STATEMENT OF ISSUES PRESENTED

1. Is a claim under Labor Code §226.7 for the required payment of "one additional hour of pay at the employee's regular rate of compensation" for each day that an employer fails to provide mandatory meal or rest periods to an employee governed by the three-year statute of limitations for a claim for compensation (Code Civ. Proc., §338) or the one-year statute of limitations for a claim for payment of a penalty (Code Civ. Proc., §340)?

2. When an employee obtains an award on a wage claim in administrative proceedings and the employer seeks *de novo* review in superior court, can the employee pursue additional wage claims not presented in the administrative proceedings?

INTRODUCTION

The first issue before this Court is whether Labor Code §226.7 payments of "one hour of pay at the employee's regular rate of compensation" constitute pay, or penalties, for purposes of applying the statute of limitations. Section 226.7 payments are pay. The plain language of the statute uses the term "pay," not "penalty," consistent with a long-standing dichotomy between the two terms in the Labor Code. Meal and rest pay operates similarly to other kinds of compensation in the overall California framework regulating the employer-employee relationship. Like other types of pay, meal and rest pay compensates employees, and enforces

employer compliance with minimum labor standards. It is the *only* compensation employees receive for deprivation of the right to use time for their own purposes during the workday.

The second issue involves California's unique Berman process for administrative wage claims. The intent of the Berman process is expressed directly in the statute: to create a method for resolving wage claims "in an informal setting preserving the rights of the parties." (Lab. Code, §98(a).) The Court of Appeal did not consider this intent. It ruled that an employee who pursues a successful administrative wage claim, which the employer appeals under Labor Code §98.2 for a *de novo* trial before a superior court, is barred from raising related claims in the *de novo* proceedings. This restrictive approach is not supported by the statutory scheme or the underlying policies it serves. Consistent with legislative intent, and subject to the trial court's discretion, employees are authorized to raise new claims in the *de novo* proceedings.

STATEMENT OF THE CASE

Statement of Facts

As noted by the Court of Appeal, "the controlling historical facts as established by the trial court [are] largely undisputed." (*Murphy v. Kenneth Cole Productions, Inc.* (2005) 134 Cal.App.4th 728, 756.)

Over the course of two years, John Paul Murphy logged nearly 900 overtime hours in the service of his employer without receiving an extra

penny of pay. Although KCP called him a "Store Manager," and classified him as an exempt employee, Murphy spent approximately 90% of his time doing the same tasks as sales associates. (Reporter's Transcript ("RT") 31-62; 229-261; *Murphy*, 134 Cal.App.4th at 733-736.) KCP paid Murphy a fixed weekly salary. But he often worked far more than 40 hours per week without receiving overtime compensation. (RT 8:23-26; 69:19-70:10; 85:9-96:17.)

KCP's misclassification of Murphy deprived him of other rights and protections of which Murphy was unaware until much later. If KCP had properly classified him as a non-exempt worker, he would also have been entitled to statutorily mandated meal and rest periods. As found by the trial court, company policies and scheduling demands made it "impossible" for Murphy to take any rest breaks, and rarely allowed for a meal break:

> Mr. Murphy regularly worked 9 to 10 hour days, and was only able to take an uninterrupted, duty-free meal period approximately once every two weeks. Because store policy required that there be a manager in the store at all times, Mr. Murphy often had to be on stand-by while he ate, and customarily ate at his desk while tending to store business. He was interrupted to address customer issues and to answer questions from other employees.
>
> With respect to rest periods, Mr. Murphy rarely if ever had the opportunity to take a break. Company policy required that there be someone from management at the store at all times, and that there be at least two people available to the sales floor at all times. The existence of these policies and company-imposed scheduling restrictions meant that there were usually only two employees at the store during the periods of time in which the morning break should have been taken. Thus, Mr. Murphy was not free to

choose to take a rest break because scheduling demands, coupled with company policies made it impossible for him to do so.

(Clerk's Transcript ("CT") 536; RT 39:6-17; 41:22-42:5; 45:4-46:11; 97:25-101:18; 262:8-266:20.)

Indeed, there were days when Murphy was unable to go to the restroom. (RT 103:24-105:7; 175:21-178:19.)

Murphy complained to his District Manager that policies and scheduling restrictions resulted in employees not being able to take breaks. He received no response. (RT 102:9-104:26.)

As a non-exempt employee, Murphy was also entitled to itemized paystubs showing, among other things, the number of hours worked as well as the rate of pay. (Lab. Code, §226.)[1] No store employee, including Murphy, received a proper paystub from KCP. (RT 71:4-72:19, 340:8-341:15.)

Murphy resigned on June 19, 2002. (RT 8:6-8; 104:3-26; 113:3-117:20; 352:2-21.) On October 15, 2002, he filed an administrative wage claim with the Division of Labor Standards Enforcement ("DLSE"), also known as the office of the Labor Commissioner. (RT 112:18-24.)

Procedural History

Murphy was not represented when he filed his wage claim. The one-page "check the box"-style form he completed to initiate his claim provided

[1] All statutory citations are to the California Labor Code, unless otherwise specified.

few clues to the rights he could assert. In the area of the form entitled "Brief explanation of issues," Murphy wrote, "Not paid overtime for position engaged in primarily non-managerial (non-exempt) work. Waiting time penalties."[2] Not surprisingly, he was unaware that KCP's misclassification of him resulted in violations of the meal and rest laws, as well as the requirement that paystubs provide certain basic information. (CT 535:18-21; RT 351:19-352:1.) The DLSE did not alert him to these rights. (*Id.*) Even if he had known to ask about the paystub violations, the DLSE's policy was not to process such claims. (CT 224.)

After an administrative hearing, (in which KCP was represented and Murphy was not), the Labor Commissioner issued an Order, Decision or Award ("ODA") in his favor. (CT 4-11.) On August 7, 2003, KCP filed a *de novo* appeal under §98.2, which vested jurisdiction in San Francisco Superior Court. (CT 1-12.) Because KCP appealed, and because Murphy was unable to afford counsel, the DLSE undertook Murphy's representation pursuant to §98.4. The DLSE associated the Hastings Civil Justice Clinic as co-counsel on October 24, 2003. (CT 24-25.) Counsel identified the other claims resulting from KCP's misclassification, and promptly gave

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[2] A copy of Murphy's "Initial Report or Claim" form, Plaintiff's Trial Exhibit 9, is submitted for the Court's convenience as Motion for Judicial Notice ("MJN") Exh. 1. It is essentially identical to the form currently in use. (See www.dir.ca.gov/dlse/Form1.doc; MJN Exh. 2.)

notice of all claims to KCP and the Court on November 10, 2003. (CT 29-31.)

KCP never requested discovery or a trial continuance. Rather, KCP waited until the first day of trial to object to the related meal/rest and paystub claims. (CT 34-39.) During the six-day trial, KCP's counsel had a full opportunity to elicit testimony about meal and rest breaks, and did so. (RT 175:21-179:9; 280:9-282:5.) The paystubs, with the required information clearly missing, were admitted into evidence without objection. (Plaintiff's Trial Exh.2; RT 70:11-73:8.) Before the court exercised its discretion to adjudicate the meal/rest and paystub issues, the parties fully briefed and presented arguments on the issue. (CT 211-237, 352-358, 368-375; RT 627-638, 666-667.) KCP *never once* asserted to the trial court that it had been prejudiced in its ability to defend itself against any of the claims.

The trial court ruled that KCP misclassified Murphy as an exempt employee, and that this misclassification was not made in good faith, (a "good faith defense" having been asserted by KCP to avoid waiting time penalties). It also ruled that Murphy's meal/rest and paystub claims related back to his initial wage claim, since they flowed from the "same general set

of facts," and were therefore timely.[3] Thus, the court awarded meal and rest pay, as well as penalties for paystub violations. (CT 525-544.)

KCP again appealed. On December 2, 2005, the Court of Appeal affirmed the decision with respect to the misclassification. It also agreed that KCP had not acted in good faith, and affirmed the imposition of waiting time penalties.[4] However, the Court of Appeal reversed the trial court's decision to adjudicate Murphy's meal/rest and paystub claims in the §98.2 *de novo* trial. (*Murphy*, 134 Cal.App.4th at 744-749.) It nevertheless went on to rule that the §226.7 meal and rest payments constitute penalties, rather than compensation, and therefore triggered the one-year statute of limitations rather than the three-year limitations period for statutory liabilities.[5] (*Id.* at 750-754.)

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[3] KCP did not appeal the "relation back" rulings, thereby waiving its right to further challenge. (*Dieckmeyer v. Redevelopment Agency* (2005) 127 Cal.App.4th 248, 260.)

[4] KCP unsuccessfully sought review of the misclassification and waiting time penalty issues. KCP did not seek review of the Court of Appeal's affirmance of Murphy's entitlement to attorneys' fees and costs under §98.2(c). (*Murphy*, 134 Cal.App.4th at 759-60). All of those rulings in favor of Murphy are now final.

[5] Actions "upon a statute for a penalty or forfeiture" are subject to a one-year limitations period. (Code Civ. Proc., §340(a).) A three-year statute of limitations applies to actions "upon a liability created by statute, other than a penalty or forfeiture." (Code Civ. Proc., §338(a); see also *Cuadra v. Millan* (1998) 17 Cal.4th 855, 859 (wage liabilities created by statute are governed by three-year limitations period), disapproved on other grounds, *Samuels v. Mix* (1999) 22 Cal.4th 1, 16 fn.4).)

ARGUMENT

I. SECTION 226.7 MEAL AND REST PAYMENTS CONSTITUTE "PAY," NOT A "PENALTY," AND ARE GOVERNED BY A THREE-YEAR STATUTE OF LIMITATIONS.

By its own terms, §226.7 requires employers to "pay one hour of pay at the employee's regular rate of compensation" if the employer does not provide a required meal or rest break. The statute does not use the word "penalty." In fact, the Legislature considered, then *rejected* a penalty scheme in §226.7, but enacted two penalty statutes as part of the same bill.

The Labor Code and Industrial Welfare Commission ("IWC") Wage Orders contain a complex system that regulates the employer-employee relationship. The compensation policies in this system accomplish a dual purpose: they compensate employees, while shaping employer behavior to

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This Court granted review in two other cases, with briefing held pending the outcome in this matter. (See *National Steel and Shipbuilding Co. v. Superior Ct. ("NASSCO")* (2006) 135 Cal.App.4th 1072, review granted (Cal. April 12, 2006) 2006 Cal. Lexis 4401; *Mills v. Superior Ct.* (2006) 135 Cal. App. 4th 1547, review granted (Cal. April 12, 2006) 2006 Cal. Lexis 4402.) One district court held that §226.7 payments constitute earned wages that are enforceable as restitution under the Unfair Competition Law. (*Tomlinson v. Indymac Bank, F.S.B.* (C.D. Cal. 2005) 359 F.Supp.2d 891.) Another district court disagreed. (See *Corder v. Houston's Restaurants, Inc.* (C.D. Cal. March 21, 2006) 2006 U.S. Dist. LEXIS 20170.)

Three opinions labeled the remedy as a "penalty" in dicta. (See *Valles v. Ivy Hill Corp.* (9th Cir. 2005) 410 F.3d 1071 (state law rights to meal periods were non-waivable); *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949 (union contract arbitration clause did not bar plaintiffs' meal/rest claims); *Caliber Bodyworks, Inc. v. Superior Ct.* (2005) 134 Cal.App.4th 365 (construing §§2698 et seq.).)

be consistent with a healthy and safe work environment. In this way, meal and rest pay, like other types of pay, both compensates employees *and* enforces employee compliance with minimum labor standards. Like other forms of pay, meal and rest payments are the *only* compensation available to employees for the loss of time during a workday to use for their own purposes. As a form of wages, §226.7 payments should be subject to a three-year statute of limitations for liabilities created by statute.

A. General Principles of Interpretation

Several principles of statutory interpretation apply to both questions presented in this case. First, the Court must examine the actual words of the statute, giving them a plain and common sense meaning. If the language is unambiguous, "the plain meaning controls and resort to extrinsic sources to determine the Legislature's intent is unnecessary." (*Bonnell v. Medical Board of California* (2003) 31 Cal.4th 1255, 1261 (citation omitted).)

The Court must also attempt to harmonize the language within the larger context of the statutory scheme:

> The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible.

(*Dyna-Med, Inc. v. Fair Employment & Housing Comm'n* (1987) 43 Cal.3d 1379, 1387.)

Finally, "in light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection." (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794, quoting *IWC v. Superior Ct.* (1980) 27 Cal.3d 690, 702, 724; see *Sav-On Drug Stores, Inc. v. Superior Ct.* (2004) 34 Cal.4th 319, 340.)

The Court of Appeal did not apply these precepts. It did not analyze the actual statutory language; it did not harmonize §226.7 within its greater statutory context; and it did not apply the "liberal construction" rule to this worker protection legislation. (*Murphy*, 134 Cal.App.4th at 750-754.)

B. The History of the Meal and Rest Pay Provisions

The IWC Wage Orders[6] have required that employers provide regular meal and rest periods since 1916 and 1932, respectively. (*California Mfrs. Ass'n v. IWC* (1980) 109 Cal.App.3d 95, 114-115; *IWC*, 27 Cal.3d at 715.) Recognized as "obvious" basic demands of an

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[6] See 8 Cal. Code Regs., §§11010 et seq. The IWC was "the state agency empowered to formulate regulations (known as wage orders) governing employment." (*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 581; see also §1173.) It was charged with creating regulations "to provide adequate and reasonable wages, hours, and working conditions appropriate for all employees in the modern society." (*IWC*, 27 Cal.3d at 702.) Although the Legislature defunded the IWC effective July 1, 2004, its wage orders remain in effect. (*Huntington Memorial Hosp. v. Superior Ct.* (2005) 131 Cal.App.4th 893, 902, fn.2.)

employee's health and welfare, (*California Mfrs. Ass'n*, 109 Cal.App.3d at 115), meal and rest breaks have long been viewed as part of the remedial worker protection framework. (*IWC*, 27 Cal.3d at 724 (rejecting challenge to IWC's authority to promulgate numerous provisions including meal and rest periods, focusing on "remedial purpose" of regulations); *Bono Enter., Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968, 975 (duty-free meals necessary for employee welfare), disapproved on other grounds, *Tidewater Marine Western v. Bradshaw* (1996) 14 Cal.4th 557, 574.)

The Wage Orders direct employers to provide employees with meal periods of at least thirty minutes for every five hours worked, and rest periods of at least ten minutes for every four hours worked.[7] In 1999, the Legislature codified the meal period requirement as §512.

Until 2000, the only remedy available to workers who did not receive requisite breaks was to seek an injunction.[8] In order to "address a

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[7] These provisions are identical in §§11 and 12 of nearly all seventeen Wage Orders (see exceptions at Wage Order Nos. 14, 16 and 17). A copy of Wage Order No.7, which governed Murphy's employment, appears at MJN Exh. 3. (8 Cal. Code Regs., §11070 (2001)**,** hereafter "Wage Order".)

[8] IWC Commissioner Broad, who introduced the Wage Order pay provisions at issue here explained: "At this point, if [employers] are not giving a meal period or rest period, the only remedy is an injunction against the employer…. And [I want to amend the language to require that] on any day that an employer does not provide a meal period or rest period in accordance with our regulations, that it shall pay the employee one hour – one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest period is not provided." (Public

lack of employer compliance" with the existing meal and rest requirements, lawmakers amended the IWC Orders and the Labor Code to provide compensation for workers, and at the same time add a financial disincentive for employers, by requiring "one hour of pay at the employee's regular rate of compensation" if employers did not provide the mandated meal or rest breaks.[9]

Thus, effective October 1, 2000, the IWC added separate "one hour pay" provisions to Wage Order §11 (meal breaks) and §12 (rest breaks). The word "penalty" does not appear in these provisions:

Section 11: Meal Periods

> (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.

Section 12: Rest Periods

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

(MJN Exh. 3 at 13-14; emphasis added.)

Hearing of IWC Re Proposed Amendments to Wage Orders (June 30, 2000), MJN Exh. 4 at p.25.)

[9] See IWC Statement as to the Basis. (CT 396-397.) A "Statement of Basis" is "an explanation of how and why the [IWC] did what it did." (*IWC*, 27 Cal.3d at 711; §1177.)

The Legislature quickly followed suit, importing the key language of the amended Wage Order. Labor Code §226.7 became effective January 1, 2001:

> No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the [IWC]. If an employer fails to provide an employee a meal period or a rest period in accordance with an applicable order of the [IWC], *the employer 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*. (Emphasis added.)[10]

C. The Plain Language of §226.7 States that Meal and Rest Pay Is "Pay," and Not a "Penalty."

The noun "pay" has an undisputable common sense meaning: "Wages, salary, or a stipend." (Random House Webster's Unabridged Dictionary (2d ed. 2001).)

The word "penalty" does not appear anywhere in §226.7 or Wage Order §§11 or 12, and in fact was *dropped* from an earlier version during §226.7's enactment.[11] Despite the plain language of the statute, the Court of Appeal overlooked the word "pay" and substituted the omitted word "penalty." In so doing, it violated a basic tenet of interpretation – that it not

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[10] Except for the word "additional," the relevant language is identical to the Wage Order.

[11] AB 2509, as Amended, August 25, 2000, MJN Exh. 9 at 3, 11-13. As described *infra* at pp. 32-36, lawmakers not only dropped the word "penalty" from §226.7, but also *chose* to use "penalty" in two other provisions enacted in the same bill.

"ignore the actual words of the statute in an attempt to vindicate [its] perception of the Legislature's purpose in enacting the law… [and] rewrite the statute so as to make it conform to a presumed intention which is not expressed." (*Murillo v. Fleetwood Enter., Inc.* (1998) 17 Cal.4th 985, 993, reh'g den. (Cal. July 8, 1998) 1998 Cal. Lexis 4333; see also Code Civ. Proc., §1858 (judge's duty is "to ascertain and declare what is in terms or in substance contained [in a statute], not to insert what has been omitted, or to omit what has been inserted.")

The Legislature knew how to express the difference between "pay" and a "penalty," for it has done so on many occasions. The Labor Code contains explicit provisions for penalties. (See, e.g., §91 (entitled "penalty" for impeding work of Labor Commissioner); §203 (waiting time "penalty" for failure to pay wages due)[12]; §203.1 ("penalty" for employer issuance of bad check); §256 ("penalty" imposed by Labor Commissioner under §203 in seasonal labor claims); §558 (civil "penalties" for wage and hour

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[12] In fact, §203 contains the word "penalty," but designates a different limitations period. It provides for waiting time "penalties" if an employer fails to pay all wages due upon an employee's separation from employment. In order to make clear that the one-year limitations period for penalty statutes *did not* apply, the Legislature provided that a "[suit for §203 penalties]… may be filed at any time before the expiration of the statute of limitations on an action for the wages from which the penalties arise." (§203.) This indicates that with respect to §226.7, the Legislature rejected use of the word "penalty," knowing the term could be interpreted to trigger a one-year statute of limitations. "The Legislature has in mind existing laws when it passes a statute." (*Estate of McDill* (1975) 14 Cal.3d 831, 837.)

violations); §1033 (civil "penalty" for failure to provide lactation accommodation); §1197.1 (civil "penalty" for minimum wage violation); §1403 ("penalty" for failure to give notice of mass layoff).)

By contrast, in addition to §226.7, the Labor Code makes explicit references to "pay" or "compensation." (See, e.g., §96(h) ("vacation pay" and "severance pay"); §§204c, 510 and 511 ("overtime pay," "rate of compensation"); §204.3(a) ("employee's regular rate of compensation"); §230.8(b)(1) ("time off without pay"); §§1027 and 1043 ("time off with pay").) "Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject…is significant to show that a different intention existed." (*Penasquitos, Inc. v. Superior Ct.* (1991) 53 Cal.3d 1180, 1188-89 (citation omitted).)

If the Legislature intended a §226.7 payment to be a penalty, it would have called it one. Instead, lawmakers rejected the word "penalty," and called it "pay."

D. Viewed in Context, Section 226.7 Payments Are Part of California's Regulatory Framework of Compensation Policies.

1. Meal and Rest Payments Are Like Other Forms of Wages that Compensate Employees While Encouraging Employer Compliance with Minimum Labor Standards, and Should Be Subject to a Three-Year Limitations Period.

Section 226.7 must be interpreted within its greater statutory context. (*Dyna-Med*, 43 Cal.3d at 1386-1387.) The Labor Code and IWC Wage Orders embody a complex framework regulating the employee-employer relationship with respect to wages, hours and conditions of work. (See Cal. Const., art. XIV, §1 ("The Legislature may provide for minimum wages and for the general welfare of employees and for those purposes may confer on a commission legislative, executive and judicial powers"); *IWC*, 27 Cal.3d at 732 ("In dealing with the regulation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety") (citation omitted).)

This framework reflects policies that define the boundaries of acceptable employer behavior in a manner consistent with worker welfare. Such a scheme inherently involves economic consequences: "[T]he 'legislative power' to regulate employment conditions is very broad indeed, even though such regulations almost inevitably impose some economic burden upon employers." (*Id.*)

Labor Code §90.5(a) also recognizes that the creation of minimum labor standards for employees goes hand-in-hand with economic consequences for the employer:

> It is the policy of this state to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions or for employers that have not secured the payment of compensation, and to protect employers who comply with the law from those who attempt to gain a competitive advantage at the expense of their workers by failing to comply with minimum labor standards.

This language, adopted in 1983, is consistent with the approach taken in 1918 by the Court of Appeals when called upon to construe the constitutionality of the earliest iterations of California's statutory labor protections:

> There has been a pronounced tendency in state and national legislation for many years, not only to ameliorate the working conditions of the wage-earner, but to safeguard him in his relations to his employer in respect of hours of labor and the compensation to be paid for his labor.

(*Moore v. Indian Spring Channel Gold Mining Co*. (1918) 37 Cal.App. 370, 379.)

Thus, employee compensation and employer compliance with minimum labor standards are inextricably intertwined. Employee protections necessarily come at the expense of the employer. For example, minimum wage laws were created in order to guarantee that workers were paid enough to meet basic living needs. (*IWC,* 27 Cal. 3d at 701; *Rivera v. Division of Indus. Welfare* (1968) 265 Cal.App.2d 576, 582; §1178.)

Obviously, instituting minimum wage laws resulted in an economic consequence for employers. Similarly, California's prevailing wage laws set baseline wages in order to benefit and protect employees on public works projects. (*Lusardi Constr. Co. v. Aubry* (1992) 1 Cal.4th 976, 987.) Compliance with these laws necessarily impacts an employer's pocketbook.

Compensation policies within California's regulatory framework thus serve a dual purpose. They set baseline pay for employees, and also shape employer behavior to be consistent with minimum labor standards. Indeed, overtime pay was created in order to encourage employer compliance with the eight-hour day: "As to the provision for premium pay for overtime, the [IWC's Statement as to the Basis] make[s] it clear that such provision has become the primary device for enforcing limitation on the maximum number of hours of work…. The statements set forth the reasons supporting premium pay, to wit, it is a maximum hour enforcement device …" (*California Mfrs. Ass'n*, 109 Cal.App.3d at 111; see also *Skyline Homes, Inc. v. Department of Indus. Relations* (1985) 165 Cal.App.3d 239, 250 ("Premium pay for overtime is the primary device for enforcing limitations on the maximum hours of work"), disapproved on other grounds, *Tidewater*, 14 Cal.4th at 573; *Keyes Motors, Inc. v. Div. of Labor Standards Enforcement* (1987) 197 Cal.App.3d 557, 564 ("purpose of premium pay for overtime hours is to 'regulate maximum hours consistent with the health and welfare of

employees'… it is crucial for their health and safety [and for quality of their work] … that they not be overtired") (citation omitted); *Monzon v. Schaefer Ambulance Serv., Inc.* (1990) 224 Cal.App.3d 16, 39 (overtime is premium for labor performed, intended to compensate the employee, while placing financial pressure upon employers to spread employment in the workforce in the interest of workers' health and well-being); *California Grape & Tree Fruit League v. Industrial Welfare Comm'n.* (1969) 268 Cal.App.2d 692, 703 (purpose of overtime pay "is to regulate *hours* of employment, insuring that overtime privileges granted employers will not be abused.")[13]

Similarly, reporting time pay "provides, with certain exceptions, that an employee who reports for work, but is given half or less of a day's work to do, shall be paid for at least a stated minimum number of hours." (*California Mfrs. Ass'n*, 109 Cal.App.3d at 112.) This form of pay "encourag[es] proper notice and scheduling,… is reasonably related to the welfare of employees,… and is an appropriate device for enforcing

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[13] The court in *California Grape & Tree Fruit League* took notice of a report that concluded that double pay requirements had essentially eliminated the imposition of the twelve hour day in certain industries; a goal that the mere prohibition of such work had not accomplished. (*Id.*) This was exactly the cause and effect that Commissioner Broad refers to in his motion to amend the Wage Orders relating to meal and rest periods. (See fn.8, *supra* and pp. 31-32, *infra*.)

proper scheduling consistent with maximum hours and minimum pay requirements." (*Id.*)

As previously noted, (see pp. 10-12, *supra*), the IWC originally required meal and rest breaks as part of an overall worker health and safety framework. It later added the "one hour of pay" in order to "encourage employer compliance" with those existing break provisions.

Thus, meal and rest pay falls in line with other types of pay within the greater regulatory framework. Overtime pay, reporting time pay, and meal and rest pay all perform a dual function. They compensate employees, while at the same time, they enforce employer compliance with minimum labor standards.[14] Meal and rest pay therefore should be considered a "liability created by statute," governed by a three-year statute

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[14] The Court of Appeal rested part of its conclusion on the fact that, unlike the overtime laws, §226.7 "does not allow employers to deny meal and rest breaks." (*Murphy*, 134 Cal.App. at 753 and fn.22.) This does not transform §226.7 payments into penalties. In *Parker v. Otis* (1900) 130 Cal. 322, aff'd *sub nom. Otis v. Parker* (1903) 187 Cal. 606, the Court reviewed an action for recovery of money used to make margin stock purchases, which were prohibited by the Constitution at that time. The *Parker* Court rejected the argument that Code Civ. Proc. §340 applied: "If the constitution, in effect, makes the margin sales of stock unlawful, it does not follow that the action given to recover the money paid for the purchase of such stock is a penal action, or is for the recovery of a penalty, and certainly the recovery cannot be said to be 'without reference to the actual damage sustained,' for there is no damage except as measured by the money paid." *(Id.* at 333.)

Likewise, it is unlawful to pay less than minimum wage (§1197), or to discriminate against a member of a protected class in his or her

of limitations. (See *Cuadra,* 17 Cal.4th at 859 (actions for unpaid wages created by statute must be brought within three years after accrual); *Aubry v. Goldhor* (1988) 201 Cal.App.3d 399, 404 (overtime claim is "an action upon a liability created by statute" subject to three-year limitation period); see also *Cortez v. Purolator Air Filtration Prod. Co*. (2000) 23 Cal.4th 163, 178 (overtime pay constitutes earned wages recoverable in a restitution action, subject to Bus. & Prof. Code, §17208's four-year limitations period).)

Notably, overtime pay has long been referred to interchangeably as "penalty or premium pay." (See, e.g., *IWC*, 27 Cal.3d at 713 ("premium or penalty for overtime"); *Keyes Motors, Inc.*, 197 Cal.App.3d at 562 ("penalty pay for overtime"); *Skyline*, 165 Cal.App.3d at 249 (overtime "premium or penalty").) This dual characterization reflects that while overtime pay compensates the employee, it also has an economic impact on the employer, and acts as an enforcement mechanism with respect to the eight-hour day. But the fact that overtime pay serves this dual function does not turn it into a "penalty" for purposes of triggering a shorter statute of limitations. The same holds true for meal and rest pay.

Courts have recognized that statutes may have the effect of deterring or compelling behavior, but that this does not transform the law

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compensation. (Gov't Code, §12940(a).) The fact that these actions are unlawful does not transform the wages or backpay into penalties.

into a "penal" statute for purposes of application of the statute of limitations. In *People v. Triplett* (1996) 48 Cal.App.4th 233, 251-52, review den. (Cal. Nov. 13, 1996) 1996 Cal. Lexis 471, the court interpreted a statute that charged a fee of 12.5% of the assessed property value for cancellation of a Williamson Act contract designating property for agricultural use. The state sued the county assessor and the land developer for undervaluing the land, and thereby generating too small a fee for remittance to the state. The developer argued that the cancellation fee was a penalty, and therefore should be subject to the one-year limitations period. The court disagreed and applied the three-year limitations period, holding that "the gravamen of the instant action is to compel the Assessor to comply with this statute." (*Id.* at 251.) "While the cancellation fee may be loosely considered a penalty, and has been described in this manner, … it may also be considered in the broader sense as an effort to enforce the cancellation fee." (*Id.* at 252, fn.9.)

In *Medrano v. D'Arrigo Brothers Co.* (N.D. Cal. 2000) 125 F.Supp.2d 1163, 1165, fn.3, 1168-1170, the court interpreted the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"), which authorizes awards of statutory damages of up to $500 per plaintiff for failure to pay wages due when owed. The court held that the AWPA civil remedy compensates injuries, and also promotes enforcement of the

Act and deters violations, and is thus subject to Code Civ. Proc. §338's three-year limitations period. (*Id.*)[15]

2. Like Other Forms of Pay, Meal and Rest Pay Reflects the Monetary Value Assigned by Lawmakers to Compensate for Intangible Loss.

Lawmakers have assigned amounts to compensate employees for certain kinds of work or scheduling which results in a detriment to the employee. For example, workers are paid one and one-half times the regular rate for each hour spent over eight hours. (Wage Order §3.) Employees working the thirteenth hour in a single day are paid twice the regular rate of pay. (*Id.)*

When required to report to work, but not allowed to commence, the employee receives as much as four hours of reporting time pay, even if the employee performs no work on that day. (Wage Order §5.) When an employee works a split shift (i.e., is scheduled for two non-consecutive shifts in the same day), the employee is paid one additional hour of pay, at the minimum wage, for non-working time. (Wage Order §4(C).) Each of

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[15] See also *Martinez v. Shinn* (9th Cir. 1993) 992 F.2d 997, 999 (AWPA statutory damages do not have "punitive purpose"); *California Ass'n of Health Facilities v. Department of Health Serv.* (1997) 16 Cal.4th 284, 294-295 (Long Term Care Health, Safety and Security Act's civil penalty scheme, with penalties of up to $25,000, was not "essentially penal in nature but remedial" for purposes of determining sovereign immunity from penalties; "while civil penalties may have a punitive or deterrent aspect, their primary purpose is to secure obedience to statutes and regulations imposed to assure important public policy objectives.")

these types of pay is tied to the earnings of the worker. Each type of pay compensates the worker for things other than time spent working, such as extra fatigue or inconvenience. Each type is automatically owed to the employee, rather than owed only upon enforcement.

Meal and rest pay operates just like those other forms of pay, compensating employees for extra labor, inconvenience, lost opportunity, and added fatigue.[16] The break requirements entitle employees to periods of complete relief from responsibility and employer control during their workday. If an employer requires an employee to work instead of rest, the employer benefits from that labor and the employee suffers a loss of free time. Section 226.7 provides the only compensation for that loss. The "one hour of pay" compensates for more than just the time spent working rather than resting.[17] It compensates for the denial of the right to use that time to eat, rest, use the bathroom, schedule a doctor's appointment, go to the bank, check on a child in childcare, take a walk, – in other words, to be

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[16] *Tomlinson* recognized this parallel, finding meal and rest payments "akin to payment of overtime wages to an employee: both are 'earned wages.'" (*Tomlinson*, 359 F.Supp.2d at 896.)

completely free from the employer's control. A worker suffers – and under §226.7 is paid for – the loss of the right to be free from employer control during the workday. (See *Morillion*, 22 Cal.4th at 586 (uncompensated time is time employees can effectively use "for their own purposes").)

The fact that meal and rest payments are tied to the particular employee's wage rate is also consistent with the intent to *compensate* the employee as part of his or her pay. Construing "one hour of pay at the employee's regular rate of compensation" as a penalty illogically would result in employers being penalized less or more, depending on the affected employee. It would make no sense to penalize an employer $6.75 for one employee, and $20.00 for another higher paid employee, for the same violation.

With respect to overtime, reporting time, split shift, and meal and rest pay, lawmakers recognized that employees suffer a loss when the employer imposes on their freedom to use their time for their own purposes. Lawmakers established a monetary value that compensates for

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[17] A California employee earns at least $6.75 per hour, and in any eight hour day, is entitled to two compensated ten minute rest periods. Therefore, the employer is required, at a minimum, to pay an employee $54.00 for seven hours and forty minutes of work. If employees do not receive rest breaks, they work for free for twenty minutes that day. Even though meal periods are uncompensated, §226.7 pay provides compensation for denial of that free time.

that loss.[18] Each payment is the *only* monetary compensation available to the employee for that particular loss, inconvenience or extra fatigue.[19]

The fact that §226.7 pay compensates employees for loss, and is the *only* monetary compensation for that loss, places §226.7 firmly outside the

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[18] Courts have recognized that the monetary value of harm can be difficult to ascertain. Where damages are obscure and difficult to prove, a set amount of compensation is not a penalty for purposes of applying the statute of limitations. (See, e.g., *Stone v. Travelers Corp.* (9th Cir. 1995) 58 F.3d 434, 439 (ERISA remedy of $100 per day for failure to provide benefits documentation is not a penalty under Code Civ. Proc., §340); *Rivera v. Anaya* (9th Cir. 1984) 726 F.2d 564, 568-569 (statutory remedy of actual damages or $500 for farm labor contractor registration laws is not penalty, since damages may be difficult to calculate, but instead is statutory remedy subject to Code Civ. Proc., §338); *Overnight Motor Transp. Co. v. Missell* (1942) 316 U.S. 572, 583-584 (FLSA liquidated damages for failure to pay overtime is compensation, not penalty; "the retention of a workman's pay may well result in damages too obscure and difficult of proof"), superceded by statute on other grounds, *TWA, Inc. v. Thurston* (1985) 469 U.S. 111, 128; *Hays v. Bank of America* (1945) 71 Cal.App.2d 301, 305 (same).)

[19] As previously stated, until the meal and rest pay provisions, employees had no remedy for missed breaks other than obtaining an injunction. However, employers were liable in other ways. Section 1199 provided for misdemeanor fines for violations of any provision of a wage order. More importantly, §558, enacted in 1999, requires that employers pay a civil penalty of $50 for initial violations, and $100 for subsequent violations. Sections 226.7 and 558 complement each other. When an employer fails to provide a break, the employer must pay the employee the remedy of one hour of pay pursuant to Wage Order §§11 and 12 and §226.7. If the employer fails to do so on the payday for the pay period for which the meal or rest period violation took place, the employer will also be subject to the pre-existing civil penalty in §558. This complementary scheme supports the construction that the "one hour of pay" remedy is compensatory, since it is unlikely that the Legislature intended to create a second employer penalty for the same conduct.

two common law tests for identifying a penalty for purposes of applying the statute of limitations.

The first test defines a statutory penalty as (1) one which an individual is allowed to recover against a wrongdoer, as a satisfaction for the wrong or injury suffered, and without reference to the actual damage sustained, or (2) one which is given to the individual and the state as a punishment for some act which is in the nature of a public wrong. (*County of Los Angeles v. Ballerino* (1893) 99 Cal. 593, 596 (interest imposed on delinquent payment of taxes is not a penalty subject to Code Civ. Proc., §340).) Section 226.7 payments do not constitute a penalty under the *Ballerino* test. [20] They are not something an individual "is allowed to recover against a wrongdoer… without reference to the actual harm sustained." Section §226.7 payments are automatically owed by the employer to the employee if no break is provided, and the employee does not have to "recover" the pay by bringing an action. (See pp. 28-30, *infra*.) The amount of the compensation is made in reference to that particular employee's rate of pay, and reflects a legislative judgment of the value of the loss caused by having to forego a break.[21]

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[20] The second *Ballerino* test is easily dispensed with, since no part of the "one additional hour of pay" is given to the state.

[21] See also fn.18, *supra,* for examples of statutes that are remedial, and not penal, where their fixed-sum damages reflect the difficulty in ascertaining the actual value of the harm.

The second common law test applies to civil penalty schemes that include "an arbitrary sum in addition and unrelated to actual damages." (*Prudential Home Mortgage Co. v. Superior Ct.* (1998) 66 Cal.App.4th 1236, 1243.) As correctly pointed out by the *Murphy* Court of Appeal, statutes that provide for recovery of double or treble damages *in addition* to actual losses typically are considered penal in nature. (*Murphy*, 134 Cal.App.4th at 750-751, citing *Prudential Home Mortgage Co.*, and *Menefee v. Ostawari* (1991) 228 Cal.App.3d 239, 243.) Again, §226.7 falls outside this definition, for it provides the *sole* monetary remedy to an employee when an employer fails to provide a mandated break.

3. Like Other Forms of Pay, Meal and Rest Pay Is Owed Immediately by the Employer to the Employee, Rather than Being "Subject to" Enforcement, Like a Penalty.

The language of §226.7 is self-operational: "The employer 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." It creates an immediate obligation to pay an hour of pay for failure to provide a requisite break, just as employees are immediately entitled to overtime pay if they work over eight hours in a day. In this way, meal and rest pay once again operates like other payment obligations, such as overtime and double time pay (Wage Order §3), minimum wage and split shift pay (Wage Order §4), and reporting time pay (Wage Order §5).

Employees have a vested right in these payment obligations as soon as they accrue. (See, e.g., *Kerr's Catering Serv. v. Department of Indus. Relations* (1962) 57 Cal.2d 319, 326 ("wages due belong to the employee, not the employer"); *Loehr v. Ventura County Comty. College Dist.* (1983) 147 Cal.App.3d 1071, 1080 ("earned but unpaid salary or wages are vested property rights"); *Cortez*, 23 Cal.4th at 178 (unlawfully withheld wages are property of the employee subject to restitutionary order under the Unfair Competition Law).)

By contrast, in other Labor Code provisions, the employer is "subject to" penalties, and the employee or Labor Commissioner must take some action to enforce it. (See, e.g., §203 ("suit may be filed for these penalties"); §§210 and 225.5 (employer "subject to a civil penalty," recoverable by the Labor Commissioner in administrative hearing or civil action); §§558 and 1197.1 (setting forth civil penalties, as well as Labor Commissioner enforcement process); §§1403 and 1404 (employer's failure to give notice of mass layoff is "subject to civil penalty" which may be enforced through civil action).) [22]

Unlike §226.7 payments, statutory penalties are <u>not</u> self-operational. They do not vest until they have been enforced. (*People v. Durbin* (1966)

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[22] In fact, the Senate deleted a proposed penalty structure requiring that an aggrieved employee file an enforcement action, and in its place enacted an affirmative obligation for employers to pay the employee the one hour's pay. (MJN Exh. 9 at 3, 11-13; see pp. 32-36, *infra*.)

64 Cal.2d 474, 479 ("No person has a vested right in an unenforced statutory penalty or forfeiture"); *Anderson v. Byrnes* (1898) 122 Cal. 272, 274 ("no person has a vested right in an unenforced penalty").)

Section 226.7 compensates employees with "one hour of pay," which is simultaneously earned and accrued by the worker, rather than being "subject to" enforcement like a penalty.

4. Meal and Rest Pay Falls Within California's Broad Definition of "Wages."

Recognizing §226.7 payments as a form of compensation is also "consistent with the Labor Code's definition of 'wages.'" (*Tomlinson*, 359 F.Supp.2d at 896.) Section 200(a) defines "wages" very broadly:

> all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation.

Courts have recognized the breadth of what constitutes a "wage" under the Labor Code. "In its legal sense, the word 'wage' has been given a broad, general definition so as to include compensation for services rendered without regard to the manner in which such compensation is computed." (*Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1972) 24 Cal.App.3d 35, 44 (§200 "wages" includes profit sharing plan; citing cases holding that §200 "wages" encompass bonuses, payments to health and welfare fund, insurance premiums, payments to unemployment insurance fund, and pension plan benefits); see also *Suastez v. Plastic Dress-Up, Inc.* (1982) 31

Cal.3d 774, 779 (vacation benefit is "additional wages for services performed"); *DIR v. UI Video Stores, Inc.* (1997) 55 Cal.App.4th 1084, 1091-1092 ("wages" includes reimbursement of uniform costs.)

Meal and rest pay compensates employees at a premium rate for "labor performed" when they had a right to be free of the employer's control. A definition of "wages" broad enough to encompass insurance premiums and the cost of uniforms as "amounts for labor performed" certainly includes meal and rest pay.

E. The Regulatory and Legislative History Supports that Meal and Rest Payments Are Compensation, Not Penalties.

Given §226.7's plain language, and viewing it within the context of the Labor Code, there is no need to examine extrinsic sources to determine legislative intent. Nevertheless, both the agency and legislative histories evince the intent to create a remedy for employees and encourage employer compliance.

1. IWC History

At the June 30, 2000 IWC hearing, Commissioner Broad introduced the Wage Order meal and rest pay provisions. He explained the intent behind the payments, and drew an explicit parallel to overtime pay:

> This [meal and rest pay provision applies] to an employer who says, "You do not get lunch today, you do not get your rest break, you must work now." That is the intent…. And, of course, the courts have long construed overtime as a penalty, in effect, on employers for working people more than full – you know, that is how it's been construed, as more than the -- the normal daily

> workday. It is viewed as a penalty and a disincentive in order to encourage employers not to. *So, it is in the same authority that we provide overtime pay that we provide this extra hour of pay.*

(MJN Exh. 4 at p.30 (emphasis added).)

As set forth above, overtime has often been described as both pay and penalty, because it compensates employees as well as encourages employers to comply with the eight-hour day. Nevertheless, overtime has long been considered a remedy subject to the three-year statute of limitations. Commissioner Broad used the terms "overtime pay" and "overtime penalty" in the sense that overtime, like meal and rest pay, compensates employees while providing incentives for employers to comply with healthy working conditions.

The IWC adopted Commissioner Broad's proposal. The Statement as to the Basis explains that an employer is required to "pay an employee one additional hour of pay at the employee's rate of pay for each work day that a meal period is not provided," and "for each day that a rest period is not provided." It does not mention "penalty." (CT 396.)

2. Legislative History

The Legislature began with an entirely different scheme than what it ultimately adopted. As originally introduced, the portion of AB 2509 that addressed missed meal and rest periods called for penalties *plus* payments to the worker. It also required employees to take affirmative steps to enforce the amounts, either through the agency or directly in court:

> Provides for penalties of $50 per employee per pay period and payment of an amount equal to twice the average hourly rate of compensation for the employee for the full length of the meal or rest period. Provides that an employee may bring a complaint before the Commissioner or file a civil action or for damages or penalties, and attorney's fees.

(Assembly Third Reading, MJN Exh. 12 at 3.)[23]

On August 25, 2000, the Senate *deleted* this civil penalty scheme, as well as the employee's duty to enforce the penalty, explaining instead that "[t]his bill would require any employer that requires any employee to work during a meal or rest period mandated by an order of the commission to pay the employee one hour's pay for each workday that the meal or rest period is not provided." (MJN Exh. 9 at 3, editing omitted.)

The Senate Rules Committee described this bill amendment as providing "*wages*": "Failure to provide such meal and rest periods would subject an employer to paying the worker one hour of wages for each work day when rest periods were not offered." (Aug. 28, 2000, Senate Rules Committee Third Reading, MJN Exh. 17 at 4.)

In this way, the bill lost the attributes of a penalty: a set and arbitrary $50/$100 penalty in addition to double damages, with enforcement responsibility placed on the employee. Instead, it took on the

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[23] This original version would have fallen squarely within the common law definition of a penalty statute, since it authorized "an arbitrary sum in addition and unrelated to actual damages." (See p. 28, *supra*.) The Legislature subsequently *rejected* this version.

characteristics of compensation: one hour of pay tied to the employee's rate of compensation, that an employer was automatically "required to pay" to the employee.

In its Enrolled Bill Report, the Department of Industrial Relations recognized the compensatory aspects of the "hour of pay," as well as the need to encourage employer compliance with meal and rest requirements:

> This bill prohibits an employer from requiring an employee to work during a meal or rest period prescribed by the IWC. Any employer who violates this provision is required to *compensate* an employee with one additional hour's pay at the regular rate for each day that a meal or rest period was denied.
>
> DLSE has found that the fact the employers must pay employees their regular wages for working during a meal period is insufficient to discourage noncompliance … and does little to protect the mandatory character of the off-duty meal period. Currently, the means of enforcing meal period requirements consists of filing an action for injunctive relief to compel prospective compliance with the law. Of course, *an injunction does nothing to remedy past noncompliance*.

(Dept. of Industrial Relations Enrolled Bill Report, Sept. 13, 2000, MJN Exh. 19 at 9 (emphasis added).)

After the civil penalty scheme was discarded, other legislative documents refer to the new provision as codifying the "penalty" adopted by the IWC.[24] But as discussed above, the IWC intended to create meal and rest "penalties" in the same spirit as the "overtime penalty"; in other words,

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[24] See, e.g., August 25, 2000, Concurrence in Senate Amendments (MJN Exh. 16 at 2) ("delete the provisions related to penalties for an employer who fails to provide a meal or rest period, and instead codify the lower penalty amounts adopted by the IWC.").)

as a vehicle to help attain employer compliance. The fact that the bill had a compensatory as well as deterrent aspect made it comparable to overtime pay.

The Legislative Counsel Digest's description of the final bill makes no mention of a penalty, and instead references the employer's obligation "*to pay the employee one hour's pay* for each workday that the meal or rest period is not provided." (Emphasis added.)[25]

In the end, lawmakers considered but ultimately refused to enact a penalty structure in §226.7. Where the Legislature has deleted language from the original draft of a statute, such history demonstrates that the deleted language was "considered and expressly *rejected* by the legislative draftsmen." (*City of Santa Cruz v. Mun. Ct.* (1989) 49 Cal.3d 74, 89 (emphasis in original).) "The rejection of a specific provision contained in an act as originally introduced is 'most persuasive' that the act should not be interpreted to include what was left out." (*Wilson v. City of Laguna Beach* (1992) 6 Cal.App.4th 543, 555 (citations omitted).)

The Legislature's decision to omit the word "penalty" from §226.7 is particularly significant in light of the fact that it used the word "penalty" in two other segments of AB 2509. (*Penasquitos*, 53 Cal.3d at 1188-89 (where statute contains a provision, and that provision is omitted from a

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[25] AB 2509, as Chaptered, September 29, 2000, MJN Exh. 11 at 2.

similar statute on related subject, then it supports a different intent.) AB 2509 expressly provided for a "penalty" for issuing a bad check for payment of wages (§203.1). It also amended "penalty" amounts for an employer's failure to provide properly itemized wage statements (§226(b).) (See MJN Exh. 11 at pp. 4-6.).

In sum, the Legislature considered, then dropped, a civil penalty structure. Moreover, the word "penalty" is absent from the statute, but present in other statutes enacted in the same bill. These facts indicate that meal and rest pay was not intended to be a penalty. And certainly nothing in the IWC or legislative history demonstrates an intent to cut off employer liability after one year.[26]

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[26] The DLSE has completely reversed itself in its interpretations of §226.7, and is entitled to no deference. The DLSE represented Murphy as co-counsel before the trial court. At that time, the agency's unequivocal interpretation was that meal and rest pay constituted compensation, and not a penalty, and was not subject to the one-year statute of limitations. (See June 11, 2003 DLSE Opinion Letter, Plaintiff's Trial Brief Exh.C, CT 126-193 at 177-180.) Since that time, the meal and rest pay provisions have not changed. Nevertheless, under a new administration, the DLSE made a complete turnaround, opining in an internal "Precedential Decision" that meal and rest pay is a "penalty." (June 17, 2005 Memo, Respondent's Motion for Judicial Notice, Exh. 4.**)** The agency's vacillating position is entitled to no deference. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 13); see also *Hudgins v. Neiman Marcus Group, Inc.* (1995) 34 Cal.App.4th 1109, 1125 (no deference given to DLSE's self-contradictory interpretations).)

II. A TRIAL COURT PROPERLY MAY EXERCISE ITS DISCRETION TO ADJUDICATE WAGE CLAIMS RAISED IN A §98.2 TRIAL *DE NOVO* AFTER APPEAL OF A LABOR COMMISSIONER DECISION.

California lawmakers created a unique process for handling wage claims, providing a "speedy, informal and affordable" forum for employees to pursue and collect their wages. The explicit legislative intent states that the process is informal, while "preserving the rights of the parties."

Claimants like Murphy who choose this preferred administrative route, and are successful, may nevertheless find themselves in court because the employer files a *de novo* appeal under §98.2. Courts consistently have acknowledged the broad authority of trial courts in these *de novo* proceedings. Indeed, legislators added the *de novo* standard, and the ability to invoke a trial court's discretion, out of a constitutional concern regarding the exercise of judicial power by an administrative agency.

Nothing in the statutory language restricts the *de novo* court to considering solely the specific claims identified in the administrative process. Nevertheless, the Court of Appeal held that *de novo* courts are barred from adjudicating claims other than those raised in the administrative process. The Court of Appeal's approach contravenes the express legislative intent, as well as the public policies underlying the statutory scheme.

Consistent with such legislative intent and public policies, employees are able, subject to the trial court's discretion, to raise new claims in a §98.2 *de novo* proceeding. When this happens, trial courts are well-equipped to exercise discretion and manage cases in a manner that protects the parties from prejudice and enhances judicial economy.

Murphy's situation illuminates the issue, for he did exactly what a wage claimant should do. He acted promptly, filing an administrative wage claim within months of leaving employment. As with most wage claimants, he did not have a lawyer. Nevertheless, he explained his basic problem to the Labor Commissioner, namely, that KCP had misclassified him as an exempt employee. Not surprisingly, he did not have a sophisticated understanding of all of the rights that flowed from that misclassification.

After KCP filed its *de novo* appeal, Murphy's counsel promptly identified all claims and notified KCP. The trial court ruled that all of Murphy's claims flowed from the same general set of facts, and applied the relation back doctrine. KCP did not ask for discovery or a trial continuance, and never once asserted that it was prejudiced in its ability to defend against Murphy's claims. Creating a rule that automatically bars Murphy from pursuing the related claims that he did not know about when he filed his administrative wage claim would defeat the purposes behind the statutory scheme.

A. The Berman Process Is Intended to Provide a Speedy, Informal, Affordable Forum for Resolving Wage Claims While Preserving the Rights of the Parties.

The Legislature created a unique statutory scheme to resolve wage disputes, commonly referred to as the Berman Process. (*Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 350.) "If an employer fails to pay wages in the amount, time or manner required by contract or by statute, the employee has two principal options. The employee may seek *judicial* relief by filing an ordinary civil action against the employer for breach of contract and/or for the wages prescribed by statute. (§§218, 1194.) Or the employee may seek *administrative* relief by filing a wage claim with the [Labor Commissioner] pursuant to a special statutory scheme codified in sections 98 to 98.8." (*Id.* at 355, (emphasis in original) (citation omitted).) Thus, unlike other types of administrative processes, there is no administrative exhaustion requirement for wage claims.

The statute itself spells out the express intent behind Berman hearings: to create a method for resolving wage claims in "an informal setting *preserving the rights of the parties*." [27] (§98(a) (emphasis added); *Smith*, 29 Cal.4th at 356.) "Public policy has long favored the 'full and prompt payment of wages due an employee." (*Cuadra*, 17 Cal.4th at 871 (citation omitted).) The Berman process is "designed to provide a speedy,

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[27] The Court of Appeal did not discuss this explicit statement of intent.

informal, and affordable method of resolving wage claims." (*Smith*, 29 Cal.4th at 356 (citation omitted).) The process sets up a preference for administrative resolution, creating an accessible means for handling most wage disputes in order to "avoid recourse to costly and time-consuming judicial proceedings in all but the most complex of wage claims." (*Id*.)

Following a Berman hearing, the Labor Commissioner issues an ODA which, among other things, advises the parties of their right to seek review by filing an appeal to the superior court, which shall hear the case *de novo*. (§§98.1, 98.2(a).)[28] A timely appeal "forestalls the commissioner's decision, terminates his or her jurisdiction, and vests jurisdiction to conduct a hearing *de novo* in the appropriate court." (*Vos Post v. Palo/Haklar* (2000) 23 Cal.4th 942, 947 (citation omitted).) The ODA is "entitled to no weight whatsoever, and the proceedings are truly 'a trial anew in the fullest sense.'" (*Id.* at 948 (citation omitted).)

An employer who files a §98.2 *de novo* appeal knows it runs the risk of additional exposure in the form of higher damages, as well as prevailing party fees and costs pursuant to §98.2(c). (See, e.g., *Miller*, 16 Cal.App.4th at 1274 (*de novo* court awarded damages "over 20 times the amount

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[28] If one party files a timely appeal, the other is not required to take action in order to preserve their right to appeal. (*Miller v. Foremost* (1993) 16 Cal.App.4th 1271, 1274.) Section 98.2(a) requires an appealing employer to post a bond in the amount of the ODA. If neither party appeals, the ODA becomes enforceable as a judgment in a civil action. (§98.1(a); *Smith*, 29 Cal.4th at 356.)

awarded by the commissioner"); §98.2(c) (employer who is unsuccessful in appeal is liable for attorneys' fees if court awards employee more than $0).)

An employer also knows it can raise new factual or legal defenses in the *de novo* trial. Indeed, an employer who doesn't even appear at a Berman hearing is nevertheless permitted to mount a defense in the §98.2 *de novo* proceedings. (*Jones v. Basich* (1986) 176 Cal.App.3d 513, 519 (employer not required to appear or participate in Berman process in order to pursue §98.2 appeal).) This is consistent with the concept that the Berman process is informal and preserves the parties' rights.[29]

B. The Statutory Scheme, Its Legislative History, and the Underlying Public Policies Support an Employee's Right to Seek Additional Claims in a §98.2 *De Novo* Trial.

1. The Statutory Language and Prior Interpretations

Section 98.2(a) provides that following an ODA, "the parties may seek review by filing an appeal to the superior court, where the appeal shall be heard *de novo*." The statute should be interpreted to "give[] effect to both the term 'review' and the term '*de novo*.'" (*Sales Dimensions v. Superior Ct.* (1979) 90 Cal.App.3d 757, 762.) These two terms appear in

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[29] The Court of Appeal's restrictive interpretation, that the superior court cannot consider "entirely new issues or disputes that were never previously submitted to the Labor Commissioner," (*Murphy*, 134 Cal.App.4th at 748), contradicts both *Jones* and the underlying statutory intent. Under the Court of Appeal's interpretation, in a trial *de novo*, an employer presumably could only raise factual or legal disputes it asserted in its defense before the Labor Commissioner.

separate clauses, and neither term is defined. The first clause answers the question of *how* to seek review -- "by filing an appeal to the superior court;" and the second clause answers the question of *scope* of review – "where the appeal shall be heard *de novo*."

Nothing in the statutory language states that a *de novo* court is absolutely barred from considering any claims other than those first raised in the administrative proceedings. Such an interpretation would contravene the express statutory intent to preserve the parties' rights.[30]

Sales Dimensions interpreted the term "review" within §98.2, and determined it was not intended to limit superior court jurisdiction to what was presented to the Labor Commissioner. Given the *de novo* nature of the superior court proceedings, "[r]eview is accorded not to the decision of the commissioner, but to the underlying facts on which depend the merits of the dispute." (90 Cal.App.3d at 763.)[31]

As to the term "*de novo*," this Court repeatedly has addressed its meaning within §98.2 and acknowledged its expansive scope, as well as the

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[30] Such a reading would fall hardest upon employees who are often unrepresented and lack a full understanding of the law when they attempt to recover their wages in the "speedy, informal and affordable" administrative process. As discussed at pp. 44-47, *infra*, the Berman process was created to enhance, not hinder employees' ability to collect unpaid wages.

[31] Here, "the merits of the dispute" involve injuries to Murphy flowing from KCP's misclassification of him.

broad authority of the *de novo* court. "Although denoted an 'appeal,' unlike a conventional appeal in a civil action, hearing under the Labor Code is *de novo*…. 'A hearing *de novo* [under §98.2] literally means a new hearing,' that is, a new trial." (*Smith,* 29 Cal.4th at 356-357 (citation omitted).) A *de novo* proceeding "may include entirely new evidence." (*Id.* at 357.) The Labor Code provisions "*do not place any restriction on the authority of the reviewing court, in a hearing de novo, to address a disputed question concerning any issue of law or fact, . . . or to determine its jurisdiction over a matter."* (*Vos Post*, 23 Cal.4th at 949-950 (emphasis added).)

Smith examined the definition of success on appeal for purposes of awarding attorneys' fees under §98.2(c).[32] The *Smith* Court discussed the *de novo* court's authority to award interest on non-wage claims even though the Labor Commissioner was precluded from making such an award in the administrative forum. At the time of the Berman hearing, the Labor Commissioner was only authorized to award interest on wage claims. (*Smith*, 29 Cal.4th at 371.) Significantly, the Court held that the "statutory constraints on the commissioner's authority to award interest on the non-wage items did not similarly bind the trial court," because it "*heard Smith's claims de novo.*" *(Id.* (emphasis added).) Thus, the employee in *Smith* had

[32] The Legislature overturned *Smith*'s holding with respect to attorneys' fees when it amended §98.2(c) in 2003.

been unable to pursue the non-wage interest claim before the Labor Commissioner, but could properly pursue the claim in a trial *de novo*.[33]

2. The Legislative History

Lawmakers created the Berman hearing process in 1976 by amending §98, to remedy delays in the wage claim process resulting from employer tactics. In the words of then-Labor Commissioner Quillen:

> This legislation should expedite the handling of disputed wage claims by the Labor Commissioner's office and should discourage obstruction and stalling tactics engaged in by some employers knowing that the only recourse available to the Labor Commissioner to enforce a valid claim is to sue in the Superior Court. That process often delays final resolution and many times when a court decision is finally rendered on a matter, the employer is no longer in business or has declared bankruptcy or has reorganized under a different name, all of which frustrates the purpose of the Labor Code protections regarding timely and complete payment of wages to California workers.[34]

(August 16, 1976, Department of Industrial Relations Enrolled Bill Report, MJN Exh. 36 at 1.)

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[33] Murphy faces a similar situation with respect to his paystub claim, which flowed from KCP's misclassification, but which the DLSE would have refused to process as a matter of agency policy. (CT 224.)

The Court of Appeal did not discuss the fact that the *Smith* plaintiff could not have raised the non-wage interest claim in the Berman process. Instead, it simply characterized the claim as a "consequence of continuing the litigation." (*Murphy*, 134 Cal.App.4th at 747.)

[34] Courts have long recognized the unique importance of prompt payment of wages to the public welfare. (See *Kerr's Catering*, 57 Cal.2d at 326-327; *Pressler v. Donald L. Bren Co.* (1982) 32 Cal.3d 831, 837.)

As originally conceived, an ODA would be "subject to review by the courts in the manner provided by the Code of Civil Procedure," rather than *de novo*. (AB 1522 (April 9, 1975), MJN Exh. 20 at 5 (see §98.7); *Vos Post*, 23 Cal.4th at 950.) The bill subsequently was amended to provide for a *de novo* standard. (AB 1522 (Jan. 5, 1976), MJN Exh. 21 at 5.)[35]

The provision allowing for an appeal *de novo*, rather than a conventional appeal to a judicial court, addressed constitutional concerns regarding the exercise of judicial power by an administrative agency. (See, e.g., Sept. 14, 1976, Legal Affairs Enrolled Bill Report, MJN Exh. 38 at 2 ("[W]hen a trial de novo is provided in the courts, as in AB 1522, there is no 'appellate review' of the administrative decision because the court is permitted to make new findings of fact"); Sept. 21, 1976, Legislative Counsel Supplemental Report, MJN Exh. 39 at 2.) The legislative history discusses *Collier & Wallis v. Astor* (1937) 9 Cal.2d 202, on this point. (See MJN Exh. 38 at 1.)

Interpreting the Private Employment Agency Act, *Collier* held that the "Labor Commissioner is a purely administrative officer with state-wide authority and possesses no judicial power," and that in order for the Act to be valid, it must allow for more than a simple appeal from the Labor

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[35] AB 1522's final version of §98.2 read "the parties may seek review by filing an appeal to the superior court where the same shall be heard de novo." (MJN Exh. 26 at 3.) In 1990, it was amended to replace "same" with "appeal." (SB 240 (Cal. 1990), MJN Exh. 41 at 3.)

Commissioner's determination. (*Collier*, 9 Cal.2d at 204- 205.) In finding the Act constitutional, the Court focused on the Act's provision of a hearing *de novo* in the superior court upon appeal. (*Id.*)

Collier makes clear that "review" in a trial *de novo* does not limit the jurisdiction of the court:

> *It is in no sense a review of the hearing previously held, but is a complete trial of the controversy, the same as if no previous hearing had ever been held*. It differs, therefore, from an ordinary appeal from an inferior to an appellate body where the proceedings of the hearing in the inferior court are *reviewed* and their validity determined by the reviewing court. A hearing *de novo* therefore is nothing more nor less than a trial of the controverted matter by the court in which it is held. . . . *The court hears the matter*, not as an appellate court, *but as a court of original jurisdiction, with full power to hear and determine it as if it had never been before the labor commissioner*.

(9 Cal.2d at 205 (emphasis added).)[36]

The legislative history acknowledged that the constitutionality of the Berman process rested on the parties' ability to invoke the exercise of judicial discretion:

> [S]o long as the decision of the Labor Commissioner is not final, and the *opportunity is provided for an aggrieved party to invoke the exercise of judicial discretion through a trial de novo*, the separation of powers principle is not violated.

(MJN Exh. 38 at 1.)

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[36] The Court of Appeal also discussed *Collier*, but focussed on several statements it found to support its ruling, rather than exploring *Collier*'s full context. (*Murphy*, 134 Cal.App.4th at 746-747.)

The Legislative Analyst explained that "appeals [from an ODA] are to be heard de novo, *or as though no judgment had been rendered by the Labor Commissioner*." (June 18, 1976, Legislative Analyst Analysis of AB 1522, MJN Exh. 35 at 1.)

In a subsequent bill amendment, lawmakers included an express statement of intent: "It is the intent of the Legislature that hearings held pursuant to this section be conducted in an informal setting preserving the rights of the parties." (AB 1522 (Jan. 8, 1976), MJN Exh. 22 at 4.)

3. The Underlying Public Policies

The Berman statutory scheme must also be interpreted in light of the public policies it seeks to serve. (*People v. Triplett*, 48 Cal.App.4th at 242 (citation omitted).) These policies are set forth at pp. 39-41, *supra*.[37] Allowing employees to raise additional wage claims in the *de novo* proceedings, subject to the trial court's discretion, furthers these policies. The Court of Appeal's bar to raising new claims thwarts them.

The Court of Appeal's interpretation of §98.2 penalizes employees who seek a speedy, informal, affordable resolution of their wage claim yet

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[37] The Court consistently has relied on these underlying policies to interpret various provisions of the Berman process. (See, e.g., *Vos Post*, 23 Cal.4th at 951 (inconsistent with §98's legislative purpose of providing expeditious resolution of wage claims to foreclose *de novo* review of Labor Commissioner's finding that claimant was not in an employer-employee relationship); *Pressler*, 32 Cal.3d at 837 (to ensure "full and prompt payment of wages due," ten-day time period to file §98.2 appeal is mandatory and jurisdictional).)

who find themselves in court all the same, due to an employer's appeal. Under the Court of Appeals' interpretation, the rights of unrepresented wage claimants effectively may be waived through their pursuit of the administrative process unless they are fortunate enough to know the entirety of claims they may raise. Workers filing administrative claims are not provided with a checklist of possible violations, nor does the DLSE inform them that any claims not raised may be waived, if not asserted through a separate civil action.[38]

The Court of Appeal's interpretation thus creates an incentive to find a lawyer and bring a lawsuit so that rights are not waived. No longer affordable or informal, this approach also contravenes the stated preference that most wage claims be resolved through the administrative process. In

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[38] See DLSE website regarding how to file a wage claim at http://www.dir.ca.gov/dlse/howtofilewageclaim.htm. Moreover, certain claims would be lost because the Labor Commissioner refused to hear them, such as Murphy's paystub claim.

The problem is compounded by the DLSE's administrative delays, which the worker "can't control." (*Cuadra*, 17 Cal.4th at 863.) When an employee files a claim, the DLSE may take another six months to a year or more to process the claim to the Berman hearing stage. (*Id.* at 860, 863.) During this delay, rights may expire that the employee simply did not know about.

In Murphy's case, he promptly filed his wage claim within months of leaving employment. But the DLSE took nine months from the initial claim filing (Oct. 15, 2002 – Plf's Exh. 9) to the Berman hearing, (June 24, 2003 – CT 5), to issuance of the ODA (July 14, 2004 – CT 4).

addition, the potential unknowing waiver of rights goes against the policy supporting *full* and prompt payment of wages. Instead, it lets employers, who are charged with knowing the labor laws as a condition of doing business, escape the consequences of violating employee rights.[39]

The Court of Appeal's interpretation also creates an unsupportable double standard. Claimants who can afford to choose the judicial route are free to amend their pleadings to add new claims, subject to the court's discretion. (See pp. 52-53, *infra.*) But claimants who take the legislatively preferred and more affordable route would find themselves barred from invoking the court's discretion to adjudicate other related claims, once the employer moves the action to superior court.

The Court of Appeal's approach extinguishes rights, rather than preserves them. It "penalizes employees who exercise their right to invoke the Berman hearing procedure, deters them from doing so, and frustrates the evident remedial purpose of the legislation." (*Cuadra*, 17 Cal.4th at 870.)

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[39] Since employers must maintain personnel and time records for three years, (§226(a), Wage Order §7(C)), they are not likely to be prejudiced by lack of documentary evidence if employees are permitted to raise additional claims in the *de novo* trial.

C. Trial Courts Are Fully Capable of Exercising Their Broad Discretion to Manage §98.2 *De Novo* Trials in a Manner that Protects All Parties from Prejudice and Enhances Judicial Economy.

Trial courts, which inherently have broad discretion to control the proceedings before them in an efficient and just manner, are well-equipped to manage §98.2 *de novo* cases, just as they do any other case. (See *Citizens Util. Co. of California v. Superior Ct.* (1963) 59 Cal.2d 805, 812-13 ("'Courts have inherent power… to adopt any suitable method of practice, both in ordinary actions and special proceedings, if the procedure is not specified by statute or by rules adopted by the Judicial Council.'") (citations, footnote and emphasis omitted); *Rutherford v. Owen-Illinois, Inc.* (1997) 16 Cal.4th 953, 967 (trial courts have "inherent power to control litigation before them").)

Trial courts have discretion to accept or reject amendments to proceedings, to decide whether it is appropriate to apply the relation back doctrine, and if not, to apply the statute of limitations. Trial courts have the power to grant continuances where warranted, and to determine whether discovery is appropriate. In short, trial courts already possess all the tools necessary to protect the interests of all parties in a §98.2 *de novo* proceeding, to guard against prejudice, and to serve judicial economy.

Nothing in the Berman statutory scheme expresses an intent to limit the trial court's authority and discretion. Indeed, "the Labor Code

provisions do not... place any restriction on the authority of the reviewing court, in a hearing de novo, to address a disputed question concerning any issue of law or fact..." (*Vos Post*, 23 Cal. 4th at 949-950).)[40]

Sales Dimensions acknowledged the trial court's ability to exercise discretion in a §98.2 *de novo* trial. The issues in *Sales Dimensions* were whether the superior court had the authority to permit discovery in a §98.2 proceeding, and whether it was appropriate to consolidate a §98.2 action with a separate civil action. Analogizing to trials *de novo* following an appeal from a justice court's decision, the court concluded that "where a trial *de novo* is authorized in the superior court, proceedings are subject to the rules usually applicable to superior court actions." (*Sales Dimension*s, 90 Cal.App.3d at 761.) In considering the legislative purpose of providing for a speedy resolution of wage claims, the court acknowledged that unlimited discovery in a §98.2 appeal might prolong rather than expedite a *de novo* trial. (*Id.* at 763.*)* Nevertheless, it recognized that a §98.2 appeal vests jurisdiction in the superior court, and concluded that the decision whether to allow discovery in a particular matter "is best left to the discretion of the superior court hearing the appeal." (*Id.* at 763.*)* The court

[40] And, as noted at pp. 45-47, *supra*, legislators viewed the ability to invoke the exercise of judicial discretion through a *de novo* proceeding as critical to the constitutionality of the Berman process.

reached the same conclusion on essentially the same basis regarding consolidation. (*Id.* at 764.)

Similarly, the question of whether to allow or reject additional claims in a particular §98.2 appeal is well within the trial court's discretion. Case law and statutes support liberal allowance of amendments. (See *Austin v. Massachussetts Bonding Ins. Co.* (1961) 56 Cal.2d 596, 600; *Thomasian v. Superior Ct.* (1953) 122 Cal.App.2d 322, 335 (provision "giving courts power to permit amendments in furtherance of justice" is liberally interpreted by courts).) Thus, adding new claims is appropriate as of right before a defendant has answered. In furtherance of justice, a trial court may exercise discretion to allow amendments after an answer is filed, and even after trial has begun, "if the defendant is alerted to the charges by the factual allegations, no matter how framed and the defendant will not be prejudiced." (*Honig v. Financial Corp. of America* (1992) 6 Cal.App.4th 960, 965 ("If the original pleading has not framed the issues in an articulate and precise manner, a plaintiff should not be precluded from having a trial on the merits"); see also Code Civ. Proc., §§472, 473, 576.)[41]

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[41] The concept of avoiding overly technical pleading requirements is echoed in the Fair Employment and Housing Act ("FEHA") and the federal Title VII's "scope of the charge" doctrine. Both FEHA and Title VII require administrative exhaustion before a discrimination lawsuit may be filed. This doctrine determines how broad the lawsuit can be, based on the underlying administrative charge. As expressed in *Mora v. Chem-tronics, Inc.* (S.D. Cal. 1998) 16 F.Supp.2d 1192, 1201-1202, "since lay persons initiate the administrative process for resolving employment discrimination

This preference for a trial on the merits remains even where amendment is sought after the statute of limitations arguably has run. "[A]n amended complaint relates back to the filing of the original complaint, and thus avoids the bar of the statute of limitations, so long as recovery is sought in both pleadings on the same general set of facts, " even if the amendment "rests upon a different legal theory and may state a different cause of action than his original complaint." (*Smeltzley v. Nicholson Mfg. Co.* (1977) 18 Cal.3d 932, 934, 940, citing *Austin*, 56 Cal.2d 596.)

Murphy's case illustrates the point, for the trial court exercised its discretion in various conventional ways. Murphy filed his initial wage claim,[42] indicating that KCP had misclassified him as an exempt employee, but not understanding the full legal implications of that misclassification. After KCP's appeal, Murphy's counsel promptly notified the court and

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complaints, the procedural requirements for FEHA actions are 'neither interpreted too technically nor applied too mechanically.'….. The purpose of the administrative charge is to 'provide the basis for the DFEH to investigate the aggrieved employee's claims of discrimination. It is not intended as a limiting device,'…. [so a court should] construe the charge with the 'utmost liberality,' mindful of the fact that these charges are made by lay persons "unschooled in the technicalities of formal pleading.'…. Specifically, a Plaintiff's subsequent federal complaint must raise claims "like or reasonably related to the allegations" of the administrative charge." (citations omitted.)

[42] For purposes of the statute of limitations, a wage claim commences when an employee files an initial administrative claim. (*Cuadra*, 17 Cal.4th at 859 and fn.9.)

KCP of all of Murphy's claims. The court subsequently ruled that because the new claims flowed from the same general set of facts, they related back to Murphy's initial wage claim.[43] KCP never asserted that it had been prejudiced in its ability to defend against any of Murphy's claims.

Had Murphy raised unrelated claims, the court could have decided that they did not relate back to his original claim. Had KCP sought discovery or a trial continuance, the court could have exercised its discretion to consider, then grant or deny those requests.

Allowing trial courts to exercise discretion in determining whether to permit additional claims also enhances judicial economy.[44] This Court has rejected the creation of duplicative procedures (e.g., pursuing administrative relief and judicial relief simultaneously), as unduly

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[43] Interestingly, the Court of Appeal attempted to distinguish *Vos Post* and *Smith* from Murphy's situation by stating that in those cases, "the employees had raised the same general issue before the Labor Commissioner" as was raised in the *de novo* appeal. (*Murphy*, 134 Cal.App.4th at 747.) Even under the Court of Appeal's standard, the trial court properly adjudicated all of Murphy's claims, since they all flowed from the "same general issue" – namely, KCP's misclassification of him.

[44] The Court of Appeal opined that limiting the scope of a §98.2 *de novo* trial would not leave Murphy without a remedy, for he could have filed a separate lawsuit and moved to consolidate. (*Murphy*, 134 Cal.App.4th at 749.) This approach runs contrary to principles of judicial economy, as well as §98.2's underlying policies. (See *Cuadra*, 17 Cal.4th at 870 (requiring claimants to commence superior court action in order to toll statute of limitations would defeat statutory objective of providing claimants with informal process of resolving wage claims").)

burdensome on the injured party and the already overtaxed court system. In *Elkins v. Derby* (1974) 12 Cal.3d 410, the injured plaintiff filed a claim before the Workmen's Compensation Appeals Board, which ultimately determined that he was not an employee. Plaintiff then filed a tort claim against the same defendant seeking damages for the same injuries, which the superior court ruled was barred by the applicable statute of limitations. (*Id.* at 412.)

On appeal, defendant argued that plaintiff could have preserved his rights by simultaneously pursuing an action in superior court. (*Id.*) The Court noted that this proposed duplicative procedure would unduly burden the courts and the plaintiff, especially since "the workmen's compensation system seeks to establish a non-technical means to recover for industrial injuries, a dual filing requirement presupposes a professional knowledge without which the worker would forfeit all right to recover." (*Id.* at 413.)[45] The same is equally true of the Berman process.

[45] Although *Elkins* addressed the application of the tolling doctrine, it acknowledged that the same concerns arise with respect to the relation back doctrine, which is the tolling doctrine's "functional equivalent." (*Elkins*, 12 Cal.3d at 418.)

CONCLUSION

Respondent Murphy, standing in the place of many California workers, respectfully requests that this Court fulfill the remedial purposes of the statutes under consideration by ruling in his favor on both issues.

Dated: June 8, 2006

Respectfully Submitted,

HASTINGS CIVIL JUSTICE CLINIC

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