No. _____

In The
Supreme Court of the United States

U.S. SECURITY ASSOCIATES, INC.,

Petitioner,

v.

MUHAMMED ABDULLAH, as an individual and on behalf of all others similarly situated,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether divesting a defendant to a Rule 23(b)(3) class action of its right to assert defenses against class members on an individual basis creates a conflict with *Wal-Mart Stores, Inc. v. Dukes,* the Due Process Clause and the Rules Enabling Act.

II. Whether a district court may shift the plaintiff's burden of proof for Rule 23 class certification compliance onto defendant, and instead, require defendant to establish that the proposed class ***does not*** comply with Rule 23.

III. Whether a uniform policy that on its face does not dictate liability may be the basis for Rule 23(a)(2)'s commonality requirement, where the legality of the policy depends upon the circumstances of its application as to each class member.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, Christina Aguilar, Melissa Robinson, and William Kimbrough, IV are also plaintiffs in this action.

Pursuant to this Court's Rule 29.6, undersigned counsel state that U.S. Security Associates, Inc. is a wholly-owned subsidiary of U.S. Security Holdings, Inc., which is a wholly-owned subsidiary of U.S. Security Associates Holdings, Inc. All above entities are Delaware corporations. No publicly held corporation owns 10% or more of Petitioner's stock.

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INTRODUCTION

In *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) this Court reaffirmed that class certification under Federal Rule of Civil Procedure 23 cannot infringe upon a defendant's fundamental Due Process right to assert individual defenses to each class member's individual claims. "[A] class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." *Wal-Mart,* 131 S. Ct. at 2561. Despite this unambiguous guidance, the Ninth Circuit premised its affirmance of the decision below on the assumption that U.S. Security Associates, Inc. ("U.S. Security Associates") can *only* assert *class-wide* defenses and not defenses aimed at individual class members: "[W]e conclude that the merits inquiry will turn on whether USSA is permitted to adopt a single-guard staffing model that does not allow for off-duty meal periods – namely, *whether it can invoke a 'nature of the work' defense on a class-wide basis. . . .*" App. 24 (emphasis added). The defense at issue, the "nature of the work" exception to California's meal period requirements, requires an individualized, fact specific analysis of five factors related to an employee's specific job duties and the characteristics of his/her place of employment. The putative class, although all given the title of security guard, worked at a wide range of locations and performed a wide range of jobs, from passive patrol to unloading life

flight helicopters. The Ninth Circuit recognized these variations yet inexplicably washed over them in favor of certification. In doing so, the Ninth Circuit placed the District Court in the impossible position of either preventing U.S. Security Associates from presenting evidence related to the applicability of the "nature of the work" exception to individual class members or holding thousands of mini-trials to make those determinations. This directly violates the holding in *Wal-Mart*, as well as fundamental principles of law embodied in Rule 23, the Rules Enabling Act, and the Due Process Clause.

Moreover, in a decision that conflicts with both long-standing authority from this Court as well as holdings from the Second and Fourth Circuits, the Ninth Circuit shifted the burden of proof for Rule 23 certification, alleviating Respondents of the responsibility of affirmatively establishing all of the prerequisites for certification and forcing U.S. Security Associates to "show" that individual issues predominated in order to avoid certification. Specifically, the Ninth Circuit held that "USSA had to demonstrate not just that its employees' duties varied, but that they varied to an extent that some posts would qualify for the 'nature of the work' exception, while others would not" and upheld certification after asserting that U.S. Security Associates "failed to do so." App. 22. This, however, is a fundamental distortion of the class certification analysis. The party *seeking* certification has the burden of proof for *all* of Rule 23's requirements. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). Indeed, as recently made clear by

this Court, the party seeking certification bears the burden to "prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, typicality of claims or defenses, and adequacy of representation, as required by Rule 23(a)" and "satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." *Id.* at 1432 (internal quotation marks omitted).

These distortions of the proper Rule 23 analysis are of fundamental importance. Employers throughout the country face a rising tide of wage and hour class actions and the lower courts are receiving new cases at a rapidly increasing rate. Review is necessary to eliminate the conflicts created by the Ninth Circuit's decision, to clarify the proper standards and burdens for class certification, and to provide clear guidance for the lower courts.

OPINIONS BELOW

The panel opinion of the Ninth Circuit Court of Appeals (App. 1-App. 32) is published at 731 F.3d 952 (2013). The district court's certification order (App. 51-App. 77) was not officially published, but is available at 2011 U.S. Dist. LEXIS 156685. The Ninth Circuit Court of Appeals order denying U.S. Security Associates' timely Petition for Rehearing En Banc was not published. App. 78.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on September 27, 2013. U.S. Security Associates' petition for rehearing *en banc* was denied on January 10, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Due Process Clause (U.S. Const. amend. V and XIV), the Rules Enabling Act (28 U.S.C. § 2072), Federal Rule of Civil Procedure 23, California Labor Code §§ 61, 226.7, 512, and 1193.5, and California Code of Regulations, tit. 8 § 11040 are reproduced in the Appendix at App. 79-App. 129.

STATEMENT OF THE CASE

1. The "Nature Of The Work" Exception For California's "On Duty" Meal Periods

Under California law, employers are generally required to provide meal periods to their employees when their employees work over five hours. Cal. Code Regs., tit. 8, § 11040, subd. 11(A); *see also* Cal. Lab. Code § 512(a) ("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. . . ."). Employers

may meet their meal period obligations by providing employees with either an "off duty" or "on duty" meal period. Cal. Code Regs., tit. 8, § 11040, subd. 11(A). The legality of an "off duty" meal period depends on the length (30 minutes), timing (before the end of the fifth hour), and nature (uninterrupted or interrupted) of the meal period. *Brinker Rest. Corp. v. Super. Court,* 53 Cal. 4th 1004, 1035, 1049 (2012).

In contrast, an "on duty" meal period requires a far more complex analysis and is 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). Accordingly, "on duty" meal periods are neither inherently legal or illegal. Rather, they are legal in certain circumstances (where the nature of the work prevents the employee from being relieved of all duty) and illegal in other circumstances (where the nature of the work does not prevent the employee from being relieved).

While no published California case addresses the appropriate "test" for when the "nature of the work" exception applies, the Division of Labor Standards Enforcement (DLSE)[1] has addressed the issue and

[1] The DLSE is the body charged with administration and enforcement of California's Wage Orders. Cal. Lab. Code, §§ 61, 1193.5, at App. 92, 94. The DLSE's interpretation of California's wage and hour laws is "entitled to great weight and, unless it is

(Continued on following page)

established a non-exhaustive list of factors to determine whether the "nature of the work" exception applies to an individual employee including: (1) the type of work, (2) the availability of other employees to provide relief to an employee during a meal period, (3) the potential consequences to the employer if the employee is relieved of all duty, (4) the ability of the employer to anticipate and mitigate these consequences such as by scheduling the work in a manner that would allow the employee to take an "off duty" meal period, and (5) whether the work product or process will be destroyed or damaged by relieving the employee of all duty. DLSE Opinion Letter 2009.06.09, p. 7, at App. 121. The DLSE has further advised that the determination of whether a meal period qualifies for the "nature of the work" exception requires a shift-by-shift analysis. *Id.*, p. 9, at App. 126 ("[T]he Company and employee may enter into a single agreement so long as the conditions necessary to establish that the nature of the employee's work prevents the employee from being relieved of all duty are met for *each* applicable on-duty meal period taken.") (emphasis added). Accordingly, whether an "on duty" meal period is lawful is entirely dependent on each employee's job duties and the specific attributes of his or her job on a shift-by-shift basis.

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clearly unreasonable, it will be upheld." *See, e.g.*, *Monzon v. Schaefer Ambulance Serv., Inc.*, 224 Cal. App. 3d 16, 30 (1990).

2. Proceedings Below

U.S. Security Associates provides security guards and a wide range of security services to private companies and public entities at over 700 locations throughout California.

Respondents Muhammed Abdullah, Christina Aguilar, and William Kimbrough, IV are former security guard employees of U.S. Security Associates who brought suit, alleging a number of wage and hour violations, including, as relevant in this petition, a claim for failure to provide "off duty" meal breaks.[2] U.S. Security Associates successfully removed this case to the United States District Court for the Central District of California on December 30, 2009 under 28 U.S.C. § 1332(d), as amended by the Class Action Fairness Act of 2005. Respondents moved for certification of a class of "all current and former Security Guard/Officer employees of Defendants [sic] who worked at US Security Associates, Inc. in California during the period from July 1, 2007 to the present." App. 54, n.2.

In opposition to class certification, U.S. Security Associates submitted declarations from 103 putative class members. The declarations established that the duties performed by U.S. Security Associates' security guards varied substantially from post to post and

[2] Melissa Robinson was named as a plaintiff in the operative Second Amended Complaint, but Ms. Robinson did not join in the motion for class certification and was not a party to the underlying appeal.

included such divergent tasks as checking receipts to unloading life flight helicopters. *See* App. 3, 60. The declarations and evidence also established that, while a majority of the posts were single guard posts (posts that had only a single guard assigned at a time), the staffing could vary from location to location. *See* App. 29-30, 58-59. Based on the differences in job duties and characteristics, U.S. Security Associates argued that class certification was inappropriate because a determination of the "nature of the work" exception would require an individualized analysis of each class member's location, post, and shift. App. 60.

Despite the record and without hearing any oral argument, the District Court granted certification of the meal period class. App. 75. In what fell short of the "rigorous analysis" required by *Wal-Mart*, 131 S. Ct. at 2551, the District Court spent a mere two paragraphs collectively analyzing "commonality" under Rule 23(a)(2) and "predominance" under Rule 23(b)(3). App. 58-61. The District Court found that "commonality" and "predominance" under Rule 23(a)(2) and Rule 23(b)(3) were satisfied by a mere two "common" issues (both of which are largely redundant): 1) "[a]ll putative subclass members were required to sign an 'On Duty Meal Break Consent Agreement'" and 2) "a large majority of [U.S. Security Associates'] employees work at 'single guard posts.'" App. 58 (footnote omitted). While both may be true, neither issue addresses whether any "on duty" meal period was lawful or unlawful under the "nature of the work" exception. Accordingly, neither "resolve[s] an issue that is central to the validity of each one of the

claims in one stroke" as required for class certification. *Wal-Mart*, 131 S. Ct. at 2551.

The District Court dismissed U.S. Security Associates' straightforward argument that the "nature of the work" exception would inherently require an individualized inquiry rendering class certification untenable. App. 60-61. The District Court stated that "[n]o evidence has been offered *by Defendant*" to establish that the "nature of the work" exception applied to any member of the class. App. 61 (emphasis added). The District Court's cursory conclusion, however, was made without even analyzing the factors required to make the determination as to whether the "nature of the work" exception applied to any class member. App. 60-61. Moreover, the Court's decision was predicated on an improperly shifted burden, as it should properly have been Respondents' burden to establish that all of the requirements of Rule 23 were met, and ***not*** U.S. Security Associates' burden to prove that Rule 23 was ***not*** satisfied. *Wal-Mart*, 131 S. Ct. at 2551.

Importantly, the District Court admitted it was motivated to err on the side of certification in a misguided attempt to ensure enforcement of the California Labor Code: "[w]e must be cautious of a defendant invoking the 'nature of the work' exception [to class certification] on the grounds that there are 'case-by-case, shift-by-shift' differences, because this 'would potentially eviscerate the protections provided by California Labor Code § 226.7 . . . .'" App. 60. In doing so, the District Court failed to heed the long-standing tenet that the prerequisites to Rule 23

certification cannot be overlooked in order to aid in the vindication of statutory rights. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) ("Nor does congressional approval of Federal Rule of Civil Procedure 23 establish an entitlement to class proceedings for the vindication of statutory rights.").

On appeal, the Ninth Circuit upheld the certification. App. 2. First addressing the "commonality" requirement for class certification, the Ninth Circuit held that the "merits inquiry will turn on whether USSA is permitted to adopt a single-guard staffing model that does not allow for off-duty meal periods – namely, whether it can invoke a 'nature of the work' defense *on a class-wide basis*, where the need for on-duty meal periods results from its own staffing decisions." App. 24 (emphasis added). In basing certification on the premise that U.S. Security Associates would be relegated to a single class-wide defense, the Ninth Circuit disregarded U.S. Security Associates' Due Process right to assert individual defenses to individual claims, a defense which cannot be infringed upon by class certification. *Wal-Mart*, 131 S. Ct. at 2561. Turning to the "predominance" requirement of Fed. R. Civ. P. 23(b)(3), the Ninth Circuit affirmed the District Court's finding that the "'nature of the work' inquiry would be a common one, focused on the legality of a single-guard staffing model, rather than a site-by-site inquiry." App. 26 (internal quotation marks omitted). However, the Ninth Circuit, like the District Court before it, based this conclusion on the mistaken premise that it was U.S. Security Associates' burden to "demonstrate" that material variations existed throughout the class,

which it "failed to do." App. 22. Accordingly, the Ninth Circuit made the same fundamental mistake as the District Court in alleviating Respondents of the burden of proving all of Rule 23's prerequisites and improperly shifting the burden onto U.S. Security Associates. *See Comcast Corp.*, 133 S. Ct. at 1432.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Ruling Improperly Stripped U.S. Security Associates Of Its Right To Assert Defenses Against Individual Class Member's "On Duty" Meal Period Claims

A. As Made Clear In *Wal-Mart*, The Due Process Clause And The Rules Enabling Act Require That U.S. Security Associates Be Provided The Opportunity To Assert Its Affirmative Defenses As To Each Class Member's Claims

It has been well settled law since Congress first delegated to this Court the power to prescribe rules of procedure in the Rules Enabling Act that procedural rules must give way to substantive rights and that no procedural rule can "abridge, enlarge, nor modify the substantive rights of any litigant." *See Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1, 17 (1941) (Frankfurter, J., dissenting) (quoting Rules Enabling Act, 48 Stat. 1064, currently codified at 28 U.S.C. § 2072) (internal quotation marks omitted). Throughout the decades, this Court has steadfastly reiterated the limitations

of the Act and consistently held that no rule of civil procedure can be construed or applied so as to alter any substantive right. *See, e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 629 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010); *Wal-Mart*, 131 S. Ct. at 2561.

Rule 23 is no exception to this rule and class action procedures cannot infringe upon a party's substantive rights. *Ortiz,* 527 U.S. at 845 ("The Rules Enabling Act underscores the need for caution . . . no reading of [Rule 23] can ignore the Act's mandate that rules of procedure shall not abridge, enlarge or modify any substantive right.") (internal citations and quotation marks omitted); *Amchem*, 521 U.S. at 629 ("Rule 23 . . . must be interpreted with fidelity to the Rules Enabling Act . . . ."). In fact, this Court has previously cautioned against invoking class action procedures out of perceived convenience or efficiency at the expense of a party's rights: "the rulemakers' prescriptions for class actions may be endangered by those who embrace Rule 23 too enthusiastically just as they are by those who approach the rule with distaste." *Amchem*, 521 U.S. at 629 (internal quotation marks and alterations omitted).

The Due Process Clause guarantees the right of any party to a lawsuit to litigate all of the issues raised in the lawsuit. *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971) (The "right to litigate the issues raised" is "guaranteed . . . by the Due Process Clause . . . ."). For a defendant, this does not merely include rebutting any affirmative elements of a claim,

but also includes the fundamental right to present any and all defenses. *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense.") (internal quotation marks omitted) (quoting *American Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932)).

Accordingly, as required by both the Rules Enabling Act and Due Process Clause, a class cannot be certified under Rule 23 if the certification will prevent a defendant from presenting its defenses against each individual class member. *Wal-Mart*, 131 S. Ct. at 2561. This Court made this principle abundantly clear in *Wal-Mart,* clarifying that an employer has the right to "individualized determinations" of each putative class member's claim for individual relief. *Id.* at 2560. Importantly, *Wal-Mart* rejected the use of any "Trial by Formula," under which liability to a portion of a class would be extrapolated to the class as a whole, holding that such a procedure would violate the Rules Enabling Act. *Id.* at 2561. Instead, the Court made clear that an employer's right to present an affirmative defense as to each and every class member could not be abridged, concluding that "a class cannot be certified on the premise that [the defendant-employer] will not be entitled to litigate its statutory defenses to individual claims." *Id*. The Court succinctly summarized that "[c]ontrary to the Ninth Circuit's view, Wal-Mart is entitled to individualized determinations of each employee's eligibility for backpay." *Id.* at 2560.

B. The Ninth Circuit's Holding Requires The District Court To Choose Between Holding Thousands Of Mini-Trials Or Eliminating U.S. Security Associates' Right To Present Its Inherently Individualized "Nature Of The Work" Defense

In direct contradiction with *Wal-Mart,* the Ninth Circuit specifically premised its certification on *preventing* U.S. Security Associates from asserting defenses to *individual* class members:

> [W]e conclude that the merits inquiry will turn on whether USSA is permitted to adopt a single-guard staffing model that does not allow for off-duty meal periods – namely, *whether it can invoke a "nature of the work" defense on a class-wide basis,* where the need for on-duty meal periods results from its own staffing decisions.

App. 24 (emphasis added). The contradiction could not be more direct or fundamental.

There is no support for the Ninth Circuit's directive in the substantive law. California's substantive law makes clear that the "nature of the work" exception is a highly specific and individualized inquiry that requires an analysis of (1) the type of work, (2) the availability of other employees to provide relief to an employee during a meal period, (3) the potential consequences to the employer if the employee is relieved of all duty, (4) the ability of the

employer to anticipate and mitigate these consequences such as by scheduling the work in a manner that would allow the employee to take an "off duty" meal period, and (5) whether the work product or process will be destroyed or damaged by relieving the employee of all duty. DLSE Opinion Letter 2009.06.09, p. 7 at App. 121. Moreover, as even the Ninth Circuit recognized, the legal test for an "on duty" meal period requires not only an employee-by-employee analysis, but a day-by-day, shift-by-shift analysis for *each* employee: "'each' on duty meal period covered by [an on duty] agreement must *independently* qualify for the 'nature of the work' exception." App. 16, n.13 (emphasis added).

In its ruling, the Ninth Circuit recognized variations across the class in general job duties,[3] assignment

[3] App. 3 ("In addition to standing guard at such locations, USSA's employees may perform a range of other duties, such as inspecting vehicles, patrolling properties, reacting to patient emergencies, clearing off railroad tracks, and recording damage to vehicles, among many other tasks."); App. 23 ("[T]he duties performed by security guards include patrolling parking lots; checking receipts; signing in and out trucks; setting up school parking lots and assisting with student drop-offs and pick-ups; inspecting vehicles; restraining unruly patients; escorting dead bodies; checking the inventory, mileage, and temperature of trucks; working undercover to catch shoplifters; monitoring psychiatric patients; checking in employees and answering phones at a front desk; performing surveillance; and enforcing hotel quiet hours.").

locations,[4] staffing of locations,[5] and day-to-day responsibilities,[6] each of which would necessarily be of import to the analysis outlined above,[7] yet disregarded these variations to achieve certification. The Ninth Circuit justified its homogenization of the class by asserting that U.S. Security Associates' "single guard" staffing model provides a uniform basis to analyze the class claims and that, based on an analysis of the staffing model, all of the class members' claims "will prevail or fail in unison." App. 24, 32. The Ninth Circuit, however, glossed over the fact that not all class members were posted at single guard posts. Moreover, the Ninth Circuit ignored the fact that the staffing model only implicates two of the five relevant factors (the availability of other employees to provide relief to an employee and the ability to mitigate

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[4] App. 3 ("USSA provides guards at over 700 locations in California, including hotels, hospitals, warehouses, and construction sites, among other locations . . . .").

[5] App. 3 ("A large majority of USSA's employees in California work at 'single post' locations, meaning that no other guards are on duty at the same time.").

[6] App. 16-17, n.13 (" . . . USSA's own admission that, 'beyond the variation in general duties by post,' the guards' day-to-day responsibilities also vary.").

[7] An employee's job duties relate directly to the type of work, the staffing model relates directly to the availability of other employees to provide relief and the ability of the employer to anticipate and mitigate adverse consequences, and the location type relates directly to the potential consequences to the employer if the employee is relieved and whether the work product or process will be destroyed or damaged by relieving the employee.

negative consequences by scheduling work in a manner that would allow the employee to take an "off duty" meal period). Accordingly, at best, the single guard staffing model provides a basis to evaluate a *portion* of the "nature of the work" factors for a *portion* of the class. As made clear in *Wal-Mart*, class certification cannot be based upon such an extrapolation from *most* to *all* and "a class cannot be certified on the premise that [the defendant-employer] will not be entitled to litigate its statutory defenses to individual claims." *Wal-Mart,* 131 S. Ct. at 2561. The Ninth Circuit's determination that the "on duty" claims of the class "will prevail or fail in unison" ignores the variations across the class and infringes upon U.S. Security Associates' right to present evidence to support the "nature of the work" exception for each individual class member, in conflict with this Court's ruling in *Wal-Mart*.

The Ninth Circuit's attempt to avoid *Wal-Mart* by framing the "nature of the work" defense as a question of damages and not liability is unavailing. App. 24 ("[A]n employer may be held liable under state law upon a determination that its uniform on-duty meal break policy is unlawful, with the 'nature of the work' defense being relevant only to damages.") (internal quotation marks omitted). In fact, this reasoning is both a misstatement of California substantive law and a misapplication of Rule 23's certification standards. "On duty" meal periods are unquestionably legal in California. *Brinker Rest. Corp. v. Super. Court*, 53 Cal. 4th 1004, 1035-36

(2012). If the "nature of the work" exception is met, the employer has fully complied with the law and there is no violation. *Id.* Accordingly, the "nature of the work" exception dictates *liability,* not *damages*. Even assuming, *arguendo*, that the "nature of the work" defense is relevant "only to damages," in order for class certification to be proper, damages, like liability, must be "capable of measurement on a classwide basis" and "[q]uestions of individual damage calculations" cannot "overwhelm questions common to the class." *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013). Accordingly, certification cannot be achieved by re-characterizing individualized "nature of the work" variations as "damage issues" instead of "liability issues." Such a semantic sleight of hand does not eliminate the individualized determinations that are required to resolve this case and does not make the putative class immune from Rule 23's predominance requirement.

In certifying a class based on the question of whether a single guard staffing model can serve, by itself, as the basis for a "nature of the work" defense, the Ninth Circuit eviscerated the detailed analysis that a court must utilize in analyzing the "nature of the work" defense. In essence, this approval would result in the District Court determining, on a classwide basis, that either U.S. Security Associates must hire additional guards to relieve all guards at single post sites for an "off duty" meal period or that U.S. Security Associates is not obligated to hire additional employees and that all single post sites satisfy the

"nature of the work" defense. If the District Court rules that additional guards must be hired, such a ruling would conflict with one of the few examples provided by the DLSE of a justified "on duty" meal period – the "isolated [gas station] in which only a single employee is present." DLSE Opinion Letter 2003.11.03, p. 4 at App. 103. Yet, the lone gas station employee from the DLSE ruling could have been relieved for an "off duty" meal period if the owner of the gas station hired a second employee for the shifts in question. Consequently, the DLSE already has opined that a blanket approach requiring redundant employees to allow for the provision of "off duty" meal periods is not required.

Similarly, if the District Court determines on a class-wide basis that U.S. Security Associates is not required to hire additional employees to relieve employees assigned to single post sites for "off duty" meal periods, then, apparently, the class claims will fail. Yet, there may be instances when an "off duty" meal break can be provided even without a relief employee being assigned. For example, a lone security guard assigned to the exterior of a school may be able to take an "off duty" meal break while a school administrator monitors the school exterior during recess and not cause undue hardship to the school in question. A class-wide ruling on the single guard site issue, however, would result in no analysis being done on a site-by-site basis to determine whether a lone employee could be provided an "off duty" meal period. Therefore, as currently constructed, a class-wide determination of U.S. Security Associates' "single guard

model," regardless of the ultimate ruling, does not properly apply the "nature of the work" defense.

The Ninth Circuit places the District Court in the impossible position of either prohibiting U.S. Security Associates from introducing evidence to establish the "nature of the work" defense against individual class members (which would violate the Due Process Clause) or overseeing an unwieldy and unmanageable trial involving an evaluation of the five factor test for each post and each shift at over 700 different worksites. Review is, therefore, necessary to clarify the standard and ensure the Ninth Circuit and other courts do not infringe upon a defendant's right to assert its defenses against individual class members.

II. The Ninth Circuit Improperly Alleviated Respondents Of The Burden To Establish All Of Rule 23's Requirements And, Instead, Shifted The Burden Onto U.S. Security Associates To Prove That Certification Was Not Proper

A party seeking class certification bears the burden of demonstrating that each element of Rule 23 is satisfied. *Wal-Mart*, 131 S. Ct. at 2551; *Comcast Corp.*, 133 S. Ct. at 1432. Specifically, "[a] party seeking class certification must affirmatively demonstrate his compliance with [Rule 23]." *Wal-Mart*, 131 S. Ct. at 2551. "The Rule does not set forth a mere pleading standard" and, consequently, a party seeking certification must both "prove that there are *in fact* sufficiently numerous parties, common questions

of law or fact, typicality of claims or defenses, and adequacy of representation, as required by Rule 23(a)" and "satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." *Comcast*, 133 S. Ct. at 1432 (internal citations and quotation marks omitted).

In the decisions below, both the District Court and the Ninth Circuit improperly shifted the burden of proof from Respondents and, instead, placed the burden onto U.S. Security Associates to affirmatively demonstrate that Rule 23's requirements were ***not*** met. Specifically, the District Court and the Ninth Circuit maintained that it was U.S. Security Associates' burden to show that the "nature of the work" varied from worksite to worksite as opposed to Respondents' burden to show that it was uniform and would not create individual issues.[8]

Neither the District Court nor the Ninth Circuit were subtle about shifting the burden to U.S. Security Associates. The District Court specifically premised its certification on the grounds that "[n]o evidence has been offered *by Defendant*" as to individual issues:

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[8] By making this argument, U.S. Security Associates is by no means conceding that it did not make a factual showing that the "nature of the work" varied from worksite to worksite and from employee to employee. In fact, U.S. Security Associates introduced declarations from 103 class members that demonstrated substantial differences in job duties and material variations in posts and worksites.

> The 103 employee declarations provided by Defendant at best establish that the declarants' job descriptions varied; but it is not clear how any of these job descriptions would qualify for the nature of the work exception. The variety of the work itself is immaterial unless the particular nature of certain job duties prevents an off-duty meal break from being taken. ***No evidence has been offered by Defendant*** that certain worksites presented such unique considerations that employees were unable to take an off-duty meal break.

App. 60-61 (emphasis added).

The Ninth Circuit affirmed on the basis that U.S. Security Associates "failed" to "make . . . a showing" that employees' duties varied from post-to-post:

> [W]e conclude that the plaintiffs' claims will yield a common answer that is apt to drive the resolution of the litigation, as required by Rule 23(a)(2). First, as the district court explained, the DLSE letters make clear that the showing necessary to establish the "nature of the work" exception is a high one. *In order to make such a showing, USSA had to demonstrate* not just that its employees' duties varied, but that they varied to an extent that some posts would qualify for the "nature of the work" exception, while others would not. It failed to do so.

App. 2, 22 (internal citation and quotation marks omitted) (emphasis added).

More troubling than the burden shift is the distorted rationale for placing the burden on U.S. Security Associates. The District Court was explicit in its rationale, indicating a belief that proper enforcement of California's meal break laws required a slight judicial thumb on the scale in favor of certification: "We must be cautious of a defendant invoking the 'nature of the work' exception [in a class action] on the grounds that there are case-by-case, shift-by-shift differences, because this would potentially eviscerate the protections provided by California Labor Code § 226.7 . . . ." App. 60 (internal quotation marks omitted). While the Ninth Circuit was not as transparent in its reasoning, it upheld the certification and explicitly placed the burden on U.S. Security Associates to show that individual issues predominated instead of requiring Respondents to show that common issues predominated. This Court has repeatedly warned against such a distortion of Rule 23's requirements for the sake of seeking to enforce statutory rights. *Am. Express Co.*, 133 S. Ct. at 2309 ("Nor does congressional approval of Federal Rule of Civil Procedure 23 establish an entitlement to class proceedings for the vindication of statutory rights."); *Amchem*, 521 U.S. at 629 ("[T]he rulemakers' prescriptions for class actions may be endangered by those who embrace Rule 23 too enthusiastically just as they are by those who approach the Rule with distaste.") (internal quotation marks and alterations omitted).

Not only does the Ninth Circuit's ruling conflict with prior rulings of this Court regarding the burden

of proof for class certification, it directly conflicts with the holdings of both the Second and Fourth Circuits and creates a split of authority that requires resolution. In *Myers v. Hertz Corp.*, 624 F.3d 537 (2d Cir. 2010), the Second Circuit held that the party seeking certification has the burden to satisfy all of the requirements of Rule 23, even if the ultimate burden on the merits rests on the opposing party at trial:

> While Hertz will ultimately bear the burden of proving the merits of its exemption argument, plaintiffs must at this stage show that more "substantial" aspects of this litigation will be susceptible to generalized proof for all class members than any individualized issues.

Id. at 551 (citation omitted).

The Fourth Circuit reached the same conclusion in *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311 (4th Cir. 2006), wherein the plaintiffs alleged that the defendant insurance company charged black policyholders higher premiums than whites:

> Appellants [argue that defendant] failed to satisfy [its] burden of proving that its statute of limitations defense presents issues that must be decided on an individual basis. This argument, of course, assumes that [defendant] bears such a burden. Our cases prove this assumption false; we have stressed in case after case that it is ***not the defendant*** who bears the burden of showing that the proposed class ***does not comply*** with Rule

> 23, but that ***it is the plaintiff*** who bears the burden of showing that the class ***does comply*** with Rule 23. It is not enough, therefore, for Appellants to argue that [defendant] failed to show that its statute of limitations defense presents individual issues. Instead, the record must affirmatively reveal that resolution of the statute of limitations defense on its merits may be accomplished on a class-wide basis.
>
> Seeking to avoid this conclusion, Appellants argue that because [defendant] bears the burden of proving the merits of its statute of limitations defense, it should also bear the burden of demonstrating that resolution of that defense cannot occur on a class-wide basis. Even assuming that [defendant] has the burden of proving its statute of limitations defense on the merits, we reject this argument . . . [T]he standard justifications for allocating the burden of proving an affirmative defense to the defendant – efficiency and fairness – disappear when the thing to be proved is no longer the merit of the defense but compliance with Rule 23. There is no reason to believe that the defendant is any better suited than the named plaintiffs to prove whether an issue is common to the class simply because the defendant bears the burden of proving the merits of that issue. We therefore continue, as we must, to allocate to the plaintiff the burden of proving compliance with Rule 23.

Id. at 321-22 (internal citations and footnote omitted).

By reversing the parties' burdens on class certification, the District Court and the Ninth Circuit improperly divested Respondents of their obligations under Rule 23 and premised the certification order on a fundamental misinterpretation of the Rule. This Court should, therefore, grant review in order to clarify that a plaintiff continues to bear the burden of proof under Rule 23 when a defendant has raised a defense and that a plaintiff must demonstrate that resolution of the defense can occur on a class-wide basis in order for certification to be proper.

III. The Decision Below Is In Conflict With The Second Circuit's Holding That An Employer's Application Of A Uniform Employment Policy That Does Not, By Itself, Dictate Liability Cannot Support Commonality

The Ninth Circuit's decision also creates a conflict with the Second Circuit over how to evaluate commonality based on an employer's application of a uniform policy to a group of employees where the policy, by itself, does not dictate liability. In *Myers*, 624 F.3d 537, the Second Circuit addressed this issue in the context of a proposed class of "station managers" who worked for Hertz and were uniformly classified as exempt employees. *Id.* at 542-43. The Second Circuit recognized that while there were common questions applicable to the entire class (whether the class members worked overtime and were not paid overtime), resolution of those common questions could

not be achieved on a class-wide basis without looking to how the exemption policy applied to individual class members. *Id.* at 548.

The Second Circuit reasoned that determination of the applicability of the exemption would require a trier of fact to look beyond the mere policy of classifying employees as exempt; it required a review of the specific job characteristics and duties of each employee to determine if the classification was lawful or not. *Myers*, 624 F.3d at 549-51. In affirming the District Court's denial of class certification, the Court reasoned that "the existence of a blanket exemption policy, standing alone, is not itself determinative of 'the main concern in the predominance inquiry: the balance between individual and common issues.'" *Id.* at 549 (quoting *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 959 (9th Cir. 2009)).

The Ninth Circuit's decision in the case below is in direct conflict with the Second Circuit's holding that a uniform policy which is not unlawful on its face does not by itself establish commonality. In the decision below, the Ninth Circuit was faced with a nearly identical situation. Respondents seek to certify an "on duty" meal period class on the premise that U.S. Security Associates had a common policy of requiring "on duty" meal breaks of all security guards.[9] "On

[9] U.S. Security Associates' "on duty" policy was not uniform. It was applied to a majority of worksites. However, even assuming *arguendo* that the policy was uniform, certification was

(Continued on following page)

duty" meal periods, however, like overtime exemptions, are not inherently lawful or unlawful and require a review of class members' job duties and characteristics to determine their legality for any given shift. The Ninth Circuit's assertion that the overtime exemption cases do not apply because overtime is a different substantive right than "on duty" meal periods is a distinction without a difference. *See* App. 28-29. Establishing liability for either requires a factually specific individualized review of an employees' job duties and characteristics.

Resolution of this Circuit conflict is necessary to provide uniform guidance as to whether a class-wide policy that is not unlawful on its face, standing alone, may satisfy Rule 23's commonality requirement. To be sure, the Second and Ninth Circuits are not the only jurisdictions which have grappled with this issue. The Seventh Circuit recently addressed the issue in the now vacated *Ross v. RBS Citizens, N.A.*, 667 F.3d 900 (7th Cir. 2012), in which the Seventh Circuit reached a substantially similar ruling as the Ninth Circuit in this case by certifying a class based on a uniform employment policy that did not, by itself, establish liability. This Court, however, appropriately vacated the Seventh Circuit's decision and remanded, with instructions to reconsider in light of *Comcast Corp.*, 133 S. Ct. 1426. *See RBS Citizens, N.A. v. Ross*, 133 S. Ct. 1722 (2013).

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improper as individualized determinations are required to determine the "nature of the work" for each worksite.

Undoubtedly, this issue will continue to be heavily litigated and a clarification of the standard is necessary to provide guidance to the lower courts and to prevent the improper certification of claims based on uniform policies that do not dictate liability.

IV. The Ninth Circuit's Decision Will Exacerbate The Substantial Burden Placed On Employers By The Increasing Surge Of Wage And Hour Class Actions

As this Court has recognized, the burdens imposed by a potentially bankrupting judgment in a class action lawsuit can entail a "risk of '*in terrorem*' settlements" that far outweigh the value of the claims asserted. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (citations omitted); *see also* Fed. R. Civ. P. 23(f), Advisory Committee Note on 1998 Amendments at App. 90 (Class certification can exert substantial pressure on the defendant "to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."). After a class is certified, defendants are faced with potentially disastrous consequences should they not prevail at trial, often leading to a settlement that drastically overcompensates the actual value of the asserted claims. To take the findings of just one recent study, 89% of California cases with a certified

class end in settlement, whereas only 15% of cases that are not certified end in settlement.[10]

That class certification is the first step in an inevitable path to settlement is nowhere more prevalent than in the wage and hour context. For example, over the past decade, over 10,000 wage and hour cases were filed in California, with just one-quarter of one percent proceeding to trial, with most of the remaining 99.75% resolved through class settlements.[11] Nationwide, employers have paid an estimated $2.95 billion to settle the 497 most recently reported wage and hour class action cases.[12] On average, employers paid approximately $4.5 million to settle a wage and hour class action in 2013.[13]

Employers are frequently forced to settle class actions because of their low tolerance for risk.[14] They

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[10] Hilary Hehman, *Class Certification in California: Second Interim Report From The Study Of California Class Action Litigation*, Administrative Office of the Courts: Office of Court Research, 1, 2 (Feb. 2010).

[11] Michael D. Singer, *Settling Wage and Hour Class Actions in Light of Recent Legal Developments*, CA Labor & Employment Bulletin, 311, 311 (Sept. 2010).

[12] Dr. Denise Martin, *et al.*, *Trends in Wage and Hour Settlements: 2013 Update*, NERA, 1 (Nov. 20, 2013).

[13] *Id.*

[14] It is "widely recognized" that defendants in class action lawsuits tend to be risk-averse. Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 Wm. & Mary L. Rev. 1531, 1546 n.74 (2000).

simply cannot assume "the sheer *magnitude* of the risk to which" they are exposed when the outcome of numerous claims depends on just one trial instead of many. *In re Rhone-Poulenc Rorer, Inc.,* 51 F.3d 1293, 1297 (7th Cir. 1995). There can be no doubt that the potentially catastrophic consequences to a company that are inherent in wage and hour class actions have contributed to the explosion in the number of such cases filed in the past decade. Between 2000 and 2013, there was over a *300%* increase in the number of FLSA claims filed in federal court.[15] Approximately 90% of all federal and state court employment law class actions currently filed are wage and hour class or collective actions, far outnumbering all discrimination class actions combined.[16]

This Court's review is necessary to ensure that the lower courts are applying Rule 23 correctly and ensuring class action defendants are appropriately

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[15] In the 12-month period ending March 31, 2000, there were 1,854 FLSA filings in federal courts. Kevin P. McGowan, *FLSA Lawsuits Hit Record High in 2012, Continuing Recent Trend of Sharp Growth*, Bloomberg BNA (Aug. 6, 2012), http://op.bna.com/dlrcases.nsf/id/kmgn-8wkkf7/$File/FLSAchart.pdf. In the 12-month period ending March 31, 2013, there were 7,764 FLSA filings. Jaclyn Jaeger, *FLSA Lawsuits Hit New Record High*, Compliance Week (May 10, 2013), http://www.complianceweek.com/flsa-lawsuits-hit-new-record-high/article/292819/.

[16] Laurent Badoux, *Trends in Wage and Hour Litigation Over Unpaid Work Time and the Precautions Employers Should Take*, ADP, 2011, at 1.

being provided their constitutional and statutory rights.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 10, 2014

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MUHAMMED ABDULLAH, as an individual and on behalf of all others similarly situated, *Plaintiff-Appellee*, v. U.S. SECURITY ASSOCIATES, INC., a corporation, *Defendant-Appellant*.	No. 11-55653 D.C. No. 2:09-cv-09554-GHK-E OPINION

Appeal from the United States District Court
for the Central District of California
George H. King, Chief District Judge, Presiding

Argued and Submitted
March 7, 2013 – Pasadena, California

Filed September 27, 2013

Before: Richard A. Paez and Paul J. Watford, Circuit Judges, and Leslie E. Kobayashi, District Judge.*

Opinion by Judge Paez

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* The Honorable Leslie E. Kobayashi, District Judge for the U.S. District Court for the District of Hawaii, sitting by designation.

COUNSEL

Robert J. Stumpf, Jr. (argued), San Francisco, California; Otis McGee, Jr., Ross A. Boughton, Morgan P. Forsey, and Lauren D. Thibodeaux, Sheppard, Mullin, Richter & Hampton LLP, Los Angeles, California, for Defendant-Appellant.

Kenneth H. Yoon (argued), Los Angeles, California; Peter M. Hart and Amber S. Healy, Los Angeles, California, for Plaintiff-Appellee.

OPINION

PAEZ, Circuit Judge:

The district court certified a class of former and current employees of U.S. Security Associates, Inc. ("USSA"), who allege that USSA committed numerous violations of California labor law. USSA filed a petition to appeal the district court's certification order, which we granted. *See* Fed. R. Civ. P. 23(f). On appeal, USSA argues that the court erred in certifying the meal break sub-class, because the plaintiffs failed to establish "questions of law or fact common to the class" that "predominate" over questions affecting only individual members. Fed. R. Civ. P. 23(a)(2), (b)(3). We hold that the district court did not abuse its discretion by certifying the meal break sub-class. Accordingly, we affirm.

App. 3

I. BACKGROUND

A.

Plaintiff Muhammed Abdullah is a former employee of USSA, a private security guard company.[1] USSA provides guards at over 700 locations in California, including hotels, hospitals, warehouses, and construction sites, among other locations. In addition to standing guard at such locations, USSA's employees may perform a range of other duties, such as inspecting vehicles, patrolling properties, reacting to patient emergencies, clearing off railroad tracks, and recording damage to vehicles, among many other tasks. A large majority of USSA's employees in California work at "single post" locations, meaning that no other guards are on duty at the same time.[2]

As a condition of employment, all of USSA's employees are required to sign "on-duty meal period agreements." The record contains two versions of such agreements. The first, which was used prior to 2007, provides:

> Due to the nature of the work I perform as a Security Guard, and due to the nature of the

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[1] In addition to Abdullah, the second amended complaint names three additional plaintiffs: Melissa Robinson, Christina Aguilar, and William Kimbrough. All four were employees of USSA for some period of time between 2007 and 2009.

[2] USSA's "person most knowledgeable," Leo J. Flury ("Flury"), initially testified at his deposition that 99.9% of employees work at single guard posts. He later changed his answer to say that "a large majority" of employees work at such posts.

> services provided by U.S. Security Associates, Inc., I understand that my work prevents me from being relieved of all duty during my meal period. I am voluntarily agreeing to have my daily meal period "on duty." I understand that I will be paid at my regular rate of pay for my on duty meal period. I understand that, if I elect to revoke this agreement, I may do so at any time, provided my revocation is in writing.

The second, which USSA has used since mid-2007, provides:

> Due to the nature of the work I perform as a Security Guard, and due to the nature of the services provided by U.S. Security Associates, Inc., I understand that I may be prevented from being relieved of duty during my meal period. On this basis, I voluntarily agree to have an "on-duty" meal period that shall be counted as time worked and compensated by U.S. Security Associates, Inc.

After five (5) hours worked, the following waiver becomes relevant:

> Pursuant to paragraph 13 of Wage Order No. 4-2001 of the California Industrial Welfare Commission, Employee and Employer, as evidenced by their respective signatures below, hereby mutually agree to waive the right to an off-duty meal period for any hours worked in excess of five (5) total hours in a workday.

> I understand that I may revoke this agreement at anytime in writing, and such revocation shall be presented to my Supervisor or Operations Manager at the beginning of the shift on which I first desire to revoke the agreement. I am voluntarily signing this agreement.

Flury testified that if an employee refuses to sign the "on-duty meal period agreement," he or she "won't work for us." He further testified that one of the "requirements" of the job, as evidenced by the meal-period "waiver," was for USSA employees to eat meals on the job.

B.

The plaintiffs sought to maintain a class action on behalf of themselves and all others similarly situated, alleging that USSA committed numerous violations of California labor laws, including, *inter alia,* requiring them to work through their meal periods. Of note here, they allege that USSA has a "policy of requiring employees to work through their legally mandated meal periods," and is therefore liable for "paying premium compensation for missed meal periods . . . pursuant to California Labor Code § 226.7 and the applicable [Industrial Welfare Commission] Wage Order."[3]

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[3] The plaintiffs filed their initial complaint in the California Superior Court, and USSA removed the case to federal court

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The district court certified the class and seven sub-classes, pursuant to Rule 23(b)(3). One of the sub-classes is the meal break sub-class, which is defined as:

> A Subclass of all of Defendant's past and present California Security Guard/Officer employees who worked more than six hours and were not provided a checked-out meal break in any work shift from July 1, 2007 through the present, and who were not compensated for such on-duty meal break(s) pursuant to California Labor Code § 226.7(b).

The district court determined that certifying this sub-class was appropriate, "[g]iven [USSA's] uniform policy of requiring the putative subclass members to sign the on-duty meal break agreement," as well as the "evidence that, in the vast majority of cases, this policy was implemented to require on-duty meal breaks be taken." A few months later, the court reached the same conclusion in an order denying USSA's motion for reconsideration. Having been granted leave to appeal, USSA challenges the district court's certification of the meal break sub-class on the grounds that the plaintiffs have not established "commonality," as required under Federal Rule of Civil Procedure 23(a)(2), or "predominance," as required under Rule 23(b)(3).

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pursuant to the Class Action Fairness Act. *See* 28 U.S.C. § 1332(d).

II. STANDARD OF REVIEW

We review a district court's decision to certify a class under Rule 23 for abuse of discretion. *In re Wells Fargo Home Mortg. Overtime Pay Litig.,* 571 F.3d 953, 957 (9th Cir. 2009) (hereinafter "*In re Wells Fargo*"). "When reviewing a grant of class certification, we accord the district court noticeably more deference than when we review a denial of class certification." *Wolin v. Jaguar Land Rover N. Am., LLC,* 617 F.3d 1168, 1171 (9th Cir. 2010) (quoting *In re Salomon Analyst Metromedia Litig.,* 544 F.3d 474, 480 (2d Cir. 2008)) (internal quotation marks omitted). A district court abuses its discretion if it (1) relies on an improper factor, (2) omits a substantial factor, or (3) commits a clear error of judgment in weighing the correct mix of factors. *In re Wells Fargo,* 571 F.3d at 957. In addition, an error of law is a per se abuse of discretion. *Yokoyama v. Midland Nat. Life Ins. Co.,* 594 F.3d 1087, 1091 (9th Cir. 2010). We review the district court's findings of fact under the clearly erroneous standard, meaning we will reverse them only if they are (1) illogical, (2) implausible, or (3) without "support in inferences that may be drawn from the record." *United States v. Hinkson,* 585 F.3d 1247, 1262 (9th Cir. 2009).

III. ANALYSIS

We are concerned here with two overlapping requirements for class certification. First, a party seeking class certification must always show that "there

are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2).[4] Second, "the proposed class must satisfy at least one of the three requirements listed in Rule 23(b)." *Wal-Mart Stores, Inc. v. Dukes,* 131 S. Ct. 2541, 2548 (2011); *see also* Fed. R. Civ. P. 23(b). Here, the plaintiffs seek certification under Rule 23(b)(3), which requires, *inter alia,* that "the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). Thus, "Rule 23(a)(2) asks whether there are issues common to the class," and "Rule 23(b)(3) asks whether these common questions predominate." *Wolin,* 617 F.3d at 1172. We begin our analysis by considering whether the plaintiffs have satisfied Rule 23(a)(2), keeping in mind that this analysis is also relevant to Rule 23(b)(3). *See id.* (noting the "substantial overlap between the two tests"). We then turn to Rule 23(b)(3). *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1019 (9th Cir. 1998) (explaining that the requirements of Rule 23(a)(2) are "less

[4] This requirement, known as the "commonality" requirement, is one of the four familiar requirements of Rule 23(a): the party seeking class certification must show that "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). USSA does not challenge the district court's determination that the meal break sub-class satisfies Rule 23(a)(1), (3), and (4).

rigorous than the companion requirements of Rule 23(b)(3)").

A. Rule 23(a)(2)

"The Supreme Court has recently emphasized that commonality requires that the class members' claims 'depend upon a common contention' such that 'determination of its truth or falsity will resolve an issue that is central to the validity of each claim in one stroke.'" *Mazza v. Am. Honda Motor Co.,* 666 F.3d 581, 588 (9th Cir. 2012) (quoting *Wal-Mart,* 131 S. Ct. at 2551) (internal alteration omitted). Put another way, the key inquiry is not whether the plaintiffs have raised common questions, "even in droves," but rather, whether class treatment will "generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart,* 131 S. Ct. at 2551 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof,* 84 N.Y.U. L. Rev. 97, 132 (2009)) (emphasis added) (internal quotation marks and alteration omitted). This does not, however, mean that *every* question of law or fact must be common to the class; all that Rule 23(a)(2) requires is "a single *significant* question of law or fact." *Mazza,* 666 F.3d at 589 (emphasis added); *see also Meyer v. Portfolio Recovery Assocs.,* 707 F.3d 1036, 1041-42 (9th Cir. 2012), *cert. denied,* 133 S. Ct. 2361 (2013).

Here, the district court concluded that "a common legal question that is presented and susceptible to class-wide determination" is whether California's

"nature of the work" exception to Industrial Welfare Commission ("IWC") wage order No. 4-2001 ("Wage Order No. 4-2001") – which governs meal periods – "applies to [USSA]'s single guard post staffing model."[5] USSA counters that this question will not generate a common answer, because USSA's "nature of the work" defense requires "an individualized, fact-specific analysis" of each employee's work history, including "a day-by-day examination of an employee's job duties." We therefore begin our Rule 23(a)(2) analysis by looking to state law to determine whether the plaintiffs' claims – and USSA's affirmative defenses – can yield a common answer that is "apt to drive the resolution of the litigation." *Wal-Mart,* 131 S. Ct. at 2551; *see also Amgen Inc. v. Connecticut Ret. Plans & Trust Funds,* 133 S. Ct. 1184, 1194-95 (2013) ("Merits questions may be considered to the extent – but only to the extent – that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."). We conclude that they can.

1.

Under California law, an employer may not "require any employee to work during any meal . . . period mandated by an applicable order of the Industrial

[5] Wage Order No. 4-2001 regulates the wages, hours, and working conditions for "professional, technical, clerical, mechanical, and similar occupations." Cal. Code Regs., tit. 8, § 11040.

Welfare Commission." Cal. Lab. Code § 226.7(a).[6] Wage Order No. 4-2001, in turn, guarantees certain employees a 30-minute meal period for every five hours of work.[7] Cal. Code Regs., tit. 8, § 11040, subd. 11(A); *see also* Cal. Lab. Code § 512(a) ("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 employee must be "relieved of all duty" during this break; if not, the meal period is considered "on-duty," and counts as time worked. The following three conditions apply to "on-duty" meal periods:

> 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.

Cal. Code Regs., tit. 8, § 11040, subd. 11(A). The parties do not dispute that the putative class members

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[6] If the employer does so, it "shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided." Cal. Lab. Code § 226.7(b); *see also* Cal. Code Regs., tit. 8, § 11040, subd. 11(B).

[7] "The IWC's wage orders are to be accorded the same dignity as statutes." *Brinker Rest. Corp. v. Superior Court,* 273 P.3d 513, 527 (Cal. 2012).

all signed a written agreement which provided that it could be revoked; their disagreement turns on whether USSA can defeat class certification by invoking the "nature of the work" exception to the off-duty meal period requirement. We first consider the substantive scope of duties that may qualify for the "nature of the work" exception, and we then consider two recent state court decisions addressing policies similar to the one in this case.

a.

The California state courts have not addressed the substantive scope of the "nature of the work" exception.[8] The California Division of Labor Standards Enforcement ("DLSE"), however, has issued several opinion letters addressing when the "nature of the work" exception may apply.[9] "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 may properly resort for guidance." *Brinker,* 273 P.3d at 529 n.11 (internal quotation marks and

[8] There are, however, several state court decisions that address whether the "nature of the work" exception can be decided on a class-wide basis under California Code of Civil Procedure § 382; we discuss those cases *infra.*

[9] "The DLSE is the state agency empowered to enforce California's labor laws, including IWC wage orders." *Brinker,* 273 P.3d at 529 n.11 (internal quotation marks and citations omitted).

citations omitted). We look to them for guidance on what an employer must show to invoke the exception, as well as examples where DLSE has found that it is satisfied.[10]

First, DLSE has emphasized that the "on-duty" meal period is a "limited[ ] alternative" to the off-duty meal period requirement. DLSE Opinion Letter 2009.06.09 at 8. Critically, it is "not described or defined as a *waiver* of an off-duty meal period," *id.* (emphasis added), but rather as "a *type* of meal period that can be lawfully provided only in those circumstances in which the three express conditions set forth in [the regulation] are satisfied."[11] *Id.* Thus,

> [i]n determining whether 'the nature of the work' prevents an employee from being relieved of all duty, [DLSE] starts with the premise that the general requirement for an

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[10] USSA requests that we take judicial notice of certain documents, including several DLSE Opinion Letters. "To the extent our opinion references any of the materials, we grant [USSA's] request[ ] for judicial notice." *Campbell v. PricewaterhouseCoopers, LLP,* 642 F.3d 820, 824 n.3 (9th Cir. 2011); *see also* Fed. R. Evid. 201(b) (allowing the court to take judicial notice of facts that are "not subject to reasonable dispute" because they "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned").

[11] DLSE Opinion Letter 2009.06.09 concerned IWC Wage Order No. 9-2001, subd. 11(C), Cal. Code Regs., tit. 8, § 11090, subd. 11(C), which applies to the transportation industry. Subdivision 11(C) contains the same three requirements for any on-duty meal period as Wage Order 4-2001, subd. 11(A), cited in the text, *supra* at 11.

> off-duty meal period is remedial in nature, and any exception to that general requirement must be narrowly construed, so as to avoid frustrating the remedial purpose of the regulation.

DLSE Opinion Letter 2002.09.04 at 2. The employer has the burden to "establish[ ] the facts that would justify an on-duty meal period." *Id.* at 2-3; *see also* DLSE Opinion Letter 2009.06.09 at 7; DLSE Opinion Letter 1994.09.28 at 4 ("In the view of the Division, the onus is on the employer to show that the work involved *prevents* the employee from being relieved of duty.").

Second, we can characterize the instances in which DLSE has found that the "nature of the work" exception applies into two categories: (1) where the work has some particular, external force that requires the employee to be on duty at all times, and (2) where the employee is the sole employee of a particular employer.[12] For example, in its most recent opinion

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[12] We do not – and cannot – hold that these are the only circumstances under which the "nature of the work" exception may apply. To the contrary, DLSE has laid out the following non-exhaustive factors that should be considered when deciding whether the "nature of the work" exception applies to a specific job:

> (1) [T]he type of work, (2) the availability of other employees to provide relief to an employee during a meal period, (3) the potential consequences to the employer if the employee is relieved of all duty, (4) the ability of the employer to anticipate and mitigate these consequences such as by scheduling the work in a manner

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letter, DLSE concluded that employees who transport hazardous materials, and are required by federal regulation to attend to their vehicles at all times, are covered by the "nature of the work" exception. DLSE Opinion Letter 2009.06.09 at 8. It emphasized the narrow scope of its conclusion, however, explaining,

> [W]e do not comment upon the application of the on-duty meal period requirements for any period of time during which the driver is not engaged in activity that is regulated by the referenced federal regulations. . . . It may indeed be the case that drivers may be provided an off-duty meal period during these times even though they are otherwise prevented by the nature of their work from taking a meal period during times in which they are engaged in activity otherwise governed by the [federal regulations].

Id. DLSE further allowed for the possibility that another employee might be able to cover the driver, explaining.

> that would allow the employee to take an off-duty meal period, and (5) whether the work product or process will be destroyed or damaged by relieving the employee of all duty.

DLSE Opinion Letter 2009.06.09 at 7. Thus, we make this observation solely to note the broad types of positions that DLSE has determined qualify for the "nature of the work" exception, as part of our limited inquiry into the merits of the plaintiffs' claims.

> Also, the nature of the work element may not be satisfied under circumstances where the employer may have another qualified representative reasonably available to perform the attending duties required under [federal regulation]. For instance, drivers who transport fuel in and around the Bay Area may likely park their vehicle at one of the Company's yards and leave such vehicle unattended in compliance with federal law in order to take an off-duty meal period. Such a driver would not be entitled to an on-duty meal period if the nature of his or her work did not prevent the driver from being relieved of all duty.

Id.[13] In another opinion letter, DLSE noted that the "nature of the work" exception might apply where the

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[13] In the same opinion letter, DLSE also considered whether the truck drivers could be required to "sign a blanket agreement for on-duty meal periods." *Id.* at 3. DLSE concluded that they could, but emphasized that "each" on-duty meal period covered by the agreement must independently qualify for the "nature of the work" exception:

> It is the opinion of the Division that the Company and employee may enter into a single agreement *so long as* the conditions necessary to establish that the nature of the employee's work prevents the employee from being relieved of all duty are met for each applicable on-duty meal period taken.

Id. at 9 (emphasis added). Although not dispositive of any issue, DLSE's response supports the plaintiffs' argument that it is unlawful for USSA to impose a uniform policy of requiring "on-duty" meal periods, given USSA's own admission that, "beyond

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position involves "the continuous operation of machinery requiring monitoring" that is "essential to the business of the employer." DLSE Opinion Letter 1994.09.28 at 2.

In addition to these jobs, which by their nature require the employee to be present at all times, DLSE has also found that the "nature of the work" exception would apply to an "isolated" gas station "in which only a single employee is present," but only if there was not "another employee employed at the worksite." DLSE Opinion Letter 2003.11.03 at 3; *see also* DLSE Opinion Letter 1994.09.28 (noting that "the nature of the work" exception might apply where "the employee is the only person employed in the establishment and closing the business would work an undue hardship on the employer"). *Cf.* DLSE Opinion Letter 2002.09.04 at 2-3 (concluding that the "nature of the work" exception does not apply to late-night shift managers at fast-food restaurants, in part because other employees are on duty and could cover for the manager).[14]

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the variation in general duties by post," the guards' day-to-day responsibilities also vary.

[14] USSA argues that the district court applied the wrong legal standard because it initially cited one of the DLSE opinion letters for the proposition that "an off-duty meal period must be provided unless . . . the nature of the work makes it virtually impossible for the employer to provide the employee with an off-duty meal period." DLSE Opinion Letter 2002.09.04 at 2. As USSA correctly argues, DLSE has rejected the "virtually impossible"

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b.

With this understanding of the "nature of the work" defense, we turn to two recent state court decisions that guide our analysis of Rule 23(a)(2)'s commonality requirement. First, in *Brinker,* the California Supreme Court clarified multiple "issues of significance to class actions generally and to meal and rest break class actions in particular." 273 P.3d at 520. Of particular importance here, the court in *Brinker* held that the California Court of Appeal had erred in reversing the superior court's certification of a class of plaintiffs who alleged that their employer uniformly denied them rest breaks. Although the court's analysis arose in the context of a representative action under California Code of Civil Procedure § 382, it also spoke to the liability that would arise under such a scenario:

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standard as "narrow, imprecise, and arbitrary." DLSE Opinion Letter 2009.06.09 at 7.

We disagree that the district court applied the wrong legal standard. As an initial matter, the district court did not "apply" any legal standard; it merely looked to the DLSE opinion letters as part of its preliminary inquiry into the merits, to determine whether class certification was appropriate. Furthermore, the district court clarified its initial ruling when it denied USSA's motion for reconsideration, explaining that its previous citation to the "virtually impossible" standard "was not determinative in [its] analysis," and that the "analytical role" it played "was merely to express that the showing necessary to establish the 'nature of the work' exception is a high one." We are therefore satisfied that the district court applied the correct legal standard.

> [T]he Court of Appeal concluded that because rest breaks can be waived – as all parties agree – "any showing on a class basis that plaintiffs or other members of the proposed class missed rest breaks or took shortened rest breaks would not necessarily establish, without further individualized proof, that Brinker violated" the Labor Code and Wage Order No. 5. This was error. An employer is required to authorize and permit the amount of rest break time called for under the wage order for its industry. *If it does not – if, for example, it adopts a uniform policy authorizing and permitting only one rest break for employees working a seven-hour shift when two are required – it has violated the wage order and is liable*. . . .
>
> . . . The theory of liability – that Brinker has a uniform policy, and that that policy, measured against wage order requirements, allegedly violates the law – is by its nature a common question eminently suited for class treatment.

Id. at 531-32 (emphasis added).

The California Court of Appeal subsequently interpreted and applied *Brinker* in a case with strikingly similar facts to the case before us. *See Faulkinbury v. Boyd & Assocs.,* 216 Cal. App. 4th 220 (2013). In *Faulkinbury,* the putative class was made up of private security guards whose employer "had a uniform policy of requiring all security guard employees to take paid, on-duty meal breaks and to sign an

agreement by which the employee agreed" to such on-duty meal breaks. *Id.* at 233. The court of appeal concluded that the employee's liability turned on "the issue [of] whether Boyd's policy requiring all security guard employees to sign blanket waivers of off-duty meal breaks is lawful," *id.* at 234, explaining,

> *Brinker* leads us . . . to conclude Boyd would be liable upon a determination that Boyd's uniform on-duty meal break policy was unlawful. . . . *[T]he employer's liability arises by adopting a uniform policy that violates the wage and hour laws.* Whether or not the employee was able to take the required break goes to damages. . . .

Id. at 235 (emphasis added).[15] The court of appeal explicitly rejected the defendant's argument that the

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[15] The court of appeal had initially affirmed an order denying class certification, holding that "individual issues of fact [would] predominate," because "the ability of each of [the] security guard employees to take an off-duty meal break depended on individual issues," such as the specific post to which the employee was assigned, as well as "whether under the specific circumstances each employee could be relieved to take a meal break." *Faulkinbury v. Boyd & Assocs.* (*Faulkinbury I*), 112 Cal. Rptr. 3d 72, 87 (Cal. Ct. App. 2010), *review granted and opinion superseded,* 240 P.3d 1215 (Cal. 2010). However, the California Supreme Court subsequently ordered the court of appeal to "vacate its decision and to reconsider the cause" in light of *Brinker,* 273 P.3d 513. *Faulkinbury v. Boyd & Associates, Inc.,* 279 P.3d 1019 (Cal. 2012). Upon reconsideration, the court of appeal reversed the superior court's denial of class certification, as discussed above. The California Supreme Court denied a petition for review and request for de-publication on July 24, 2013. *See* California Courts, Appellate Courts Case Information,

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"nature of the work" exception applied, concluding that, "by requiring blanket off-duty meal break waivers in advance from *all* security guard employees, regardless of the working conditions at a particular station," the defendant itself "treated the off-duty meal break issues on a classwide basis." *Id.* at 234; *see also Bradley v. Networkers Int'l, LLC,* 150 Cal. Rptr. 3d 268, 284-85 (Cal. Ct. App. 2012), *as modified on denial of reh'g* (Jan. 8, 2013) ("The lack of a meal/rest break policy and the uniform failure to authorize such breaks are matters of common proof."), *review denied* (Mar. 20, 2013); *Bufil v. Dollar Fin. Grp., Inc.,* 76 Cal. Rptr. 3d 804, 811 (Cal. Ct. App. 2008) (concluding that the plaintiff 's theory that "two circumstances – single employee on duty or providing training – do not come within the 'nature of the work' exception" was "a legal question" that could be resolved on a class-wide basis). Of course, we are not bound by the California Court of Appeal's determination under California law that the sub-class certified by the district court is amenable to class-wide treatment. *See* Cal. Civ. Proc. Code § 382. However, insofar as *Faulkinbury* interprets *Brinker*'s holding regarding the potential *liability* of an employer under California law, it is directly on point for our analysis.

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http://appellatecases.courtinfo.ca.gov/search/case/disposition.cfm?dist=0&doc_id=2048870&doc_no=S211515 (last visited September 2, 2013).

2.

In light of these state authorities, we conclude that the plaintiffs' claims will yield a common answer that is "apt to drive the resolution of the litigation," as required by Rule 23(a)(2). *Wal-Mart,* 131 S. Ct. at 2551. First, as the district court explained, the DLSE letters make clear that "the showing necessary to establish the 'nature of the work' exception is a high one." In order to make such a showing, USSA had to demonstrate not just that its employees' duties varied, but that they varied to an extent that some posts would qualify for the "nature of the work" exception, while others would not. It failed to do so. Indeed, USSA's sole explanation for why it requires on-duty meal periods is that its guards are staffed at single-guard locations. It does not argue that any particular posts would qualify for the "nature of the work" exception *absent* the single-guard staffing model. In fact, when asked if he could think of "examples" where "the nature of the work requires an on-duty meal break," Flury testified that he could not.[16] Thus, the crux of the issue is that the class members' duties do not allow for a meal break *solely because* no other guards are available to cover for them during their meal periods.

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[16] The only example of a site that "requires[ ] an on-duty meal break" that Flury could identify was a union site, since USSA "follow[s] some of the[ ] union rules just to parallel them."

Consider, for example, the illustrative list of duties that USSA has provided to demonstrate the variety of its employees duties:

> [T]he duties performed by security guards include patrolling parking lots; checking receipts; signing in and out trucks; setting up school parking lots and assisting with student drop-offs and pick-ups; inspecting vehicles; restraining unruly patients; escorting dead bodies; checking the inventory, mileage, and temperature of trucks; working undercover to catch shoplifters; monitoring psychiatric patients; checking in employees and answering phones at a front desk; performing surveillance; and enforcing hotel quiet hours.

These duties are undoubtedly distinct from one another, but the only reason any of them "prevent" the employee from taking a meal period is because USSA has chosen to adopt a single-guard staffing model. *See* Cal. Code Regs., tit. 8, § 11040, subd. 11(A) (stating that an "on-duty" meal period is permitted "only when the nature of the work *prevents* an employee from being relieved of all duty" (emphasis added)).[17]

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[17] In this way, the duties of USSA's employees are distinct from, for example, a truck driver who is required by federal regulation to attend to his vehicle at all times, DLSE Opinion Letter 2009.06.09 at 7-8, or a worker whose job involves the "continuous operation of machinery requiring monitoring," DLSE Opinion Letter 1994.09.28 at 2.

On this basis, we conclude that the merits inquiry will turn on whether USSA is permitted to adopt a single-guard staffing model that does not allow for off-duty meal periods – namely, whether it can invoke a "nature of the work" defense on a class-wide basis, where the need for on-duty meal periods results from its own staffing decisions. Such an inquiry is permissible under *Brinker* and *Faulkinbury*; the latter clarified that an employer may be held liable under state law "upon a determination that [its] uniform on-duty meal break policy [is] unlawful," with the "nature of the work" defense being relevant only to damages. *Faulkinbury,* 216 Cal. App. 4th at 235. Thus, the legality of USSA's policy is a "significant question of law," *Mazza,* 666 F.3d at 589, that is "apt to drive the resolution of the litigation" in this case, *Wal-Mart,* 131 S. Ct. at 2551. We therefore hold that the district court did not abuse its discretion in concluding that Rule 23(a)(2) was satisfied.

B. Rule 23(b)(3)

We next turn to Rule 23(b)(3), which asks if "the questions of law or fact common to class members *predominate* over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3) (emphasis added). Although there may be "*some* variation" among individual plaintiffs' claims, *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.,* 244 F.3d 1152, 1163 (9th Cir. 2001) (emphasis added), "Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)," *Comcast*

Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013). "A principal purpose behind Rule 23 class actions is to promote efficiency and economy of litigation." *In re Wells Fargo,* 571 F.3d at 958 (internal quotation marks omitted). Thus, "[t]he predominance analysis under Rule 23(b)(3) focuses on 'the relationship between the common and individual issues' in the case," and tests whether the proposed class is "'sufficiently cohesive to warrant adjudication by representation.'" *Wang v. Chinese Daily News, Inc.,* 08-55483, 2013 WL 4712728 at * 5 (9th Cir. Sept. 3, 2013) (quoting *Hanlon,* 150 F.3d at 1022). Here, we conclude that it is.

1.

First, our analysis of the "nature of the work" exception, *supra,* drives our conclusion that Rule 23(b)(3) is satisfied here. *Cf. Erica P. John Fund, Inc. v. Halliburton Co.,* 131 S. Ct. 2179, 2184 (2011) ("Considering whether 'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action."). We have concluded that the "nature of the work" defense can, and will, be applied on a class-wide basis in this case. We offer no opinion on whether USSA's "single-guard" staffing model will qualify for the "nature of the work" exception.[18] But "Rule 23(b)(3)

[18] Indeed, the DLSE opinion letters do not provide a definite metric for deciding in what circumstances a lone employee may be permitted to take an on-duty meal break – for example, it is

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requires [only] a showing that questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Amgen Inc.,* 133 S. Ct. at 1191 (emphasis removed); *see also United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC v. ConocoPhillips Co.,* 593 F.3d 802, 808 (9th Cir. 2010) (holding that the district court "abused its discretion by declining certification based on the possibility that plaintiffs would not prevail on the merits on their 'on duty' theory," where the plaintiffs' theory was that certain restrictions on their meal breaks made the meals "on duty" under California law (emphasis removed)). And where, as here, "there are no relevant distinctions between the worksites," we agree with the district court that "the 'nature of the work' inquiry would be a common one," focused on the legality of a single-guard staffing model, "rather than a site-by-site" inquiry. Viewing the meal break sub-class' claims in this manner

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not clear if an employee must be (1) the sole employee *on duty* at a particular time, (2) the sole employee staffed at a particular *location,* or (3) the sole employee *working for the employer* in order to qualify for the "nature of the work" exception. *Cf.* DLSE Opinion Letter 2003.11.03 (concluding that the "nature of the work" exception would apply to an "isolated" gas station with "a single employee," but not if "another employee [is] employed at the worksite"); DLSE Opinion Letter 1994.09.28 (explaining that the "nature of the work" exception might apply where "the employee is the only person employed in the establishment and closing the business would work an undue hardship on the employer").

undercuts USSA's primary argument that individual issues will predominate due to its need to present an individual "nature of the work" defense for each plaintiff and each worksite.

2.

We are mindful that it is an abuse of discretion for the district court to rely on uniform policies "to the near exclusion of other relevant factors touching on predominance." *In re Wells Fargo,* 571 F.3d at 955; *see also Wang,* 2013 WL 4712728 at *5; *Vinole v. Countrywide Home Loans, Inc.,* 571 F.3d 935, 946 (9th Cir. 2009). Thus, in *In re Wells Fargo,* we held that the district court had abused its discretion when it certified a class of home mortgage consultants ("HMCs"), all of whom Wells Fargo had classified as "exempt from overtime laws," under Rule 23(b)(3). 571 F.3d at 955. The district court in *In re Wells Fargo* had found that it would need to analyze "the job experiences of the individual employees, including the amount of time worked by each HMC, how they spend their time, where they primarily work, and their levels of compensation," but nevertheless decided that the uniform exemption policy "weigh[ed] heavily in favor of class certification." *Id.* at 956. We held that it was an abuse of discretion for the district court to rely on the "blanket exemption policy," which "[did] nothing to facilitate common proof," since the court would still have to consider how "individual employees *actually* spent their time" in order to decide if they were exempt from overtime requirements. *Id.* at 959 (emphasis

added); *see also id.* at 957 (explaining that a district court abuses its discretion when it makes "a clear error of judgment in placing too much weight on [a] single factor vis-a-vis the individual issues"). We reached the same conclusion in two other cases that required the district court to consider whether individual employees were properly classified as "exempt" employees. *See Wang,* 2013 WL 4712728 at *5 (noting that "the district court's conclusion that common questions predominate in this case rested on the fact, *considered largely in isolation,* that plaintiffs are challenging CDN's uniform policy of classifying all reporters and account executives as exempt employees," and vacating the district court's finding of predominance under Rule 23(b)(3) (emphasis added)); *Vinole,* 571 F.3d at 945 (affirming the district court's denial of class certification where the court's exemption analysis would be "fact-intensive" and require an "individualized analysis of the way each employee actually spends his or her time").

This case is not like *In re Wells Fargo, Wang,* or *Vinole.* First, unlike in those cases, federal or state exemption classifications – which may sometimes be fact-intensive – are not at issue here. *Cf. In re Wells Fargo,* 571 F.3d at 959 (explaining that the "federal outside salesperson exemption" often "requires 'a fact-intensive inquiry into each potential plaintiff 's employment situation' " (quoting the district court)); *Vinole,* 571 F.3d at 945 (explaining that under California law, "a court evaluating the applicability of the outside salesperson exemption *must* conduct an

individualized analysis of the way each employee actually spends his or her time," and the court's "analysis of the FLSA exemption" is likewise "a fact-intensive inquiry" (emphasis added)).

Second, unlike in *Wells Fargo* and *Vinole,* the district court did not rely on the existence of USSA's uniform on-duty meal period policy to the *exclusion* of other factors. To the contrary, the district court found that nearly all of the evidence in the record – including Flury's testimony about USSA's actual business practices, as well as the declarations of USSA's employees – supports a finding that common questions would predominate. For example, the court found that Flury's testimony described "more than a policy," since he also explained how USSA's "policies and practices are implemented on the ground." In considering the employee declarations, the court found that "[n]one of these declarations establishes that the declarant was categorically given off-duty meal breaks." And, "[g]iven the uniform policy of requiring . . . the on-duty meal break agreement," the court further found that, "in the vast majority of cases, this policy was implemented to require [that] on-duty meal breaks be taken." In light of these findings, the district court properly concluded that the employee declarations "did not indicate a lack of predominance."

USSA nevertheless challenges the district court's factual findings, particularly with regard to the employee declarations. USSA argues that it staffs its guards in groups "ranging from one guard per shift to up to 30 guards per shift and practically everything

in between." It further argues that "at many locations, 'off-duty' meal periods were provided." But these arguments directly contradict the statements that Flury made during his deposition. Flury testified to three critical facts. First, he initially testified that 99.9% of employees work at single guard posts (he later changed his answer to say that "a large majority" of employees work at such posts).[19] Second, Flury testified that no single guard post allowed for a lunch break. ("I don't know of any single post that has a lunch break as part of the program."). Third, Flury made clear that such "on-duty" meal periods are required as a matter of policy – not necessity – explaining that one of the "requirements as signed to by the wavier" was for the guards to eat lunch at their posts. In fact, when asked if one USSA employee could relieve another for a meal period, Flury responded, "[b]ut then [the employee] wouldn't be doing his job, would he? No."[20]

We agree with the district court that although USSA "may wish to distance itself from Flury's statements, his admissions were material and [are] properly before us." Furthermore, to the extent the

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[19] We note that, although Flury changed some of his answers by errata, he did not change his statement that USSA's business is "all made up of single posts."

[20] As discussed *supra,* Flury stated in his deposition that the on-duty meal period was part of the "nature of the *business,*" but when asked for an example where "the nature of the *work* requires an on-duty meal break," he could not think of one, other than a union site.

employee declarations submitted by USSA are not entirely consistent with Flury's testimony, we defer to the district court's decision to weigh his testimony over the employee declarations. We cannot say, in light of all the evidence, that the district court's findings of fact were "illogical," "implausible," or "without support in inferences that may be drawn from the facts in the record." *See Hinkson,* 585 F.3d at 1262. The district court here did not abuse its discretion by finding, on the record before it, that common issues of law or fact would predominate.

3.

Finally, USSA argues that individual issues will predominate because USSA's "time records will not dispositively show which meal periods were 'off duty' meal periods" for any given employee. As a factual matter, however, USSA's argument is again belied by the record. Many of the employee declarations describe keeping records of their time worked. And, as the district court noted, "given Flury's admission that those staffed at single guard posts were required to take on-duty meals, Defendant's records of each employee's clock-in and clock-out times, how much he was paid, and whether he was staffed at a single guard post, can be used to extrapolate whether his meal break was on- or off-duty." For example, Flury testified that "for on-duty meal breaks, the sign-in sheets would just have a start time and end time." In light of these records, it would not be difficult to determine USSA's liability to individual plaintiffs,

nor would it be overly-burdensome to calculate damages.

For the foregoing reasons, we conclude that the plaintiffs' claims "will prevail or fail in unison," as required by Rule 23(b)(3). *See Amgen Inc.,* 133 S. Ct. at 1191. The district court did not abuse its discretion in concluding that Rule 23(b)(3) was satisfied.

IV. CONCLUSION

In sum, we conclude that the district court did not abuse its discretion by certifying the meal break sub-class.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MUHAMMED ABDULLAH, as an individual and on behalf of all others similarly situated, Plaintiff-Respondent, v. U.S. SECURITY ASSOCIATES, INC., a corporation, Defendant-Petitioner.	No. 11-80017 D.C. No. 2:09-cv-09554-GHK Central District of California Los Angeles ORDER (Filed Apr. 20, 2011)

Before: McKEOWN and FISHER, Circuit Judges.

The court, in its discretion, grants the petition for permission to appeal the district court's January 12, 2011 order granting class action certification. *See* Fed. R. Civ. P. 23(f); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005) (per curiam). Within 14 days after the date of this order, petitioner shall perfect the appeal in accordance with Federal Rule of Appellate Procedure 5(d).

APPENDIX C

E-Filed

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 09-9554-GHK(Ex) Date March 24, 2011

Title *Muhammed Abdullah, et al. v. U.S. Security Associates, Inc., et al.*

Presiding: The Honorable GEORGE H. KING, U. S. DISTRICT JUDGE

Beatrice Herrera	N/A	N/A
Deputy Clerk	Court Reporter/ Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: (In Chambers) Order re: Defendant's Motion for Reconsideration; **[51]**

This matter is before the Court on Defendant U.S. Security Associates, Inc.'s ("Defendant") Motion for Reconsideration of the Court's January 11, 2011 Order ("Motion"). We have considered the papers filed in support of and in opposition to this Motion, and deem this matter appropriate for resolution without oral argument. L.R. 7-15. As the Parties are familiar with the facts, we will repeat them only as necessary. Accordingly, we rule as follows.

I. Background

Our January 11, 2011 Order ("Class-Certification Order") certified a class of "all of Defendant's current and former Security Guard/Officer employees in California from July 1, 2007 to the present, [ ] who qualify as a member of one or more of the certified subclasses." (*Id.* at 2). We also certified a meal break subclass ("Meal Break Subclass") consisting of "all of Defendant's past and present California Security Guard/Officer employees who worked more than six hours and were not provided a checked-out meal break in any work shift from July 1, 2007 through the present, and who were not compensated for such on-duty meal break(s) pursuant to California Labor Code § 226.7(b)." (*Id.* at 6).

Defendant has moved the Court to reconsider our certification of the Meal Break Subclass pursuant to Local Rule 7-18(c). Defendant argues that we failed to consider material facts contained within the 103 employee declarations filed in support of its Opposition to the Motion for Class Certification. Specifically, Defendant argues that the Court overlooked, or applied the wrong legal standard in evaluating the declarants' statements concerning whether, and the extent to which, the declarants took off-duty meal breaks. Defendant also argues that the Court applied an incorrect legal standard in considering its affirmative defense that the "nature of the work" exception permitted on-duty meal periods to be taken, with the result that we made an erroneous merits determination and failed to consider material facts going

to the susceptibility of this exception to class-wide determination.

II. The Court's Evaluation of Defendant's Declarations re: Off-Duty Meal Periods

Federal Rule of Civil Procedure 23(b)(3) requires that we find "that the questions of law or fact common to class members predominate over any questions affecting only individual members." Our Class Certification Order noted the following common and predominate facts: (1) "[a]ll putative subclass members were required to sign an 'On-Duty Meal Break Consent Agreement'" and (2) "a large majority of [Defendant's] employees work at 'single guard posts' where there is no other employee to relieve them from their duties, requiring the employees to take on-duty meals."[1] (Class Certification Order at 4).

[1] We noted that "our conclusions with respect to the [Class Certification] Motion would be the same irrespective of our consideration of the declarations." (Class Certification Order at 4-5 n.5). Our conclusions as to commonality and predominance were informed by the admissions by Leo Flury, who is *Defendant's* designated Person Most Knowledgeable. (*See id.* at 4, n.4). Flury testified that "99.9%" and later "a large majority" of his business consisted of single guard posts. He also stated that he didn't "know of any single post that has a lunch break as part of the program" because "[a]s part of the requirements as signed by the waiver . . . [t]hey cannot abandon post." (Flury Dep. Tr. 128:18-129:5). Although Defendant may wish to distance itself from Flury's statements, his admissions were material and properly before us. We were not relying on the existence of an "internal uniform [] policy . . . to the near exclusion of other factors." *Vinole v. Countrywide Home Loans*, 571 F.3d 935, 946 (9th Cir.

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We concluded that Defendant's declarations did not undermine this showing,[2] and that "[g]iven the uniform policy of requiring the putative subclass members to sign the on-duty meal break agreement

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2009). Flury describes more than a policy; he makes representations about how Defendant's policies and practices are implemented on the ground.

[2] Although the analytical significance of our discussion of Defendant's declarations could have been more explicit, our intention was to express our conclusion that the declarations had not indicated a lack of predominance as to Defendant's requirement for the on-duty meal break agreement and its use of the single guard staffing model where the employee could not abandon post. Our review of the declarations did not indicate a lack of predominance as to those common facts we identified. (*See id.* at 5 ("None of these declarations establishes that the declarant was categorically given off-duty meal breaks.")). In more precise words, as a matter of predominance, the declarations did not indicate that declarants who worked at single guard posts and signed the on-duty meal break agreement, were nonetheless not required to take on-duty meals. If a declarant was exempted from on-duty meal breaks at times, that would not defeat his standing as a Subclass member because during those times when he *was* subject to the policy, the circumstances would be those common to the Subclass. It was not our intention to pontificate about what percentage of employees took on-duty meal periods during what percentage of shifts. As explained *infra*, this is appropriately a damages inquiry. In the interest of thoroughness, we addressed Defendant's contention that the declarations "establish that meal breaks were taken during some shifts" by noting that "very few of these declarations unambiguously demonstrate that the employee was entirely relieved of duty; a significant number reveal that employees could be called away from their meal breaks to return to work." (*Id.* at 4-5). Even if this finding is based on a mistake of law (which, as we explain *infra*, it is not), our analysis as to predominance did not turn on this finding.

and the evidence that, in the vast majority of cases, this policy was implemented to require on-duty meal breaks be taken, Plaintiffs have established common and predominate issues of fact and law concerning the implementation of this waiver policy and its legality." (*Id.* at 5). In other words, when on-duty meals *were actually taken*, such on-duty meals were governed by a common policy. The justification for that policy, and the reason that it would have been triggered in any given case, is the common nature of Defendant's staffing policy – employees were not allowed to abandon their post.

Defendant interprets our Class Certification Order as "conclud[ing] that there was no evidence that any employees were fully relieved of duty and given off-duty meal periods." (Mot. at 6). Defendant appears to base this interpretation on our statement that "[n]one of these declarations establishes that the declarant was categorically given off-duty meal breaks." (Class Certification Order at 5). Even if this one sentence, abstracted from our surrounding analysis, implies that we found that *no* employee was *ever* given an off-duty meal break during *any* shift, such a finding, even if entirely erroneous, would not disturb our ultimate conclusion.[3] The Meal Break Subclass is

[3] When our Class Certification Order stated that "*very few* of these declarations unambiguously demonstrate that the employee was entirely relieved of duty," "a *significant number* reveal that employees could be called away from their meal breaks to return to work," and "in the *vast majority* of cases, this policy was implemented to require on-duty meal breaks be

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defined as Defendant's employees "who worked more than six hours and were not provided a checked-out meal break *in any work shift* from July 1, 2007 through the present, and who were not compensated for *such* on-duty meal break(s) pursuant to California Labor Code §226.7(b)." (*Id.* at 6 (emphasis added)). To have standing as a Subclass member, an employee need only to have been required to take an improper on-duty meal break a single time. To the extent that Defendant is arguing that there are particular employees who took off-duty meal breaks during some shifts or at some posts, given the way that the class has been defined, this is a damages inquiry.[4]

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taken," we acknowledged that off-duty meals were sometimes taken. (*Id.* at 5 (emphasis added)).

[4] Defendant asserts that "[t]here are no records that show which meal breaks were on-duty and which were off-duty, so USSA would have to put every class member on the stand to determine if an off-duty or on-duty meal period was taken." (Reply at 3). However, this is belied by their own declarations. With scattered exception, the declarants describe keeping records of time worked and also having been paid for on-duty meals. A significant number, including six of the nine declarations quoted by Defendant, specifically stated that they kept track of off-duty meal periods and reported this to Defendant. (*See*, *e.g.*, Asabor Decl. ¶ 7 ("I understand that USSA has a policy requiring me to keep accurate records of all of my work time, including overtime and off-duty meal periods. During my employment, I accurately reported all of the time that I worked.")). Even for those declarants who did not specifically declare that they kept track of their off-duty meal periods, inasmuch as they were able to declare that they had received compensation for the on-duty meal periods they worked, without any showing otherwise, the reasonable inference is that they were also accounting for their meal time to Defendant. Additionally, even if there are some exceptions to

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(*See id.* at 3 ("Defendant's records for each employee concerning their payment history, hours worked, and worksite assignments can be analyzed readily to determine issues related to the claims and damages, if any.")). Certainly a Subclass member could only recover for those improper on-duty meal periods actually taken, but "[t]he amount of damages is invariably an individual question and does not defeat class action treatment." *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975). What is dispositive here is that if Plaintiffs prevail on the merits, then any demonstrated on-duty meal period would give rise to liability on the basis of a question of law common to all other class members.

Finally, even if we were to reach Defendant's argument that we applied the wrong standard in evaluating the declarations, and erroneously concluded that the mere possibility of being called back to work renders a meal period 'on-duty,' we would reject Defendant's conclusion given the full content of the declarations.[5] Defendant analogizes to authority

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record-keeping as to off-duty meal periods, given Flury's admission that those staffed at single guard posts were required to take on-duty meals, Defendant's records of each employee's clock-in and clock-out times, how much he was paid, and whether he was staffed at a single guard post, can be used to extrapolate whether his meal break was on- or off-duty. In any case, predominance is not disturbed; at most, this informs the methodology used to calculate class-wide damages, if any.

[5] We also note the somewhat academic nature of this inquiry. It is *Defendant's* records that would be analyzed upon any finding of liability. These records are maintained, we would

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discussing on-call policies, arguing that since on-call time is non-compensable even when an employee might be called to work, here too, the possibility of being called back from a meal break does not make such break on-duty. California law instructs that we determine whether "the employees [are] substantially restricted during [the relevant] time, so as to be unable to attend to private pursuits." *Madera Police Officers Ass'n v. City of Madera*, 36 Cal. 3d 403, 410 (1984). So while Defendant is correct that the chance of being called back to work, without more, does not make time compensable, we must examine all of the conditions placed on the employee. *See* DLSE Opinion Letter 1992.01.28, p. 3 ("If the employee is simply required to wear a pager or respond to an in-house pager during the meal period there is no presumption that the employee is under the direction or control of the employer *so long as no other condition* is put upon the employee's conduct during the meal period." (emphasis added)).

Here, a predominate number of declarants have stated that they were required to remain on the premises during their meal period. (*See*, *e.g.*, Asobor Decl. ¶ 10 ("[T]he nature of the work prevented me, at times, from being fully relieved of all of my duties for

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presume, by Defendant and the Subclass members. Even if the *Court* has applied an erroneous standard in its evaluation of the declarations, Defendant has not suggested that its own declarants or the Subclass members incorrectly accounted for *their own* on-duty meal periods.

a meal period . . . and therefore I am not permitted to leave the premises during my lunch break.")).[6] Under California law, this makes this time compensable because the employee was substantially restricted from attending to private pursuits. *See Bono Enters., Inc. v. Bradshaw*, 32 Cal. App. 4th 968, 975 (1995), overruled on other grounds *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557 (1996) ("When an employer directs, commands or restrains an employee from leaving the work place during his or her lunch hour and thus prevents the employee from using the time effectively for his or her own purposes, that employee remains subject to the employer's control. According to IWC Order No. 1-89 [defining "hours worked"], that employee must be paid."); *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575 (2000) (agricultural workers were subject to employer's control during the time when they were being transported to and from agricultural fields on employer's buses, making these compensable hours worked); *see also* DLSE Opinion Letter 2009.06.09, p.4 ("[T]he Division has consistently taken the position that, except in specified circumstances involving the health care industry, if an employer does not permit an employee to leave their work site during the meal period (even

[6] Although many of the declarants purport to say that the "nature of the work" required them to remain on-duty, as we discuss *infra*, this is something that can be determined on a class-wide basis.

if relieved of all duties) the employee must be compensated for that meal period.").[7]

[7] This is fully consistent with the authority cited by Defendant, most of which analyzes the requirements of the Fair Labor Standards Act, rather than California law. In each of the cases cited by Defendant which held that on-call time was non-compensable, the employer's on-call policy permitted the employee considerable freedom of movement. *See Gomez v. Lincare*, 173 Cal. App. 4th 508, 523-524 (2009) (policy required a telephone response to a page within 30 minutes and appearance at the worksite within 2 hours, did not impose geographic restrictions on employee's movements, employees could trade on-call responsibilities, and employees engaged in personal activities while on-call); *Bright v. Houston N.W. Med. Ctr. Survivor, Inc.*, 934 F.2d 671, 676 (5th Cir. 1991) (pursuant to the on-call policy, the employee "did not have to remain on or about his employer's place of business, or some location designated by his employer, but was free to be at his home or at any place or places he chose, without advising his employer, subject only to the restrictions that he be reachable by beeper, not be intoxicated, and be able to arrive at the hospital in 'approximately' twenty minutes"); *Paniagua v. City of Galveston*, 995 F.2d 1310, 1317 (5th Cir. 1993) ("[t]he record plainly supports the finding that Paniagua was able to effectively use his standby time for his own purposes. That he was interrupted several times a week does not change the fact that he was able to attend movies, go to dinner, and otherwise travel within a thirty-mile radius"); *Armitage v. City of Emporia*, 982 F.2d 430, 432-33 (10th Cir. 1992) (police detectives on-call time was non-compensable because they were "allowed to do as they pleased while on call, as long as they remained sober, could be reached by beeper and were able to report to duty within twenty minutes of responding to the page")

III. The Court's Evaluation of the "Nature of the Work" Exception

Defendant argues that we erred in determining that the "nature of the work" exception was susceptible to class-wide determination because we applied the wrong legal standard, and therefore failed to appreciate the necessarily individualized nature of the "nature of the work" inquiry.

We begin by noting, as we did in our Class Certification Order, that we must be "cautious of a defendant invoking the 'nature of the work' exception on the grounds that there are 'case-by-case, shift-by-shift' differences, because this 'would potentially eviscerate the protections provided by California Labor Code § 226.7, as every employer would defend against a claim of missed meal periods by arguing that, because of the nature of the employee's work on that day, he was too busy to take a break.'" (Class Certification Order at 5 (quoting *West v. Circle K Stores, Inc.*, No. CIV. S-04-0438 WBS GGH, 2006 WL 1652598, at *4 (E.D. Cal. June 13, 2006))).[8] While it seems that the DLSE has moved away from the language it used in Opinion Letter 2002.09.04, that the "nature of the work" exception applies only where it is "virtually impossible" to allow for an off-duty meal period, this citation was not determinative in

[8] In its moving papers, Defendant distinguishes *West* on its facts. We quoted *West* solely for the proposition cited, not to analogize our case to its facts.

our analysis. The analytical role it served in our Class Certification Order was merely to express that the showing necessary to establish the "nature of the work" exception is a high one. Given this, coupled with our concern that employers not evade the requirements of the California Labor Code, the evidence did not cause us concern that the exception could be established for any one worksite in particular, as opposed to from a class-wide perspective.[9] Even without resort to the "virtually impossible" language, none of the authority of which we are

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[9] Defendant argues that we made an improper merits determination. However, we made no legal conclusion on the merits, nor did we say that Defendant would be incapable of establishing the "nature of the work" exception on a class-wide basis. We were commenting on the showing that Defendant had made, at that time, for purposes of understanding whether individual issues predominated. If there are no relevant distinctions between the worksites – because none "presented such *unique* considerations that employees were unable to take an off-duty meal break," (Class Certification Order at 5 (emphasis added)) – then the "nature of the work" inquiry would be a common one, rather than a site-by-site one. *See Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 593 (9th Cir. 2010) ("Rule 23(b)(3) requires a district court to formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case." (citation and quotation marks omitted)). To the extent that our analysis could be read as analyzing 'probability of success on the merits,' (*see*, *e.g.* Class Certification Order at 5 ("[I]t is not clear how *any* of these job descriptions would qualify for the nature of the work exception.")), such analysis was limited to the 103 declarations, and only to the extent that we failed to see a nexus between *Defendant's argument* that the declarants' job descriptions varied and the "nature of the work" inquiry.

aware would support the proposition that the "nature of the work" exception should *not* require a high showing.[10] Indeed, DLSE Opinion Letter 2009.06.09, which Defendant argues we erred in failing to properly consider, opined that in the fairly remarkable circumstances where a truck driver hauling flammable materials was prohibited by federal regulations from leaving his truck unattended, he could permissibly take an on-duty meal period.

The California court of appeal in *Bufil v. Dollar Financial Group, Inc.*, 162 Cal. App. 4th 1193 (2008), in reversing the trial court's order denying class certification, offered analysis which we find instructive. There, the defendant had in place a policy that triggered on-duty meals in two specific cases and employees were required to record whether their meal break was on-duty and if so, which trigger was present. The court of appeal held that the plaintiff's theory, which was that those two triggers were outside the scope of the "nature of the work" exception, was a common legal question susceptible to classwide evaluation. The plaintiff's "position [was] that either the putative class employees were denied an

[10] We disagree with Defendant's interpretation of DLSE Opinion Letter 2009.06.09 as imposing a *per se* rule requiring shift-by-shift analysis. The Opinion Letter is entirely consistent with determining the "nature of the work" exception on a group-wide basis – in that case, drivers hauling flammable materials in accordance with federal regulations. To the extent that the Opinion Letter does suggest a *per se* rule requiring individualized analysis, we decline to adopt it because it is incompatible with the remedial objectives of California Labor Code § 226.7.

off-duty meal for an improper purpose, or they were not. Under [the plaintiff's] structuring of the case, the court could identify the class from [the defendant's] records and determine liability as a matter of law." *Id.* at 1203-04. We read *Bufil* to endorse the determination of the "nature of the work" exception on a class-wide basis where the defendant's liability, if any, will be based on a legal theory common to the class. In *Bufil*, there were discrete and ascertainable reasons why a class member would have been required to take an on-duty meal break, and those reasons could be subjected to legal scrutiny.

Our Class Certification Order similarly identified a policy justification offered by Defendant that can be subjected to common legal inquiry:

> On the contrary, given the admission that a large majority of Defendant's employees work at single guard posts and therefore cannot be relieved of duty, a common legal question that is presented and susceptible to class-wide determination is whether the nature of the work exception applies to Defendant's single guard post staffing model.

We recognize that unlike in *Bufil*, the Meal Break Subclass is not definitionally limited to those off-duty meal breaks necessitated by Defendant's staffing model. However, Defendant has explained the justification for on-duty meal periods unequivocally in these terms. In his deposition, Leo Flury gave no indication that on-duty meal periods were required for reasons *other than* the single post staffing model (i.e. an inability to be relieved of duty), such that

predominance has been defeated. (*See* Flury Dep. Tr. 128:9-131:6). The merits inquiry here will be based on the *justification* proffered for the on-duty meal breaks that *were taken*.

We reiterate the conclusion that we reached in our Class Certification Order that evaluating the legal sufficiency of this proffered rationale is not inextricably intertwined with individualized shift-by-shift determinations. We acknowledged that the declarants' job descriptions varied, but noted that the "variety of work itself is immaterial unless the particular nature of certain job duties prevents an off-duty meal break from being taken." (Class Certification Order at 5). Defendant argues that we erred in that we recognized variation, yet refused to accord those individualized issues appropriate weight under the current DLSE standard. Defendant has again provided generic descriptions of the diversity of worksites in which its employees serve. Defendant seems to frame the issue as an analysis of the "nature of the work" in a vacuum. This glosses over the purpose of such analysis. "An 'on duty' meal period shall be permitted only when the nature of the work *prevents an employee from being relieved of all duty*." Industrial Welfare Commission Wage Order No. 4 § 11(A) (emphasis added). Defendant has still not analyzed *how* the variations in job descriptions are legally significant. Even after reciting the five factors[11]

[11] "(1) the type of work, (2) the availability of other employees to provide relief to an employee during a meal period, (3) the

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the DLSE employs in its "nature of the work" opinions, Defendant does not point to specific facts, which are not common to the class, in order to articulate a nexus with any of those factors. Defendant's assertion that individualized inquiries will be required as to the guards' "job duties, the type of people or property that is being protected, the staffing level of the location, the remoteness of the location, the feasibility of providing additional staff, and the ramifications of relieving the employee of all duty," (Reply at 6), is highly boilerplate. This argument would be more persuasive if Defendant illustrated how these specific factors *actually* manifested in *particular* posts in a way that was not common to the Subclass, such that predominance is defeated.[12]

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potential consequences to the employer if the employee is relieved of all duty, (4) the ability of the employer to anticipate and mitigate these consequences such as by scheduling the work in a manner that would allow the employee to take an off-duty meal period, and (5) whether the work product or process will be destroyed or damaged by relieving the employee of all duty." DLSE Opinion Letter 2009.06.09, p. 7.

[12] We fully recognize Defendant's argument, by way of example, that an analysis of the 'nature' of the work of Anthony Alonzo, who worked at a chemical plant, would be different than an analysis of the 'nature' of the work of Elizabeth Lopez, who worked at K-Mart. Even if we give Defendant's illustration every possible favorable inference (notwithstanding Defendant's failure to articulate them), and concluded that the five DLSE factors would be differently animated in these two cases such that Defendant could invoke the "nature of the work" exception at one worksite but not the other, taken *as a whole*, the declarations do not demonstrate that individual issues predominate.

The insufficiency of this showing aside, Defendant's own Person Most Knowledgeable Leo Flury has explained the rationale for its on-duty meal break policy in undifferentiated, unparticularized, and generalized terms. To the extent that Defendant is now saying, implicitly, that its own admission was mistaken, and in fact, we have to examine the propriety of its staffing model on a case-by-case basis, Defendant has not *shown* how individual issues predominate over the general staffing conditions.

III. Conclusion

In light of the foregoing discussion, the Motion is **DENIED**.

IT IS SO ORDERED.

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APPENDIX D

E-Filed

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 09-9554-GHK (Ex) Date January 11, 2011

Title *Muhammed Abdullah, et al. v. U.S. Security Associates, Inc.*

Presiding: The Honorable GEORGE H. KING, U. S. DISTRICT JUDGE

Beatrice Herrera	N/A	N/A
Deputy Clerk	Court Reporter/ Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: (In Chambers) Order re: Plaintiffs' Motion for Class Certification; **[36]**

This matter is before the Court on Plaintiffs Muhammed Abdullah ("Abdullah"), William Kimbrough, IV ("Kimbrough"), and Christina Aguilar's ("Aguilar," and collectively, "Plaintiffs") Motion for Class Certification ("Motion"). Plaintiffs are former security guard employees of Defendant U.S. Security Associates, Inc. ("Defendant"). In their Second Amended Complaint ("SAC"), Plaintiffs identified

eleven sub-classes. The instant Motion seeks the certification of eight sub-classes.[1] We have considered the papers filed in support of and in opposition to this Motion, and deem this matter appropriate for resolution without oral argument. L.R. 7-15. As the Parties are familiar with the facts, we will repeat them only as necessary. Accordingly, we rule as follows.

I. Legal Standard

A motion for class certification is governed by the requirements of Federal Rule of Civil Procedure 23. In determining whether to certify the class, we must take the substantive allegations of the complaint as true. *Blackie v. Barrack,* 524 F.2d 891, 901 n.17 (9th Cir. 1975). However, we may look beyond the pleadings and at the substantive claims of the parties to decide whether the Rule 23 criteria have been met. *Id.* Moreover, we are "required to consider the nature

[1] There is considerable ambiguity in Plaintiffs' Motion as to which subclasses they wish to certify. The Notice of Motion and the introduction to the Memorandum of Points and Authorities omit any mention of subclass (i), yet Abdullah's claims are asserted to be, without any analysis, typical of this subclass. Although the introduction to the Memorandum of Points and Authorities lists subclasses (j) and (h) as among those Plaintiffs seek to certify, the Notice of Motion omits them and no class representative is designated for either subclass. To the extent that Plaintiffs actually intended to seek certification of any of these three subclasses, their notice to the Court and Defendant is inadequate, and we deem Plaintiffs to have abandoned these subclasses.

and range of proof necessary to establish [the] allegations" in the complaint. *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.,* 691 F.2d 1335, 1342 (9th Cir. 1982) (citation omitted).

Federal Rule of Civil Procedure 23(a) imposes four prerequisites for a proper class action:

> One or more members of a class may sue . . . as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

In addition to satisfying the prerequisites set forth in Rule 23(a), a party seeking certification must satisfy one of three conditions set forth in Rule 23(b). Plaintiffs argue that the proposed class and subclasses satisfy Rule 23(b)(3), which requires that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Furthermore, "[t]he party seeking certification bears the burden of showing that each of the four requirements of Rule 23(a) and at least one requirement of Rule 23(b) have been met." *Dukes v. Wal-Mart Stores, Inc.,* 603 F.3d 571, 580 (9th Cir. 2010) *(en banc)* (citation omitted).

II. Overall Class

A. Class Definition[2]

For the reasons contained herein, we certify the following class: "a class of all of Defendant's current and former Security Guard/Officer employees in California from July 1, 2007 to the present, and who qualify as a member of one or more of the certified subclasses."

B. Rule 23(a)(1)

The numerosity requirement is satisfied here because it is undisputed that Defendant's current and former employees during the class period are approximately 3,600 security guards in California. (Dkt. No. 36, Whitehead Decl., Ex. A, Flury Depo. ["Flury Depo."] 138:22-139:14).

C. Rule 23(a)(4)

We conclude that the named representative parties will fairly and adequately protect the interests of the class. "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other

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[2] Plaintiffs have defined the putative class as: "a class of all current and former Security Guard/Officer employees of Defendants [sic] who worked at US Security Associates, Inc. in California during the period from July 1, 2007 to the present." We conclude that this is an overbroad definition absent the limitation we impose in our discussion.

class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1020 (9th Cir. 1998). All Plaintiffs have indicated that they will assist counsel, (Dkt. No. 36, Abdullah Decl. ["Abdullah Decl."] ¶ 10; *id.,* Kimbrough Decl. ["Kimbrough Decl."] ¶ 12; *id.,* Aguilar Decl. ["Aguilar Decl."] ¶ 11), and counsel for Plaintiffs appear to be experienced wage and hour class action litigators, (*id.,* Yoon Decl. ¶¶ 3-8).

Defendant suggests that Plaintiffs have a potential conflict in representing a class that includes supervisory security guards, who Defendant claims were responsible for overseeing and enforcing Defendant's meal break policies. However, Plaintiffs' theory is based on the existence of a company-wide policy, not the potential wrongdoing, if any, of individual supervisory employees.

Defendant also argues that all Plaintiffs are former employees and therefore are inadequate representatives of the putative class members currently employed by Defendant. Although a class representative's status as a former employee is a factor we must weigh, there is no absolute bar against a former employee representing a class that includes current employees. *See Glass v. UBS Fin. Servs., Inc.,* 331 F. App'x 452, 455 (9th Cir. 2009); *Wofford v. Safeway Stores, Inc.,* 78 F.R.D. 460, 489 (N.D. Cal. 1978) ("[T]here is ample support for the position that former employees may represent present employees. . . ." (citing *Wetzel v. Liberty Mut. Ins.*

Co., 508 F.2d 239, 247 (3d Cir. 1975))); *In re Wells Fargo Home Mortgate Overtime Pay Litigation,* 527 F. Supp. 2d 1053, 1064 (N.D. Cal. 2007). Notwithstanding Plaintiffs' status as former employees or the nature of their termination, Plaintiffs and the putative class's current employee members are all "equally interested in obtaining compensation for the assertedly unlawful practices set forth" in the Second Amended Complaint, and Plaintiffs are adequate representatives. *Glass,* 331 F. App'x at 455. Moreover, any purported inconsistencies between Plaintiffs' prior testimony do not overcome their showing of adequacy.

D. Rule 23(b)(3), Rules 23(a)(2) and (a)(3)

To the extent there is dispute between the Parties as to commonality, typicality, and predominance, such disputes relate to the claims asserted by particular subclasses. We address those specific issues in our discussion of each subclass.

The class action method is superior to requiring each employee to file an individual claim. Such alternative would result in duplicative discovery and filings. Also, given the relatively small amount each putative class member stands to collect, there would be insufficient incentive for each to bring a claim. This case is also manageable as a class action. Defendant's records for each employee concerning their payment history, hours worked, and worksite assignments can be analyzed readily to determine issues related to the claims and damages, if any.

III. Subclasses

A. Rule 23(a)(1)

Plaintiffs assert, and Defendant does not dispute, that the smallest subclasses are those made up of former employees. Even for these smallest subclasses, there are 800-900 employees whose employment ended during the class period, satisfying the numerosity requirement. (Flury Depo. 139:3-14).

B. Rule 23(b)(3), Rules 23(a)(2) and (a)(3)

1. Subclass (b) (meal and rest break)[3]

As to the meal break component of the subclass, Plaintiffs allege that Defendant's policy improperly required its employees to take on-duty meal breaks. California Labor Code § 226.7 states:

> (a) No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission. (b) If an employer fails to [do so,] . . . the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for

[3] Plaintiffs have defined the putative subclass as: "a Subclass of all of Defendants' [sic] past and present California employees who worked more than 6 hours in any work shift as a Security Guard/Officer from July 1, 2007 through the present[.]" (SAC ¶ 18(b)). This definition is also too broad absent the limitation we impose in our discussion.

> each work day that the meal or rest period is not provided.

Industrial Welfare Commission Wage Order No. 4 § 11(A) provides that:

> 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.

Plaintiffs have provided sufficient evidence to establish predominate common issues of fact and law. All putative subclass members were required to sign an "On-Duty Meal Break Consent Agreement." (Dkt. No. 36, Whitehead Decl., Ex. F; Flury Depo. 39:17-19). Furthermore, Defendant has admitted that a large majority[4] of its employees work at "single guard posts" where there is no other employee to relieve

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[4] In his deposition, Leo Flury, the designated Person Most Knowledgeable for Defendant, stated that "99.9% of [his] business" consisted of single guard posts. (Flury Depo. 128:9-129:19). Through an errata, Flury corrected his testimony to indicate that "a large majority" consisted of single guard posts. (Dkt. No. 36, Whitehead Decl., Ex. B).

them from their duties, requiring the employees to take on-duty meals. (Flury Depo. 128:9-129:19). Defendant argues that various employees' declarations[5] establish that meal breaks were taken during some shifts. However, very few of these declarations unambiguously demonstrate that the employee was entirely relieved of duty; a significant number reveal that employees could be called away from their meal breaks to return to work. (*See, e.g.,* Dkt. No. 42, Hildebran Decl. ¶ 6; *id.* Hyatt Decl. ¶ 6; *id.,* Haynes Decl. ¶ 11). None of these declarations establishes that the declarant was categorically given off-duty meal breaks.[6] Given the uniform policy of requiring

[5] Plaintiffs have objected that these declarations were not timely disclosed and should be excluded pursuant to Federal Rule of Civil Procedure 37(c)(1). Since our conclusions with respect to the instant Motion would be the same irrespective of our consideration of the declarations, and since Defendant represents that the declarations have now been disclosed in a supplemental initial disclosure, (Dkt. No. 45, Boughton Decl., Ex. 2), we do not reach the issue of whether the declarations should be excluded

[6] Accordingly, Defendant's reliance on *Faulkinbury v. Boyd & Associates, Inc.,* 112 Cal. Rptr. 3d. 72 (2010), *petition for review granted,* 117 Cal. Rptr. 3d 1 (2010), is misplaced. Unlike *Faulkinbury,* where despite a uniform policy of requiring employees to consent to an on-duty meal agreement, there was nonetheless wide variation in whether the putative subclass employees *actually* took on-duty or off-duty meals, we have here a uniform policy and a uniform practice of requiring on-duty meal breaks. *See id.* at 87. We also note that subsequent to the filing of the Motion, on October 13, 2010, the California Supreme Court granted review in *Faulkinbury,* and therefore, according to California Rules of Court 8.1105(e)(1), *Faulkinbury* is no longer considered a published decision.

the putative subclass members to sign the on-duty meal break agreement and the evidence that, in the vast majority of cases, this policy was implemented to require on-duty meal breaks be taken, Plaintiffs have established common and predominate issues of fact and law concerning the implementation of this waiver policy and its legality.

Defendant argues that individual issues predominate over the common issues because it intends to invoke the "nature of the work" exception, which will be necessarily individualized. We disagree. We must be cautious of a defendant invoking the "nature of the work" exception on the grounds that there are "case-by-case, shift-by-shift" differences, because this "would potentially eviscerate the protections provided by California Labor Code § 226.7, as every employer would defend against a claim of missed meal periods by arguing that, because of the nature of the employee's work on that day, he was too busy to take a break." *West v. Circle K Stores, Inc.,* No. CIV. S-04-0438 WBS GGH, 2006 WL 1652598, at *4 (E.D. Cal. June 13, 2006). The "nature of the work" exception only applies in cases where it is "virtually impossible" to allow for an off-duty meal period. Department of Labor Standards Enforcement Opinion Letter 2002.09.04. The 103 employee declarations provided by Defendant at best establish that the declarants' job descriptions varied; but it is not clear how *any* of these job descriptions would qualify for the nature of the work exception. The variety of the work itself is immaterial unless the particular nature of certain job

duties prevents an off-duty meal break from being taken. No evidence has been offered by Defendant that certain worksites presented such unique considerations that employees were unable to take an off-duty meal break. On the contrary, given the admission that a large majority of Defendant's employees work at single guard posts and therefore cannot be relieved of duty, a common legal question that is presented and susceptible to class-wide determination is whether the nature of the work exception applies to Defendant's single guard post staffing model.

Plaintiffs Abdullah, Kimbrough, and Aguilar's claims are typical of this subclass because they were subject to Defendant's uniform policy. All three Plaintiffs have declared that they were not given off-duty meal breaks because they were not allowed to abandon their posts. (Abdullah Decl. ¶¶ 5, 7; Kimbrough Decl. ¶ 6; Aguilar Decl. ¶¶ 5-7).

However, as to the rest break component of this proposed subclass, we find that there are insufficient common issues of fact and that individual issues would predominate. An employer must authorize and permit a rest period for every four hours worked or pay the employee one hour of pay at the employee's regular rate for each workday the rest break is not provided. Cal. Labor Code § 226.7(b); Industrial Welfare Commission Wage Order No. 4 § 12. However, employers are not required to compel employees to take rest breaks; only to provide and authorize them.

See White v. Starbucks Corp., 497 F. Supp. 2d 1080, 1085-86 (N.D. Cal. 2007).

Plaintiffs have not produced evidence of a common issue of law regarding Defendant's rest break policy. The putative class members were not required to sign any sort of consent agreement governing rest breaks. All of the testimony cited by Plaintiffs in support of certification of the rest break subclass actually involves the deponent's testimony about Defendant's *meal break* policy. Plaintiffs urge the inference that since employees were not allowed to leave their post for an off-duty meal break, they must not have been allowed to take an off-duty rest break either. However, Plaintiffs have provided no evidence that this was Defendant's common policy and such an inference is unsupported by the record. Each of the named Plaintiffs admits to having taken regular rest breaks during certain postings. (*See* Dkt. No. 42, Boughton Decl., Ex. 8, Abdullah Depo. 155:1-156:13; *id.,* Ex. 10, Aguilar Depo. 74:10-75:15; *id.,* Ex. 11, Kimbrough Depo. 45:17-46:14). To the extent that Plaintiffs have produced evidence showing that on particular occasions rest breaks were improperly denied, we conclude that such claims are not susceptible to class-wide treatment because we would have to undertake individualized determinations as to each putative subclass member.

Therefore, only the meal break component of subclass (b) shall be certified. Accordingly, we certify

the following subclass: "a Subclass of all of Defendant's past and present California Security Guard/ Officer employees who worked more than six hours and were not provided a checked-out meal break in any work shift from July 1, 2007 through the present, and who were not compensated for such on-duty meal break(s) pursuant to California Labor Code §226.7(b)."

2. Subclasses (c) and (e) (reimbursement)[7]

California Labor Code § 2802 requires that employers "indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties." Plaintiffs allege that Defendant had a policy of failing to provide reimbursement for the costs incurred by the putative subclass members in maintaining their uniforms, obtaining required training, licenses, and certifications, and for the

[7] Plaintiffs have defined the two putative subclasses as: first, "a subclass of all of Defendants' [sic] past and present California Security Guard/Officer employees who were not reimbursed for all work-related expenses during the period from July 1, 2007 to the present;" and second, "a subclass of all of Defendants' [sic] past and present California Security Guard/Officer employees whom Defendants [sic] required to maintain a uniform during the period from July 1, 2007 to the present[.]" (SAC ¶¶ 18(c), (e)). We conclude that these definitions are imprecise absent the modifications we make in our discussion. We have set forth three subclasses in the interest of clarity.

mileage costs of using their personal vehicles to patrol worksites and to travel between worksites.

i. Uniform Maintenance

Section 9 of Industrial Welfare Commission Wage Order 8 provides that "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." *See also California Dairies, Inc. V. RSUI Indem. Co.,* 617 F. Supp. 2d 1023, 1044 (E.D. Cal 2009). Plaintiffs have established that Defendant had a class-wide policy of requiring the putative subclass members to maintain their own uniforms. Employees were required to sign an "Employee Uniform Agreement" prior to being hired, (Dkt. No. 36, Whitehead Decl., Ex. D), which required that the employee maintain and return the uniform in a clean condition or otherwise reimburse Defendant for the cost of cleaning the uniform. Defendant responds that it has never charged any employee under this provision. However, this does not speak to Plaintiffs' argument that Defendant failed, as a matter of policy, to provide maintenance for uniforms. There is nothing to suggest a lack of commonality among the putative subclass or that individual issues predominate.

Therefore, we certify the following subclass: "a subclass of all of Defendant's past and present California Security Guard/Officer employees whom Defendant required to maintain a uniform during the

period from July 1, 2007 to the present, and who were not provided reimbursement."

Plaintiffs Abdullah and Kimbrough's claims are typical of the uniform maintenance subclass because they have declared that they were responsible for cleaning their own uniforms and were never provided reimbursement. (Abdullah Decl. ¶ 4; Kimbrough Decl. ¶ 4).

ii. Mileage Expenses

Plaintiffs have further established that there was a company-wide policy of not reimbursing employees for the mileage costs of operating their private vehicles for work-related purposes. Defendant has admitted that its policy is not to reimburse employees for using their personal vehicles to travel between job sites during the workday when the job sites are within a 50-mile radius of the employee's home. (Flury Depo. 62:1-21; 103:2-11). Defendant has also admitted that it has no policy in place to ensure that employees who use their personal vehicles to patrol their job site are reimbursed for mileage. (*Id.* 100:8-101:22). Defendant argues that some employees never incurred mileage expenses, while others that sought reimbursement received it. Certainly, those employees who did not suffer an injury would not have standing as subclass members. Defendant's own records should reveal which employees received reimbursement for mileage expenses. The law requires that "[o]nce an employer knows or has reason

to know that the employee has incurred an expense, then it has the duty to exercise due diligence and take any and all reasonable steps to ensure that the employee is reimbursed for the expense." *Stuart v. RadioShack Corp.,* 641 F. Supp. 2d 901, 903 (N.D. Cal. 2009). Given Defendant's common policies, common issues of fact and law predominate over individual instances where expenses were not incurred or were reimbursed upon request.

Therefore, we certify the following subclass: "a subclass of all of Defendant's past and present California Security Guard/Officer employees who were not reimbursed for the mileage costs of operating a personal vehicle in carrying out work-related duties during the period from July 1, 2007 to the present."

Plaintiffs Abdullah and Kimbrough's claims are typical of the mileage reimbursement subclass because they have both declared that they used their personal vehicles to patrol their work site and did not always receive reimbursement, and Kimbrough has declared that he was sometimes required to drive to various locations during his shift using his personal vehicle and was not reimbursed. (Abdullah Decl. ¶ 3; Kimbrough Decl. ¶ 3).

iii. Mandatory Training, Licensing, and Certifications

Finally, Plaintiffs have shown that Defendant had a company-wide policy of requiring its employees to obtain specialized licenses and certifications without

reimbursing them for their costs. (Flury Depo. 43:25-44:10; 45:9-18). Defendant argues that several employees were reimbursed for their training. However, the common issues of fact and law presented by the company-wide policy predominate over any such individual instances of reimbursements.

Therefore, we certify the following subclass: "a subclass of all of Defendant's past and present California Security Guard/Officer employees who were not reimbursed for mandatory training, licensing, and certifications during the period from July 1, 2007 to the present."

Plaintiff Kimbrough's claims are typical of this subclass because he has declared that he was required to pay for training and licenses, including CPR and First Aid, and was not reimbursed. (Kimbrough Decl. ¶ 5).

3. Subclass (a) (vacation)[8]

California Labor Code § 227.3 requires that when "an employee is terminated without having taken off

[8] Plaintiffs have defined the putative subclass as: "a subclass of all of Defendants' [sic] former California Security Guard/Officer employees whose employment ended between July 1, 2007 and the present who were not paid at the end of their employment all vested, unused vacation wages, including floating holidays, personal days, and other time off benefits[.]" (SAC ¶ 18(a)). We conclude that this definition is imprecise absent the modification we make in our discussion.

his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with . . . [the] employer policy respecting eligibility or time served." "The right to a paid vacation, when offered in an employer's policy or contract of employment, constitutes deferred wages for services rendered. . . . [A] proportionate right to a paid vacation 'vests' as the labor is rendered. Once vested, the right is protected from forfeiture by section 227.3. On termination of employment, therefore, the statute requires that an employee be paid in wages for a pro rata share of his vacation pay." *Saustez v. Plastic Dress-Up Co.,* 31 Cal. 3d 774, 784 (1982).

Plaintiffs present several theories of recovery. First, Plaintiff Abdullah contends that he was not paid the correct number of accrued vacation hours, and not at his final wage rate. (Abdullah Decl. ¶ 8). This is insufficient to establish a common question affecting the subclass. Plaintiffs have pointed to the testimony of Defendant's PMK that branch managers were responsible for deciding the appropriate rate to pay accrued vacation time. (Flury Depo. 153:12-154:7). However, Plaintiffs have presented no evidence that there was a systematic policy of discounting the number of hours owed for accrued vacation, or compensating accrued vacation at a rate other than the employee's final rate. Plaintiffs have also presented no evidence of any person, other than Plaintiff Abdullah, who received inaccurate compensation for accrued vacation because of these claimed errors.

Plaintiffs next argue that the Employee Handbook policy is to credit accrued vacation pay to a former employee if they are rehired within 180 days. But none of the named Plaintiffs suffered this injury and none of them can represent this purported subclass.

Finally, Plaintiffs argue that Defendant's "retention bonus," which is offered to employees after they complete an initial 2,080 hours of work, is actually a "subterfuge" for vacation pay that is otherwise accruable pursuant to Labor Code § 227.3. *See also Saustez,* 31 Cal. 3d at 784 (requiring pro rata share of accrued vacation pay upon termination). Plaintiffs' theory is that since the retention bonus is worth 40 hours of pay, and after reaching an initial 2,080 of work the employee begins accumulating vacation benefits at an identical rate of 40 hours of vacation time for each subsequent 2,080 worked, the retention bonus is, in reality, vacation pay. Therefore, Plaintiffs argue, those employees who are discharged before reaching the initial 2,080 hours worked, and who therefore did not receive the retention bonus, are entitled to a pro rata share of the retention bonus as vacation pay upon discharge. Whether Defendant's retention bonus policy should be considered vacation pay presents a common question of law. Defendant argues that it is permissible to offer a retention bonus rather than vacation pay. However, this argument goes to the merits. Defendant also argues that an individualized evaluation of each employee would be

necessary because the dictionary definition of "subterfuge" includes an element of deceit. We disagree. The policy is subject to a common legal inquiry.

Therefore, we certify the following subclass: "a subclass of all of Defendant's former California Security Guard/Officer employees whose employment ended between July 1, 2007 and the present, and whose employment totaled fewer than 2,080 hours and who were not paid at the end of their employment any vested, unused vacation wages."[9] While we, of course, do not purport to decide on this Motion whether the so-called retention bonus is in actuality vacation pay, this definition permits a class-wide determination on this legal issue, and recovery by members of this subclass only were we to conclude that the retention bonus is in reality vacation pay.

Plaintiff Kimbrough's claims are typical of this subclass because he was terminated before reaching an initial 2,080 hours of employment and did not receive vacation wages or any part of the retention bonus, however characterized. (Kimbrough Decl. ¶¶ 10-11). However, Plaintiff Aguilar, who is also designated as a subclass representative, brings a claim that is not typical of this subclass because she

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[9] Plaintiffs' proposed subclass definition also includes those employees who were not paid for "floating holidays, personal days, and other time off benefits." (SAC ¶ 18(a)). It is unclear if these desigations are synonymous with vacation pay. Even if they are not synonymous with vacation pay, there has been no showing of any justification for class-treatment on these bases.

asserts that she in fact worked 2,080 hours, yet failed to receive a retention bonus. (Aguilar Decl. ¶ 9). There is no evidence that Defendant has a policy of not paying the retention bonus even after an employee has worked 2,080 hours. Plaintiff Aguilar's individualized complaint does not qualify her as an adequate class representative. Therefore, only Plaintiff Kimbrough is designated a representative of this subclass.

4. Subclasses (f) and (g) (off-the-clock)[10]

Plaintiffs seek to certify two subclasses related to Defendant's failure to provide compensation to employees who worked at multiple job sites throughout the day and did not receive compensation from Defendant for time spent traveling between the sites. However, none of the named Plaintiffs is representative of any of these subclasses. Although Kimbrough is designated as the representative of subclass (f), a review of his declaration reveals no statement that he was denied wages for the time spent traveling in his personal vehicle for work-related purposes. Moreover, the Memorandum of Points and Authorities offers no

[10] Plaintiffs have defined the putative subclasses as follows: first, "a subclass of all, of Defendants' [sic] past and present California Security Guard/Officer employees during the period from July 1, 2007 to the present whom [sic] were denied proper wages;" and second, "a subclass of all of Defendants' [sic] past and present California Security Guard/Officer employees during the period from July 1, 2007 to the present whom [sic] were denied minimum wages[.]" (SAC ¶¶ 18(f), (g)).

specific analysis as to Kimbrough's claim as to this subclass, let alone how they are typical of the putative subclass. None of the named Plaintiffs is expressly designated as a representative for subclass (g) and no analysis is provided as to how any of the Plaintiffs were not paid a minimum wage, or how such claim for unpaid minimum wage is typical of the class. Certification of these subclasses is **DENIED**.

5. Subclass (d) (wage statements)[11]

California Labor Code § 226(a) requires every employer to "furnish each of his or her employees . . . an accurate itemized statement in writing." Under § 226(e), "[a]n employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled" to recovery. This subclass is derivative of the other subclasses. Plaintiffs argue that on account of Defendant's failure to pay, *inter alia,* premium pay for missed meal breaks and pro rata vacation pay upon discharge, the putative subclass members' wage statements were inaccurate. Herein we certify these other subclasses, so this subclass should be certified as well. Defendant argues that many putative subclass members have

[11] Plaintiffs have defined the putative subclass as: "a subclass of all of Defendants' [sic] past and present California employees who worked as Security Guard/Officers from July 1, 2007 through the present who received an itemized wage statement[.]" (SAC ¶ 18(d)). We conclude that this definition is overbroad absent the limitation we impose in our discussion.

provided declarations that they were not injured. However, this is a legal conclusion and goes to the merits.[12] All of the named Plaintiffs are designated as representatives of this subclass and each has derivative claims typical of the other subclasses to which they are members.

Therefore, we certify the following subclass: "a subclass of all of Defendant's past and present California employees who worked as Security Guard/ Officers from July 1, 2007 to the present who, due to the violations claimed in one or more of the other certified subclasses, received an inaccurate itemized wage statement."

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[12] The first clause of § 226(e) requires an "injury," and the penalty provision entitles a plaintiff to recover either actual damages or statutory damages. The statute makes clear that an injury must be more than the mere occurrence of a violation (a non-compliant statement). Otherwise, the statute would have no injury requirement – it could simply have been written to allow an employee receiving a non-compliant wage statement to recover actual or statutory damages. However, "[l]ost wages is a form of 'all actual damages,' which is recoverable under that statute." *Cornn v. United Parcel Service,* No. C03-2001 TEH, 2006 U.S. Dist. LEXIS 9013, at *9 (N.D. Cal. Feb. 22, 2006) (citations omitted). Therefore, if on account of the violations identified in the certified subclasses, class members did not receive their full wage, they have suffered an injury.

6. Subclass (k) (waiting time)[13]

California Labor Code § 201 requires that employees be paid on their last day of actual work or within 72 hours thereof. Plaintiffs argue that since wages were owed but unpaid as a consequence of the violations outlined in the other subclasses, the putative subclass members have not been paid within 72 hours of the end of their employment. This derivative theory of recovery presents common and predominate issues of fact and law. Defendant's argument that a determination of "wilfulness" would require case-by-case analysis is unavailing because Plaintiffs' theory applies to Defendant's policy, not individual decisions as to particular employees.

Therefore, we certify the following subclass: "a subclass of all of Defendant's California employees who worked as Security Guard/Officers from July 1, 2007 to the present who were not paid wages within 72 hours of their termination and who qualify as a member of one of the other certified subclasses."[14]

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[13] Plaintiffs have defined the subclass as: "a subclass of all of Defendants' [sic], past and present California Security Guard/Officer employees during the period from July 1, 2007 to the present who from Defendants' [sic] records were paid wages beyond 72 hours from the date of the end of their employment." (SAC ¶ 18(k)). For the reasons set forth in our discussion, we modify this definition as indicated.

[14] Because this subclass's claims are entirely derivative of the violations outlined in the other certified subclasses, and no other of Defendant's policies present common and predominate issues of fact and law, to have standing as a member of this

(Continued on following page)

IV. Conclusion

In light of the foregoing, Plaintiffs' Motion is **GRANTED**.[15] We certify "a class of all of Defendant's current and former Security Guard/Officer employees in California from July 1, 2007 to the present, and who qualify as a member of one or more of the certified subclasses." We also certify the following subclasses:

- *Meal Break Subclass.* A Subclass of all of Defendant's past and present California Security Guard/Officer employees who worked more than six hours and were not provided a checked-out meal break in any work shift from July 1, 2007 through the present, and who were not compensated for such on-duty meal break(s) pursuant to California Labor Code §226.7(b).

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subclass, a subclass member must also be a member of one of the other certified subclasses. Plaintiffs have presented a separate non-derivative theory of recovery by arguing that Defendant has a policy of suspending an employee prior to termination to circumvent the requirements of California Labor Code § 201. However, Plaintiffs' declarations do not state that they were subjected to suspension prior to termination and Plaintiffs' Memorandum of Points and Authorities fails to identify any such Plaintiffs. Accordingly, Plaintiffs are inadequate representatives of this subclass under this theory.

[15] Plaintiffs have sought "certification of the Class and each of the Subclasses as to the UCL claim." (Mot. at 22). Since the UCL claim is entirely derivative of the other subclasses, we do not need to separately certify it. Plaintiffs may pursue this claim as to any of the subclasses we have certified herein.

- *Uniform Maintenance Subclass.* A subclass of all of Defendant's past and present California Security Guard/Officer employees whom Defendant required to maintain a uniform during the period from July 1, 2007 to the present, and who were not provided reimbursement.

- *Mileage Expenses Subclass.* A subclass of all of Defendant's past and present California Security Guard/Officer employees who were not reimbursed for the mileage costs of operating a personal vehicle in carrying out work-related duties during the period from July 1, 2007 to the present.

- *Mandatory Training, Licensing, and Certifications Subclass.* A subclass of all of Defendant's past and present California Security Guard/Officer employees who were not reimbursed for mandatory training, licensing, and certifications during the period from July 1, 2007 to the present.

- *Vacation Subclass.* A subclass of all of Defendant's former California Security Guard/Officer employees whose employment ended between July 1, 2007 and the present, and whose employment totaled fewer than 2,080 hours and who were not paid at the end of their employment any vested, unused vacation wages.

- *Wage Statements Subclass.* A subclass of all of Defendant's past and present California employees who worked as Security Guard/Officers from July 1, 2007 to the present

who, due to the violations claimed in one or more of the other certified subclasses, received an inaccurate itemized wage statement.

- *Waiting Time Subclass.* A subclass of all of Defendant's California employees who worked as Security Guard/Officers from July 1, 2007 to the present who were not paid wages within 72 hours of their termination and who qualify as a member of one of the other certified subclasses.

IT IS SO ORDERED.

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APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MUHAMMED ABDULLAH, as an individual and on behalf of all others similarly situated, Plaintiff-Appellee, v. U.S. SECURITY ASSOCIATES, INC., a corporation, Defendant-Appellant.	No. 11-55653 D.C. No. 2:09-cv-09554-GHK-E Central District of California, Los Angeles ORDER (Filed Jan. 10, 2014)

Before: PAEZ and WATFORD, Circuit Judges, and KOBAYASHI, District Judge.*

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

* The Honorable Leslie E. Kobayashi, District Judge for the U.S. District Court for the District of Hawaii, sitting by designation.

APPENDIX F

U.S. Const. Amend. 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. 14, § 1

Sec. 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

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28 U.S.C. § 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this *title* [*28 USCS § 1291*].

Fed. R. Civ. P. Rule 23. Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties' on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) *Certification Order.*

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) *Notice.*

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment.* Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) *Particular Issues.* When appropriate, an action may be maintained as a class action with respect to particular issues.

(5) *Subclasses.* When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) *In General.* In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require – to protect class members and fairly conduct the action – giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) *Combining and Amending Orders.* An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days

after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) *Appointing Class Counsel.* Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) *Standard for Appointing Class Counsel.* When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) *Interim Counsel.* The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) *Duty of Class Counsel.* Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for

motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

* * *

Notes of Advisory Committee on 1998 amendments. *Note to Subdivision (f).* This permissive interlocutory appeal provision is adopted under the power conferred by *28 U.S.C. § 1292(e).* Appeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals. No other type of Rule 23 order is covered by this provision. The court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari. This discretion suggests an analogy to the provision in *28 U.S.C. § 1292(b)* for permissive appeal on certification by a district court. Subdivision (f), however, departs from the § 1292(b) model in two significant ways. It does not require that the district court certify the certification ruling for appeal, although the district court often can assist the parties and court of appeals by

offering advice on the desirability of appeal. And it does not include the potentially limiting requirements of § 1292(b) that the district court order "involve a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

The courts of appeals will develop standards for granting review that reflect the changing areas of uncertainty in class litigation. The Federal Judicial Center study supports the view that many suits with class-action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings. Yet several concerns justify expansion of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.

Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive. Permission is most likely to

be granted when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation.

The district court, having worked through the certification decision, often will be able to provide cogent advice on the factors that bear on the decision whether to permit appeal. This advice can be particularly valuable if the certification decision is tentative. Even as to a firm certification decision, a statement of reasons bearing on the probable benefits and costs of immediate appeal can help focus the court of appeals decision, and may persuade the disappointed party that an attempt to appeal would be fruitless.

The 10-day period for seeking permission to appeal is designed to reduce the risk that attempted appeals will disrupt continuing proceedings. It is expected that the courts of appeals will act quickly in making the preliminary determination whether to permit appeal. Permission to appeal does not stay trial court proceedings. A stay should be sought first from the trial court. If the trial court refuses a stay, its action and any explanation of its views should weigh heavily with the court of appeals.

Appellate Rule 5 has been modified to establish the procedure for petitioning for leave to appeal under subdivision (f).

Cal. Lab Code § 61. Provisions administered through Division of Labor Standards Enforcement

The provisions of Chapter 1 (commencing with Section 1171) of Part 4 of Division 2 shall be administered and enforced by the department through the Division of Labor Standards Enforcement.

Cal. Lab Code § 226.7. Provision of meal, rest, or recovery period

(a) As used in this section, "recovery period" means a cooldown period afforded an employee to prevent heat illness.

(b) An 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.

(c) If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, including, but not limited 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, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each

workday that the meal or rest or recovery period is not provided.

(d) This section shall not apply to an employee who is exempt from meal or rest or recovery period requirements pursuant to other state laws, including, but not limited to, a statute or regulation, standard, or order of the Industrial Welfare Commission.

Cal. Lab Code § 512. Meal periods; Certain employees in specified industries exempt

(a) 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, 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. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

Cal. Lab Code § 1193.5. Administration and enforcement by division; Authority of authorized representatives

The provisions of this chapter shall be administered and enforced by the division. Any authorized representative of the division shall have authority to:

(a) Investigate and ascertain the wages of all employees, and the hours and working conditions of all employees employed in any occupation in the state;

(b) Supervise the payment of unpaid minimum wages or unpaid overtime compensation owing to any employee under the provisions of this chapter or the orders of the commission. Acceptance of payment of sums found to be due on demand of the division shall constitute a waiver on the part of the employee of his or her cause of action under Section 1194.

Unpaid minimum wages or unpaid overtime wages recovered by the division under the provisions of this section which for any reason cannot be delivered within six months from date of collection to the employee for whom such wages were collected shall be deposited into the Industrial Relations Unpaid Wage Fund in the State Treasury.

8 CCR § 11040. Order Regulating Wages, Hours, and Working Conditions in Professional, Technical, Clerical, Mechanical, and Similar Occupations

* * *

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 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 the 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. 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 workday 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 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 (1) 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.

APPENDIX G

STATE OF CALIFORNIA GRAY, DAVIS, Governor

DEPARTMENT OF [SEAL]
INDUSTRIAL RELATIONS
DIVISION OF LABOR
STANDARDS ENFORCEMENT
LEGAL SECTION
455 Golden Gate Avenue, 9th Floor
San Francisco, CA 94102
(415) 703-4883

MILES E. LOCKER, *Attorney for the Labor Commissioner*

November 3, 2003

Noel Anenberg ALSO FAXED TO: 818/474-8512
NASA Oil Corporation
4163 Green Meadow Court
Encino, CA 91316

Re: Meal and Rest Period Requirements for Employees Working Alone With No Other Employees at the Work Site

Dear Mr. Anenberg:

I have been asked by Director Chuck Cake to respond to your e-mail of October 16, 2003, in which you inquired whether an employee who works alone at a gasoline station, with no other employees present at the work site, is covered by California meal and rest period requirements, or whether there is an available exemption from such requirements that would apply to single employee work-sites.

Rest period requirements are set out in the various wage orders of the Industrial Welfare Commission ("IWC"). For the most part, these requirements are the same in every wage order. Gasoline stations are covered by IWC Order 7-2001, which governs employers in the mercantile industry. Section 12 of Order 7 provides:

> (A) 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 minutes net rest time per four 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 hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.
>
> (B) 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 hour of pay at the employee's regular rate of compensation for each workday the rest period is not provided.

There is no exception from these rest period requirements for small employers, or for employees who work alone without other employees at a work site. However, there is a provision in the wage order,

at section 17, that allows for an exemption from the rest period requirements. Section 17 provides:

> If, in the opinion of the Division [of Labor Standards Enforcement] after due investigation, it is found that enforcement of any provision contained in . . . Section 12, Rest Periods . . . 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/for 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.

The plain language of Section 17 leaves no doubt that there can be no exemption from rest period requirements without first applying to the Division of Labor Standards Enforcement ("DLSE") for an exemption, and that no exemption can be issued by the DLSE without an investigation. The DLSE investigation consists of sending a deputy labor commissioner to the worksite to conduct interviews of affected employees, and an exemption will not issue unless the investigation establishes that such exemption would not materially affect the health and comfort of the employees. Of course, any such exemption would

only be prospective from the date it is issued. An application for an exemption from rest period requirements should be sent to the attention of the State Labor Commissioner, or Deputy Chief Labor Commissioner, at the address shown on our letterhead.

Unlike the situation with rest periods, there is no provision under the law that would allow the Labor Commissioner, or any other state officer, to exempt an employer from meal period requirements. The section of the IWC order that allows for such exemptions from rest period requirements, Section 20, fails to include the section mandating meal periods within the list of sections as to which exemptions are available. IWC wage orders in effect prior to 2000 contained a provision authorizing the Labor Commissioner to grant exemptions from meal period requirements, but with the adoption of the 2000 and post-2000 wage orders, the IWC withdrew this authorization.

Meal period requirements are set out at section 11 of the various IWC orders. Section 11 of Order 9-2001 provides, in relevant part:

> (A) No employer shall employ a person for a work period of more than five hours without a meal period of not less than 30 minutes, except when a work period of not more than six hours will complete the day's work the meal period may be waived by mutual consent of the employer and the 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. 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 hour of pay at the employee's regular rate of compensation for each workday the meal period is not provided.

Thus, as a general rule, the required meal period must be an off-duty meal period of no less than 30 minutes in duration, during which time the employee is relieved of all duty; that is, the employee is neither required to work, nor is suffered or permitted to work. Moreover, except for employees in the health care industry covered by IWC Orders 4 or 5, the employee must be free of employer control so as to have the right to leave the employment premises during an off-duty meal period. (*Bono Enterprises v. Bradshaw* (1995) 32 Cal.App.4th 968, reversed on other grounds in *Tidewater Marine Western v. Bradshaw* (1996) 14 Cal.4th 557, approved for the proposition cited above in *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575.)

An employer need not pay an employee for an off-duty meal period. An employer must pay an employee at his or her regular rate of pay for an on-duty meal period, as the entire on-duty meal period constitutes "hours worked". Finally, if the employer fails to provide an employee entitled to a meal period under the wage order with (1) a timely off-duty meal period of not less than 30 minutes duration, or (2) an on-duty meal that meets the requirements for a lawful on-duty meal period, the employer must pay the employee an additional one hour of pay at the employee's regular rate of pay for each day in which the employee was not provided with this lawful, required meal period.

In a normal eight hour shift, the off-duty meal period is timely if it is provided to the employee not more than five hours after the start of the workday, and not more than five hours before the end of the workday (i.e, no sooner than 3 hours and no later than 5 hours after the start of the workday). An on-duty meal period is not permitted under the wage orders unless each of the following three factors are present: (1) the "nature of the work" prevents the employee from being relieved of all duty during the meal period, and (2) the employee and employer entered into a signed written agreement authorizing the on-duty meal period prior to the dates in question, and (3) this written agreement explicitly states that the employee may revoke the agreement in writing at any time. In order to understand what factors the Labor Commissioner will consider in

deciding whether the first of these three factors is present, please refer to the attached *opinion letter of September 4, 2002*. Applying the test set out in that letter to an isolated retail industry worksite in which only a single employee is present, we would conclude that this first factor is satisfied. However, that is not enough to establish a lawful on-duty meal period, absent the second and third required factors. Also, please note that the first factor will generally not be met if there is another employee employed at the worksite, as this second employee should then be able to relieve the first employee during a meal break, even if this second employee is primarily assigned to some other task.

In your e-mail, you state that the employees in question "work alone in an environment where business is sporadic." You contend that over the course of an eight hour shift there are myriad and sometimes lengthy opportunities to eat, smoke and to rest." Though that may be, an employee in a gasoline station (like an employee in any retail store) is considered to be on-duty if the employee is expected to wait for customers to arrive, and to ring up a sale or otherwise provide service to a customer upon the customer's arrival. Such time constitutes "hours worked" and is compensable. For the past sixty years, courts have interpreted the Fair Labor Standards Act (and similar California wage and hour laws) to require payment of time during which an employee is required to remain on the employer's premises to respond to unscheduled contingencies. As the United

States Supreme Court explained in *Armour & Co. V. Wantock* (1944) 323 U.S. 126, 133:

> Of course, an employer, if he chooses, may hire a man to do nothing or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employment in a stand-by capacity. . . . Readiness to serve may be hired, quite as much as service itself.

In short, a retail clerk who is engaged to wait for customers is not off-duty while he or she is so engaged. This means that no matter how long the wait may be between customers, these employees are nonetheless entitled to meal and rest periods in accordance with the provisions of IWC Order 7-2001.

Finally, in your e-mail you state that "eating and rest breaks . . . were enumerated in our Employee Handbook, but for lack of affordable supervision, were never monitored." Employers have somewhat different obligations with respect to meal and rest periods. As to meal periods, employers have an obligation to self-police, and to ensure that employees are in fact taking required meal periods. The wage orders provide: "No employer shall employ a person" without providing the required meal period. And self-policing, even in a single employee worksite, should present no practical difficulty in that the wage orders also provide, at section 7(A)(3), that every employer maintain accurate records showing when each employee begins and ends each work period, and that "meal periods

. . . shall also be reported." To be sure, the provision goes on to state that "meal periods during which operations cease . . . need not be recorded," but it would certainly behoove any employer of an employee working at a location without supervision to record meal periods to enable the employer to review these records to ensure compliance.

As to rest periods, the employer's obligation does not extend to self-policing to ensure that employees are in fact taking their required rest breaks. The wage orders provide only that "every employer shall authorize and permit all employees to take rest periods. . . ." "Authorize" means that employers have some affirmative obligation to advise employees of the right to take rest periods in accordance with the provisions of the wage order; and "permit" means that employers must allow employees to take the rest periods to which they are entitled, and cannot deny permission to an employee or make it impossible for an employee to exercise this right. But if an employee, after having been "authorize[d] and permit[ted]" to take the rest period that he or she is entitled to under the applicable wage order, nonetheless chooses not to take any rest period, the employer has not violated the provisions of the wage order.

We understand your concerns about the impact these laws and regulations may have on the cost of doing business. But in our role as a law enforcement agency, we must enforce the laws that have been enacted by the Legislature, and the regulations that have been adopted by the Industrial Welfare

Commission, as they, are written, and as interpreted by controlling Judicial decisions. We hope this explanation of meal and rest period requirements will help you better understand the legal framework within which we must decide those cases that come before us.

Thank you for your interest in California wage and hour law. Feel free to contact me with any further questions.

Sincerely,

Miles E. Locker
Attorney for the
Labor Commissioner

cc: Chuck Cake, Director
Art Lujan, State Labor Commissioner
Sam Rodriguez, Deputy Chief Labor Commissioner
Anne Stevason, Chief Counsel
Assistant Chief Counsel
Assistant Labor Commissioners
Regional Managers
Bridget Bane, IWC Executive Officer

Arnold Schwarzenegger,
STATE OF CALIFORNIA *Governor*
DEPARTMENT OF [SEAL]
INDUSTRIAL RELATIONS
DIVISION OF LABOR
STANDARDS ENFORCEMENT
455 Golden Gate Avenue, 9th Floor
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ANGELA BRADSTREET, STATE LABOR COMMISSIONER

ROBERT R. ROGINSON
Chief Counsel

June 9, 2009

Susan E. Kirkgaard
Bullivant Houser Bailey, PC
1415 L. Street
Suite 1000
Sacramento, California 95814

Re: Meal Periods for Fuel Carriers Subject to Federal Safety Regulations

Dear Ms. Kirkgaard:

This is in response to your letter dated April 11, 2008, requesting an opinion from this office concerning the application of California's meal period requirements to employees engaged in the transportation of hazardous explosive materials.

In your letter and in subsequent telephone discussions with this office, you describe that California's meal period requirements present a particular challenge for an employer you represent, whose employees transport fuel to service stations throughout California and in neighboring states, because the employer must also comply with federal regulations governing carriers of hazardous explosive materials. You ask whether a driver for your client who cannot leave or be far from his or her truck due to applicable federal regulations is so restricted that any meal period is not an off-duty meal period, whether such restrictions would qualify for an on-duty meal period under the wage order, and whether these drivers may enter into blanket on-duty meal period agreements to the extent that such employees qualify for an on-duty meal period.

As described more fully below, it is the opinion of the Division of Labor Standards Enforcement (DLSE or Division) that a meal period provided to your client's drivers who are not able to be relieved of all duty due to applicable federal regulations is not considered an off-duty meal period as provided for under the applicable wage order. It is also the opinion of the Division that the application of these federal regulations may, in some circumstances, satisfy the requirement for an on-duty meal period under the applicable wage order that the nature of the driver's duties prevents the employee from being relieved of all duty. Lastly, it is the opinion of the Division that the Company and employee may enter into a single

agreement so long as the conditions necessary to establish that the nature of the employee's work prevents the employee from being relieved of all duty are met for each applicable on-duty meal period taken.

Factual Background

In the circumstances presented in your letter, you describe the federal regulations which prevent drivers who transport hazardous materials from being relieved of all duty in order to take a 30 minute off-duty meal period. In follow up telephone discussions, you provided the following information about the company ("Company") you represent which is seeking guidance on these issues. In particular, the Company is a California based company which transports gasoline from distributors located in and around the Bay Area to various service stations throughout the state of California and other, neighboring states. You inform that approximately 95% of the transportation is performed within California and that the remainder includes the transportation of gasoline from California to Nevada, Oregon, Washington, Arizona, and Idaho. The Company employs approximately 32 drivers and maintains three yards. The primary yard is located in Santa Rosa, California, a secondary yard is located in Martinez, California, and a third yard is located in Ukiah, California. Most drivers are dispatched out of the Santa Rosa yard on a daily basis. Four trucks are dispatched out of the Martinez facility and one driver is dispatched out of the Ukiah yard.

After dispatch, the trucks are loaded with fuel at refineries and other distributors located in and around the Bay Area.

You inform that the Company's drivers are typically scheduled for 12 hours shifts and return to the Santa Rosa or Martinez facility each night. It is customary for the drivers to unload their entire load at each service station and then return to the distributor to reload or to the Santa Rosa or Martinez facility if that is the completion of their shift. Depending upon the proximity of the distributor to the service stations, the driver may deliver multiple loads during one shift. You also inform that the refineries and distributors do not permit the drivers to park and leave their vehicles unattended at the terminals where the drivers load the gasoline. The service stations similarly require the drivers to unload their gasoline loads upon arrival and do not permit the drivers to leave their trucks unattended.

You further inform that, in addition to the limitations placed by the service stations and distributors, these drivers are also covered by the Federal Hazardous Materials Act, 49 U.S.C. §§ 5103 et seq., which specifies that when vehicles containing hazardous explosive materials are on the road, the vehicle "must be attended at all times by its driver or a qualified representative of the motor carrier that operates it." (49 C.F.R. § 397.5(a)). These regulations also specify that a motor vehicle is attended when the person in charge of the vehicle is on the vehicle, awake, and not in the sleeper berth, or is within 100 feet of the

vehicle and has it within his/her unobstructed field of view. (49 C.F.R. § 397.5(d)). Further, these regulations specify that they apply to each motor carrier engaged in the transportation of hazardous materials by a motor vehicle which must be marked or placarded in accordance with § 177.823 of Title 49 governing transportation, each officer or employee of the motor carrier who performs supervisory duties related to the transportation of hazardous materials, and each person who operates or is in charge of a motor vehicle containing hazardous materials. (49 C.F.R. § 397.1(a)).

You also indicate that since these drivers are transporting hazardous explosive materials in intra-state and interstate commerce via trucks, they must have specialized training and maintain certain safety standards in the operation of their vehicles. You indicate that these employees are traveling throughout the state of California making deliveries of the hazardous materials they are transporting and, therefore, you contend that it is impossible for the Company to simply send another employee out to relieve the driver of his or her duties for 30 minutes at a time. You also indicate that if the employee is relieved of all duties and thereby leaves the vehicle unattended, the Company will necessarily violate federal safety regulations, potentially resulting in citations, penalties, etc. for the Company. You also state that if the vehicle is left unattended the potential for explosion, leak or other adverse consequences exponentially increases, which would subject the

Company to loss of product and liability to the employee and/or third parties for damages resulting from the explosion or leak.

Issues

You request an opinion on three separate issues that arise from the foregoing facts. Specifically, you request an opinion that:

1. If an employee cannot leave and/or be far from the truck due to the State or Federal regulation, the Company is not restricting the employee's movement for purposes of determining whether a meal period is "on-duty" or "off-duty."

2. Employees transporting hazardous flammable materials who cannot leave the area of their truck due to state and federal regulations meet the requirements for on-duty meal periods, if the determination under 1, above, is that the meal period is an on-duty meal period.

3. Employees requiring on-duty meal periods due to the circumstances set forth in 2, above, may have the employees sign a blanket agreement for on-duty meal periods and will be in compliance with the requirements for such an agreement.

Based upon the facts presented and described above, each of your requests is addressed below, in turn.

Off-Duty Meal Period Requirements

California's meal period requirements are set forth in Labor Code § 512 and the applicable wage orders. Industrial Welfare Commission Wage Order 9-2001 governs the transportation industry, and its meal period provisions are set forth in Section 11 of the wage order. Section 11 of Wage Order 9-2001 provides, in pertinent part:

> (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 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 the employee.
>
> (B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.
>
> (C) 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. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.
>
> (D) 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 workday that the meal period is not provided.

The term "hours worked" is defined in Wage. Order 9-2001 as "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." (IWC order 9-2001, subd. 2(H).)

The seminal case interpreting the "hours worked" language under the IWC Orders is *Morillion v. Royal Packing Company* (2000) 22 Cal.4th 587. In *Morillion,* the Supreme Court held that compulsory travel time spent by agricultural workers was compensable "hours worked" where workers were required to meet at designated departure points at a certain time to ride employer's buses to work and for return to the departure point after work.

You correctly note that the Division has consistently taken the position that, except in specified circumstances involving the health care industry, if an employer does not permit an employee to leave

their work site during the meal period (even if relieved of all duties) the employee must be compensated for that meal period. This is in accord with controlling case law. Unless the employee is relieved of all duty during, a meal period, such time constitutes hours worked under California law. (*Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968, disapproved on other grounds in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 573-574.). (*See also, Aguilar v. Association of Retarded Citizens* (1991) 234 Cal.App.3d 21, 30 [time an employer required personal attendant employees to spend at its premises, even when they were allowed to sleep, constitutes "hours worked"]). *Bono* involved employees at a manufacturing plant who were required by their employer to remain on the premises during their 30 minute meal period. The court found that such employees were entitled to compensation for such time under the definition of "hours worked" contained in the applicable wage order. (*Bono, supra,* 32 Cal.App.4th at p. 975). The court interpreted the clause "subject to the control of the employer" contained in the definition of "hours worked" as follows:

> When an employer directs, commands, or restrains an employee from leaving the work placed during his or her lunch hour and thus, prevents the employee from using the time effectively for his or her own purposes, that employee remains subject to the employer's control. According to [the definition of hours worked], that employee must be paid.

You present the question whether the Division's position is the same if the employees' ability to be free to take an off-duty meal period is restricted by the federal regulation governing the transportation of hazardous materials, and not simply by the employer. Under the facts presented here, the answer is yes. Wage Order 9-2001, subd. 11(C) expressly states that "[u]nless the employee is *relieved of all duty during a 30 minute meal period*," the meal period will be considered an on-duty meal, and not off-duty, meal period and counted as time worked. (Emphasis added). The obligation to attend to the vehicle is not necessarily an employer-imposed requirement but is based upon a federal regulation. Such time in carrying out this federal responsibility, however, is subject to the control of and for the benefit of the employer. Specifically, the manner and means by which the driver complies with the federal regulation is controlled, by the Company, and the employee is engaged in the duty of attending to the vehicle which is part of the working conditions of the employee. The employee is not free to use such time for his or her own use but is, in fact, engaged in work duties for the benefit of the Company and in concert with the Company's own obligations under the Federal Hazardous Materials Transportation Act, including these driving and parking rules. (*See* 49 C.FR, § 397.1). As you state, if the employee is relieved of all duties and thereby leaves the vehicle unattended, the Company will necessarily violate federal safety regulations, potentially resulting in citations and penalties for the Company. Further, if the vehicle is left, unattended,

the potential for explosion, leak or other adverse consequences exponentially increases, which would subject the Company to loss of product and liability to the employee and/or third for damages resulting from the explosion or leak. Under these facts and circumstances, it is clear that while the employee is engaged in fulfilling such responsibilities, he or she is not sufficiently relieved of all duty to have an off-duty meal period.

The circumstances presented here are not like those involving certain employees in the health care industry in California who are considered to have been provided a duty free meal period even though they are required to remain on the employer's work site. Under Wage Order 4-2001 and 5-2001, the term "hours worked" contain a specific definition that applies to the health care, industry, as defined.[1] There is no comparable language applicable to workers employed in the transportation industry under Wage Order 9-2001.

In sum, it is the opinion of the Labor Commissioner that a meal period provided to a Company driver transporting hazardous materials who is not relieved of his or her duty to remain with or remain

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[1] "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*." (emphasis added) *See* Section 2(K) in Wage Order 4-2001 and Wage Order 5-2001.

close to his or her truck as a consequence of their obligations under the Federal Hazardous Materials Act is not an off-duty meal period as provided for under Wage Order 9-2001. Pursuant to Wage Order 9-2001, subd. 11(C), the meal period under these circumstances is considered an on-duty meal period and must be counted as time worked. Furthermore, unless the conditions are met for an on-duty meal period as required under Wage Order 9-2001, subd. 11(C), such a driver would be entitled to one additional hour of pay at the employee's regular rate of compensation under Labor Code § 226.7 and Wage Order 9-2001, subd. 11(D).

On Duty Meal Periods

As identified above, the requirements for an on-duty meal period are set forth in Wage Order 9-2001, subd. 11(C). The language is clear that in order for an on-duty meal period to be lawfully permitted under Wage Order 9-2001, all three of the following requirements must be met (1) the nature of the work prevents an employee from being relieved of all duty, (2) the employer and employee have agreed in writing to an on-the-job paid meal period, and (3) the written agreement states that the employee may, in writing, revoke the agreement at anytime.

There are no identified published California cases identifying specific circumstances under which the nature of the work element has been found to be

satisfied. The Division has, in the past, issued a number of opinion letters addressing the subject.

In 1992, the then Labor Commissioner issued an opinion letter addressing the question of whether an employee who was required to wear a pager during his meal period was in fact, permitted a "duty-free" or off-duty meal period. (O.L. 1992.01.28). In that letter, the Labor Commissioner concluded that whether such a meal period was "duty-free," and therefore non-compensable, depended upon the restrictions placed upon the employee:

> If the employee is simply required to wear a pager or respond to an in-house pager during the meal period there is no presumption that the employee is under the direction or control of the employer so long as no other condition is put upon the employee's conduct during the meal period. If, on the other hand, the employer requires the employee to not only wear the pager or listen for the in-house paging system, but also to remain within a certain distance of a telephone or otherwise limits the employee's activities, such control would require that all of the meal period time be compensated.
>
> So long as the employee who is simply required to wear the pager is not called upon during the meal period to respond, there is no requirement that the meal period be paid for. On the other hand, if the employee responds, as required, to a pager call during

> the meal period, the whole of the meal period must be compensated.

In 1994, the then chief counsel of the Division issued an opinion letter addressing on-duty meal periods for employees of a large chain auto parts store. (O.L. 1994.09.28). Although the chief counsel was unable to provide a specific response due to the lack of necessary facts, the chief counsel described, in general terms, the view of the Division in determining whether the nature of the work prevents an employee from being relieved of all duties during the 30 minute meal period:

> In the view of the Division, the onus is on the employer to show that the work involved *prevents* the employee from being relieved of duty. Examples of situations where the nature of the work would require an on-duty lunch would be situations where the employee is the only person employed in the establishment and closing the business would work an undue hardship on the employer; or the continuous operation of machinery requiring monitoring is essential to the business of the employer.

In 2002, a staff attorney of the Division issued an opinion letter addressing the availability of an on-duty meal period for a shift manager working during a late night shift in the fast food industry. (O.L. 2002.09.04) As you describe in your letter, the staff attorney in the 2002 letter identified a multi-factor objective test, stating that the Division has *always*

followed an enforcement policy that the determination of whether the nature of the work element was met must be based on the multi-factor objective test. The factors listed include (1) the type of work, (2) the availability of other employees to provide relief to an employee during a meal period, (3) the potential consequences to the employer if the employee is relieved of all duty, (4) the ability of the employer to anticipate and mitigate these consequences such as by scheduling the work in a manner that would allow the employee to take an off-duty meal period, and (5) whether the work product or process will be destroyed or damaged by relieving the employee of all duty. Contrary to what is suggested in the 2002 letter, these factors are not an exhaustive list of the factors considered in all cases. Indeed, other factors may also likely be relevant in determining whether the nature of the work prevented the employee from being relieved of all duty, such as in this case where there are federal regulations restricting the ability of the employee to be relieved of all duty. In the end, the critical determination to whether an on-duty meal period may be lawfully provided by an employer is whether the employer can establish that the facts and circumstances in the matter point to the conclusion that the nature of the work prevents, the employee from being relieved of all duty. The express language of the wage order contains no requirement that, in order to have an on-duty meal period, the employer must establish that the nature of the work makes it "virtually impossible" for the employer to provide the employee with an off-duty meal period, as suggested

in the 2002 opinion letter. Nor is there a rational basis to impose such a narrow, imprecise, and arbitrary standard.

In the circumstances presented in this matter, the drivers transport fuel throughout the state of California and, in some limited cases, other states as well. Neither the refineries, the distributors, nor the service stations permit the drivers to leave their vehicles unattended. In addition, these drivers are subject to the federal regulations which prevent them from being relieved of all duty in order to take a 30 minute off-duty meal period. These employees are covered by the Federal Hazardous Materials Act, 49 U.S.C. §§ 5103 et seq., which specifies that when vehicles containing hazardous explosive materials are on the road, the vehicle "must be attended at all times by its driver or a qualified representative of the motor carrier that operates it." (49 C.F.R. § 397.5(a)). These regulations also specify that a motor vehicle is attended when the person in charge of the vehicle is on the vehicle, awake, and not in the sleeper berth, or is within 100 feet of the vehicle and has it within his/her unobstructed field of view. (49 C.F.R. § 397,5(d)). As the facts demonstrate, such employees cannot be relieved of such duties without exposing the Company to liability for violation of various federal safety regulations as well as the loss of property and liability to employees and other third parties for damages resulting from any explosion, leak or other adverse consequence of leaving a vehicle unattended. This is not unlike the monitoring of the continuous operation

of machinery that is essential to the business of an employer. Also, to the extent that the employees are traveling to distant parts of the state in fulfillment of their duties, it may likely be impossible or impractical to send another employee out to relieve the driver of his or her duties for 30 minutes.

Pursuant to these regulations, to the extent that the affected drivers cannot be relieved of all duty during a 30 minute off-duty meal period as required under California law during the period of time in which they are "on the road" as those terms are used in 49 C.F.R. § 397.5(a), it is the opinion of the Division that the nature of the driver's work prevents them from being relieved of all duty. Your letter does not describe, and accordingly, we do not comment upon the application of the on-duty meal period requirements for any period of time during which the driver is not engaged in activity that is regulated by the referenced federal regulations, for example, under the conditions specified in 49 C.F.R. 397.5(b). It may indeed be the case that drivers may be provided an off-duty meal period during these times even though they are otherwise prevented by the nature of their work from taking a meal period during times in which they are engaged in activity otherwise governed by the restrictions set forth in section 397.5. Also, the nature-of-the-work element may not be satisfied under circumstances where the employer may have another qualified representative reasonably available to perform the attending duties required under section 397.5. For instance, drivers who

transport fuel in and around the Bay Area may likely park their vehicle at one of the Company's yards and leave such vehicle unattended in compliance with federal law in order to take an off-duty meal period. Such a driver would not be entitled to an on-duty meal period if the nature of his or her work did not prevent the driver from being relieved of all duty.

The Company drivers at issue here work 12-hour shifts. Accordingly, such drivers must be provided a second meal period under Section 11(B) of Wage Order 9-2001. The wage order also provides 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. It is also important to understand that the on-duty meal period presented by the Industrial Welfare Commission in the wage, order is a permissible, but limited, alternative to the off-duty meal period referenced in Section 11 of the wage order. The on-duty meal period is not described or defined as a waiver of an off-duty meal period. Rather, it is a *type* of meal period that can be lawfully provided only in those circumstances in which the three express conditions set forth, in subdivision (C) are satisfied. The wage order itself does not limit the number of on-duty meal periods that may be taken in a workday. No identified cases hold such a restriction. Nor does the history of the on-duty meal period language in Wage Order 9, or any of the wage orders, support such a restriction. The district court's reasoning in *McFarland v. Guardsmark, LLC* (N.D. Cal

2008) 538 F.Supp.2d 1209 is persuasive. In *McFarland,* the district court granted summary judgment to an employer finding that under California law an employee may have two on-duty meal periods when they work more than 10 hours in a day. The court found that there was no support in Labor Code § 512 for plaintiff's position that an on-duty meal period that complies with the conditions under the wage orders constitutes a "waiver" of an off duty meal period:

> The court reads "waiver of the meal period" to mean that the employee gives up his right to eat during that particular five-hour shift, period. The main problem with plaintiff's argument is that he appears to be confusing the concept of totally "waiving" a meal period with the concept of agreeing to take an "on duty" meal period in lieu of an "off duty" meal period. Because the word "waiver" in the first part of § 512(a) clearly means a waiver of any meal period, it cannot mean a waiver of a particular type of meal period later in the same statute

(*McFarland, supra,* 538 F.Supp.2d at p. 1216).

In light of the express language of subdivision (C), the persuasive reasoning in *McFarland,* and the absence of any statutory, regulatory, or case authority holding or suggesting otherwise, there is no legitimate basis to conclude that on-duty meal periods cannot be provided to the Company's drivers when the three circumstances are met, regardless of the

number of meal periods provided, or required to be provided, during the workday. Also, 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 if the first meal period is not waived. Of course, to the extent the driver hauling hazardous materials is provided two on-duty meal periods during the course of the workday, the burden is on the Company to establish the facts justifying any on-duty meal period in each instance in which one is provided. It remains the Division's position that even though the employee is required to work during an on-duty meal period, the employee must be given the opportunity, while working if necessary, to eat his or her meal period.

On-Duty Meal Period Agreement

Lastly, you inquire whether these drivers whose working conditions prevent them from taking an off-duty meal period may enter into a blanket agreement for on-duty meal periods and remain in compliance with the requirements for such agreements. It is the opinion of the Division that the Company and employee may enter into a single agreement so long as the conditions necessary to establish that the nature of the employee's work prevents the employee from being relieved of all duty are met for each applicable on-duty meal period taken. Stated differently, it is not necessary that the Company and driver enter into a separate agreement for each meal period. Of course, the agreement must expressly state that the employee

may, in writing, revoke the agreement at any time, as required under Wage Order 9-2001, subd. 11(C).

This opinion is based exclusively on the facts and circumstances described in your request and is given based upon your representations, express or implied, that you have provided a full and fair description of all facts and circumstances that would be pertinent to our consideration of the questions presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issues addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Division of Labor Standards Enforcement.

We hope this letter is responsive to your request. Thank you for your interest in California wage and hour law.

Very truly yours,

/s/ Robert R. Roginson
Robert R. Roginson
Chief Counsel

RRR:

Cc: Labor Commissioner Angela Bradstreet

[SEAL]

OFFICIAL NOTICE

INDUSTRIAL WELFARE COMMISSION
ORDER NO. 4-2001
REGULATING
WAGES, HOURS AND WORKING CONDITIONS IN THE PROFESSIONAL, TECHNICAL, CLERICAL, MECHANICAL AND SIMILAR OCCUPATIONS
Effective January 1, 2001 as amended

Sections 4(A) and 10(C) amended and republished by the Department of Industrial Relations, effective January 1, 2007, pursuant to AB 1835, Chapter 230, Statutes of 2006

This Order Must Be Posted Where Employees Can Read It Easily

* * *

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 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 the 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. 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 workday 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 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 (1) 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.