S224853

IN THE SUPREME COURT OF CALIFORNIA

JENNIFER AUGUSTUS et al.,
Plaintiffs and Respondents,

v.

ABM SECURITY SERVICES, INC.,
Defendant and Appellant.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION ONE
CASE NOS. B243788 & B247392

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF; AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF APPELLANT ABM SECURITY SERVICES, INC.

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APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF APPELLANT ABM SECURITY SERVICES, INC.

Pursuant to California Rules of Court, rule 8.520(f), the Chamber of Commerce of the United States of America (the Chamber) and the National Association of Manufacturers (NAM) (collectively, amici) respectfully request permission to file the attached amici curiae brief in support of defendant and appellant ABM Security Services, Inc.[1]

[1] Amici certify that no person or entity other than amici, their members, and their counsel authored or made any monetary (continued...)

The Chamber is the world's largest federation of business, trade, and professional organizations, representing 300,000 direct members and indirectly representing the interests of more than three million businesses and corporations of every size, from every sector, and in every geographic region of the country. In particular, the Chamber has many members located in California and others who conduct substantial business in the State and have a significant interest in the sound and equitable development of California employment law. The Chamber routinely advocates for the interests of the business community in courts across the nation by filing amicus curiae briefs in cases involving issues of similar vital concern. In fulfilling that role, the Chamber has appeared many times before this Court, the California Courts of Appeal, the United States Supreme Court, and the supreme courts of various other states.

NAM is the largest association of manufacturers in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. The manufacturing industry employs more than 12 million men and women, contributes roughly $2.1 trillion to the United States economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of private-sector research and development in the United States. NAM is the leading advocate for laws and policies that help manufacturers compete in the global economy and create

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(...continued)
contribution intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.520(f)(4).)

jobs throughout the United States. NAM often advocates before state and federal courts by filing amicus curiae briefs in cases, like this one, involving issues of paramount concern to the business community.

This case is of significant interest to amici because many of their members do business in California and this appeal calls on the Court to decide a question of fundamental importance to every California employer and nonexempt employee—what constitutes a legally required rest period? California law requires the vast majority of California employers to authorize and permit paid rest periods *every* workday. Businesses that do not comply can face crushing financial liability, as exemplified by the nearly $90 million awarded to plaintiffs in this case.

California employers and employees need a clear definition of the term "rest period." This Court has the opportunity to clarify whether on-call rest periods are permitted under the Labor Code and the Wage Orders promulgated by the Industrial Welfare Commission (IWC). Although the defendant in this appeal provides security services, this Court's interpretation of the law governing rest breaks could well have broad implications extending far beyond the security services industry, given the wide range of California employers (many of whom are amici's members) who are required to provide rest breaks.

Amici believe this Court would benefit from additional briefing on whether on-call rest breaks comply with California law, especially with respect to the interplay between the relevant provisions of the Wage Orders promulgated by the Industrial

Welfare Commission (IWC) and the Labor Code, the legislative history that should guide this Court's analysis of those provisions, and the serious policy implications for the broad swath of industries outside of the security sector that would flow from a rule prohibiting on-call rest breaks. Accordingly, amici request that this Court accept and file the attached amici curiae brief.

November 23, 2015

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AMICI CURIAE BRIEF

INTRODUCTION

None of us can know precisely when we may be required to confront exigencies, emergencies, or other unpredictable crises, and employers are no different. Such events can arise during an employee's work shift just as readily as they do outside the workplace. Imminent threats to life and property may require that a security guard remain on-call. A patient's sudden distress might call for a nurse to provide unexpected assistance. Skilled maintenance mechanics might need to return to the production floor, assembly line, or control room as soon as complex machinery breaks down. An employer's ability to call upon resting employees to assist in times of crisis is vital to the health of California's economy and the safety of its citizens.

The trial court here, however, concluded that every on-call rest break policy in the state is unlawful. To uphold such a ruling would force employers to ensure that their employees' rest breaks could never be interrupted, even in emergencies. This interpretation of California rest break law is wrong as a matter of statutory interpretation and contravenes public policy.

As the Court of Appeal correctly held, requiring employees to remain on-call during rest breaks does not violate Labor Code

section 226.7's[2] prohibition on performing "work" during rest breaks. The term "work," by its plain meaning, requires physical or mental exertion on an employer's behalf and on-call status does not entail such exertion.

That conclusion is confirmed by the relevant Wage Orders promulgated by the Industrial Welfare Commission (IWC). Section 226.7 looks to the IWC's Wage Orders as defining the scope of valid rest breaks, and these Wage Orders *allow* on-call rest periods. The plain language and history of the order at issue here—Wage Order No. 4[3]—shows that the IWC never intended to mandate completely off-duty rest periods for employees who work alone on a shift and who have ample time to rest because of the nature of their work. The IWC has never backed away from this position, and has instead affirmed that Wage Order No. 4 was not intended to preclude all on-call rest breaks.

During *meal* breaks, by contrast, the Wage Orders call for employees to be "relieved of all duty" unless the nature of the work prevents that relief. This distinction in the Wage Orders' treatment of meal and rest breaks confirms that, while employees generally must be "relieved of all duty" during meal breaks, there is no similar restriction for rest breaks—thus permitting on-call rest breaks.

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[2] All further statutory references are to the Labor Code unless otherwise indicated.

[3] The parties agree that Wage Order No. 4 governs the employees in this case. (See OBOM 21; ABOM 13.)

The legislative history of section 226.7 likewise confirms that the Legislature never intended to prohibit on-call rest breaks when it specified in section 226.7 that employers may not require an employee "to work" during a rest period. Section 226.7 was enacted to provide a civil remedy to enforce the *existing* Wage Orders. (See *Murphy v. Kenneth Cole Productions, Inc.* (2004) 40 Cal.4th 1094, 1107-1108 (*Murphy*) [section 226.7, as enacted into law, "intended to track the existing provisions of the IWC wage orders regarding meal and rest periods"].) As previously noted, the existing Wage Orders permit on-call rest breaks.

The legislative history of sections 512 and 516 also corroborate that the Legislature never meant to alter the IWC's decision to permit on-call rest breaks in the Wage Orders. The Legislature enacted section 512 and amended section 516 to enshrine the IWC's pre-existing safeguards for meal breaks and statutorily imposed certain restrictions on meal break waivers. But sections 512 and 516 placed no such restriction whatsoever on the IWC's continuing authority to regulate *rest* breaks. As sections 512 and 516 demonstrate, when the Legislature circumscribes the IWC's authority to regulate breaks, it does so explicitly. Yet the Legislature has never altered the IWC's authorization of on-call rest breaks in Wage Order No. 4.

The IWC's and Legislature's decision not to prohibit on-call rest breaks is unsurprising because such a prohibition is simply unworkable. Especially in the modern age, cell phones and other devices permitting instant communication create an ever-present possibility that an employee's break will be interrupted by someone

with a work-related matter. This is particularly true for large companies that have no reasonable method of informing their workforce that a specific employee is on a rest break and should not be texted, called, or otherwise interrupted. If California law were construed to mean that employees are performing "work" whenever there is even the slightest possibility they might be interrupted by another employee during a rest break, employers would have little choice but to ban the use of cell phones and other electronic devices that might facilitate work-related communications with the employees during rest breaks. Such a ban would obviously interfere *more* with employees' autonomy than a policy permitting on-duty rest breaks.

Moreover, the nature of the work performed in a wide variety of industries today leaves employers with little choice but to allow for the possibility that resting employees may need to be called back to work in order to handle emergencies. Whether the employee is a security guard, a nurse, a medical technician, a power plant mechanic, or a control room operator, the skills of particular employees may be needed at a moment's notice to prevent serious injury to life and property. As a matter of public policy, such employees should be permitted to remain available to respond in an emergency or other exigency, rather than having their responsiveness limited by on-call rest break prohibitions. Certainly, rest breaks must be respected, and in the limited circumstance when an employee is called back from a break, the employee must be both appropriately compensated and entitled to reschedule the missed break. But adopting a policy that would render all on-call

rest breaks unlawful based on the mere *possibility* that an employee *might* be interrupted is unworkable and dangerous, both to the employees as well as to the citizens and property entrusted into their care.

LEGAL ARGUMENT

I. THE PLAIN LANGUAGE OF SECTION 226.7 AND WAGE ORDER NO. 4 SHOWS THAT NEITHER PROHIBITS ON-CALL REST BREAKS.

Section 226.7 provides that "[a]n employer shall not require an employee ***to work*** during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health." (§ 226.7, subd. (b), emphasis added.)

Under the plain meaning of section 226.7, the "work" that is prohibited during a rest break is any "physical or mental exertion" on an employer's behalf. (See *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123* (1944) 321 U.S. 590, 598 [64 S.Ct. 698, 88 L.Ed. 949] [work is "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business"], superseded by statute as stated in *IBP, Inc. v. Alvarez* (2008) 546 U.S. 2126 [126 S.Ct. 514, 163 L.Ed.2d 288];

Christie v. Commercial Casualty Ins. Co. (1935) 6 Cal.App.2d 710, 716 ["Among the preferred definitions of the term 'work' " in modern dictionaries "is that it consists of 'physical or intellectual effort' "]; Black's Law Dict. (9th ed. 2009) p. 1742 [defining work as "[p]hysical and mental exertion to attain an end, esp. as controlled by and for the benefit of an employer; labor"]; American Heritage Dict. (2d coll. ed. 1982) p. 1390 [defining "work" as "[p]hysical or mental effort or activity directed toward the production or accomplishment of something"]; Merriam-Webster's Collegiate Dict. (11th ed. 2007) p. 1492 [defining "work" as "sustained physical or mental effort to overcome obstacles and achieve an objective or result"].)

In turn, section 226.7, by its terms, looks to the IWC Wage Orders to define whether an employer is requiring an employee to engage in this physical or mental exertion (i.e., "work") during a rest break. (See *Murphy*, *supra*, 40 Cal.4th at pp. 1107-1108 [explaining that section 226.7 was "intended to track the existing provisions of the IWC wage orders regarding meal and rest periods"]; *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1018 (*Brinker*) [explaining that employers fail to comply with section 226.7's prohibition against requiring employees " 'to work' " during rest periods if employers violate a Wage Order's requirements for rest periods].)

Wage Order No. 4provides:

> Every employer shall authorize and permit all employees to take rest periods . . . at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. . . . Authorized rest period time shall

be counted as hours worked for which there shall be no deduction from wages.

(Cal. Code Regs., tit. 8, § 11040, subd. (12)(A).)

Courts " 'construe wage orders, as quasi-legislative regulations, in accordance with the standard rules of statutory interpretation.' " (*Sheppard v. North Orange County Regional Occupational Program* (2010) 191 Cal.App.4th 289, 300.) When interpreting a statute, courts "turn first to the statutory language, since the words the Legislature chose are the best indicators of its intent." (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1152.) Here, nothing in the plain language of Wage Order No. 4 prohibits on-call rest breaks or otherwise requires an employer to relieve an employee of all duty during a rest break.

By contrast, another provision in Wage Order No. 4 that governs meal breaks *does* circumscribe the availability of on-duty meal breaks:

> 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 . . . . ***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.

(Cal. Code Regs., tit. 8, § 11040, subd. (11)(A), emphasis added.)

In short, whereas the provision governing meal periods generally requires employers to relieve employees of all duties and

curtails the availability of on-duty meal breaks,[4] the related provision governing rest breaks includes no such limitations. This meal period provision shows that if the IWC had wanted to circumscribe the availability of on-call rest periods, it knew how to do so. (See, e.g., *People v. Rener* (1994) 24 Cal.App.4th 258, 267 [when the Legislature wants to impose limitations, it knows how to do so].)

That Wage Order No. 4 includes both of these related break provisions but places restrictions against on-duty breaks only in the subdivision governing meal breaks and omits any such limitation from the subdivision governing rest breaks confirms that Wage Order No. 4 does not prohibit on-call rest breaks. (See *Guedalia v. Superior Court* (1989) 211 Cal.App.3d 1156, 1164 [" ' "The fact that a provision of a statute on a given subject is omitted from other statutes relating to a similar subject is indicative of a different legislative intent for each of the statutes. [Citations.] Where a statute with reference to one subject contains a certain vital word, omission of that word from a similar statute on the same subject is significant to show a different intention." ' "].)

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[4] It is important to note, however, that even under circumstances where the "relieved of all duty" standard applies to meal breaks, the mere possibility that an employee may be called back to work does not invalidate that meal break. (See ABOM 26-27; see also Cal. Dept. of Industrial Relations, DLSE Opn. Letter No. 1993.03.31 (Mar. 31, 1993) p. 4 <http://www.dir.ca.gov/dlse/opinions/1993-03-31.pdf> [as of Nov. 20, 2015]; Cal. Dept. of Industrial Relations, DLSE Opn. Letter No. 1994.02.16 (Feb. 16, 1994) p. 4 at <http://www.dir.ca.gov/dlse/opinions/1994-02-16.pdf> [as of Nov. 20, 2015], emphasis added.)

Plaintiffs concede that "the wage order does not expressly prohibit on-duty rest breaks," but assert that "by default, all breaks must be duty free." (OBOM 26.) In other words, plaintiffs argue that Wage Order No. 4 must necessarily prohibit on-call rest breaks because it is silent about whether on-call rest breaks are permitted. But silence generally creates the opposite "default" inference. (See *Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182, 1197, fn. 19 ["total silence" indicates "an absence of intent to affect that subject"]; see generally *Morcos v. Board of Retirement* (1990) 51 Cal.3d 924, 927-928 [interpreting a statute that allowed for the recovery of trial attorney fees, but was silent as to whether appellate fees could be recovered, to permit recovery of appellate fees].) Thus, Wage Order No. 4's silence concerning whether an employer may authorize and permit on-call rest breaks indicates that the order never meant to prohibit such breaks.

At any rate, as we explain below, the history of Wage Order No. 4 confirms that the IWC never intended to prohibit on-call rest breaks.

II. THE LEGISLATIVE HISTORY OF THE PROVISIONS GOVERNING REST BREAKS CONFIRMS THAT CALIFORNIA LAW PERMITS ON-CALL REST BREAKS.

A. California has vested the IWC with the power to regulate employees' hours, wages, and working conditions.

The IWC " 'is the state agency empowered to formulate regulations (known as wage orders) governing employment in the State of California.' " (*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 581.)

The Legislature created the IWC in 1913, "delegating to it broad authority to regulate the hours, wages and labor conditions of women and minors." (*Martinez v. Combs* (2010) 49 Cal.4th 35, 54 (*Martinez*).) The Legislature also "propos[ed] to the voters a successful constitutional amendment confirming the Legislature's authority to proceed in that manner." (*Ibid.*)

"The IWC's initial statutory duty under the 1913 act was to 'ascertain the wages paid, the hours and conditions of labor and employment in the various occupations, trades, and industries in which women and minors are employed in the State of California, and to make investigations into the comfort, health, safety and welfare of such women and minors.' " (*Martinez, supra*, 49 Cal.4th at p. 54.) "If, after investigation, the IWC determined that the wages paid to women and minors in any industry were 'inadequate

to supply the cost of proper living, or the hours or conditions of labor [were] prejudicial to the health, morals or welfare of the workers,' the IWC was to convene a ' "wage board" ' of employers and employees." (*Id.* at pp. 54-55.) "Based on the wage board's report and recommendations, and following a public hearing, the commission was to issue wage orders fixing for each industry '[a] minimum wage to be paid to women and minors . . . and the standard conditions of labor [citation]." (*Id.* at p. 55.)

The laws defining the IWC's powers and duties remain essentially the same today as in 1913, with a few important exceptions that *expanded* the IWC's authority: "First, the voters have amended the state Constitution to confirm the Legislature's authority to confer on the IWC '*legislative, executive, and judicial powers.*' " (*Martinez, supra,* 49 Cal.4th at p. 55, fn. omitted.) "Second, the Legislature has expanded the IWC's jurisdiction to include all employees, male and female, in response to federal legislation barring employment discrimination because of sex [citation]." (*Ibid.*) Third, " 'while retaining the authorizing language of [the 1913 act],' " the Legislature has " 'restated the commission's responsibility in even broader terms' " [citation], charging the IWC with the 'continuing duty' to ascertain the wages, hours and labor conditions of 'all employees in this state,' to 'investigate [their] health, safety, and welfare,' to 'conduct a full review of the adequacy of the minimum wage at least once every two years' [citation], and to convene wage boards and adopt new wage orders if the commission finds 'that wages paid to employees

may be inadequate to supply the cost of proper living [citation].' " (*Ibid.*)

"Today 18 wage orders are in effect, 16 covering specific industries and occupations, one covering all employees not covered by an industry or occupation order, and a general minimum wage order amending all others to conform to the amount of the minimum wage currently set by statute." (*Martinez, supra,* 49 Cal.4th at p. 57, fns. omitted.)

These Wage Orders "are legislative regulations specifying minimum requirements with respect to wages, hours and working conditions." (*Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 838 (*Mendiola*).) "The Legislature defunded the IWC in 2004, however its wage orders remain in effect." (*Murphy, supra,* 40 Cal.4th at p. 1102, fn. 4.)

B. The history of Wage Order No. 4 demonstrates that the IWC intended to allow on-call rest breaks.

IWC provisions regulating rest periods date back to 1919, when women and minors were "permitted to use . . . seats when not engaged in the active duties of their occupation." (Declaration of Theane Evangelis in Support of ABM's Motion for Judicial Notice, exh. F.) Thereafter, in 1932, the IWC required a rest period for women and minors during work that required standing. (*Ibid.*) By 1947, Wage Orders for various industries "clearly" provided for rest breaks, requiring paid 10-minute rest periods for each four hours of

work. (*Ibid.*; see also Request for Judicial Notice, filed concurrently herewith (RJN), exh. D, p. 2 [IWC's 1976 Statement of Findings].)

In 1952, the IWC amended Wage Order No. 4—which generally applies to "all persons employed in professional, technical, clerical, mechanical, and similar occupations whether paid on a time, piece rate, commission, or other basis" (Cal. Code Regs., tit. 8, § 11040, subd. (1))—to specify that compensated rest periods need not be authorized for women and minors who worked less than three and one-half hours in a day. (Evangelis Decl., exh. F.) While additional provisions have been added over the years, the basic rest period requirement of Wage Order No. 4 has remained nearly unchanged since 1952. (See Evangelis Decl., exh. C.)

During the process of adopting the 1952 revisions to Wage Order No. 4, the IWC appointed a wage board to take public input, hold hearings and suggest revisions. (See RJN, exh. A, pp. 4-5 [IWC meeting minutes (Feb. 16, 1951) unanimously moving to "open" Wage Order No. 4, among others, to revise provisions relating to working conditions and the minimum wage].) This wage board recommended a revision to explicitly circumscribe "on-duty" meal periods, but with regard to Wage Order No. 4's rest period provision, the wage board simultaneously recommended "[***n***]***o*** specific changes in wording" because the board thought it best to continue to "allow for an 'on-duty' rest period when the nature of the work prevents an employee from being relieved of all duties, and where the provision of the section is being substantially met." (RJN, exh. B, p. 10, emphasis added [IWC Summary of Wage Board Recommendations (Dec. 12, 1951)].)

In response, the IWC stated "that the Commission did not intend a completely off-duty rest period to be applicable in the case of an employee who is alone on a shift and has ample time to rest because of the nature of the work," such as "a night switchboard operator on a small board, a night hotel clerk, etc." (Evangelis Decl., exh. D, p. 34.) As the IWC explained, "[i]f employees in such positions are able to rest on the job it is not intended that the employer provide a special relief employee." (*Ibid.*)

Plaintiffs argue that "[t]he IWC's 1952 comment appears to refer to the availability of exemptions from the wage order's rest-break requirements, which already included the exemption process at that time." (RBOM 3.) This is incorrect. The IWC placed the 1952 wage board recommendations relating to rest breaks under the provision of the wage order that specifically regulated rest periods, rather than under the different section relating to exemptions. (Compare RJN, exh. B, p. 10 [recommending that enforcement of section "XI, Rest Periods" "allow for an 'on duty' rest period"] with RJN, exh. B, p. 13 [for section "XXV, Exemptions. No change recommended by any board"].) The IWC thus responded to the wage board's recommendations for the regulation of rest breaks by addressing the very provision in the Wage Order that governed rest breaks rather than the distinct section governing exemptions.

Notably, the IWC's 1952 comment regarding the propriety of on-duty rest breaks was "unanimously" adopted by all members of the IWC, including *both* the employer and employee representatives. (Evangelis Decl., exh. D, p. 31-B.) Clearly, an on-duty rest break was intended to be authorized when employees

could rest while on-duty, such as in the case of an on-call security guard.

In fact, during public hearings before the adoption of the 1952 revisions, an IWC Commissioner specifically referenced a "watchman" as the type of employee whose work could require remaining on-duty during a break. (RJN, exh. C, p. 102:5-9 [Reporters Transcript of Proceedings of the IWC Public Hearing on January 25 and 26, 1952, Commissioner Stoneman, questioning W. A. Gregory, representing Southern Pacific Company "I could see where you might pay a watchman 8 hours if he took 20 minutes to eat on the company's time. Maybe, a telegrapher or someone at the window on duty late at night some time when there was no relief, that might be an occasion."].)[5]

Since then, the IWC has never wavered either from its intent to permit on-call rest breaks, or its emphasis that, in requiring employers to provide rest breaks, it intended to provide relief only from long periods of physical and mental exertion. For example, in 1976,[6] the IWC explained that "[t]he Commission sees no reason to

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[5] The particular question posed during this testimony referenced Wage Order No. 9, which has an identical rest period provision, except for an exemption for public transit bus drivers added in 2003. (See Cal. Code Regs, tit. 8, § 11090, subd. (12); see also Wage Order No. 9, subd. (12)(C) (July 1, 2014) <https://goo.gl/tkIoMT> [as of Nov. 20, 2015] [amended in 2003 to include subdivision 12(C)].)

[6] In 1976, the IWC adopted revisions to its Wage Orders, which for the first time applied to *all* employees; in the process of doing so, the IWC appointed 15 wage boards—one for each industry or occupational group covered by an order—to take public input, hold hearings and suggest revisions. (See RJN, exh. D, p. 4.)

change its earlier findings that the general health and welfare of employees ***requires periods of rest during long stretches of physical and/or mental exertion***." (RJN, exh. D, p. 14, emphasis added.)

Plaintiffs argue that if on-call rest breaks were permissible under the Wage Orders, the IWC would not have needed to carve out "a limited exception from the general requirement of off-duty rest breaks" for certain care-givers under Wage Order No. 5. (OBOM 29; see also RBOM 8, fn. 5.) Not so.

Wage Order No. 5 provides, in pertinent part:

> [E]mployees with direct responsibility for children . . . and employees of 24 hour residential care facilities for elderly, blind or developmentally disabled individuals may, without penalty, require an employee to remain on the premises and maintain general supervision of residents during rest periods if the employee is in sole charge of residents.

(Cal. Code Regs., tit. 8, § 11050, subd. (12)(C).)

Maintaining "sole charge" of children or elderly or disabled patients qualifies as "work" under any definition of the word. Likewise, monitoring children or patients requiring 24-hour care requires the sort of "physical and mental exertion" that merely keeping a pager turned on during an on-call rest break does not. That the IWC has made an exception allowing for active care-giver "work" during rest breaks in Wage Order No. 5 does not mean that merely being *on-call* during a rest break is impermissible under Wage Order No. 4.

C. The Legislature never intended to circumscribe the IWC's authority to allow on-call rest breaks.

Although the IWC's Wage Orders had required rest breaks after specified hours of work, before the year 2000 the "only remedy available to employees . . . was injunctive relief aimed at preventing future abuse." (*Murphy, supra*, 40 Cal.4th at p. 1105.) But that year the IWC added "a pay remedy to the wage orders," providing that employers who failed to provide rest periods " 'shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day' that the period is not provided." (*Id.* at pp. 1105-1106.)

"At the same time that the IWC was adding the pay remedy, Assemblymember Darrell Steinberg introduced Assembly Bill No. 2509 (1999-2000 Reg. Sess.) (Bill No. 2509) to codify a pay remedy via proposed section 226.7." (*Murphy, supra*, 40 Cal.4th at p. 1106.) This bill then went through several amendments. (See *id.* at pp. 1106-1107.)

The amended bill, in the form it "ultimately was signed into law" in 2000 as section 226.7, "intended to track the existing provisions of the IWC wage orders regarding meal and rest periods." (*Murphy, supra*, 40 Cal.4th at p. 1107.) Specifically, section 226.7 affirmed the Wage Orders' prohibition against employers requiring employees " 'to work' " during a rest break, and looked to the Wage Orders to define the scope of those breaks. (*Id.* at p. 1102 [explaining that, as enacted in 2000, section 226.7, subdivision (a), provided: " 'No employer shall require any employee to work during

any meal or rest period *mandated by an applicable order of the Industrial Welfare Commission*' " (emphasis added)].) As explained above, Wage Order No. 4's provisions—i.e., the very provisions to which section 226.7 looked to define the scope of rest periods—permitted on-call rest breaks. (*Ante*, pp. 9-13.)

Nothing in section 226.7's legislative history suggests that it was intended to expand an employer's obligations with regard to rest breaks or otherwise disturb the IWC's well-established regulatory scheme. (See *Murphy*, *supra*, 40 Cal.4th at p. 1107 [section 226.7, as enacted into law, "intended to track the existing provisions of the IWC wage orders regarding meal and rest periods"]; see also *Brinker*, *supra*, 53 Cal.4th at p. 1037 ["we begin with the assumption the Legislature did not intend to upset existing rules, absent a clear expression of contrary intent"].)

To the contrary, section 226.7 was intended to give teeth to the *existing* IWC Wage Orders. The Senate Judiciary Committee Report (Report) for the bill that enacted section 226.7 included a list of "CHANGES TO EXISTING LAW." (Evangelis Decl., exh. B, pp. 3-8.) According to the Report, "[e]xisting law authorizes the Industrial Welfare Commission to adopt orders respecting wages, hours, and working conditions," and "[u]nder this authority, IWC Wage Orders require meal and rest periods." (Evangelis Decl., exh. B, p. 6.) The Report then explained that the proposed legislation would change existing law by making "any employer that requires any employee to work during a meal or rest period *mandated by an order of the commission* subject to a civil penalty," and that "[a]n aggrieved employee could bring an administrative or

civil action for recovery of these amounts." (Evangelis Decl., exh. B, pp. 6-7, emphasis added.) Similarly, in the comment section, the Report identified the "stated need" for section 226.7 to be "lax enforcement." (Evangelis Decl., exh. B, p. 8.) The Report corroborates that, in enacting section 226.7, the Legislature believed it was changing existing law solely by affording civil enforcement and compensation for violations of existing Wage Orders, not by expanding on the IWC's provisions regulating rest breaks. (See *Murphy*, *supra*, 40 Cal.4th at pp. 1107-1108.)

Furthermore, in the years since enacting it, the Legislature has amended section 226.7 twice. On neither occasion has the Legislature changed existing law to curtail the on-call rest breaks that have long been permitted by the IWC.

In 2013, the Legislature amended section 226.7 to extend existing rest period protections to include heat recovery periods, as defined under applicable statutes, regulations, or orders by the Occupational Safety and Health Standards Board or the Division of Occupational Safety and Health. (See RJN, exh. E [Aug. 21, 2013 Assembly Appropriations Committee Summary of the bill amending section 226.7].) These 2013 amendments to section 226.7 did not affect the extent to which section 226.7 looks to the IWC's rest break provisions to define the scope of the rest breaks mandated by the IWC. (See Stats. 2013, ch. 719, §1.)

In 2014, the Legislature amended section 226.7 to add a subdivision that deems a "rest or recovery period mandated pursuant to a state law" to "be counted as hours worked, for which there shall be no deduction from wages." (Stats. 2014, ch. 72, § 1.)

But this amendment likewise did not change existing law. The IWC Wage Orders have long required "rest period time" to "be counted as hours worked, for which there shall be no deduction from wages" (Cal. Code Regs., tit. 8, § 11040, subd. (12)(A)), even as they simultaneously have permitted on-call rest breaks (*ante*, pp. 16-20). Thus, this amendment to section 226.7 was simply "declaratory of existing law," as it expressly stated. (Stats. 2014, ch. 72, § 1; Lab. Code, § 226.7, subd. (d).)

"Because the Legislature is presumed to be aware of a long-standing administrative practice, the [Legislature]'s failure to substantially modify a statutory scheme is a strong indication that the administrative practice is consistent with the Legislature's intent." (*Sheet Metal Workers' International Assn., Local 104 v. Duncan* (2014) 229 Cal.App.4th 192, 207.) "If the Legislature believed the formulation in the wage orders [did] not accurately reflect" the limitations set by section 226.7, "it could have amended the statute to clarify this intent. The Legislature has never done so, suggesting the wage orders reflect" an accurate interpretation of California law. (*United Parcel Service Wage & Hour Cases* (2011) 196 Cal.App.4th 57, 68.) That the Legislature has repeatedly amended section 226.7 without repealing or otherwise circumscribing the IWC's long-standing position permitting on-call rest breaks is therefore a strong indication that the Legislature never intended for section 226.7 to prohibit on-call rest breaks.

Moreover, the Legislature's corresponding enactment of sections 512 and 516 further confirms that, in enacting section

226.7, the Legislature never meant to limit the IWC's authority to permit on-call rest breaks in the Wage Orders.

In 1999, "the Legislature first regulated meal periods, previously the exclusive province of the IWC," by enacting section 512. (*Brinker, supra*, 53 Cal.4th at p. 1036.) At the time the Legislature enacted section 512, it was concerned by the IWC's "rollback of employee protections" in the unrelated area of overtime compensation. (*Id.* at pp. 1037-1038.) Consequently, the Legislature wrote into section 512 "various guarantees that previously had been left to the IWC, including meal break guarantees." (*Ibid.*) In doing so, section 512 imposed restrictions on certain meal break waivers. (See § 512, subd. (a).)

Moreover, in 2000, the Legislature amended section 516 to "create an exception" to the IWC's authority to "regulate break periods" by "bar[ring] the use of this [IWC] power to diminish section 512's protections" for meal breaks. (*Brinker, supra*, 53 Cal.4th at pp. 1042-1043; see also *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1137 ["an amendment to section 516" in 2000 "replaced the opening phrase 'Notwithstanding any other provision of law' with 'Except as provided in Section 512 . . . .' "].)

In short, after the IWC began rolling back worker protections for overtime compensation, the Legislature enacted section 512 to enshrine safeguards for meal breaks into the Labor Code and amended section 516 to circumscribe the IWC's authority to rollback this protection for meal breaks. (See *Brinker, supra*, 53 Cal.4th at pp. 1034-1043.)

But section 512 relates solely to the limitations on meal periods. (See § 512.) Likewise, section 516 places restrictions on the IWC's authority to circumvent the limitations on meal breaks set by section 512, but preserves the IWC's authority to regulate breaks in every other respect. (See *Brinker*, *supra*, 53 Cal.4th at pp. 1042-1043 (section 516 "preserved the IWC's authority to regulate break periods."); see also § 516, subd. (a) ["*Except as provided in Section 512*, the Industrial Welfare Commission may adopt or amend working condition orders with respect to *break periods*, meal periods, and days of rest for any workers in California consistent with the health and welfare of those workers" (emphasis added)].) Unlike the IWC's circumscription of on-duty meal breaks, the IWC has long permitted on-call rest breaks and has never backed away from that position. That the Legislature enacted section 226.7 to track existing Wage Order provisions governing rest breaks without curtailing the IWC's long-standing decision to permit on-call rest breaks confirms that the Legislature, in enacting sections 226.7, 512, and 516, never intended to restrict the IWC's authorization of on-call rest breaks.

D. Plaintiffs' misguided focus on whether or not on-call rest breaks constitute compensable "hours worked" provides no guidance here.

Plaintiffs' argument that merely being on-call constitutes "work" under section 226.7 depends upon equating this statute's prohibition against requiring employees "to work" during rest

breaks with the manner in which employees must be compensated for "hours worked" in accordance with the Wage Orders. (See OBOM 4, 42.)

Plaintiffs are mistaken. The definition of "hours worked" pertains to the question of which portions of an employee's time can be counted in the calculation of the employee's compensation. (See, e.g., *Mendiola, supra*, 60 Cal.4th at pp. 838-841 [whether portion of employee's time counts as "hours worked" relates to whether employee must be compensated for that time]; *See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889, 905 ["how an employer calculates the number of hours worked" pertains to the calculation of the amount of "wages owed"].) As explained above (*ante*, pp. 10-11, 23-24), the time spent on rest breaks is *always* compensable time under the definition of "hours worked," irrespective of whether an employee is on-call or not. (See Cal. Code Regs., tit. 8, § 11040, subd. (12)(A) ["Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages"]; accord, § 226.7, subd. (d).) In other words, the Wage Orders expressly provide that all rest break time, whether on-call or not, counts as "hours worked" when employers calculate the amount of an employee's compensation. Thus, whether rest break time satisfies the definition of compensable "hours worked" (it always does) cannot be determinative of whether an on-call rest break constitutes "work" for purposes of section 226.7.

III. IN THE MODERN COMMUNICATIONS AGE, A PROHIBITION AGAINST ON-CALL REST BREAKS IS UNWORKABLE AND CONTRARY TO PUBLIC POLICY.

A. The mere possibility that a work-related communication might interrupt an employee's rest break cannot serve as the test for whether an employee is working during a break.

Plaintiffs assert that "rest breaks must necessarily be 'off duty' periods where the employee is relieved of all duties." (OBOM 25.) Not only is this interpretation of rest break law at odds with Wage Order No. 4 and the Labor Code for the reasons previously explained, it cannot be squared with the reality of modern life.

The great majority of Americans carry their cell phones with them at all times, making them reachable throughout the day, both personally and professionally. Cell phone use is not only ubiquitous in present-day society but, for many has become essential to full cultural and economic participation. (See *Riley v. California* (2014) 573 U.S.__ [134 S.Ct. 2473, 2484, 189 L.Ed.2d 430] ["modern cell phones . . . are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy"]; *U.S. v. Jones* (2012) 565 U.S.__ [132 S.Ct. 945, 963, 181 L.Ed.2d 911] ["as of June 2011, it has been reported, there were more than 322 million wireless devices in use in the United States"]; *City of Ontario, Cal. v. Quon* (2010) 560 U.S. 746, 760 [130 S.Ct. 2619, 2630, 177 L.Ed.2d 216]

["Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification"]; *United States v. Cooper* (N.D.Cal., Mar. 2, 2015, No. 13-cr-00693-SI-1) 2015 WL 881578, at p. *8 [nonpub. opn.] ["Technological advances, coupled with declining cost, have rendered cell phones ubiquitous, and for many, an indispensable gizmo to navigate the social, economic, cultural and professional realms of modern society"].)

People carry their cell phones with them at all times because doing so allows them to receive emergency calls from day cares, schools, and relatives, to make personal calls during normal working hours, to access password managers, and to schedule calendar events. Today's "smart" phones additionally provide internet access, email, music, photos and games, all of which California employees should be allowed to enjoy during rest breaks.

The fact that modern technology also enables employers to communicate with employees during non-working hours does not mean that employees are working during those hours. To the contrary, as courts around the country have repeatedly held, technology has *eased* restrictions on employees. (See, e.g., *Gomez v. Lincare, Inc.* (2009) 173 Cal.App.4th 508, 524 (*Gomez*) [use of a pager to contact employees during on-call time held to "not unduly restrict plaintiffs' ability to engage in personal activities"]; see also *Berry v. County of Sonoma* (9th Cir. 1994) 30 F.3d 1174, 1184-1185 [holding coroners were not entitled to compensation for on-call time because the "use of pagers eases restrictions while on-call and

permits them to more easily pursue personal activities"]; *Gilligan v. City of Emporia, Kan.* (10th Cir. 1993) 986 F.2d 410, 413 [sewer department employees not entitled to compensation for on-call time, where employees were given a pager, finding they were "free to pursue personal activities with little interference while waiting to be called"]; *Bright v. Houston Northwest Medical Center Survivor, Inc.* (5th Cir. 1991) 934 F.2d 671, 676 (en banc) (*Bright*) [hospital equipment repair technician not entitled to compensation for on-call time, where beeper allowed employee to "carry on his normal personal activities at his own home [and] do normal shopping, eating at restaurants, and the like, as he chose"]; *Brekke v. City of Blackduck* (D.Minn. 1997) 984 F.Supp. 1209, 1222 [finding plaintiff "was substantially at liberty to engage in any number of activities while wearing her pager" while on-call].)

In short, technology has enabled people to manage their working time to serve their own needs, offers greater mobility during off-hours and rest breaks, and has served to increase freedom and quality of life.

In such a technologically interconnected world, a ruling that deems employees to be working based on the mere possibility they might be reached on devices that permit long-distance communication is simply unworkable. How could any large employer prevent all of its employees from communicating with a co-employee whenever that employee takes a rest-break? And if an employee receives a work-related email or call during a break, does that interruption automatically invalidate the break? If the employee is required to and actually does respond, it certainly

might. But the mere *possibility* that an employee *might* receive an email or a call to which the employee may respond during breaks should not suffice to invalidate *all* rest breaks the employee will ever take. If anything, such a rule would lead inexorably to the conclusion that nearly all employees are always working under California law because modern technology permits nearly any employee to be reached by an employer at nearly any time.

Indeed, the DLSE has refused to draw such a line, stating that it "does not take the position that simply requiring the worker to respond to call backs is so inherently intrusive as to require a finding that the worker is under the control of the employer." (Cal. Dept. of Industrial Relations, DLSE Opn. Letter No. 1993.03.31, *supra*, p. 4 <http://www.dir.ca.gov/dlse/opinions/1993-03-31.pdf> [as of Nov. 20, 2015]; see also DLSE Enforcement Policies and Interpretations Manual (June 2002) § 47.5.5 <http://www.dir.ca.gov/dlse/dlsemanual/dlse_enfcmanual.pdf> [as of Nov. 20, 2015] ["[t]he simple requirement that the employee wear a beeper, standing alone, doesn't require the employee be paid for all the hours the beeper is on"]; Cal. Dept. of Industrial Relations, DLSE Opn. Letter No. 1996.07.12 (July 12, 1996) p. 2 <http://www.dir.ca.gov/dlse/opinions/1996-07-12.pdf> [as of Nov. 20, 2015] ["If the employee is simply required to wear a pager . . . during the meal period there is no presumption that the employee is under the direction or control of the employer"].)[7] As

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[7] The "DLSE's opinion letters, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants (continued...)

the DLSE has acknowledged, the fact that an employee can be reached at any time does not mean he or she is working all the time.

B. Preventing employers from communicating with employees during rest breaks will actually interfere with employees' autonomy.

Under plaintiffs' interpretation of the law, if an employee carries a radio or cell phone during a rest break, and thus could *potentially* be called back to work in an emergency, the employer has, as a matter of law, failed to provide a lawful rest break. According to plaintiffs, the law treats the mere possibility that an employee's break might be interrupted as the equivalent of complete denial of a rest break.[8]

(...continued)
may properly resort for guidance." (*Brinker*, *supra*, 53 Cal.4th at p. 1029, fn. 11, internal quotation marks omitted.) Similarly, while a position that the DLSE takes in its manual is not controlling authority, California courts treat such a position as an appropriate and persuasive statement of California wage and hour law if it is consistent with California law. (See, e.g., *Marin v. Costco Wholesale Corp.* (2009) 169 Cal.App.4th 804, 815 [California court may adopt the DLSE's position from the DLSE Manual if it determines the interpretation is correct under California law]; see also, e.g., *Schacter v. Citigroup, Inc.* (2009) 47 Cal.4th 610, 621-623 [this Court relying on DLSE Manual].)

[8] While ABM has thoroughly briefed the facts relating to the rest breaks provided to its guards in this case, it bears repeating that the Court of Appeals found "no evidence indicating anyone's rest period had ever been interrupted." (Typed opn. 6.)

If this Court adopts this interpretation, employers would essentially be left with two choices: (1) risk crippling liability for failing to provide rest breaks based on the mere possibility that modern technology might be used to interrupt the employee's breaks, *or* (2) impose draconian policies to ensure that employees are *never* interrupted during rest breaks. Implementing restrictions to ensure that employees' breaks are never interrupted will likely require removing employees from the premises during breaks and prohibiting employees from responding to emergencies. Such restrictions could also encourage employers to forbid employees from possessing cell phones or other communication devices during times when the employer would otherwise permit a wide range of communications. This clearly is not what the Legislature intended.

A forced ban on the use of cell phones and similar technology during rest breaks, not based on some credible business need such as protecting valuable confidential information, but solely to protect against even the mere possibility that such breaks might be interrupted by work-related communications, could hurt California's employees far more than a rule allowing for a rescheduled rest break if a resting employee actually responds to an emergency. If employees throughout California who were previously permitted access to communication devices during rest breaks are deprived of that access as a result of plaintiffs' theory, they will be unnecessarily hindered in their ability to communicate with family members, make appointments or perform a wide range of tasks that may be routinely handled by cell phone. A ruling that would encourage a ban on the possession of communication

technology by employees when it would otherwise be permitted could place an unnecessary limitation on employees without any corresponding benefit.

C. Numerous industries require the ability to call upon resting employees during emergencies.

The ability to call upon resting employees during emergencies is crucial to many industries in California. As the DLSE has observed:

> The nature of the employment is used to determine whether the 'on-call' requirement is reasonable. A *reasonable and long-standing industry practice* which clearly indicates that workers in the affected classifications are expected to be on-call and that depriving the employer of the right to require uncompensated on-call status of the workers in this category will have a serious negative impact on the employer's business will be considered in making this determination [i.e., whether on-call time is compensable while employees go about their personal business].

(Cal. Dept. of Industrial Relations, DLSE Opn. Letter No. 1994.02.16, *supra*, p. 4 at <http://www.dir.ca.gov/dlse/opinions/1994-02-16.pdf> [as of Nov. 20, 2015], emphasis added.) In other words, based on the nature of the job and industry practice, certain employers may require employees to remain on-call even during uncompensated off-hours. Prohibiting on-call rest breaks would turn this "reasonable and long-standing practice" on its head, allowing employees to remain on-call during

uncompensated off-hours, but prohibiting them from responding to work emergencies during rest breaks.

As highlighted by the facts of this case, security guards are an example of the type of employees whose jobs, by their very nature, require them to respond to emergencies whenever necessary. The Court of Appeal pointed out that ABM has consistently maintained that the "on-call nature of a rest break for a security guard is an industry necessity." (Typed opn. 18; see also Cal. Rules of Court, rule 8.500(c)(2) ["the Supreme Court normally will accept the Court of Appeal opinion's statement of the issues and facts"]; *People v. Brown* (2015) 61 Cal.4th 968, 978-979 [same].) As ABM has aptly explained, security guards " 'must keep their radios or pagers on in case an emergency—fire, flood, criminal activity, medical crisis or bomb threat—should arise to ensure the safety of the facility and its tenants.' . . . If the magnitude of the emergency was large enough, all security officers would be required to respond regardless of what they were doing at the time." (Typed opn. 18-19.)

As long as security guards are permitted to rest during breaks, public policy dictates those breaks be interruptible as necessary and, if interrupted, simply rescheduled. The law should not be interpreted to prevent such interruptions. Allowing security guards to remain on-call during rest breaks benefits everyone, including the guards who are allowed relief from active patrols during those breaks.

The medical industry would also be adversely affected by a ruling prohibiting on-call rest periods. Medical technicians are required to be on-call to answer patient calls and service life-saving

equipment. (See, e.g., *Gomez, supra,* 173 Cal.App.4th at p. 511 [service representatives for respiratory services company were on-call to respond to emergency phone calls from patients and to provide liquid and compressed oxygen and medical equipment setup to patients in their homes]; see also *Bright, supra,* 934 F.2d at p. 672 [biomedical equipment repair technician was required to be on-call during off-duty hours for emergency repairs].)

Likewise, nurses, therapists, and ambulance crews remain on-call in case of emergency. (See, e.g., *Huskey v. Trujillo* (Fed. Cir. 2002) 302 F.3d 1307, 1309 [nurse was provided with beeper to enable free movement during on-call periods]; *Reimer v. Champion Healthcare Corp.* (8th Cir. 2001) 258 F.3d 720, 724 [nurses were scheduled for on-call time in which they must be reachable by either cellular phone or beeper in case of emergency]; *Dinges v. Sacred Heart St. Mary's Hospitals, Inc.* (7th Cir. 1999) 164 F.3d 1056, 1058 [emergency medical technicians in ambulance department were required to be on-call to respond to medical emergencies after hours]; *Blaney v. Charlotte-Mecklenburg Hosp. Authority* (W.D.N.C., Sept. 16, 2011, No. 3:10-CV-592-FDW-DSC) 2011 WL 4351631, at p. *6 [nonpub. opn.] [nurses required "to be 'on call' during a meal break" by carrying pagers]; *Berger v. Cleveland Clinic Foundation* (N.D. Ohio, Sept. 29, 2007, No. 1:05 CV 1508) 2007 WL 2902907, at p. *18 [nonpub. opn.] [respiratory therapists and respiratory technicians remained on-call during breaks to assist physicians and nurses in respiratory emergencies].)

Skilled mechanics and machinists are also needed on-call in case of emergencies to prevent huge delays or errors in production.

(See, e.g., *Owens v. Local No. 169, Ass'n of Western Pulp and Paper Workers* (9th Cir. 1992) 971 F.2d 347, 348 [electricians and machinists needed to respond to emergency breakdowns of machinery in pulp mill in order to keep mill running at night]; *Myracle v. General Elec. Co.* (6th Cir., Aug. 23, 1994, No. 92-6716) 1994 WL 456769, at pp.*1-*2 [nonpub. opn.], 33 F.3d 55 [skilled maintenance mechanics were responsible for overseeing the operations of complex machinery and sometimes paged during break periods to respond to power outages or machine breakdowns]; *Taunton v. GenPak LLC* (M.D.Ala. 2010) 762 F.Supp.2d 1338, 1341 [maintenance employees at plastics manufacturer needed to address maintenance issues that arose during night shift or weekend].) In the case of public utilities, for example, an interruption in power production caused by an equipment failure that is not quickly addressed can result not only in inconvenience, but in threats to public safety.

These are just a few examples of occupations that require employees to remain on-call. Other businesses in California similarly need to interrupt employees occasionally during rest breaks for legitimate reasons. Workers at technology companies, oil refineries, manufacturing plants, and innumerable other industries in California may be called upon to return from breaks in cases of an emergency—whether that be an emergency that puts lives, a professional practice, or the company's bottom line in danger.

According to plaintiffs, there are "administrative advantages of a bright-line rule" prohibiting on-call rest breaks, and the "wage orders themselves contain built-in flexibility through the exemption

process." (OBOM 36.) In practice, however, this bright-line rule is both impractical and draconian. Requiring exemptions in all cases where employees *might* be interrupted during a break would mean that virtually all employers must obtain exemptions for all employees, creating a situation in which the exception would swallow the rule.

Because on-call breaks are intended to provide backup in potentially dangerous situations, it is imperative that this Court continue to allow employers leeway to contact resting employees in emergencies. As a matter of sound public policy, we should not discourage security guards, nurses, skilled technicians, and other employees with skills necessary to tackle unexpected crises from responding to emergencies. Any contrary rule would cause potentially dire consequences for the health and safety of California's citizens and the productivity of California's businesses.

CONCLUSION

For the foregoing reasons, in addition to those set forth in ABM's brief on the merits, this Court should affirm the Court of Appeal's determination that on-call rest periods are permissible under California law.

November 23, 2015 **HORVITZ & LEVY** LLP
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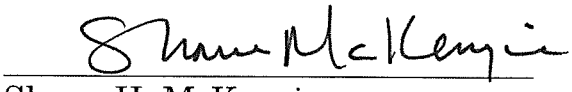
CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.520(c)(1).)

The text of this brief consists of 8,453 words as counted by the Microsoft Word version 2010 word processing program used to generate the brief.

Dated: November 23, 2015



Shane H. McKenzie

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

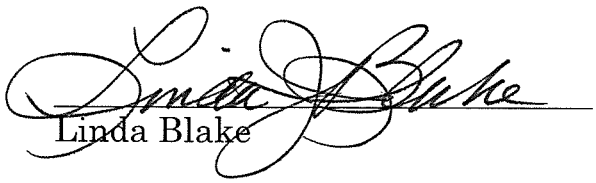
On November 23, 2015, I served true copies of the following document(s) described as APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF; AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF APPELLANT ABM SECURITY SERVICES, INC. on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on November 23, 2015, at Encino, California.



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