employees, including the effects of the proposed arrangement on the employees' wages, hours, and benefits. Such a disclosure shall include meeting(s) , duly noticed, held at least fourteen (14) days prior to voting, for the specific purpose of discussing the effects of

the alternative workweek schedule. An employer shall provide that disclosure in a non-English language, as well as in English, if at least five (5) percent of the affected employees primarily speak that non-English language. The employer shall mail the written disclosure to employees who do not attend the meeting. Failure to comply with this Section shall make the election null and void.

(4) Any election to establish or repeal an alternative workweek schedule shall be held at the worksite of the affected employees. The employer shall bear the costs of conducting any election held pursuant to this section. Upon a complaint by an affected employee, and after an investigation by the Labor Commissioner, the Labor Commissioner may require the employer to select a neutral third party to conduct the election.

(5) Any type of alternative workweek schedule that is authorized by the Labor Code may be repealed by the affected employees. Upon a petition of one-third (1/3) of the affected employees, a new secret ballot election shall be held and a two-thirds (2/3) vote of the affected employees shall be required to reverse the alternative workweek schedule. The election to repeal the alternative workweek schedule shall be held not more than 30 days after the petition is submitted to the employer, except that the election shall be held not less than twelve (12) months after the date that the same group of employees voted in an election held to adopt or repeal an alternative workweek schedule. However, where an alternative workweek schedule was adopted between October 1, 1999 and the effective date of this Order, a new secret ballot election to repeal that alternative workweek schedule shall not be subject to the 12-month interval between elections. The election shall take place during regular working hours at the employees' work site. If the alternative workweek schedule is revoked, the employer shall comply within sixty (60) days. Upon proper showing of undue hardship, the Division of Labor Standards Enforcement may grant an extension of time for compliance.

(6) Only secret ballots may be cast by affected employees in the work unit at any election held pursuant to this Section. The results of any election conducted pursuant to this Section shall be reported by the employer to the Division of Labor Statistics and Research within thirty (30) days after the results are final, and the report of election results shall be a public document. The report shall include the final tally of the vote, the size of the unit, and the nature of the business of the employer.

(7) Employees affected by a change in the work hours resulting from the adoption of an alternative workweek schedule may not be required to work those new work hours for at least thirty (30) days after the announcement of the final results of the election.

(8) Employers shall not intimidate or coerce employees to vote either in

support of or in opposition to a proposed alternative workweek. No employees shall be discharged or discriminated against for expressing opinions concerning the alternative workweek election or for opposing or supporting its adoption or repeal. However, nothing in this section shall prohibit an employer from expressing his/her position concerning that alternative workweek to the affected employees. A violation of this subsection shall be subject to Labor Code section 98 *et seq.*

(C) No employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises shall be deemed to have violated any provision of this section if, pursuant to an agreement or understanding arrived at between the employer and employee before performance of work, a work period of fourteen (14) consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for any employment in excess of eighty (80) hours in such fourteen (14) day period, the employee receives compensation at a rate not less than one and one-half (1 ½) times the regular rate at which the employee is employed.

(D) This section does not apply to organized camp counselors who are not employed more than fifty-four (54) hours and not more than six (6) days in any workweek except under the conditions set forth below. This section shall also not apply to personal attendants as defined in section 2(O) , nor to adult employees or minors who are permitted to work as adults who have direct responsibility for children under eighteen (18) years of age receiving twenty-four (24) hour care, nor to resident managers of homes for the aged having less than eight (8) beds; provided that persons employed in such occupations shall not be employed more than forty (40) hours nor more than six (6) days in any workweek, except under the following conditions:

In the case of emergency, employees may be employed in excess of forty (40) hours or six (6) days in any workweek provided the employee is compensated for all hours in excess of forty (40) hours and all days in excess of six (6) days in the workweek at not less than one and one-half (1 ½) times the employee's regular rate of pay. However, regarding organized camp counselors, in case of emergency they may be employed in excess of fifty-four (54) hours or six (6) days, provided that they are compensated at not less than one and one-half (1 ½) times the employee's regular rate of pay for all hours worked in excess of fifty-four (54) hours and six (6) days in the workweek.

(E) One and one-half (1 ½) times a minor's regular rate of pay shall be paid for all work over forty (40) hours in any workweek except minors sixteen (16) or seventeen (17) years old who are not required by law to attend school and may therefore be employed for the same hours as an adult are subject to subsection (A) , (B1) and B(2) , (C) , or (D) above.

(VIOLATIONS OF CHILD LABOR LAWS are subject to civil penalties of from $500 to $10,000 as well as to criminal penalties. Refer to California Labor

Code sections 1285 to 1312 and 1390 to 1399 for additional restrictions on the employment of minors and for descriptions of criminal and civil penalties for violation of the child labor laws. Employers should ask school districts about any required work permits.)

(F) An employee may be employed on seven (7) workdays in a workweek when the total hours of employment during such workweek do not exceed thirty (30) and the total hours of employment in any one workday thereof do not exceed six (6) .

(G) If a meal period occurs on a shift beginning or ending at or between the hours of 10 p.m. and 6 a.m., facilities shall be available for securing hot food and drink or for heating food or drink, and a suitable sheltered place shall be provided in which to consume such food or drink.

(H) The provisions of this section are not applicable to employees whose hours of service are regulated by

(1) The United States Department of Transportation Code of Federal Regulations, title 49, sections 395.1 to 395.13, Hours of Service of Drivers, or

(2) Title 13 of the California Code of Regulations, subchapter 6.5, section 1200 and following sections, regulating hours or drivers.

(I) The daily overtime provisions of subsection (A) above shall not apply to ambulance drivers and attendants scheduled for twenty-four (24) hours shifts of duty who have agreed in writing to exclude from daily time worked not more than three (3) meal periods of not more than one hour each and a regularly scheduled uninterrupted sleeping period of not more than eight (8) hours. The employer shall provide adequate dormitory and kitchen facilities for employees on such a schedule.

(J) The provisions of Labor Code §§ 551 and 552 regarding one (1) day's rest in seven (7) shall not be construed to prevent an accumulation of days of rest when the nature of the employment reasonably requires the employee to work seven (7) or more consecutive days; provided, however, that in each calendar month, the employee shall receive the equivalent of one (1) day's rest in seven (7) .

(K) (1) Except as provided in subsections (E) and (G) , this section shall not apply to any employee covered by a valid collective bargaining agreement if the agreement expressly provides for the wages, hours of work, and working conditions of the employees, and if the agreement provides premium wage rates for all overtime hours worked and a regular hourly rate of pay for those employees of not less than thirty (30) percent more than the state minimum wage.

(2) Notwithstanding Section (K)(1) above, where the employer and a labor organization representing employees of the employer have entered into a valid collective bargaining agreement pertaining to the hours of work of the

employees, the requirement regarding the equivalent of one (1) day's rest in seven (7) (see Section (J) above) shall apply, unless the agreement expressly provides otherwise.

(L) If an employer approves a written request of an employee to make up work time that is or would be lost as a result of a personal obligation of the employee, the hours of that make up work time, if performed in the same workweek in which the work time was lost, may not be counted toward computing the total number of hours worked in a day for purposes of the overtime requirements, except for hours in excess of eleven (11) hours of work in one (1) day or forty (40) hours of work in one (1) workweek. If an employee knows in advance that he or she will be requesting make up time for a personal obligation that will recur at a fixed time over a succession of weeks, the employee may request to make up work time for up to four (4) weeks in advance; provided, however, that the make up work must be performed in the same week that the work time was lost. An employee shall provide a signed written request for each occasion that the employee makes a request to make up work time pursuant to this Section. While an employer may inform an employee of this make up time option, the employer is prohibited from encouraging or otherwise soliciting an employee to request the employer's approval to take personal time off and make up the work hours within the same workweek pursuant to this Section.

4. Minimum Wages.

(A) Every employer shall pay to each employee wages not less than four dollars and seventy-five cents ($4.75) per hour for all hours worked, effective October 1, 1996; not less than five dollars ($5.00) per hour for all hours worked, effective March 1, 1997; not less than five dollars and fifteen cents ($5.15) per hour for all hours worked, effective September 1, 1997; and not less than five dollars and seventy-five cents ($5.75) per hour for all hours worked, effective March 1, 1998, except:

(1) LEARNERS. Employees 18 years of age or over, during their first one hundred and sixty (160) hours of employment in occupations in which they have no previous similar or related experience, may be paid not less than eighty-five percent (85%) of the minimum wage rounded to the nearest nickel.

(2) MINORS may be paid not less than eighty-five percent (85%) of the minimum wage rounded to the nearest nickel provided that the number of minors employed at said lesser rate shall not exceed twenty-five percent (25%) of the persons regularly employed in the establishment. An employer of less than ten (10) persons may employ three (3) minors at said lesser rate. The twenty-five percent (25%) limitation on the employment of minors shall not apply during school vacations.

NOTE: Under certain conditions, the full minimum wage may be required for minors. See Labor Code Section 1391.2 (b) .

(B) Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise.

(C) When an employee works a split shift, one hour's pay at the minimum wage shall be paid in addition to the minimum wage for that workday, except when the employee resides at the place of employment.

(D) The provisions of this section shall not apply to apprentices regularly indentured under the State Division of Apprenticeship Standards.

5. Reporting Time Pay.

(A) Each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's work, but in no event for less than two (2) hours nor more than four (4) hours, at the employee's regular rate of pay, which shall not be less than the minimum wage.

(B) If an employee is required to report for work a second time in any one workday and is furnished less than two hours of work on the second reporting, said employee shall be paid for two hours at the employee's regular rate of pay, which shall not be less than the minimum wage.

(C) The foregoing reporting time pay provisions are not applicable when:

(1) Operations cannot commence or continue due to threats to employees or property; or when recommended by civil authorities; or

(2) Public utilities fail to supply electricity, water, or gas, or there is a failure in the public utilities, or sewer system; or

(3) The interruption of work is caused by an Act of God or other cause not within the employer's control.

(D) This section shall not apply to an employee on paid standby status who is called to perform assigned work at a time other than the employee's scheduled reporting time.

6. Licenses for Disabled Workers.

A license may be issued by the Division authorizing employment of a person whose earning capacity is impaired by physical disability or mental deficiency at less than the minimum wage. Such licenses shall be granted only upon joint application of employer and employee and employee's representative if any.

A special license may be issued to a nonprofit organization such as a sheltered workshop or rehabilitation facility fixing special minimum rates to enable the employment of such persons without requiring individual licenses of such employees.

All such licenses and special licenses shall be renewed on a yearly basis or more frequently at the discretion of the Division.
(See California Labor Code, Sections 1191 and 1191.5.)

7. Records.

(A) Every employer shall keep accurate information with respect to each employee including the following:

(1) Full name, home address, occupation and social security number.

(2) Birth date, if under 18 years, and designation as a minor.

(3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.

(4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.

(5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.

(6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.

(B) Every employer shall semimonthly or at the time of each payment of wages furnish each employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately, an itemized statement in writing showing: (1) all deductions; (2) the inclusive dates of the period for which the employee is paid; (3) the name of the employee or the employee's social security number; and (4) the name of the employer, provided all deductions made on written orders of the employee may be aggregated and shown as one item.

(C) All required records shall be in the English language and in ink or other indelible form, properly dated, showing month, day and year, and shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. An employee's records shall be available for inspection by the employee upon reasonable request.

(D) Clocks shall be provided in all major work areas or within reasonable distance thereto insofar as practicable.

8. Cash Shortage and Breakage.

No employer shall make any deduction from the wage or require any reimbursement from an employee for any cash shortage, breakage, or loss of equipment, unless it can be shown that the shortage, breakage, or loss is caused by a dishonest or willful act, or by the gross negligence of the employee.

9. Uniforms and Equipment.

(A) When uniforms are required by the employer to be worn by the employee as a condition of employment, such uniforms shall be provided and maintained by the employer. The term "uniform" includes wearing apparel and accessories of distinctive design or color.

NOTE: This section shall not apply to protective apparel regulated by the Occupational Safety and Health Standards Board.

(B) When tools or equipment are required by the employer or are necessary to the performance of a job, such tools and equipment shall be provided and maintained by the employer, except that an employee whose wages are at least two (2) times the minimum wage provided herein may be required to provide and maintain hand tools and equipment customarily required by the trade or craft. This subsection (B) shall not apply to apprentices regularly indentured under the State Division of Apprenticeship Standards.

NOTE: This section shall not apply to protective equipment and safety devices on tools regulated by the Occupational Safety and Health Standards Board.

(C) A reasonable deposit may be required as security for the return of the items furnished by the employer under provisions of subsections (A) and (B) of this section upon issuance of a receipt to the employee for such deposit. Such deposits shall be made pursuant to Section 400 and following of the Labor Code or an employer with the prior written authorization of the employee may deduct from the employee's last check the cost of an item furnished pursuant to (A) and (B) above in the event said item is not returned. No deduction shall be made at any time for normal wear and tear. All items furnished by the employer shall be returned by the employee upon completion of the job.

10. Meals and Lodging.

(A) **"Meal"** means an adequate, well-balanced serving of a variety of wholesome, nutritious foods.

"Lodging" means living accommodations available to the employee for full-time

occupancy which are adequate, decent, and sanitary according to usual and customary standards. Employees shall not be required to share a bed.

(B) Meals or lodging may not be credited against the minimum wage without a voluntary written agreement between the employer and the employee. When credit for meals or lodging is used to meet part of the employer's minimum wage obligation, the amounts so credited may not be more than the following:

	Effective January1,1998	**Effective March 1, 1998**
Lodging		
Rooms occupied alone	$24.25 per week	$27.05 per week
Room shared	$20.00 per week	$22.30 per week
Apartment-two thirds (2/3) of the ordinary rental value, and in no event more than	$290.80 per month	$324.70 per month
Where a couple are both employed by the employer, two-thirds (2/3) of the ordinary rental value, and in no event more than	$430.20 per month	$480.30 per month
Meals:		
Breakfast.	$1.80	$2.05
Lunch	$2.55	$2.85
Dinner	$3.40	$3.80

(C) Meals evaluated as part of the minimum wage must be bona fide meals consistent with the employee's work shift. Deductions shall not be made for meals not received nor lodging not used.

(D) If, as a condition of employment, the employee must live at the place of employment or occupy quarters owned or under the control of the employer, then the employer may not charge rent in excess of the values listed herein.

11. Meal Periods.

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than thirty (30) minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and employee. Unless the employee is relieved of all duty during a thirty (30) minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

(B) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the meal period is not provided.

(C) In all places of employment where employees are required to eat on the premises, a suitable place for that purpose shall be designated.

(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 a 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.

12. Rest Periods.

Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof.

However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 ½) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the rest period is not provided.

13. Change Rooms and Resting Facilities.

(A) Employers shall provide suitable lockers, closets,

(B) or equivalent for the safekeeping of employees' outer clothing during working hours, and when required, for their work clothing during non-working hours. When the occupation requires a change of clothing, change rooms or equivalent space shall be provided in order that employees may change their clothing in reasonable privacy and comfort. These rooms or spaces may be adjacent to but shall be separate from toilet rooms and shall be kept clean.

NOTE: This section shall not apply to change rooms and storage facilities regulated by the Occupational Safety and Health Standards Board.

(C) Suitable resting facilities shall be provided in an area separate from the toilet rooms and shall be available to employees during work hours.

14. Seats.

(A) All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.

(B) When employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties.

15. Temperature.

(A) The temperature maintained in each work area shall provide reasonable comfort consistent with industry-wide standards for the nature of the process and the work performed.

(B) If excessive heat or humidity is created by the work process, the employer shall take all feasible means to reduce such excessive heat or humidity to a degree providing reasonable comfort. Where the nature of the employment requires a temperature of less than 60° F., a heated room shall be provided to which employees may retire for warmth, and such room shall be maintained at not less than 68°.

(C) A temperature of not less than 68° shall be maintained in the toilet rooms, resting rooms, and change rooms during hours of use.

(D) Federal and State energy guidelines shall prevail over any conflicting provision of this section.

16. Elevators.

Adequate elevator, escalator or similar service consistent with industry-wide standards for the nature of the process and the work performed shall be provided when employees are employed four floors or more above or below ground level.

17. Exemptions.

If, in the opinion of the Division after due investigation, it is found that the enforcement of any provision contained in Section 7, Records; Section 12, Rest Periods; Section 13, Change Rooms and Resting Facilities; Section 14, Seats; Section 15, Temperature; or Section 16, Elevators, would not materially affect the welfare or comfort of employees and would work an undue hardship on the employer, exemption may be made at the discretion of the Division. Such exemptions shall be in writing to be effective and may be revoked after reasonable notice is given in writing. Application for exemption shall be made by the employer or by the employee and/or

the employee's representative to the Division in writing. A copy of the application shall be posted at the place of employment at the time the application is filed with the Division.

18. Filing Reports.

(See California Labor Code, Section 1174(a))

19. Inspection.

(See California Labor Code, Section 1174

20. Penalties.

(See Labor Code, Section 1199)

In addition to any other civil penalties provided by law, any employer or any other person acting on behalf of the employer who violates, or causes to be violated, the provisions of this order, shall be subject to the civil penalty of:

(A) Initial Violation -- $50.00 for each underpaid employee for each pay period during which the employee was underpaid in addition to the amount which is sufficient to recover unpaid wages.

(B) Subsequent Violations -- $100.00 for each underpaid employee for each pay period during which the employee was underpaid in addition to an amount which is sufficient to recover unpaid wages.

(C) The affected employee shall receive payment of all wages recovered.

The Labor Commissioner may also issue citations pursuant to Labor Code § 1197.1 for payment of wages for overtime work in violation of this order.

21. Separability.

If the application of any provision of this Order, or any section, subsection, subdivision, sentence, clause, phrase, word, or portion of this Order should be held invalid or unconstitutional or unauthorized or prohibited by statute, the remaining provisions thereof shall not be affected thereby, but shall continue to be given full force and effect as if the part so held invalid or unconstitutional had not been included herein.

22. Posting of Order.

Every employer shall keep a copy of this Order posted in an area frequented by employees where it may be easily read during the work day. Where the location of work or other conditions make this impractical, every employer shall keep a copy of this Order and make it available to every employee upon request.

EXCERPTS FROM THE LABOR CODE

Section 98.6. (a) No person shall discharge or in any manner discriminate against any employee because such employee has filed any bona fide complaint or claim or instituted or caused to be instituted any proceeding under or relating to his rights, which are under the jurisdiction of the Labor Commissioner, or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any rights afforded him.

(b) Any employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated against in the terms and conditions of such employment because such employee has made a bona fide complaint or claim to the division pursuant to this part shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by such acts of the employer. Any employer who willfully refuses to hire, promote, or otherwise restore an employee or former employee who has been determined to be eligible for such rehiring or promotion by a grievance procedure, arbitration or hearing authorized by law, is guilty of a misdemeanor.

Note: Nothing in this act shall be construed to entitle an employee to reinstatement or reimbursement for lost wages or work benefits if such employee willfully misrepresents any facts to support a complaint or claim filed with the Labor Commissioner.

Section 200. As used in this article: (a) "Wages" includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation.

Section 201. If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately.

Section 202. If an employee not having a written contract for a definite period quits his employment, his wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his intention to quit, in which case the employee is entitled to his wages at the time of quitting.

Section 226. (a) Every employer shall semimonthly, or at the time of each payment of wages, furnish each of his or her employees either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately when wages are paid by personal check or cash, an itemized statement in writing showing: (1) gross wages earned; (2) total hours worked by each employee whose compensation is based on an hourly wage; (3) all deductions; provided, that all deductions made on written orders of the employee may be aggregated and shown as one item; (4) net wages earned; (5) the inclusive dates of the period for which the employee is paid; (6) the name of the employee and his or her social security number; and (7) the name and address of the legal entity which is the employer.

Section 1174. Every person employing labor in this state shall:

(a) Furnish to the commission, at its request, reports or information which the

commission requires to carry out this chapter. Such reports and information shall be verified if required by the commission or any member thereof.

(b) Allow any member of the commission or the employees of the Division of Labor Standards Enforcement free access to the place of business or employment of such person to secure any information or make any investigation which they are authorized by this chapter to ascertain or make. The commission may inspect or make excerpts, relating to the employment of employees, from the books, reports, contracts, payrolls, documents, or papers of such person.

(c) Keep a record showing the names and addresses of all employees employed and the ages of all minors.

(d) Keep at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by, and the wages paid to, employees employed at the respective plants or establishments, and which shall be kept in accordance with rules established for this purpose by the commission, but in any case shall be kept on file for not less than two years. (1937 ch. 90, 1945 ch.1431, 1972 ch. 1122, 1979 ch. 373, 1990 ch. 1379)

Section 1191. For any occupation in which a minimum wage has been established, the commission may issue to an employee who is mentally or physically handicapped, or both, a special license authorizing the employment of the licensee for a period not to exceed one year from date of issue, at a wage less than the legal minimum wage. The commission shall fix a special minimum wage for the licensee. Such license may be renewed on a yearly basis.

Section 1191.5. Notwithstanding the provisions of Section 1191, the commission may issue a special license to a nonprofit organization such as a sheltered workshop or rehabilitation facility to permit the employment of employees who have been determined by the commission to meet the requirements in Section 1191 without requiring individual licenses of such employees. The commission shall fix a special minimum wage for such employees. The special license for the nonprofit corporation shall be renewed on a yearly basis, or more frequently as determined by the commission.

Section 1199. Every employer or other person acting either individually or as an officer, agent, or employee of another person is guilty of a misdemeanor and is punishable by a fine of not less than one hundred dollars ($100) or by imprisonment for not less than 30 days, or by both, who does any of the following:

(a) Requires or causes any employee to work for longer hours than those fixed, or under conditions of labor prohibited by an order of the commission.

(b) Pays or causes to be paid to any employee a wage less than the minimum fixed by an order of the commission.

(c) Violates or refuses or neglects to comply with any provision of this chapter or any order or ruling of the commission.

Section 1391.2. (a) Notwithstanding Sections 1391 and 1391.1, any minor under 18 years of age who has been graduated from a high school maintaining a four-year course above the eighth grade of the elementary schools, or who has had an equal amount of education in a private school or by private tuition, or who has been awarded a certificate of proficiency pursuant to Section 48412 of the Education Code, may be employed for the same hours as an adult may be employed in performing the same work.

(b) Notwithstanding the provisions of the orders of the Industrial Welfare Commission, no employer shall pay any minor described in this section in his employ at wage rates less than the rates paid to adult employees in the same establishment for the same quantity and quality of the same classification of work; provided, however, that nothing herein shall prohibit a variation of rates of pay for such minors and adult employees engaged in the same classification of work based upon a difference in seniority, length of service, ability, skill, difference in duties or services performed, whether regularly or occasionally, difference in the shift or time of day worked, hours of work, or other reasonable differentiation, when exercised in good faith.

Section 2800. An employer shall in all cases indemnify his employee for losses caused by the employer's want of ordinary care.