No. D060710

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

SEE'S CANDY SHOPS, INC.,
Petitioner,
vs.

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

Respondent,

PAMELA SILVA

Real Party in Interest.

Petition from the Superior Court of California, County of San Diego
The Honorable Joel M. Pressman, Department C-66
Telephone No. (619) 450-7066
Case No. 37-2009-00100692-CU-OE-CTL

APPLICATION FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF; BRIEF OF *AMICI CURIAE* IN SUPPORT OF POSITION OF PETITIONER

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, **FOURTH** APPELLATE DISTRICT, DIVISION **ONE**	Court of Appeal Case Number: D060710
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* Kerry M. Friedrichs (SBN 198143) Seyfarth Shaw LLP 560 Mission Street, Suite 3100 San Francisco, CA 94105 TELEPHONE NO.: 415-397-2823 FAX NO. *(Optional)*: 415-397-8549 E-MAIL ADDRESS *(Optional)*: kfriedrichs@seyfarth.com ATTORNEY FOR *(Name)*: Employers Group, California Employment Law Council, Cal. Chamber of Commerce	Superior Court Case Number: 37-2009-00100692-CU-OE-CTL *FOR COURT USE ONLY*
APPELLANT/PETITIONER: SEE'S CANDY SHOPS, INC. RESPONDENT/REAL PARTY IN INTEREST: SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO/PAMELA SILVA	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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1. This form is being submitted on behalf of the following party (*name*): Employers Group

2. a. ☒ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest *(Explain):*
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The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: April 6, 2012

Kerry M. Friedrichs
(TYPE OR PRINT NAME)

▶ Kerry Friedrichs
(SIGNATURE OF PARTY OR ATTORNEY)

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APP-008 [Rev. January 1, 2009]

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1. This form is being submitted on behalf of the following party (*name*): California Chamber of Commerce

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1. This form is being submitted on behalf of the following party (*name*): California Employment Law Council

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TO THE PRESIDING JUSTICE OF THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

Pursuant to Rule 8.200(c) of the California Rules of Court, Employers Group, California Employment Law Council, and California Chamber of Commerce respectfully apply for leave to file an *amicus curiae* brief in support of the position of Defendant and Petitioner See's Candy Shops, Inc. The proposed brief is attached hereto.

I. STATEMENT OF INTEREST OF *AMICI CURIAE* EMPLOYERS GROUP, CALIFORNIA EMPLOYMENT LAW COUNCIL, AND CALIFORNIA CHAMBER OF COMMERCE

Amicus Employers Group is the nation's oldest and largest human resources management organization for employers. It represents nearly 3,800 California employers of all sizes and in every industry, which collectively employ nearly three million employees. Employers Group has a vital interest in seeking clarification and guidance from this Court for the benefit of its employer members and the millions of individuals they employ. As part of this effort, Employers Group seeks to enhance the predictability and fairness of the laws and decisions regulating employment relationships. Because of its collective experience in employment matters, including its appearance as *amicus curiae* in state and federal forums over many decades, Employers Group is uniquely able to assess both the impact and implications of the legal issues presented in employment cases such as

this one. Employers Group has been involved as *amicus* in many significant employment cases.[1]

Amicus California Employment Law Council ("CELC") is a voluntary, nonprofit organization that promotes the common interests of employers and the general public in fostering the development in California of reasonable, equitable, and progressive rules of employment law.

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[1] Employers Group has participated in many important labor and employment cases, including the following: *Dukes v. Wal-Mart,* 603 F.3d 571 (9th Cir. 2010); *Reid v. Google Inc.*, 50 Cal. 4th 512 (2010); *McCarther v. Pacific Telesis Group,* 48 Cal. 4th 104 (2010); *Chavez v. City of Los Angeles,* 47 Cal. 4th 970 (2010); *Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272 (2009); *Arias v. Superior Court,* 46 Cal. 4th 969 (2009); *Amalgamated Transit Union v. Superior Court,* 46 Cal. 4th 993 (2009); *Edwards v. Arthur Andersen,* 44 Cal. 4th 937 (2008); *Gentry v. Superior Court,* 42 Cal. 4th 443 (2007); *Prachasaisoradej v. Ralphs Grocery Co.*, 42 Cal. 4th 217 (2007); *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal. 4th 1094 (2007); *Pioneer Electronics (USA), Inc. v. Superior Court*, 40 Cal. 4th 360 (2007); *Smith v. L'Oreal USA, Inc.,* 39 Cal. 4th 77 (2006); *Yanowitz v. L'Oreal USA, Inc.,* 36 Cal. 4th 1028 (2005); *Lyle v. Warner Bros. Television Prods.,* 38 Cal. 4th 264 (2006); *Reynolds v. Bement*, 36 Cal. 4th 1075 (2005); *Grafton Partners L.P. v. Superior Court,* 36 Cal. 4th 944 (2005); *Miller v. Dep't of Corrections,* 36 Cal. 4th 446 (2005); Sav-on *Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319 (2004); *State Dep't of Health Servs. v. Superior Court,* 31 Cal. 4th 1026 (2003); *Colmenares v. Braemar Country Club, Inc.*, 29 Cal. 4th 1019 (2003); *Guz v. Bechtel National, Inc.,* 24 Cal. 4th 317 (2000); *Armendariz v. Foundation Health Psychcare Servs.,* 24 Cal. 4th 83 (2000); *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal. 4th 163 (2000); *Carrisales v. Department of Corrections,* 21 Cal. 4th 1132 (1999); *White v. Ultramar, Inc.,* 21 Cal. 4th 563 (1999); *Green v. Ralee Engineering Co.*, 19 Cal. 4th 66 (1998); *City of Moorpark v. Superior Court,* 18 Cal. 4th 1143 (1998); *Reno v. Baird*, 18 Cal. 4th 640 (1998); *Jennings v. Marralle*, 8 Cal. 4th 121 (1994); *Hunter v. Up-Right, Inc.*, 6 Cal. 4th 1174 (1993); *Gantt v. Sentry Insurance*, 1 Cal. 4th 1083 (1992); *Rojo v. Kliger*, 52 Cal. 3d 65 (1990); *Shoemaker v. Myers,* 52 Cal. 3d 1 (1990); and *Foley v. Interactive Data Corp.,* 47 Cal. 3d 654 (1988).

CELC's membership includes approximately 50 private sector employers in the State of California, who collectively employ well in excess of a half-million Californians. CELC has been granted leave to participate as *amicus curiae* in many of California's leading employment cases.[2]

California Chamber of Commerce (or CalChamber) is a non-profit business association with over 14,000 members, both individual and corporate, representing virtually every economic interest in the State of California. For over 100 years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory and legal issues. CalChamber often advocates before the courts by filing *amicus curiae* briefs in cases

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[2] CELC has participated in the following cases: *Edwards v. Arthur Anderson*, 44 Cal. 4th 937 (2007); *Reynolds v. Bement*, 36 Cal. 4th 1075 (2005); *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028 (2005); *Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319 (2004); *State Dep't of Health Servs. v. Superior Court*, 31 Cal. 4th 1026 (2003); *Intel Corp. v. Hamidi*, 30 Cal. 4th 1342 (2003); *Lolley v. Campbell*, 28 Cal. 4th 367 (2002); *Richards v. CH2M Hill, Inc.*, 26 Cal. 4th 798 (2001); *Armendariz v. Foundation Health Psychcare Servs.*, 24 Cal. 4th 83 (2000); *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal. 4th 163 (2000); *Asmus v. Pacific Bell*, 23 Cal. 4th 1 (2000); *White v. Ultramar, Inc.*, 21 Cal. 4th 563 (1999); *Cotran v. Rollins Hudig Hall Internat'l, Inc.*, 17 Cal. 4th 93 (1998); *Turner v. Anheuser-Busch, Inc.*, 7 Cal. 4th 1238 (1994); *and Foley v. Interactive Data Corp.*, 47 Cal. 3d 654 (1988).

involving issues of paramount concern to the business community. The issue presented in the above-captioned case is but one example.

No party's counsel has authored this brief, either in whole or in part; nor has any party or party's counsel contributed money intended to fund the preparation or submission of this brief. Likewise, no person other than the *amici curiae*, their members, or counsel have contributed money intended to fund the preparation or submission of this brief. Cal. R. Ct. 8.200(c)(3).

II. PROPOSED *AMICUS CURIAE* BRIEF

The proposed *amicus curiae* brief will assist the Court in deciding this matter by demonstrating the historical reliance on rounding by California employers, the legal basis for this reliance, and the severe impact a finding that rounding is unlawful would have on California businesses and their employees.

Dated: April 6, 2012

Kerry Friedrichs

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EMPLOYERS GROUP,
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LAW COUNCIL, and CALIFORNIA
CHAMBER OF COMMERCE

I.

INTRODUCTION

Likening the concerns of Petitioner See's Candy Shops ("See's") to Henny Penny shouting that "the sky is falling," Plaintiff can do little more than cry "fowl." Plaintiff contends that this case does not involve a direct attack on the time-honored practice of rounding -- if this is true, the Court need read no further. However, the trial court's order belies this assertion, as does Plaintiff's broad condemnation of this common method of timekeeping.

Indeed, the fact that the California Supreme Court decided to grant review and transfer See's writ petition to this Court indicates that the Supreme Court also views Plaintiff's arguments and the trial court's order as a direct challenge to the rounding practices used by employers throughout the country. This Court should uphold the validity of rounding, which is a neutral, fair, and practical timekeeping approach used by thousands of employers throughout California.

As set forth below, this is an issue of vital importance to California employers, who have relied upon rounding for decades as a fair, straightforward, practical, and legal solution to a variety of timekeeping challenges. Abolishing neutral rounding practices would serve *no* beneficial purpose to employees (who would receive no additional pay and will lose flexibility) or employers (who would be confronted with

administrative and employee relations difficulties, legal uncertainty, and an onslaught of lawsuits driven by the plaintiffs' bar's pursuit of enormous penalties that might be available under California law).

II.

ARGUMENT

A. ROUNDING IS A COMMON AND WELL-ESTABLISHED PRACTICE THAT FAIRLY COMPENSATES EMPLOYEES.

"Rounding" of employee time entries is a very common practice that employers throughout the United States have used for decades. While many employers use computerized timekeeping systems that incorporate rounding,[3] many small businesses use manual time cards and utilize rounding to facilitate timekeeping and payroll processing.

Employers' reliance on rounding as a method of computing hours worked is well-grounded. As set forth in See's Petition, the legal validity of rounding was affirmed by the Department of Labor over 50 years ago, and has remained settled law since that time. Numerous states, including California, have formally followed suit either by enacting laws that track the federal regulation or by issuing interpretive materials indicating

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[3] "It is estimated that some 30 million employees use a Kronos system every day." Memorandum of Points and Authorities in Support of Petitioner's Petition for Writ of Mandate and/or Prohibition, p. 3-4 and n. 3 and 4. Kronos offers a rounding option, and undoubtedly many employers use this option. Many other employers use different electronic timekeeping systems that also offer a rounding option.

approval of this method of timekeeping. Notably, counsel for *amici* are aware of *no* state law prohibiting rounding and *no* published court decision ever holding that neutral rounding policies are invalid.

There are important practical reasons why employers routinely have incorporated rounding into their timekeeping practices. Rounding provides a way to add more certainty to the payroll system (for budgeting purposes, ensuring that employees get a "full" paycheck each pay period, and ensuring that employees qualify for benefits each pay period), and also allows employers to offer employees a more flexible, less pressured clocking in/out process. When rounding is used, employees can clock in or out a few minutes early or late without worrying that they are going to receive less than expected wages, lose their benefits eligibility, or work unauthorized overtime. For some smaller employers who process payroll manually, it is difficult to precisely calculate hours worked and pay due to the nearest minute (or second), and rounding enables these employers to calculate employee pay more easily.

Most importantly, employers do not, and cannot, use rounding as a means of underpaying employees. This is because rounding *must* be fair and neutral in order to comply with the law. Under federal law and the Division of Labor Standards Enforcement's enforcement policy, rounding is only permissible where "it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for

all the time they have actually worked." 29 C.F.R. § 785.48(b); DLSE Enforcement Policies and Interpretations Manual, § 47.1.

Federal courts have found that rounding is lawful where the employer "applies a consistent rounding policy that, on average, favors neither overpayment nor underpayment." *Alonzo v. Maximus, Inc.*, 2011 WL 6396444, *2 (C.D. Cal. Dec. 5, 2011). Accordingly, courts have not hesitated to invalidate rounding policies that fail to conform to this requirement and thus "systematically undercompensate employees." *Id. at* *3 (applying the federal rounding regulation where California law governed because "California courts look to federal regulations under the FLSA for guidance in the absence of controlling or conflicting California law," and the DLSE has adopted the federal rounding regulation); *see also Austin v. Amazon.com, Inc.*, 2010 U.S. Dist. LEXIS 45623, *8 (W.D. Wash. May 10, 2010) (noting that 29 C.F.R. § 785.48(b) "does not contemplate the situation" where an employer manipulates its rounding practice so that it benefits the employer); *Eyles v. Uline, Inc.*, 2009 U.S. Dist. LEXIS 81029 (N.D. Tex. Sept. 4, 2009) (finding that the employer's practice of only rounding down was not consistent with the requirements of 29 C.F.R. § 785.48(b)). Presumably, California courts would reach the same result if an employer's rounding system routinely worked to the detriment of the employees.

Thus, the law already enables courts to ensure that employers use

rounding in an even-handed manner. Abolishing neutral forms of rounding would benefit no one.

B. IF AFFIRMED, THE TRIAL COURT'S ORDER WOULD CALL INTO QUESTION ALL FORMS OF ROUNDING, NOT ONLY SEE'S SPECIFIC ROUNDING PROCEDURE.

Plaintiff claims that this case does not involve a frontal attack on rounding, and that the trial court did not "outlaw rounding." Plaintiff's broad attack on all forms of rounding practices belies this claim. Moreover, the trial court's articulated basis for its order granting Plaintiff's motion for summary adjudication clearly indicates its view that rounding is impermissible as a matter of law in California.

The trial court's minute order granting summary adjudication of See's rounding affirmative defenses sets forth the broad bases for its rejection of rounding. The trial court found that See's rounding practices were unlawful for reasons that call into question all forms of rounding used by California employers that have been unquestioned for decades. Specifically, the court found that rounding violates California Labor Code Section 204, which requires employers to pay "all wages" every two weeks. The court also appeared to find that Labor Code Section 510, which establishes the overtime standards in California, also precludes rounding. Thus, the court seemed to find, although incorrectly, that when employers use *any* form of rounding, employees are not paid "all wages," including

overtime wages.

In an effort to downplay the breadth of the trial court's rationale, Plaintiff now argues that her position all along has been that rounding is lawful. Plaintiff's Return at 25-28. However, Plaintiff's version of acceptable "rounding" requires that the employer conduct an actuarial analysis each pay period, for each employee, that examines the impact of the rounding that took place on each day during that pay period to ensure that the rounding did not negatively impact the employee.

As a practical matter, under Plaintiff's approach, the employer would need to "un-round" the rounded time entries and compare them to the punched time entries to determine which is larger. According to the Plaintiff, if the rounding resulted in any "underpayment" to the employee during this time period (i.e., any occasion where the rounding benefitted the employer, even if this occasion was offset by other pro-employee roundings) the employee must be compensated for the time "rounded off."[4]

Accordingly, Plaintiff's "approval" of rounding is really approval of a form of "rounding" that eliminates all of the practical benefits of rounding (because the employer must "un-round" each pay period to determine the impact of the rounding) and may only be used when the analysis confirms that the rounding benefitted the employee. This is not the

[4] Tellingly, Plaintiff does not explain exactly how this actuarial reconciliation must be performed, and whether the analysis must be performed on a workday basis, a workweek basis, or a pay period basis.

neutral, fair "rounding" approved by the Department of Labor and the California DLSE and used by employers for decades, which requires only that an employer apply "a consistent rounding policy that, on average, favors neither overpayment nor underpayment. *Alonzo*, 2011 WL 6396444 at *3. Thus, it is clear that Plaintiff's arguments in this case constitute a frontal attack on rounding, despite her efforts to characterize them otherwise.

C. THERE IS NOTHING UNIQUE ABOUT CALIFORNIA LAW THAT PRECLUDES ROUNDING.

As set forth above, the trial court concluded that California law precludes the practice of rounding because (1) California has a "payday statute" that requires payment of "all wages" every two weeks, and (2) California has daily overtime. Plaintiff argues that California courts should disregard settled law permitting rounding because California law is supposedly different in these respects. However, contrary to the trial court's order and Plaintiff's arguments in this regard, there is nothing in these California statutes that provides any legal basis for a deviation from the widely-accepted federal standard.

1. California's Payday Statute Does Not Prohibit Rounding.

The trial court concluded that California's payday statute, California Labor Code Section 204, precludes rounding by California employers. As set forth in See's Opening Brief, this statute has nothing whatsoever to do

with rounding or any other timekeeping practice -- it simply prescribes a time frame within which employers must pay their employees for their hours worked. Thus, rounding is an approved method of determining hours worked, and Section 204 governs when employees must be paid for those hours worked. Section 204 does not purport to define hours worked or govern, in any manner, how those hours are calculated.

Plaintiff also fails to explain how California's payday statute differs from federal and state laws governing the payment of wages. *See, e.g.*, 29 C.F.R. § 778.106 (requiring that all overtime wages be paid on the employee's regular payday). Nearly *every* state in the nation has a payday statute. *See* Department of Labor, Wage and Hour Division "State Payday Requirements" chart (www.dol.gov/whd/state/payday.htm).

Like California's payday law, these statutes are designed to ensure that employees are paid on a regular and timely basis. They have no bearing on rounding, or any other timekeeping practice. Plaintiff does not, and cannot, explain why all of these payday statutes do not preclude rounding, but California's payday statute does.

2. California's Daily Overtime Laws Do Not Prohibit Rounding.

Plaintiff also argues that California's daily overtime statute (Labor Code Section 510) prohibits rounding, and the trial court cited this statute in support of its rejection of rounding. Plaintiff argues that California's

daily overtime requirements make rounding in California different than rounding under federal law, and thus the federal rounding regulation is inapplicable in California. This argument is meritless.

First, rounding has long been approved by the Department of Labor in the context of daily overtime mandated by federal law. Section 7(j) of the FLSA provides that hospitals and residential care establishments may utilize a 14-day work period in lieu of a 40-hour work week, as long as the employer pays an overtime rate of pay to employees for hours worked in excess of eight in a workday and 80 in a 14-day work period. 29 U.S.C. § 207(j).

The Department of Labor clearly recognized and approved of rounding by such healthcare employers, as the Wage and Hour Division included a detailed discussion of permissible rounding, with numerous examples, in its Fact Sheet #53: The Health Care Industry and Hours Worked (http://www.dol.gov/whd/regs/compliance/whdfs53.pdf). If the Department of Labor had intended to prohibit healthcare employers subject to daily overtime requirements from using rounding, it clearly would have done so in this publication.

Aside from the FLSA daily overtime rules applicable to hospitals, the federal law contains several other daily overtime premiums.[5] As with

[5] The FLSA contains several other daily overtime provisions, none of which contains any restriction on rounding. *See* 29 U.S.C. § 207(m) (providing

the special hospital daily overtime premium, there is nothing in either the FLSA or the Department of Labor regulations that indicates that the federal rounding regulation does not apply in these instances.

Similarly, knowing full well that California provides for daily overtime, the DLSE chose to follow the federal rounding regulation when formulating its enforcement policy regarding rounding. This is consistent with the approach taken by other states with daily overtime requirements.[6] This is not surprising, as *there is no analytical difference* between rounding in the context of daily overtime and rounding in the context of weekly overtime (and plaintiff offers no such analytical distinction).

For example, if an employee clocks in and out precisely on time for the first four of the employee's five eight-hour shifts (8:00 a.m. - 12:00 p.m. and 12:30 p.m. - 4:30 p.m.), and clocks out one minute late on the fifth shift (at 4:31 p.m.), and the employer pays employees to the minute, the employee will be entitled to one minute of overtime (under both California

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for daily overtime for seasonal work in the tobacco industry); 29 U.S.C. § 213(i) and (j) (providing for daily overtime for seasonal work in the cotton ginning and sugar beet industries).

[6] *See* Alaska Department of Labor and Workforce Development, *Labor Standards and Safety Division's Employment Practices and Working Conditions: Wage and Hour Administration Pamphlet 100*, p. 53 (http://labor.alaska.gov/lss/forms/pam100.pdf) (expressly adopting the federal rounding regulation); Colorado Division of Labor, *Advisory Bulletin 8(I): Time Clocks, Timekeeping, and Pay Statements* (http://www.colorado.gov/cdle/labor) (providing that rounding is acceptable, provided that any rounding arrangement "averages out" and "the employee benefits from the rounding as often as not.").

and federal law). Employers that round will also pay employees exactly the same under California and federal law -- the employee will be paid for exactly 40 hours. A similar example is an employee who clocks out exactly on time on four days, and clocks out two minutes early on the fifth day. Employers that round will pay such an employee for 40 hours, while employers that pay to the minute will pay the employee for 39 hours, 58 minutes.

Rounding under both scenarios may slightly impact employees' entitlement to overtime in any particular pay period (by slightly increasing or decreasing the employee's time for pay purposes). But any such slight temporary impact would not invalidate the specific rounding procedure so long as its neutrality is ensured over the long run. The fact that there are more, or different, overtime zones under various state and federal laws does not change the analysis of the validity or neutrality of the practice of rounding generally.

D. THE FEDERAL REGULATION APPROVING ROUNDING IS NOT LIMITED TO "TIME CLOCK" SYSTEMS.

Citing no support whatsoever, Plaintiff claims that the "plain language" of the federal rounding regulation applies only where "time clocks" are used, and that somehow the regulation does not apply when the employer's timekeeping system is computerized. This argument is contradicted by the language of the regulation itself and by its common-

sense application.

First, the "plain language" of the regulation confirms that the Department of Labor did not intend that it apply only to employers that use "time clocks." In pertinent part, the regulation clearly states as follows:

> It has been found that in some industries, *particularly where time clocks are used*, there has been the practice for many years of recording the employees' starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this *practice of computing working time* will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.

29 C.F.R § 785.48(b) (emphasis added).

If the Department of Labor had intended that the regulation apply only where time clocks are used, it would have so specified. Instead, the plain language of the regulation clearly demonstrates the Department of Labor's view that rounding is permissible in other contexts as well -- it merely refers to industries in which time clocks are used as a subset of employers who often use rounding.

Clearly, the regulation governs the "practice of computing working time," not the specific tools (time clock, computer, or hand) used by the employer to actually record the working time. *See, e.g.*, Wage-Hour

Opinion Letter FLSA2008-7NA (applying 29 C.F.R. § 785.48(b) in context of employer's "electronic" time clocks).

Further, Plaintiff appears to claim, again without citation, that the federal rounding regulation's sole purpose is to address the issue of long lines of "hundreds of workers" at the time clock. Even if Plaintiff's claim were true, she does not explain why this rationale would not apply with equal force to employee clockings at a computerized "badge reader" station, a computer, a manual sign-in area, or any other "time clock" equivalent that employers might use.

Further, under Plaintiff's argument, the legality of an employer's rounding (even by "time clock") would turn (each day) on how many time clocks the employer had, whether they were all functioning properly, how many employees were scheduled on the particular shift, how many employees reported to work on time, and myriad other variables. This is clearly not what the Department of Labor intended when it enacted 29 C.F.R. § 785.48(b).

E. A FINDING THAT ROUNDING IS UNLAWFUL WILL HAVE A SIGNIFICANT NEGATIVE IMPACT ON CALIFORNIA EMPLOYERS WITH NO COUNTERVAILING BENEFIT.

Rounding is an extremely commonplace timekeeping practice among employers in California and nationwide. Employers have relied on rounding as a practical means of addressing a variety of issues for decades.

They have had good reason to rely on this practice, as it is expressly authorized by the federal regulations and specifically approved by the generally employee-protective DLSE. Well-informed employers understand that this practice is permissible as long as it is neutral, and some employers may periodically perform statistical analyses of their rounding practices to ensure that they are neutrally applied.

Judicial abolition of rounding would have disastrous implications for California employers, many of which are already struggling in the current economic climate. There is no basis in law or public policy for a rejection of the well-established law permitting rounding in California, and such a rejection would only harm California's businesses and employees. The only beneficiaries of such a decision would be the plaintiffs' bar, which would immediately bring thousands of class action lawsuits seeking massive penalties based on employers' good faith, neutral and fair timekeeping practices.

1. Outlawing Rounding Would Not Benefit California Employees.

Eliminating rounding would be a lose-lose proposition for California employers and employees. Under settled law, rounding *must* be fair and even-handed in order to be valid. As discussed above, the clear terms of 29 C.F.R § 785.48(b) provide that rounding must "average out," and rounding must be "used in such a manner that it will not result, over a

period of time, in failure to compensate the employees properly for all the time they have actually worked." Where employers' rounding practices do not meet this standard, courts have recognized that they are not permissible.

Rounding provides employees with flexibility. Many employers, such as See's, do not permit employees to actually begin working until the exact start time of their shift. However, they permit employees to clock in when they arrive to work (sometimes a few minutes before the start of work) and then spend time on personal pursuits, such as getting a cup of coffee or taking a personal telephone call, until the start of the shift. Thus, there is never any "rounding off" of actual time worked before the start of the shift, and the rounding policy allows employees to "clock in" in a convenient, relaxed manner.[7]

Employees who arrive to work slightly late benefit from this type of rounding as well, as their time is rounded to the shift start time. If such an employee arrived to work two minutes late for one of the employee's shifts, and the employer paid the employees to the minute, the employee would receive a "short check" for the week (and from the employee's perspective, was "docked" for clocking in two minutes late on one shift). The employee resents being "docked" and the employer would prefer to avoid that

[7] It is generally easier for employees to clock out on time, as the employee is already at work. However, because of traffic and other issues, employees may actually arrive to the workplace slightly before or after the shift start time.

necessity.

As explained in greater detail below, eliminating rounding would impose massive costs and administrative burdens on California employers. There is no reason to impose such costs when there would be absolutely no countervailing benefit to employees. Employees gain nothing if rounding is eliminated, and lose the predictability and flexibility that rounding permits.

2. If Rounding Were Abolished, California Employers Would Be Required To Change Operations In A Manner That Would Negatively Impact Their Business And Employees.

Employers use rounding for many reasons, and these reasons have nothing whatsoever to do with any desire to underpay employees (and as explained above, any system that does systematically underpay employees is impermissible under the law). Rounding provides employers and employees with predictability and efficiency in many areas, and requiring employers to eliminate this practice will add hardship to already-strained California businesses.

Rounding provides employees and employers with predictable paychecks. For example, many California employees work five eight-hour workdays, and expect a certain amount of pay for their regular 40-hour workweek. If rounding were eliminated, employees would not necessarily receive a "full" workweek of pay, even if they generally worked their

regular shifts. Employees who arrive a few minutes late, take a slightly long lunch, or leave a few minutes early would not be able to benefit from rounding, and might end up with a paycheck that is for less time than their scheduled hours. Many employees count on a regular paycheck amount, and employers may face significant employee relations challenges when employees receive a paycheck for less than their expected hours.[8] This issue would be particularly significant for part-time employees, who might only qualify for certain benefits when they work a certain number of hours and are scheduled for those hours, but work slightly less.

Eliminating rounding would also result in workplace inefficiencies that would benefit no one. Because employees would feel pressure to clock in and out exactly "on time" (and maintain a running calculation of their clockings throughout the day) so that they are not either underpaid or subject to discipline for working unauthorized overtime, there will likely be long lines at employer time clocks.[9] Some employers might need to

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[8] Because rounding systems must have at least a neutral impact on the employee's time calculation, some employers choose to "round" in a manner that generally favors the employee (more minutes round in the employee's favor than round in the employer's favor). These employees would likely see a decrease in pay if rounding is eliminated.

[9] In order to ensure compliance with applicable wage and hour laws, some employers have incorporated features into the computerized clocking process that make clocking out a longer process than simply punching out. For example, some employers permit employees to use the timekeeping system to report that they were not provided with a meal period in compliance with California law, and employees can make this report before

purchase additional time clocks (which are costly), or change their operations by staggering employee shifts.

Certain employers would bear an even heavier burden. Small businesses often cannot afford electronic timekeeping systems, and rely on employees to complete manual time cards. These employers also may calculate payroll manually, and rely on rounding to allow them to calculate total hours worked more easily. If these employers were required to eliminate rounding, they would need to manually calculate each employee's total time worked each day, workweek and pay period, including possibly very small amounts of incremental overtime (for which they will be required to manually calculate the employee's regular rate of pay).

For example, if rounding were prohibited and an employee worked eight hours and two minutes in one workday and seven hours and 57 minutes on the other four workdays, the small business would be required to calculate the employee's regular rate of pay for the workweek (incorporating commissions, differentials, and similar forms of pay) and pay two minutes of overtime to the employee. However, the small business barred from rounding would also pay the employee for seven hours and 57 minutes (rather than eight) on the other four workdays, and this 12 minutes

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they officially "clock out" for the day. In addition, sometimes employees need to make adjustments to their time records at the clock. For example, an employee may need to insert a "clocking" if the employee forgot to clock back in from meal period.

of "short" time would more than offset the two minutes of overtime.

Multi-state employers also would bear a significant burden if rounding is deemed unlawful in California. Rounding is not prohibited by either federal law or the laws of the other 49 states. Employers that do business in multiple states often use the same timekeeping policies and procedures, including those governing rounding, for all employees. Requiring multi-state employers so structure their payroll practices and operations differently for employees in California would be disruptive, costly, and confusing to employees.

3. Abolishing Rounding Adds Unnecessary Uncertainty To The Law.

The forms of rounding permitted by the federal regulation and the DLSE are not only fair, they are clear and straightforward. By contrast, if rounding were no longer permitted, it is unclear how employers would have to record employee time. As Plaintiff notes in her brief, "technology exists to calculate time to the tenth of a second." Plaintiff's Brief, p. 52. Must employers calculate employee time with this level of precision? Would rounding to the minute or the second be permissible? Would it be permissible for employers to pay to the full minute only (so that the employee is paid for a minute only when the minute has been completed) or must an employer pay to the closest minute (so that the employee is paid for a minute whenever the employee works at least 30 seconds of that

minute)? Must employers purchase timekeeping equipment that enables them to record time to the second (or tenth of a second)? Would different standards apply to employers that use computerized timekeeping systems and those that use clocks and manual time cards?

If rounding were deemed impermissible, these issues will likely form the basis for the next round of class action litigation against California employers, and employers would have no clear way to avoid liability.

4. Invalidating Rounding Would Subject California Businesses To An Onslaught Of Class Action Litigation.

Invalidating rounding in California would have a devastating impact on California businesses that justifiably relied on a common, fair practice that has been approved by both the California Division of Labor Standards Enforcement and the federal Wage and Hour Division. Lawyers motivated by penalties will bring a flood of lawsuits against employers for practices that had no negative impact on employees. While these attorneys will not be able to show actual damages in the vast majority of cases (as rounding must be neutral to be permissible), they may still seek huge sums in penalties available under California law, including:

- Labor Code Section 203: Penalties for failure to pay all wages on termination, which amount to 30 days' pay for each terminated employee.
- Labor Code Section 210: Penalties for failure to pay

wages, which amount to $100 per employee, per violation for an initial violation and $200 per employee, per violation for subsequent violations.

- Labor Code Section 226: Inaccurate wage statements, which can amount to $4000 per employee.

It also is likely that claims would be brought under the Private Attorney General's Act ("PAGA"). Cal. Labor Code § 2698 *et seq.* Potential PAGA penalties could be immense, even where the employer's rounding policy had a neutral impact over time. If rounding were illegal, particular employees would be deemed "shorted" a few cents in some workweeks, even if they were "overpaid" a few cents in other workweeks due to rounding. Even though only a few pennies are involved, and these pennies balanced out over time, the employer could be subject to huge PAGA penalties for the "shorted" weeks (while the "overpaid" weeks would be ignored).

Employers would also be subject to prejudgment interest on these amounts, and attorneys' fees. This massive potential liability for a generally-accepted practice will further burden California employers that already face significantly more regulation (and attendant class action litigation) than employers in any other state.

III.

CONCLUSION

For the foregoing reasons, the trial court's conclusion that the practice of rounding is unlawful under California law is legally erroneous, and, if not reversed, will impose substantial practical and financial burdens on California employers. Not only would California employees receive nothing of value, they would lose the benefits of rounding. Accordingly, *amici* Employers Group, California Employment Law Council and CalChamber urge this Court to affirm the validity of neutral rounding practices and direct the Respondent Superior Court to vacate its order granting Plaintiff's motion for summary adjudication.

Dated: April 6, 2012

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c))

The text of this Brief consists of 4939 words as counted by the Microsoft Word processing program used to generate the Brief.

Dated: April 6, 2012

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CERTIFICATE OF SERVICE

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