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**SUPREME COURT OF THE STATE OF WASHINGTON**

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JULIE PALMER, MICHAEL BALLEW, and LARRY G. WESTBERRY,

Petitioners,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

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**BRIEF OF RESPONDENT**

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ROBERT M. MCKENNA  
Attorney General

Eric D. Peterson  
Assistant Attorney General  
WSBA No. 35555  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104-3188  
(206) 464-5347

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## I. INTRODUCTION

Three drivers appeal a decision of the Thurston County Superior Court that upheld the validity of a rule of the Department of Labor and Industries regarding overtime pay for interstate truck drivers. The truck drivers' challenge of the rule is essentially an attempted challenge of the statute on which it is based. Moreover, the truck drivers' appeal is based on a fundamental misreading of the Minimum Wage Act and this Court's opinion in *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 153 P.3d 846 (2007). The truck drivers essentially seek, without support, to twice receive a premium for hours worked over 40 per week.

Contrary to the truck drivers' argument, WAC 296-128-012 does not circumvent the *Bostain* decision or RCW 49.46.130; rather, it implements the statute and decision. As envisioned by statute, WAC 296-128-012 permits employers to pay interstate truck drivers a *uniform*, non-hourly rate of pay that *includes compensation for overtime*, in lieu of paying their regular hours at regular rates and their overtime hours at time and one-half. The truck drivers' challenge of the Department's rule rests on their erroneous theory that they are entitled to receive time and one-half their uniform mileage-based rate under WAC 296-128-012 for their overtime hours worked, or the reasonable equivalent of time and one-half

the uniform rate for the overtime hours. This would end up doubly applying a premium for overtime in the hours worked over 40.

While the truck drivers also challenge the constitutionality of the Department's rule, the constitutional challenges depend on the truck drivers' misreading of *Bostain* and Division Two's opinion in *Westberry v. Interstate Distributor Co.*, 164 Wn. App. 196, 263 P.3d 1251 (2011), *review pending*, No. 86789-5. The Department's rule is consistent with *Bostain* and within the Department's authority, and the superior court's ruling is consistent with *Westberry*.

## II. COUNTERSTATEMENT OF THE ISSUES

RCW 49.46.130(2)(f) exempts certain truck drivers from time and one-half pay for overtime if they are paid under a compensation system that includes overtime pay "reasonably equivalent" to time and one-half.

1. Does WAC 296-128-012—which expresses the interpretation that, in reasonably equivalent compensation systems, interstate truck drivers' overtime pay may be spread throughout all hours worked through a uniform non-hourly rate of pay that includes in the rate compensation for overtime (as opposed to paying only overtime hours worked at time and one-half rates)—violate the Minimum Wage Act or *Bostain* and thereby exceed the Department's authority?
2. Did the 2008 amendments to WAC 296-128-012 exceed the Department's authority when they permit retroactive but nonbinding approval by the Department of a company's compensation system, given that the standards for the Department's review did not change before or after the rule amendment?

3. Does WAC 296-128-012 violate the separation of powers doctrine when it does not correct or change *Bostain* but instead implements the decision, or does the rule violate the truck drivers' due process rights when determinations issued by the Department to companies under the rule are nonbinding in private suits by workers for overtime pay and are not the product of an adjudicative proceeding?
4. Do the truck drivers have standing to challenge WAC 296-128-012 when it permits the Department to issue nonbinding interpretations concerning employers' compliance with reasonably equivalent compensation requirements, and, in any event, the truck drivers did not timely challenge the Department's approval of their employer's compensation system?

### III. COUNTERSTATEMENT OF THE CASE

#### A. History of Exemption from Traditional Overtime for Truck Drivers Paid Under Reasonably Equivalent Compensation Systems

The Minimum Wage Act has long required that employees receive time and one-half their regular rates of pay for hours worked over 40 in a workweek. RCW 49.46.130(1). But there are a number of exceptions to this requirement. One such exception was enacted by the Legislature in 1989 for interstate truck drivers paid under "reasonably equivalent" compensation systems. RCW 49.46.130(2)(f). The exception provides:

(2) This section does not apply to:

.....

(f) An individual employed as a truck or bus driver who is subject to the provisions of the Federal Motor Carrier Act (49 U.S.C. Sec. 3101 et seq and 49 U.S.C. Sec. 10101 et seq.), if the compensation system under which the truck or bus driver is paid includes overtime pay, reasonably

equivalent to that required by this subsection, for working longer than forty hours per week . . . .

RCW 49.46.130(2)(f). The Department, in 1989, adopted rules with respect to “reasonably equivalent” compensation systems. WAC 296-128-011 and -012. WAC 296-128-011 defined various terms and established recordkeeping requirements for interstate trucking companies. WAC 296-128-012 established a system and standards for the Department’s review of a company’s compensation system. *Id.*

WAC 296-128-012 describes the types of compensation systems that the Department may approve as reasonably equivalent, adding details not supplied by the statute. For example, the drivers’ rate of pay must “not [be] on an hourly basis,” and companies must substantiate “to the satisfaction of the department” their deviation from payment of traditional overtime under RCW 49.46.130(1). *See* WAC 296-128-012(1)(a). The rate of pay must be established in advance, with notice to the drivers. *Id.* The rule provides that a payment system may use a formula “that, at a minimum, compensates hours worked in excess of forty hours per week at an overtime rate of pay and distributes the projected overtime pay over the average number of hours projected to be worked.” *Id.* The rule provided a recommended formula for establishing a “uniform rate of pay” that includes compensation for overtime, as follows:

1.	Define work unit first. E.g., miles, loading, unloading, other.		
2.	Average number of work units	=	Average number of work units accomplished per week
	<hr/>		<hr/>
	per hour		Average number of hours projected to be worked per week
3.	Weekly Base Rate	=	Number of units per hour x 40 hours x base rate of pay
4.	Weekly Overtime rate	=	Number of units per hour x number of hours over 40 x overtime rate of pay
5.	Total weekly pay	=	Weekly base rate plus weekly overtime rate
6.	Uniform rate of pay	=	Total weekly pay
			<hr/>
			Total work units

WAC 296-128-012(1)(a). The formula is followed by an example calculation. *Id.* Under the Department's rule and formula, overtime pay is imbedded in *each* non-hourly unit of pay for an interstate truck driver, not only the units worked in overtime hours. *See id.*

**B. Amended Rulemaking Post-*Bostain***

Before this Court's decision in 2007 in *Bostain*, few employers had sought the Department's review of alternative compensation systems under WAC 296-128-012. *See* Supp. Administrative Record (AR) 222. This was likely due to the rule's then-existing statement that only hours worked in Washington were subject to overtime requirements. In *Bostain*, this Court held that the Minimum Wage Act applies to all overtime work, including out-of-state work, performed by a Washington-based employee. 159 Wn.2d at 724. The *Bostain* Court did not criticize the rule's statement that a system "reasonably equivalent" to traditional overtime pay could involve a uniform, non-hourly rate of pay that includes in the rate compensation for overtime, nor the rule's allowance for the Department to evaluate an employer's payment system. *See id.* at 710, 715.

The truck drivers incorrectly assert that the Department colluded with trucking companies to amend WAC 296-128-012 for the express purpose of correcting or circumventing the *Bostain* decision. *See* Brief of Appellant (App. Br.) 2, 12, 18, 22. In fact, a review of the rulemaking file shows that the Department conferred with all interested parties to adopt a rule that addressed the effects of and complied with the *Bostain* decision. Representatives for the trucking industry contacted the Department concerning a proposal for amendment of the Department's rules in light of

*Bostain*. Supp. AR 176-77, 180-88, 191. Before filing any rule amendment proposals with the Code Reviser, the Department had months of discussions with representatives of industry and labor, including the Washington Trucking Association (WTA), Teamsters, the Washington State Labor Council, and others. Supp. AR 178-79, 192, 201-07, 221-23, 224. The Department considered a proposal that removed the rule language invalidated in *Bostain* and permitted employers who had not earlier sought the Department's review of their compensation systems—in reliance on the then-existing rule language—to apply for the Department's review, using records from when *Bostain* was pending before this Court.

A Labor Council member expressed concern about the potential rule. A Department representative responded:

The intention is not for L&I to somehow step in and undo *Bostain*. The WTA understands that either employers have paid “reasonably equivalent” under *Bostain* or they [] have not. The WTA also realizes that there may be employers who may not meet the “reasonably equivalent” standard under L&I's review. That's a risk they are willing to take.

Supp. AR 222.<sup>1</sup> The Department's approval was never intended to be a shield from liability for employers who did not pay reasonably equivalent

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<sup>1</sup> The truck drivers cite excerpts from the record to allege the Department believed its approval of a compensation system would be a *conclusive defense* in an action for unpaid wages. *See, e.g.*, App. Br. 5, 13, 14, 16, 18, 27. Fairly viewed, the rule file contains correspondence suggesting the Department's approval would be *evidence* of a defense that the court could consider and that would likely be important to resolution of the suit, not that the Department's determination would be dispositive. *See, e.g.*, Supp.

overtime compensation. “[The amended rule] is not detrimental to employees, because it is not intended to approve a compensation plan that does not meet the reasonably equivalent requirement.” AR 69; *see also* AR 70, 78, 89-91; Supp. AR 222.

After beginning the formal rulemaking process but before filing its proposed rule language, the Department continued stakeholder discussion, including receiving input by the truck drivers’ counsel. *See* AR 7 (preproposal statement of inquiry); AR 45-49, 121-32 (comments by the truck drivers’ counsel). The Department then filed its rule proposal. AR 34-35. The Department’s proposed rule language differed from that originally suggested by the trucking industry. *Cf.* AR 39-44 (Department’s proposal filed with the Code Reviser); Supp. AR 177 (trucking industry’s proposal to Department). The Department explained the proposed rule’s purpose:

Employers are already able to submit their compensation systems to the department. However, the added language will expressly require the department to review compensation systems for time periods before March 1, 2007 (the date of the *Bostain* decision) of employers who relied on the department’s regulations [invalidated by *Bostain*]. The added language requires the department to

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AR 183-84 (WTA’s argument that the Department’s approval “would likely immunize the carriers . . .”); Supp. AR 200 (Department representative’s statement that with the Department’s approval of a compensation system, “an employer may be able to avoid [class action lawsuits and ensuing transactional costs.]”); AR 161, 166 (Teamsters representative’s statement that the Department’s “approvals could certainly potentially be useful evidence for an employer’s defense against an action for unpaid wages”).

review compensation systems submitted by employers, and approve such compensation systems for the time period for which the employers seek approval if the department's review finds that they complied with RCW 49.46.130(2)(f) for hours worked both in and out of the State of Washington. The added language does not change the employer's obligation to pay overtime for hours worked within and outside Washington under *Bostain* and RCW 49.46.130(2)(f).

AR 38. Based on public comments received following the rule proposal, the Department made further changes to the rule language for WAC 296-128-012. AR 108-67. While also making technical changes to the rule, the Department deleted language from its initial proposal that appeared to provide automatic continuing approval by the Department of an employer's compensation system, regardless of changes in circumstances that may render a compensation system no longer reasonably equivalent. AR 57-58, 99-100, 168, 170-72. The Department adopted its rule amendment on October 21, 2008. AR 168-69.<sup>2</sup> The Department repeatedly made clear its rule change was not intended to expand the exemption beyond that which already existed in the law. AR 68-104.

The amended WAC 296-128-012 removed the language invalidated by this Court in *Bostain* and provided a time-limited

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<sup>2</sup> A copy of the adopted rule language, showing the changes from the former rule in strikethrough and underline, is attached as Appendix A. AR 64-66.

mandatory duty (in place of an otherwise discretionary option),<sup>3</sup> upon companies' application within 90 days of rule adoption, for the Department to review past compensation systems to determine whether they were reasonably equivalent. *See, e.g.*, AR 38, 64-66. The standards for the Department's review did not change; the Department would approve under the amended rule only those compensation systems that would previously have been approved as reasonably equivalent, had the companies then sought the Department's review. *See* AR 69, 70, 78, 89; Supp. AR 222.

Under the former rule, companies seeking the Department's review of their compensation system provided records from a 26-week representative period within the past two years. *See* WAC 296-128-012(1)(b). The new rule similarly allowed review of records from past time periods, but rather than limiting the past period to two years, companies who applied within 90 days of the October 21, 2008 rule

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<sup>3</sup> The new subsection of the rule stated that if an employer applied for approval of its compensation system within 90 days of rule adoption, "[t]he department *shall* then determine if the compensation system includes overtime that was at least reasonably equivalent to that required by RCW 49.46.130." WAC 296-128-012(3) (emphasis added). For requests for review not submitted pursuant to the amended rule, "[t]he department *may* evaluate alternative rates of pay and formulas used by employers in order to determine whether the rates of pay established under this section result in the driver receiving compensation reasonably equivalent to one and one-half times the base rate of pay for actual hours worked in excess of forty hours per week." WAC 296-128-012(1)(c) (emphasis added). The Department does not necessarily always have resources to conduct reasonably equivalent reviews of employers' compensation systems pursuant to its discretionary option to do so for applications not submitted within 90 days of adoption of the amended rule. This depends on the Department's workload, staffing, and the volume of requests.

adoption could supply for the Department's review records from a 26-week representative period between July 1, 2005 and March 1, 2007. *See* WAC 296-128-012(3). This period of time referenced under the amended subsection is when *Bostain* was pending for decision by this Court, which issued its decision on March 1, 2007.<sup>4</sup> The extension of a little over a year for reviewing past records was adopted due to trucking companies' reliance on the former rule, which was invalidated in *Bostain*. *See* AR 70.

Thus, what the parties refer to as "retroactive" approval under the amended rule means that the Department reviews employment records from past periods, as it always has, but the review allows for review further back than is otherwise the case. The Department then determines whether the records reviewed meet the long-existing standards for approval by the Department of the compensation system as reasonably equivalent. AR 69-70, 78, 89-91; Supp. AR 222. This approval by the Department does not preclude the workers' ability to bring civil suit. *See, e.g.,* Supp. AR 381; AR 70 ("[The amended rule] does not prevent employees from challenging an approved alternative compensation system. This is consistent with the current regulatory scheme, which also

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<sup>4</sup> The truck drivers' contention that the Department's determinations under the amended rule "would cover the three years immediately preceding the decision in *Bostain*," App. Br. 14, is incorrect, as three years before March 1, 2007 is March 1, 2004, and the amended rule permits approval dating back to only July 1, 2005.

does not prevent employees from challenging an already-approved compensation system.”).

The Department has never argued in this or any other litigation that its approval of an employer’s compensation system is binding upon workers or the courts. Indeed, the Department’s administrative policy published around the same time as its amended rule provides details for the process of the Department’s review of companies’ compensation systems and states in pertinent part: “As a practical matter, [the Department’s approval of employers’ compensation systems] may be further scrutinized by courts.” Supp. AR 381.<sup>5</sup>

**C. Procedural History of Truck Drivers’ Challenge of Department’s Rule**

Petitioner Westberry, a long-haul truck driver (and one of the three drivers in this case), sued his former employer, Interstate Distributor Co. (IDC), in May 2008 for overtime wages allegedly owed for 2003-07. CP 6. Westberry was paid a uniform per-mile rate for all hours worked, and alleged that he was owed time-and-one half rates for hours worked over 40 each workweek. *See id.* Before the lawsuit filed by Westberry, IDC asked the Department to review its compensation system to determine whether the system provided reasonably equivalent compensation under

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<sup>5</sup> A copy of the Department’s Administrative Policy ES.A.8.3, which describes protocols for the Department’s review of employers’ compensation systems under WAC 296-128-012, is attached as Appendix B. Supp. AR 377-83.

RCW 49.46.130(2)(f). Pursuant to the process described in its former rule (since the amended rule was not adopted, and the Department's consideration of IDC's request for approval was independent of the rulemaking), the Department determined on July 18, 2008 that IDC's system provided reasonably equivalent compensation. CP 49-50. The truck drivers never challenged the Department's July 18, 2008 letter to IDC. CP 302.

Within the 90-day period permitted by amended WAC 296-128-012, IDC sought the Department's retroactive approval of its compensation system as reasonably equivalent. Upon confirming that the compensation system in place was the same as what the Department reviewed in 2008, the Department on May 4, 2009 granted approval to IDC for the period July 2005 through July 2007. CP 71-76. The truck drivers also never challenged the Department's May 4, 2009 determination. CP 302. The truck drivers assert without factual support in the record that they did not know about the Department's approvals to IDC, App. Br. 31, yet the truck drivers submitted the approvals as attachments to a declaration of their counsel accompanying their trial brief. CP 22-89. More than 30 days passed from the truck drivers' counsel's receipt of the approvals to IDC before the truck drivers filed

their challenge of WAC 296-128-012. *See* AR 22-89; AR 5-17. The petition does not challenge the approvals to IDC. AR 5-17.

Not only have the three truck drivers failed to challenge the Department's approval of IDC's compensation system, but no determinations issued by the Department to any employers under amended WAC 296-128-012 have been challenged. The Department received requests by approximately 55 companies for review of their compensation systems under amended WAC 296-128-012. CP 143-46. All such reviews are complete. *Id.* Some compensation systems were approved, and others were rejected. *Id.* None of the Department's determinations was challenged. *Id.*

The three truck drivers (including Westberry) filed in Thurston County Superior Court the present petition to invalidate WAC 296-128-012. CP 5-17.<sup>6</sup> The superior court dismissed the truck drivers' petition for lack of standing and alternatively denied it on the merits. *See* CP 298-305.<sup>7</sup> The superior court's determination regarding standing had two alternative bases: a) the truck drivers were not injured by the Department's rule or its determinations issued to employers because they

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<sup>6</sup> The petition also seeks an injunction prohibiting the Department from allegedly interfering in judicial procedures or enacting rules that do not comply with the Administrative Procedures Act or Constitution. CP 5-17. The truck drivers did not brief this requested relief at the superior court or here.

<sup>7</sup> A copy of the superior court's December 16, 2011 findings and conclusions is attached as Appendix C.

remained free to sue for unpaid overtime wages; and, b) the truck drivers did not challenge the approvals issued by the Department to IDC so their claimed harm will not be redressed by the relief they seek. CP 303-04.

On the merits, the superior court determined that the Department's rule is consistent with *Bostain* and within the Department's authority. *See* CP 304. The superior court declined to reach the truck drivers' constitutional challenges because of its standing determination. *Id.* The superior court also determined that the Department followed proper rulemaking procedures. *Id.*

The truck drivers appeal from the Thurston County Superior Court's November 10, 2011 letter opinion and the December 16, 2011 findings and conclusions. CP 309-16; CP 298-305.

#### **IV. STANDARD OF REVIEW**

A determination whether a rule conflicts with a statute is a legal issue reviewed de novo. *See Kabbae v. Dep't of Social & Health Svcs.*, 144 Wn. App. 432, 439, 192 P.3d 903 (2008). Standing determinations are also reviewed de novo. *Knight v. City of Yelm*, 173 Wn.2d 325, 336, 267 P.3d 973 (2011). Because of its ruling that the truck drivers lacked standing, the superior court here did not consider the truck drivers' constitutional arguments. CP 304. However, if this Court reaches those issues, the truck drivers would bear the burden of proving

unconstitutionality beyond a reasonable doubt. *Longview Fibre Co. v. Dep't of Ecology*, 89 Wn. App. 627, 632-33, 949 P.2d 851 (1998).

## V. SUMMARY OF ARGUMENT

RCW 49.46.130(2)(f) permits alternative means of paying overtime compensation for interstate truck drivers. The statute provides that interstate truck drivers are not subject to the traditional overtime pay requirement that hours worked over 40 per workweek be paid at time and one-half the regular rate, if they are instead paid under a “reasonably equivalent” compensation system. *Id.* The statute does not define what “reasonably equivalent” means or how it is to be calculated. The Department’s rule challenged here, WAC 296-128-012, directs that in a reasonably equivalent compensation system an employer may establish a non-hourly rate of pay for all hours worked (i.e., a “uniform” rate, as opposed to different rates for regular versus overtime hours), that “includes in the rate of pay compensation for overtime.” WAC 296-128-012(1). The rule provides a recommended formula for calculating the uniform rate and describes a process for the Department’s review of a compensation system.

The Department’s interpretation set forth in WAC 296-128-012 that overtime pay may be spread throughout all hours worked by an interstate trucker in a reasonably equivalent compensation system has

been in place since 1989 and is consistent with the *Bostain* decision. The reasonably equivalent exception from traditional overtime requirements was not at issue in *Bostain*, but the Court provided truck drivers must be paid for overtime either at time and one-half on overtime hours, *or* under a reasonably equivalent compensation system. *See* 159 Wn.2d at 715.

After *Bostain* invalidated other portions of WAC 296-128-011 and -012 relating to whether work performed only within Washington counts toward overtime pay requirements, the Department in 2008 amended its rules. Language was stricken in accord with *Bostain* and added to change the process for the Department's review of interstate trucking companies' compensation systems. Amended WAC 296-128-012 provided a time-limited mandatory duty for the Department to review past compensation systems for companies who had not previously submitted their systems for consideration because based on the old rule they would not have needed to do so. The standards for the Department's review did not change. Contrary to the truck drivers' contention, the Department's amended rule does not attempt to circumvent *Bostain* but rather is consistent with the Court's opinion, and the rule therefore does not violate separation of powers.

Nor does the Department's rule, nor any determinations issued by the Department to employers, violate truck drivers' due process rights

because the determinations are not binding adjudications. In arguing that the *Westberry* court treated the Department's decision issued to their employer as binding upon the truck drivers, the truck drivers misread *Westberry*. Because the Department's review and approval of a trucking company's compensation system is not an adjudicative proceeding, and is not binding upon workers, the Department's actions are constitutional and do not violate the Administrative Procedures Act.

While the Department's rule should be upheld on the merits, the superior court also rightfully dismissed the truck drivers' petition for lack of standing. The truck drivers lack standing because they are not injured by the Department's rule nor by the Department's approval letters issued to employers, as such determinations are nonbinding and workers may bring private suit for unpaid wages. Also, the relief the truck drivers seek of invalidating the rule will not redress their claimed harm since they did not timely challenge the Department's approvals to their employer.

## VI. ARGUMENT

### A. Duly Enacted Rules Are Upheld if Consistent with the Statute They Implement and the Constitution

A court may invalidate a rule only if the rule violates a constitutional provision, was not adopted in compliance with statutory rulemaking procedures, exceeds the statutory authority of the agency, or

was arbitrary and capricious. RCW 34.05.570(2). Courts have no authority to invalidate rules on grounds other than these listed grounds. *Ass'n of Wash. Bus. v. Dep't of Revenue*, 121 Wn. App. 766, 776, 90 P.3d 1128 (2004), *aff'd*, 155 Wn.2d 430, 120 P.3d 46 (2005).

A duly enacted rule is presumptively valid and will be upheld if it is reasonably consistent with the statute that it implements. *See Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003); RCW 34.05.570(1)(a). The burden is on the party attacking the validity of a rule to present compelling reasons why the rule is in conflict with the intent and purpose of the statute being implemented. *Hi-Starr, Inc. v. Liquor Control Bd.*, 106 Wn.2d 455, 459, 722 P.2d 808 (1986).

Here, the truck drivers allege that WAC 296-128-012 exceeds the Department's authority by being in alleged conflict with the Minimum Wage Act, and they allege that the rule is unconstitutional.<sup>8</sup> The truck drivers must carry their burden of showing WAC 296-128-012's invalidity. As described below, this they fail to do.

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<sup>8</sup> While the truck drivers' petition to the superior court argued that the Department's rule was not adopted in compliance with proper rulemaking procedures, CP 5-17, the truck drivers did not assign error to nor brief this issue, so their challenge of the Department's rule on this basis is waived. RAP 10.3(a)(3); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992) (unchallenged findings are verities on appeal).

**B. The Department's Rule is Consistent with the Statute it Implements; Both the Minimum Wage Act and *Bostain* Support that Reasonably Equivalent Compensation is an Alternative Means of Paying Overtime for Truck Drivers**

The truck drivers cannot carry their burden of showing that the rule is inconsistent with the Minimum Wage Act. Rather, WAC 296-128-012 is consistent with RCW 49.46.130 and *Bostain*.

**1. WAC 296-128-012 is Consistent with the Minimum Wage Act**

The overtime provision of the Minimum Wage Act normally requires that employees receive time and one-half their regular rates of pay for hours worked over 40 in a workweek. RCW 49.46.130(1). For employees paid by the hour, the employees must receive time and one-half their hourly wage for each hour worked over 40. *See id.* For employees who are not paid by the hour, such as employees paid per piece produced (e.g., drywall installers paid by the square foot), they receive time and one-half their piece rate for each unit occurring in hours worked over 40, unless an exception from this requirement applies. *See* RCW 49.46.130.

There are numerous statutory exceptions to the time and one-half requirement. One such exception is for truck or bus drivers subject to the Federal Motor Carrier Act who are paid pursuant to a "compensation system" that "includes overtime pay, reasonably equivalent to that required by this subsection, for working longer than forty hours per

week.”<sup>9</sup> RCW 49.46.130(2)(f). In general, interstate commercial truck drivers are subject to the Federal Motor Carrier Act, and the truck drivers here do not dispute that they are subject to the act. 49 U.S.C. § 31502.<sup>10</sup> Thus, under RCW 49.46.130(2)(f), interstate truck drivers who are paid pursuant to a reasonably equivalent compensation system are exempt from the requirement to be paid time and one-half their regular rate of pay for hours worked over 40 per workweek.

Instead of having a premium for overtime pay occur only in overtime hours worked, WAC 296-128-012 permits that interstate truck drivers be paid a uniform non-hourly (e.g., mileage-based) rate of pay for all hours worked that has compensation for overtime imbedded in the uniform rate. *See* WAC 296-128-012(1)(a). The Department’s rule does not deprive truck drivers of time and one-half pay for overtime hours, but instead spreads that pay throughout all hours worked in arriving at the uniform rate, using a mathematical formula. *See id.* The compensation system accounts for overtime pay. *Id.* (the uniform rate “includes in the

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<sup>9</sup> The reference to this “subsection” in RCW 49.46.130(2)(f) should more properly be read to mean this “section,” since subsection (1) of RCW 49.46.130 states the requirement to pay overtime at time and one-half the regular rate, and subsection (2) states the exceptions from this requirement. This Court recognized in *Bostain* that payment of overtime pursuant to RCW 49.46.130(2)(f) is an exception from the payment requirement in RCW 49.46.130(1). 159 Wn.2d at 715 (“[A] worker must be paid an amount equal to one and one-half times the hourly rate or be provided reasonably equivalent compensation.”).

<sup>10</sup> 49 U.S.C. § 3101 et seq., explicitly cited in RCW 49.46.130(2)(f), was replaced with § 31501 et seq. in 1994. *See* Pub. L. No. 103-272 (1994).

rate compensation for overtime”). Additionally requiring payment of time and one-half (or its reasonable equivalent) for units of pay in only the overtime hours would essentially result in twice applying a premium for such overtime hours. No law requires this.

Nothing in WAC 296-128-012 is inconsistent with the Minimum Wage Act, which plainly provides an exemption from RCW 49.46.130(1) for interstate truck drivers paid pursuant to reasonably equivalent compensation systems. *See* RCW 49.46.130(2)(f). Approval by the Department of a company’s compensation system is not a prerequisite to operation of the statutory exemption from compliance with RCW 49.46.130(1). *See* WAC 296-128-012; CP 301. Contrary to the truck drivers’ claims, there is no right under RCW 49.46.130 to time and one-half the uniform mileage-based rate for hours worked over 40 per workweek when the uniform rate paid for all hours worked already includes compensation for overtime. The mathematical formula in WAC 296-128-012 distributes overtime pay throughout all hours worked. The rule describes a process for the Department to determine whether the compensation system does, or does not, include compensation reasonably equivalent to time and one-half. The rule is consistent with the statutory exemption of RCW 49.46.130(2)(f).

## 2. WAC 296-128-012 is Consistent with *Bostain*

In addition to being consistent with the Minimum Wage Act, WAC 296-128-012 is consistent with *Bostain*, which invalidated the portions of former WAC 296-128-012 that referred to *hours worked within Washington*. 159 Wn.2d at 724. The truck drivers misread *Bostain* when they imply that the Court disapproved of the Department's interpretation of when a compensation system is "reasonably equivalent." App. Br. 10, 19-20, 23. The Court did not invalidate portions of the rule that permit overtime pay to be spread throughout units of a non-hourly (e.g., mileage-based) compensation system based on a formula provided for determining a uniform rate. See 159 Wn.2d at 710, 715, 724. The formula and methodology did not change in the 2008 rulemaking. If the Court meant to strike down more of the Department's rule than the language relating to hours worked within Washington, the Court would have so stated.

Not only did the *Bostain* Court not expressly invalidate this portion of the rule, but nothing in the opinion's result or reasoning implies that the rule's formula for reasonably equivalent compensation systems is invalid. To the contrary, *Bostain* supports that overtime for interstate truck drivers may be paid pursuant to the time and one-half provision, RCW 49.46.130(1), or the reasonably equivalent provision, RCW 49.46.130(2)(f); they are alternative means of compensating for overtime.

159 Wn.2d at 710, 715. Nor did *Bostain* question the ability of the Department to review and approve employers' compensation systems. *See id.* at 710, 715.

The truck drivers selectively quote *Bostain* in arguing that the Minimum Wage Act “mandates that truck drivers must obtain *extra compensation* for hours worked over 40 per week.” App. Br. 10 (quoting 159 Wn.2d at 710 (emphasis added)); *see also* App. Br. 23-25. In making this argument, the truck drivers fundamentally misunderstand the nature of a reasonably equivalent compensation system. The purpose of the reasonably equivalent compensation system is to ensure, one way or another, that truck drivers will obtain extra compensation for hours worked over 40. Truck drivers will either receive time and one-half or will receive the reasonable equivalent of time and one-half through use of a different system. The language from *Bostain* quoted by the truck drivers, when quoted in full, demonstrates that the Court understood this:

The statute contemplates that in general truck drivers will receive overtime pay, evidenced by the fact that the exemption in (2)(f) applies only if the driver obtains overtime or its reasonable equivalent. That is, whether paid under the time-and-a-half provisions of RCW 49.46.130(1) or by “reasonably equivalent” compensation, the statute mandates that truck drivers must obtain extra compensation for hours worked over 40 hours per week.

159 Wn.2d at 710. In other words, extra compensation for overtime *is provided* by a reasonably equivalent compensation system. The extra compensation is built into the uniform pay rate. This makes the compensation system reasonably equivalent to traditional time and one-half requirements.

*Schneider v. Snyder's Foods, Inc.* also rejected the truck drivers' argument that reasonably equivalent overtime compensation must be time and one-half the regular rate. 116 Wn. App. 706, 715, 66 P.3d 640 (2003) (declaratory judgment action concerning whether an employer's compensation system was reasonably equivalent, in which court deferred to Department's approval, and, in any event, conducted independent review), *review denied*, 150 Wn.2d 1012, 79 P.3d 446 (2003). The *Schneider* court held that RCW 49.46.130(2)(f) does not require an enhanced payment system, but instead only that compensation reasonably equivalent to time and one-half for overtime be paid. *Id.* *Schneider* also supports that, in general, rates of pay for interstate truck drivers are left to employers' and employees' freedom to negotiate. *Id.*

The truck drivers repeatedly and erroneously equate absence of premium pay in the overtime hours with absence of overtime pay. *See* App. Br. 6, 10, 20, 24-25. *Bostain* requires overtime pay for overtime work by interstate truck drivers but does not require that the overtime be

paid only in the hours worked over 40. In providing that interstate truck drivers must be paid time and one-half *or reasonably equivalent compensation* (knowing full well the content of WAC 296-128-012(1)), *Bostain* supports that reasonably equivalent compensation may take the form of pay of a uniform rate for all hours worked that includes overtime pay. 159 Wn.2d at 715. Nothing in RCW 49.46.130(2)(f) requires that interstate truck drivers' overtime hours worked be paid at different rates than their regular hours worked. Nothing in *Bostain* requires this either.

Also, the truck drivers misrepresent the facts of *Bostain*. They state that "Food Express paid Bostain on a per-mile basis for interstate driving, and did not pay him any extra for overtime." App. Br. 10. Yet, *Bostain* instead says "Food Express paid Bostain an hourly wage, but if he drove over 200 miles it paid him by the mile." 159 Wn.2d at 706. This is an important distinction because under WAC 296-128-012(1)(a), only a *non-hourly* compensation system may be approved by the Department as reasonably equivalent. Thus, under the Department's rule, Food Express would be required to pay overtime wages to Bostain pursuant to RCW 49.46.130(1) because its compensation system would not meet the exception from this requirement provided by RCW 49.46.130(2)(f) as interpreted by the Department. In analogizing their claim to that of

Bostain, and thereby implying that – like Bostain – they are owed additional wages for overtime, the truck drivers err. *See* App. Br. 10.

The truck drivers argue that WAC 296-128-012 is “intended to retroactively ‘immunize’ employers from overtime pay already owed to interstate truck drivers under *Bostain* and the Minimum Wage Act.” App. Br. 1.<sup>11</sup> The rule does not do this. The rule has the same standards for evaluating reasonably equivalent compensation systems that were in place before it was amended. *See* further discussion below at Section VI.D; *see also* Appendix A (showing former and amended rule language).

The truck drivers’ argument that in reasonably equivalent compensation systems each hour worked over 40 must be paid at time and one-half or its reasonable equivalent would create a right to double overtime that is nowhere required in law, as truck drivers already receive overtime pay imbedded in their uniform rate under a reasonably equivalent compensation system. WAC 296-128-012(1). *Bostain* nowhere disapproves of this aspect of the Department’s rule. Seeking the

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<sup>11</sup> In general, the truck drivers’ allegation that the Department “has a long history — over 20 years — of protecting interstate trucking companies from paying overtime,” App. Br. 18, is inaccurate. As noted above, WAC 296-128-012 has always required payment of overtime. Also, while the truck drivers allege that *Dep’t of Labor & Indus. v. Common Carriers, Inc.* is evidence of the Department’s long history of allegedly protecting trucking companies, *see* App. Br. 7-8, the Department there brought the action, on behalf of a driver, to collect unpaid overtime wages from the carrier. 111 Wn.2d 586, 587, 762 P.2d 348 (1988). Contrary to the truck drivers’ suggestion, the Department has no animus against interstate truck drivers, nor has it acted in collusion with trucking companies.

Department's approval is not a way for an employer to avoid paying overtime, because reasonably equivalent compensation is an alternative means of compensating for overtime. The Department's rule results in spreading overtime pay throughout *all* hours worked, as opposed to having only the drivers' overtime hours be paid at premium rates.

No law requires employers to pay interstate truck drivers both reasonably equivalent compensation and time and one-half for overtime. Yet that is what the truck drivers seek. *See* App. Br. 6, 10, 20, 24-25. The truck drivers appear to seek expansion of *Bostain* to invalidate the statutory "reasonably equivalent" exemption from traditional overtime. Because *Bostain* recognizes that reasonably equivalent compensation is an alternative means of paying overtime, the decision cannot be read to require payment of time and one-half upon a reasonably equivalent uniform rate that has overtime pay imbedded in it. This would end up twice applying a premium in the hours worked over 40 per workweek.

The reasonably equivalent exemption was not at issue in *Bostain*. But the Court's passing references to the reasonably equivalent compensation provisions fail to support the truck drivers' claims.

**C. WAC 296-128-012's Interpretation that Reasonably Equivalent Compensation May Involve Mileage-Based Pay at Uniform Rates is Entitled to Deference**

Not only is the Department's rule consistent with the Minimum Wage Act and therefore valid, but it is an interpretive rule that is entitled to deference. See *Ass'n of Wash. Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 445-47, 120 P.3d 46 (2005). The truck drivers' interpretation of when a compensation system is reasonably equivalent (i.e., that flat-rate payment systems can never be reasonably equivalent), on the other hand, is not supported by law and is entitled to no deference. See, e.g., App. Br. 8, 20, 25.<sup>12</sup>

Courts uphold rule language if the statute is ambiguous and the Department's interpretation is reasonable and consistent with legislative intent. *Ass'n of Wash. Bus.*, 155 Wn.2d at 447 n.17; *Laser Underground & Earthworks, Inc. v. Dep't of Labor & Indus.*, 132 Wn. App. 274, 278, 153 P.3d 197 (2006). Courts give substantial deference to administrative agencies entrusted with interpreting specialized statutory enactments. *Roller v. Dep't of Labor & Indus.*, 128 Wn. App. 922, 926-27, 117 P.3d 385 (2005) (quoting *Cobra Roofing Serv., Inc. v. Dep't of Labor & Indus.*, 122 Wn. App. 402, 409, 97 P.3d 17 (2004), *aff'd*, 157 Wn.2d 90, 135 P.3d 913 (2006)).

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<sup>12</sup> Moreover, the truck drivers' suggestion that RCW 49.46.130(2)(f) permits that overtime hours be paid at reasonably equivalent rates using "some other state's law" is nowhere supported by the Minimum Wage Act or *Bostain*. App. Br. 8. The truck drivers do not explain what their argument about another state's law means.

WAC 296-128-012 describes the meaning of “reasonably equivalent” within RCW 49.46.130(2)(f) as interpreted by the Department but does not modify or amend the statute. The term “reasonably equivalent” is ambiguous because no framework is provided by the Legislature for what it means or how it is to be determined. The truck drivers argue that “*Bostain* determined that the term ‘reasonably equivalent’ is *not* ambiguous with regards to the right of truck drivers to receive *extra compensation* for their overtime hours.” App. Br. 23 (emphasis in original). Yet, to say it is unambiguous that the Minimum Wage Act requires overtime pay for working overtime—which is true under both a traditional and a reasonably equivalent compensation system—is not the same as saying that the term “reasonably equivalent” is unambiguous. The Department’s rule is appropriate to clarify the meaning of when a compensation system is reasonably equivalent under the statute.

WAC 296-128-012 is an interpretive rule. An interpretive rule is defined as “a rule, the violation of which does not subject a person to a penalty or sanction, that sets forth the agency’s interpretation of statutory provisions it administers.” RCW 34.05.328(5)(c)(ii). Interpretive rules are contrasted with “legislative” rules. RCW 34.05.328(5)(c)(iii). The primary distinction between interpretive and legislative rules rests in their legal force. “Legislative rules bind the court if they are within the

agency's delegated authority, are reasonable, and were adopted using the proper procedure." *Ass'n of Wash. Bus.*, 155 Wn.2d at 447. But interpretive rules are not binding on the courts:

They serve merely as advance notice of the agency's position should a dispute arise and the matter result in litigation. The public cannot be penalized or sanctioned for breaking them. They are not binding on the courts and are afforded no deference other than the power of persuasion. Accuracy and logic are the only clout interpretive rules wield. If the public violates an interpretive rule that accurately reflects the underlying statute, the public may be sanctioned and punished, not by authority of the rule, but *by authority of the statute*. This is the nature of interpretive rules.

*Id.* (emphasis in original). To illustrate the distinction between legislative and interpretive rules, consider the following example. If the Department were to amend WAC 296-128-012 to require employers to obtain approval as a prerequisite to qualifying for the reasonably equivalent exemption, this would be a legislative rule. RCW 49.46.130(2)(f) imposes no such requirement. The amended regulation would purport to create a legal obligation to obtain the Department's approval, a violation of which would subject an employer to liability. Contrast that with the present rule where seeking the Department's approval is purely voluntary on the part of the employer under RCW 49.46.130(2)(f) and WAC 296-128-012. Any liability for not paying overtime wages pursuant to RCW 49.46.130 stems from the statute, not the Department's rule.

“An agency charged with the administration and enforcement of a statute may interpret ambiguities within the statutory language through the rule making process.” *Edelman v. State ex rel. Pub. Disclosure Comm’n*, 152 Wn.2d 584, 590, 99 P.3d 386 (2004). The Department has the authority to supervise, administer, and enforce wage and hour laws, which include the Minimum Wage Act. RCW 43.22.270; RCW 49.48.040.

The truck drivers argue that the Department exceeded its authority in adopting WAC 296-128-012. App. Br. 20. Although there is no express rulemaking authority pertaining to the reasonably equivalent exemption from overtime, RCW 49.46.130(2)(f), this does not preclude the Department from adopting non-legislative rules.<sup>13</sup> Even in the absence of express legislative rulemaking authority, agencies have implied authority to adopt interpretive rules. *See Ass’n of Wash. Bus.*, 155 Wn.2d at 445.

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<sup>13</sup> Different rulemaking requirements apply to the Department’s original rule and its amended rule, only to the extent the Court were to find that either is a legislative rule. The distinction is unimportant here because agencies have implied authority to adopt interpretive rules, which both versions are. The former WAC 296-128-012 was adopted in 1989. In 1995, the Legislature enacted regulatory reform legislation, providing that an agency may not adopt rules relying solely on its enabling statute or statutory intent provision. RCW 34.05.322. But by its plain language, the statute does not apply to rules that were adopted to implement statutes enacted before July 23, 1995. *Id.* RCW 49.46.130(2)(f) was enacted before July 23, 1995, making RCW 34.05.322 inapplicable with respect to statutory authority needed to support former WAC 296-128-012, even if it was legislative, which it is not. Similarly, in 1997, the Legislature applied the same rulemaking restrictions to the Department’s rules (except prevailing wage) “adopted after July 27, 2007,” regardless of whether such rules implement pre-July 1995 statutes. RCW 43.22.051. This statute precludes the Department after 1997 from adopting rules solely relying on a statute’s or the Department’s enabling act. RCW 34.05.322 and RCW 43.22.051 do not apply to the adoption of interpretive rules regardless of when they are adopted. *See Ass’n of Wash. Bus.*, 155 Wn.2d at 445.

While the truck drivers argue that the Department's rule is not interpretive, they do not argue that it is a legislative rule that requires express delegation of authority by statute to adopt. App. Br. 26-27. Rather, they argue only that the rule is invalid because it allegedly conflicts with RCW 49.46.130 as interpreted by this Court in *Bostain*. As described above in Section VI.B, there is no such conflict.

Even if the Court found that the formula in WAC 296-128-012 for reasonably equivalent compensation systems was legislative, the rule amendment would not be legislative because it made no changes to that aspect of the Department's rule. *See* Appendix A (adopted rule language). Instead, the amendment made changes to the process for requesting and receiving an assessment by the Department of a compensation system. Such procedural changes are not legislative.

Also, seemingly with respect to statutory authority for the Department's rule,<sup>14</sup> the truck drivers' argument that the former and amended rule sections are allegedly internally inconsistent concerning notice requirements, does not make sense. *See* App. Br. 34. The truck drivers' arguments in superior court focused on challenge to the amended rule, yet the truck drivers also argue that the new section of the amended

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<sup>14</sup> The truck drivers do not explain how their argument about alleged internal inconsistency of the rule affects its validity under RCW 34.05.570(2), which provision states the sole bases on which a rule may be challenged.

rule conflicts with portions of the existing section relating to advance notice, which argument appears to depend on the former rule's validity. App. Br. 34.

In any event, the truck drivers' advance notice argument lacks merit. There are several elements to meet the reasonably equivalent exemption under former WAC 296-128-012(1). One such element is that an employer must provide "notice" to the employee. WAC 296-128-012(1)(a). As with the former rule, the amended rule does not explicitly identify notice of what. The Department has interpreted the rule to require advance notice of the non-hourly rate of pay. *See, e.g.*, AR 69 ("Under the plain language of the regulation, an employer must provide notice to employees of their rate of pay. The proposed subsection does not alter this obligation."). Advance notice, as interpreted by the Department, is consistent with retroactive approval under new subsection (3) because the truck drivers will have known their mileage-based rate of pay. There is no evidence to suggest the truck drivers here did not have advance knowledge of their mileage rates. Allowing retroactive approval under WAC 296-128-012(3) using the same substantive standards as ever before is consistent with the notice requirement of WAC 296-128-012(1). The rule is internally consistent. Under the Department's interpretation, so long as the employer established a non-hourly rate of pay that in fact includes

compensation for overtime, and it provided notice to the employees of rate of pay, *see* AR 69, the employer satisfied the rule's notice requirement.

**D. Retroactive Application of Amended WAC 296-128-012 is Permitted Because the Changes are Non-substantive and Process-related**

Retroactive application of the Department's amended rule is proper, as the rule is interpretive and the changes were not substantive.

Courts may apply rule amendments retroactively if the agency intends retroactive application and the amendments relate to practice, procedure, or remedies and do not change established law nor affect substantive or vested rights. *See Letourneau v. Dep't of Licensing*, 131 Wn. App. 657, 665-66, 128 P.3d 647 (2006); *Loeffelholz v. Univ. of Wash.*, 162 Wn. App. 360, 368, 253 P.3d 483 (2011) (retroactive application of statute).

In *Letourneau v. Dep't of Licensing*, the Department of Licensing adopted an emergency rule intended to clarify which thermometers were approved of by the state toxicologist. 131 Wn. App. at 665-66. The rule was not intended to change established law. *Id.* The court held the rule "relates to the procedures for approving breath tests and their admissibility into court and does not affect the substantive rights of Letourneau," and therefore it permitted the rule's retroactive application. *Id.*

Similarly, the rule revision here does not affect a substantive or vested right. Here, unlike the case relied on by the truck drivers, the language of the amendments does *not* suggest a different outcome when reviewing alternative pay systems under the former and amended rule. *See* App. Br. 32 (citing *Champagne v. Thurston County*, 163 Wn.2d 69, 79-80, 178 P.3d 936 (2008)). In *Champagne*, the Department of Labor and Industries amended its payment interval rule for wages such that in certain circumstances under the new rule — but not the old rule — wages could be paid in intervals longer than one month. *Id.* This denoted a substantive change and precluded retroactive application of the amended rule. *Id.* But here, the standards in WAC 296-128-012 for what is reasonably equivalent are unchanged with the amended rule. *See* AR 69, 70, 78, 89; Supp. AR 222. Neither workers' nor employers' substantive or contractual rights are implicated.

The purpose of the amendment to WAC 296-128-012 was not to broaden or alter the reasonably equivalent exemption found in RCW 49.46.130(2)(f). That statute only mandates that the compensation system under which the driver is paid be “reasonably equivalent.” WAC 296-128-012 creates a voluntary process to seek approval of a reasonably equivalent compensation system, not an exclusive process. Allowing a look back in time, upon a company's voluntary request, to provide

interpretations that do not carry the force of law does not affect a substantive or vested right. As such, the amendment is remedial, and the Department's retroactive approval is permitted. *See Loeffelholz*, 162 Wn. App. at 368; *Letourneau*, 131 Wn. App. at 665-66.

The challenged amendment to WAC 296-128-012 permits a *process* only for trucking companies to apply within a window of time for review of compensation systems. The Department was obligated to conduct review and issue a decision to those companies who timely applied. Under WAC 296-128-012(1)(c), the Department "may" evaluate compensation systems submitted by employers under the section. Requiring the Department to do what was otherwise discretionary—i.e., "shall" perform an evaluation upon a trucking company's timely request, *see* added subsection WAC 296-128-012(3)—in no way affects substance.

The amended rule uses the same standards to assess earlier time periods as did the existing rule.<sup>15</sup> Because the Department's substantive

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<sup>15</sup> In arguing that the superior court's Finding No. 12 lacks evidentiary support, the truck drivers imply that the Department's rule amendment changed the standards for assessing whether a compensation system is reasonably equivalent. *See* App. Br. 22. Finding No. 12 states in part: "The standards for the Department's review and approval of companies' compensation systems as reasonably equivalent under WAC 296-128-012 did not change before and after adoption of amended WAC 296-128-012. The amended rule changed the process for the Department's review of an interstate trucking company's pay practices." CP 302. Numerous portions of the record provide evidentiary support for the superior court's finding. *E.g.*, AR 69, 70, 78, 89; Supp. AR 222. No evidence supports that there was any change in the Department's substantive standards for assessing whether a compensation system is reasonably equivalent. The truck drivers' implicit contention is wrong.

standards for assessment of whether a compensation system is reasonably equivalent did not change pre- and post-*Bostain*, the truck drivers are not affected, and retroactive application of the amended rule is lawful.

**E. WAC 296-128-012 in Its Former and Amended Forms Does Not Violate Separation of Powers Because it is Consistent with *Bostain***

The truck drivers argue that WAC 296-128-012 violates separation of powers because it circumvents this Court's decision in *Bostain*. App. Br. 6, 33. But WAC 296-128-012 does not circumvent *Bostain*, so there is no violation of separation of powers. The Department agrees that the Minimum Wage Act requires overtime pay for truck drivers who work in excess of 40 hours per week. So too does WAC 296-128-012. Under a reasonably equivalent compensation system pursuant to WAC 296-128-012, overtime pay is imbedded in the uniform mileage-based rate paid to the truck driver for each hour worked. The uniform rate must "include in the rate of pay compensation for overtime." WAC 296-128-012(1)(a).

The amended WAC 296-128-012 is consistent with *Bostain*.<sup>16</sup> Other than invalidating the language "within the state of Washington" in

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<sup>16</sup> The truck drivers' allegation that WAC 296-128-012 circumvents *Bostain* does not make sense when one considers that the truck drivers challenge both the former and amended rule. The former rule was enacted 18 years before *Bostain* was decided and cannot therefore circumvent the opinion. The rule amendments post-*Bostain* do not change the Department's standards or formula for assessing whether a compensation system is reasonably equivalent, thus supporting that the amended rule does not circumvent *Bostain*.

the former rule, *Bostain* did not criticize WAC 296-128-012, but instead noted with approval that compensation pursuant to a reasonably equivalent system is an alternative means of paying overtime wages for interstate truck drivers. *See* 159 Wn.2d at 710, 715.

**F. The Department's Rule and Actions Do Not Violate Truck Drivers' Due Process Rights Nor the Administrative Procedures Act Because the Department's Determinations Under WAC 296-128-012 are Nonbinding and Are Not Adjudications**

The Department's reasonably equivalent approvals provided for under both the former and amended rule constitute *nonbinding opinions* concerning whether a company properly pays overtime. Nor are the approvals by the Department a product of an adjudicative proceeding. The truck drivers' due process challenges rest on their erroneous assumption that *Westberry* treated the Department's approval as binding upon the truck drivers. *See* App. Br. 19 (citing *Westberry*, 164 Wn. App. at 202, 206-09). The *Westberry* court did not do this. A court may agree with, or even give deference to, a Department determination concerning whether a company's compensation system is reasonably equivalent, but a court is not bound by the Department's determination. *See Westberry*, 164 Wn. App. at 207-08 (citing *Schneider*, 116 Wn. App. at 716-17). The Department has never argued otherwise.

**1. The Department's Determinations Concerning Whether an Employer's Compensation System is Reasonably Equivalent are Nonbinding, and the Department's Review is Not an Adjudication**

The truck drivers' repeated argument that the *Westberry* court treated the Department's approval of IDC's compensation system as a binding adjudication is an apparent attempt to show a common (and conflicting) issue between this case and *Westberry*. App. Br. 5, 16, 21-22, 30-31 (describing the Department's approval as an alleged ex parte proceeding, factfinding, or adjudication). The truck drivers go so far as to suggest impropriety on the part of the Department in arguing, and Thurston County Superior Court in issuing a decision, in alleged conflict with the Division Two opinion in *Westberry*. App. Br. 19. The truck drivers are wrong. Division Two never stated the Department's approval letter issued to IDC is binding. Division Two's discussion of *deference* to the Department's decision would be superfluous if the decision was binding. *See* 164 Wn. App. at 207-09.

The truck drivers also repeatedly argue that *Westberry* supports their contention that the Department's determination was an adjudication affecting the truck drivers, and again they are wrong. App. Br. 19, 21-22, 30. The *Westberry* court determined that the Department's review was not an adjudicative proceeding, let alone a binding adjudication. 164 Wn.

App. at 205. The truck drivers' argument about alleged irreconcilability between the decision here and in *Westberry* is based on a false dichotomy.

Rather than treating the Department's determination as binding, the *Westberry* court premised its decision on the precise record presented to it – or more accurately, on the lack of any evidence presented by *Westberry*. See 164 Wn. App. at 203. *Westberry* argued that “he had no reason to submit affidavits opposing Interstate’s summary judgment motion because L&I’s approval of Interstate’s compensation system was ‘just an opinion. That is not anything that the Court needs to defer to.’” *Id.* The result in *Westberry* is principally driven by *Westberry*’s failure, in essence, to contest summary judgment.

It is not surprising that Division Two upheld the superior court’s dismissal of *Westberry*’s private suit when IDC offered facts showing that its compensation system was reasonably equivalent,<sup>17</sup> and *Westberry* failed to present facts opposing those offered by IDC, did not argue that IDC’s calculations were in error or not otherwise made in accordance with

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<sup>17</sup> The evidence offered by IDC included a comparison assessment to IDC’s local drivers who were paid traditional overtime based on hourly rates of pay, yielding the conclusion that “on average [IDC] paid line-haul drivers more than it paid its local drivers.” *Id.* at 208. Indeed, a declaration offered by IDC in the private suit in superior court was submitted by the truck drivers in their rule challenge. CP 31-75. That declaration includes IDC’s factual analysis, independent of the Department’s review and approval of IDC’s compensation system, see CP 63-68, which “demonstrates that out of the 40 sample weeks, there are only five instances where the line-haul driver would have made more as a local driver. The sample group’s average weekly wage shows that line-haul drivers make an average of \$135.66 more per week than a local driver.” CP 57.

the Department's rule, and did not argue that the Department's determinations were an incorrect application of the standards in its rule. *Id.* at 203, 208. In this context, the court agreed that the Department's decision was "entitled to substantial weight and should be upheld as a plausible construction of the statute . . . ." *Id.* at 208. A court may disagree with the Department's determination, *especially* if presented with different facts than those presented to the Department—which Westberry failed to do. In deferring to the Department's determination that IDC's compensation system was reasonably equivalent, the *Westberry* court essentially simply rejected the truck drivers' request that a premium for overtime be doubly applied.

As discussed above, "[w]hen a statute is ambiguous (i.e., subject to more than one reasonable interpretation), the agency's adoption of one of the possible reasonable choices is entitled to some deference. Even so, the agency's interpretation is not binding on the courts." *Ass'n of Wash. Bus.*, 155 Wn.2d at 447 n.17 (citing *Weyerhaeuser Co. v. Dep't of Ecology*, 86 Wn.2d 310, 315, 545 P.2d 5 (1976)). The Department's determinations issued to employers under both the former and amended rule are nonbinding, and accorded deference by courts only to the extent the statute is ambiguous and the Department's interpretation is reasonable. *Ass'n of Wash. Bus.*, 155 Wn.2d at 447 n.17. Here, both criteria are met.

The truck drivers argue that whether a compensation system is reasonably equivalent is a matter of fact for a court to determine. App. Br. 20. The Department agrees that the courts do have ultimate authority to determine reasonable equivalence; the Department merely provides its advisory opinion given its enforcement expertise. Courts are not bound by the Department's determination, and indeed may be presented with different facts leading to a different outcome, or may determine that the Department's calculations or conclusions were not correct. But the court may defer to the Department's legal interpretation concerning whether the structure of the compensation system complies with RCW 49.46.130(2)(f) and WAC 296-128-012 (e.g., that the uniform mileage-based rates paid to interstate truck drivers include overtime pay reasonably equivalent to time and one-half the regular hourly rates of pay, based on comparison calculations performed under RCW 49.46.130(1)).

**2. The Truck Drivers' Due Process and Administrative Procedures Act Claims Lack Merit**

Because the Department's review of an employer's compensation system is nonbinding, the truck drivers' due process claims fail. As in *Westberry*, the truck drivers do not cite any authority supporting that they have a constitutional right to notice of a *nonbinding* agency review of an employer's compensation system. See *Westberry*, 164 Wn. App. at 205-

06 (declining to consider Westberry's argument because he did not cite any authority "granting potentially affected employees the right to notice or an opportunity to be heard under these circumstances"). The cases cited by the truck drivers deal with binding adjudications or res judicata and/or collateral estoppel concerning such adjudications. App. Br. 30-31<sup>18</sup>; *Westberry*, 164 Wn. App. at 205-06. Moreover, those cases dealt with individualized adjudications, whereas here the review is of an employer's compensation system, not its application to individual employees.

Nor does the truck drivers' lack of notice of the Department's review of IDC's compensation system violate the Administrative Procedures Act. The Department's review was not an "adjudicative proceeding" under RCW 34.05.010(1), and thus no statutory notice to the employee was necessary. "Adjudicative proceeding" is defined as:

a proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right before or after the entry of an order by the agency. Adjudicative proceedings also include all cases

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<sup>18</sup> *Eggert v. Empl. Sec. Dep't*, 16 Wn. App. 811, 816, 558 P.2d 1318 (1976) (judicial review of agency commissioner's ruling in an unemployment hearing) (citing *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (termination of individuals' public assistance payments)); *Esmieu v. Schrag*, 88 Wn.2d 490, 497, 563 P.2d 203 (1977) (order issued based on a hearing where plaintiff to trust action persuaded court to hear testimony without giving requisite notice to defendants or their counsel); *McDaniel v. Dep't of Social & Health Svcs.*, 51 Wn. App. 893, 897-98, 756 P.2d 143 (1988) (notice requirements for adjudicative hearing pursuant to Administrative Procedures Act); *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507-09, 745 P.2d 858 (1987) (res judicata and/or collateral estoppel concerning individual adjudications).

of licensing and rate making in which an application for a license or rate change is denied except as limited by RCW 66.08.150, or a license is revoked, suspended, or modified, or in which the granting of an application is contested by a person having standing to contest under the law.

RCW 34.05.010(1). No statute or constitutional provision requires the Department's approval of a compensation system as reasonably equivalent in order for the provisions of RCW 49.46.130(2)(f) to operate. The Department's issuance under WAC 296-128-012 of a determination concerning an employer's compensation system is not a license because such determination is not "required by law." *See* RCW 34.05.010(9)(a). Truck drivers lack standing to challenge an employer's application for approval by the Department of its compensation system as reasonably equivalent because the Department's approval is nonbinding on the drivers or the courts. *See* further discussion below at Section VI.G. Because the Department's review of an employer's compensation system is not an adjudicative proceeding, the truck drivers' argument about statutory notices of hearing is inapposite. App. Br. 6, 30.

While the Department's process of evaluating compensation systems involves a certain degree of safeguards to ensure reliability, it does not necessarily include all procedural safeguards of an adjudicative hearing. *See* Supp. AR 379.

Such a system of governmental review of practices to determine if they are in compliance with law is not unique to examining truck drivers' compensation. Government agencies routinely give guidance to persons concerning compliance with laws within the agency's enforcement and expertise; such constituent service does not implicate workers' statutory or constitutional rights.<sup>19</sup> For example, employers may ask the Department of Labor and Industries in what circumstances employees must be permitted access to paid or unpaid leave (*see* Family Leave Act, Chapter 49.78 RCW, and/or Family Care Act, RCW 49.12.265 et seq.), or they may ask in what circumstances benefits must be maintained for employees on leave (*see* Domestic Violence Leave Act, Chapter 49.76 RCW). Employers may ask the Employment Security Department for information concerning in what circumstances employees are eligible for unemployment benefits at the end of their employment (*see* Title 50 RCW). Land owners may consult the Human Rights Commission concerning discrimination provisions in rentals or sales (*see* Washington Law Against Discrimination, Chapter 49.60 RCW), or may consult various environmental departments concerning land use restrictions. To determine that an agency must give notice to potentially affected persons

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<sup>19</sup> The Department enforces the Minimum Wage Act. It defies logic that the Department cannot answer for an employer whether it complies with a law the Department enforces. The Department agrees that a court may disagree with its decision, but the Department has authority to assess compliance when so asked by a stakeholder.

before giving even an advisory opinion to a stakeholder concerning his or her compliance with the law would be unsound public policy.

The superior court correctly ruled that the Department's reasonably equivalent approvals provided for under both the former and amended rule constitute nonbinding opinions concerning whether a company properly pays overtime. CP 301-02 (Finding No. 11, Conclusion No. 3).

**G. The Truck Drivers Lack Standing Because They Are Not Injured By the Department's Rule and Their Claimed Prejudice Will Not Be Redressed by the Relief They Seek**

In order to challenge an action of an agency, petitioners must satisfy all elements of RCW 34.05.530. *Id.* The truck drivers fail to satisfy subsections (1) and (3) of the statute.

RCW 34.05.530(1) requires harm or likely harm to the petitioner by the agency's action in order for the petitioner to have standing. Any injury the truck drivers suffer flows from the statutory exemption from traditional overtime pay requirements for reasonably equivalent compensation systems, not from the rule or determinations at issue here. The truck drivers' arguments should therefore be directed to the Legislature. WAC 296-128-012 neither alters nor expands RCW 49.46.130(2)(f); it merely interprets what it means for a compensation system to be reasonably equivalent.

The Department's determinations under WAC 296-128-012 are nonbinding, so the truck drivers are not harmed. RCW 34.05.530(1). There is no consequence to a Department determination approving or rejecting a compensation system as reasonably equivalent, in and of itself; liability or avoidance of it would result only from an independent action for unpaid wages or for declaratory judgment. Neither the three truck drivers named here nor any other drivers are likely to be harmed in the future by the Department's amended rule. Roughly 55 companies applied to the Department under amended WAC 296-128-012 within 90 days of the rule's adoption for review of their compensation systems. The Department has completed all such reviews, and no decisions of the Department concerning such compensation systems were challenged. CP 143-46. Invalidation of the amended rule will achieve no effect.

Also, the petition does not challenge the approval letter to IDC, and such challenge of the approval letter to IDC would be untimely, so the truck drivers lack standing because their claimed harm will not be redressed by invalidation of the rule. *See* RCW 34.05.530(3).<sup>20</sup> Assuming, for argument only, that the Department's approval letter issued to the truck drivers' employer, IDC, is "agency action" under RCW

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<sup>20</sup> The superior court recognized that the Department's determination concerning IDC was not an adjudication, *see* CP 282, and was either not subject to challenge because it is an advisory interpretation only or was subject to challenge within 30 days as "other agency action" under RCW 34.05.542(3). *See* CP 279, 283.

34.05.010(3), the truck drivers failed to timely challenge the agency action. The time limit for filing and serving a petition for judicial review of other agency action is 30 days after the agency action.<sup>21</sup> RCW 34.05.542. Because the Department's approval of IDC's compensation system was not challenged, invalidation of WAC 296-128-012 will not redress the truck drivers' alleged harm.

While the truck drivers argue that standing rules are liberally construed when public policy interests are at issue, this case does not present issues of public policy. App. Br. 22. Moreover, this Court cautioned that many pre-1988 cases that demonstrate "a liberalization in standing requirements" do not apply to the current Administrative Procedures Act. *Allan v. Univ. of Wash.*, 140 Wn.2d 323, 329 n.1, 997 P.2d 360 (2000). The case the truck drivers cite in support of their liberal construction argument predates the current version of RCW 34.05.530. See App. Br. 22 (citing *Wash. Nat. Gas Co. v. P.U.D. No. 1 of Snohomish County*, 77 Wn.2d 94, 459 P.2d 633 (1969)). The truck drivers

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<sup>21</sup> The time limit is extended "during any period that the petitioner did not know and was under no duty to discover or could not reasonably have discovered that the agency had taken the action . . . ." RCW 34.05.542(3). While the truck drivers allege without factual support in the record that they were unaware of the Department's approvals to IDC, this is unimportant, because at least as of February 1, 2010—when their counsel received the Department's approval letters to IDC—the truck drivers should have known of the determinations. CP 22-89 (date stamp, CP 30). The truck drivers filed their petition here on March 22, 2010. CP 5-17. Moreover, the petition does not challenge the approvals issued by the Department to IDC. The truck drivers have never challenged the approvals issued by the Department to IDC, yet they long knew or should have known of the decisions. The truck drivers thus necessarily lack standing.

misinterpret the Minimum Wage Act and the *Bostain* and *Westberry* opinions. Even if it is determined that the truck drivers have standing to challenge the Department's rule, the rule should be upheld on its merits.

## VII. CONCLUSION

This Court should affirm the superior court's ruling dated December 16, 2011.

RESPECTFULLY SUBMITTED this 27th day of April, 2012.

ROBERT M. MCKENNA  
Attorney General

A handwritten signature in black ink, appearing to read "Eric D. Peterson", written over a horizontal line.

ERIC D. PETERSON  
Assistant Attorney General  
WSBA No. 35555

No. 86757-7

SUPREME COURT OF THE STATE OF WASHINGTON

Julie Palmer, Michael Ballew, and Larry G. Westberry, Petitioners

v.

Department of Labor and Industries, Respondent

**BRIEF OF RESPONDENT**

**APPENDIX A**

AMENDATORY SECTION (Amending WSR 89-22-120, filed 11/1/89, effective 12/2/89)

**WAC 296-128-011 Special recordkeeping requirements.** (1) In addition to the records required by WAC 296-128-010, employers who employ individuals as truck or bus drivers subject to the provisions of the Federal Motor Carrier Act shall maintain records indicating the base rate of pay, the overtime rate of pay, the hours worked by each employee for each type of work, and the formulas and projected work hours used to substantiate any deviation from payment on an hourly basis pursuant to WAC 296-128-012. The records shall indicate the period of time for which the base rate of pay and the overtime rate of pay are in effect.

For the purposes of this section and WAC 296-128-012, "base rate of pay" means the amount of compensation paid per hour or per unit of work in a workweek of forty hours or less. A base rate of pay shall be established in advance of the work performed and may be based on hours or work units such as mileage, performance of specified duties, or a specified percentage of the gross proceeds charged for specified work. A base rate of pay shall not be established that will result in compensation at less than the minimum wage prescribed in RCW 49.46.020. "Overtime rate of pay" means the amount of compensation paid for hours worked (~~within the state of Washington~~) in excess of forty hours per week and shall be at least one and one-half times the base rate of pay.

(2) The records required by this section shall be made available by the employer at the request of the department. Any current or past employee may obtain copies of the formula, the base rate of pay, the overtime rate of pay, and that employee's records. Job applicants seeking employment by the employer as truck or bus drivers subject to the provisions of the Federal Motor Carrier Act, may obtain copies of the formula, the base rate of pay, and the overtime rate of pay.

AMENDATORY SECTION (Amending WSR 89-22-120, filed 11/1/89, effective 12/2/89)

**WAC 296-128-012 Overtime for truck and bus drivers.** (1)(a) The compensation system under which a truck or bus driver subject to the provisions of the Federal Motor Carrier Act is paid shall include overtime pay at least reasonably equivalent to that required by RCW 49.46.130 for working (~~within the state of Washington~~) in excess of forty hours a week. To meet this

requirement, an employer may, with notice to a truck or bus driver subject to the provisions of the Federal Motor Carrier Act, establish a rate of pay that is not on an hourly basis and that includes in the rate of pay compensation for overtime. An employer shall substantiate any deviation from payment on an hourly basis to the satisfaction of the department by using the following formula or an alternative formula that, at a minimum, compensates hours worked (~~within the state of Washington~~) in excess of forty hours per week at an overtime rate of pay and distributes the projected overtime pay over the average number of hours projected to be worked. The following formula is recommended for establishing a uniform rate of pay to compensate work that is not paid on an hourly basis and for which compensation for overtime is included:

1. Define work unit first. E.g., miles, loading, unloading, other..
2. 
$$\frac{\text{Average number of work units}}{\text{per hour}} = \frac{\text{Average number of work units accomplished per week}}{\text{Average number of hours projected to be worked per week}}$$
3. 
$$\text{Weekly Base Rate} = \text{Number of units per hour} \times 40 \text{ hours} \times \text{base rate of pay}$$
4. 
$$\text{Weekly Overtime rate} = \text{Number of units per hour} \times \text{number of hours over 40} \times \text{overtime rate of pay}$$
5. 
$$\text{Total weekly pay} = \text{Weekly base rate plus weekly overtime rate}$$
6. 
$$\text{Uniform rate of pay} = \frac{\text{Total weekly pay}}{\text{Total work units}}$$

**Example:**

A truck driver is paid on a mileage basis for a two hundred thirty mile trip performed about ten times a week. The base rate of pay is twenty cents a mile. The overtime rate of pay is thirty cents a mile. The average length of the trip is four and one-half hours.

1. 
$$\frac{2300 \text{ mi.}}{\text{per week}} \text{ divided by } \frac{45 \text{ hours}}{\text{per week}} = \frac{51.1 \text{ miles}}{\text{per hour}}$$
2. (a)  $51.1 \text{ miles/hour} \times 40 \text{ hours} \times .20/\text{mile} = \$408.80$   
 (b)  $51.1 \text{ miles/hour} \times 5 \text{ hours} = 255.5 \text{ miles}$   
 (c)  $255.5 \text{ miles} \times .30/\text{mile} = \$76.65$   
 (d)  $\$408.80 \text{ plus } \$76.65 = \$485.45 \text{ divided by } 2300 \text{ miles} = 21.1 \text{ cents mile}$

(b) In using a formula to determine a rate of pay, the average

number of hours projected to be worked and the average number of work units accomplished per week shall reflect the actual number of hours worked and work units projected to be accomplished by persons performing the same type of work over a representative time period within the past two years consisting of at least twenty-six consecutive weeks.

(c) The department may evaluate alternative rates of pay and formulas used by employers in order to determine whether the rates of pay established under this section result in the driver receiving compensation reasonably equivalent to one and one-half times the base rate of pay for actual hours worked (~~within the state of Washington~~) in excess of forty hours per week.

(2) Where an employee receives a different base rate of pay depending on the type of work performed, the rate that is paid or used for hours worked (~~within the state of Washington~~) in excess of forty hours per week shall be at least the overtime rate of pay for the type of work in which most hours were worked.

(3) Compensation plans before March 1, 2007. An employer who employed drivers who worked over forty hours a week consisting of both in-state and out-of-state hours anytime before March 1, 2007, may, within ninety days of the adoption of this subsection, submit a proposal consistent with subsection (1) of this section to the department for approval of a reasonably equivalent compensation system. The employer shall submit information to substantiate its proposal consisting of at least twenty-six consecutive weeks over a representative time period between July 1, 2005, and March 1, 2007. The department shall then determine if the compensation system includes overtime that was at least reasonably equivalent to that required by RCW 49.46.130.

Note 1: On March 1, 2007, the Washington state supreme court ruled that overtime rate of pay includes hours worked within and outside the state of Washington for Washington-based employees. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 153 P.3d 846 (2007).

Note 2: The adoption date of this subsection is October 21, 2008.

No. 86757-7

SUPREME COURT OF THE STATE OF WASHINGTON

Julie Palmer, Michael Ballew, and Larry G. Westberry, Petitioners

v.

Department of Labor and Industries, Respondent

**BRIEF OF RESPONDENT**

**APPENDIX B**

ADMINISTRATIVE POLICY



STATE OF WASHINGTON  
DEPARTMENT OF LABOR AND INDUSTRIES  
EMPLOYMENT STANDARDS

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TITLE: PROCESS PROTOCOLS FOR REASONABLY EQUIVALENT OVERTIME COMPENSATION PLANS FOR TRUCK & BUS DRIVERS NUMBER: ES.A.8.3

CHAPTER: RCW 49.46.130(2)(f) and  
WAC 296-128-011 and - 012

ISSUED: 10/24/2008  
REISSUED: 11/4/2008

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ADMINISTRATIVE POLICY DISCLAIMER

This policy is designed to provide general information in regard to the current opinions of the Department of Labor & Industries on the subject matter covered. This policy is intended as a guide in the interpretation and application of the relevant statutes, regulations, and policies, and may not be applicable to all situations. This policy does not replace applicable RCW or WAC standards. If additional clarification is required, the Program Manager for Employment Standards should be consulted.

This document is effective as of the date of print and supersedes all previous interpretations and guidelines. Changes may occur after the date of print due to subsequent legislation, administrative rule, or judicial proceedings. The user is encouraged to notify the Program Manager to provide or receive updated information. This document will remain in effect until rescinded, modified, or withdrawn by the Director or his or her designee.

**A. Purpose:**

Companies may voluntarily submit to L&I for its review under RCW 49.46.130(2)(f) and WAC 296-128-011 and -012 a compensation system for truck and bus drivers subject to the Federal Motor Carrier Act that includes overtime pay for hours over forty per workweek and is reasonably equivalent to traditional overtime. These protocols, which are based on L&I's general historical practices, describe processes for employers' submission and L&I's evaluation of non-hourly compensation systems for truck and bus drivers.

**B. What a company making a request that L&I evaluate its compensation system must do:**

1. The company must follow the requirements in WAC 296-128-012 when making a request that L&I evaluate its compensation system. To meet this requirement, an employer may, with notice to a truck or bus driver subject to the provisions of the Federal Motor Carrier Act, establish a rate of pay that is not on an hourly basis and that includes compensation for overtime in the rate of pay.

2. Companies that seek L&I's approval of a compensation system as reasonably equivalent must submit to L&I's Employment Standards Program Manager a letter, which must state at least:
- a. That the company seeks L&I's review of its compensation system under RCW 49.46.130(2)(f) and WAC 296-128-011 and -012;
  - b. Whether all drivers covered by the compensation system are subject to the Federal Motor Carrier Act;
  - c. Whether the compensation system has been in effect prior to submission for approval, and if so, for how long (as this may relate to the period of time for which L&I may request records);
  - d. Whether employees are covered by a collective bargaining agreement;
  - e. Whether the company anticipates or is engaged in litigation regarding its compensation for Washington-based employees, or has been engaged in such litigation concerning any time period in the two years preceding the request for review of the compensation system;
  - f. If the compensation system was previously implemented, the letter must identify whether, when, and how the rate of pay was communicated to employees. If the compensation system is not yet in effect, the letter must identify how the company intends to communicate the rate of pay to its employees.

- g. Send the letter to:  
Program Manager  
Employment Standards Program  
Department of Labor & Industries  
P O Box 44510  
Olympia, WA 98504-4510

or

Program Manager  
Employment Standards Program  
Department of Labor & Industries  
7273 Linderson Way SW  
Tumwater, WA 98501-5414

3. L&I will acknowledge receipt of the request for approval of the compensation system as reasonably equivalent and will request that the company supply additional required information within 60 days from L&I's acknowledgement of receipt, to include the following:
- a. Description of compensation system. The company must supply to L&I's Employment Standards Program Manager a letter that describes its compensation system and includes at least the following information:
    - i. How the company performed all calculations on which the compensation system was based, and the identity of persons who performed such calculations or are familiar with the creation or implementation of the company's compensation system;

- ii. How, and from which sources, data was collected for purposes of each calculation (e.g., how did the company determine the number of hours each employee worked in each workweek?);
  - iii. Bases for the company's assertion that the rate of pay for each employee includes compensation for overtime;
  - iv. An explanation for all terms of art associated with the company's compensation system (e.g., what is meant by "hooking"?) or other necessary information for L&I to interpret and evaluate records and descriptions provided.
- b. Raw payroll records. The company must supply copies of payroll records for employees from at least a 26 consecutive week period in the past two years. Companies may submit records for all employees covered by the compensation system or for a random sample of such employees. If a random sample of employee records are provided, the data provided must be representative of the actual number of hours worked and work units projected to be accomplished by persons performing the same type of work over the time period for which records are submitted. The period for which records are supplied, if less than all records for the two years preceding the request for approval, must be a representative period for those two years of not less than 26 consecutive weeks. Payroll records supplied must show at least the hours worked by each employee in each workweek, the work units accomplished by the employee in each workweek, the rate of pay for each work unit accomplished by the employee, and the total gross pay received by the employee for each workweek.
- i. **Note:** If the data provided is for only some employees, L&I may require additional data, including but not limited to: a different random sample of employees' data; data for different employees specifically chosen by L&I; or, data for all employees. Such additional data must be provided within time frames specified by L&I.
  - ii. **Note:** If the period of time for which data is provided is at least 26 consecutive weeks in duration but less than the complete two year period preceding the request for approval, L&I may require additional data for any other time period in the two years preceding the request for approval, to include data for that entire period. Such additional data must be provided within time frames specified by L&I.
- c. Comparison calculations. Submit, along with the raw data (i.e., payroll records) as described above, spreadsheets that calculate the difference between what each employee whose records are provided to L&I was paid or would be paid under the company's compensation system relative to what the employee was paid or would have been paid under the overtime requirements of RCW 49.46.130(1). The spreadsheet must show all data used to arrive at each calculation and be calculated by employee for each workweek. The spreadsheet must contain a key or other explanation for

any formulas used to arrive at totals and for any abbreviations or company terms of art such that L&I may interpret and evaluate the calculations.

- i. For compensation systems in effect before submission of a request for approval: using data from the period constituting at least 26 consecutive weeks in the past two years, calculate what each employee in the data provided was paid under the company's compensation system, and what the employee would have been paid under traditional overtime.
- ii. For compensation systems not yet in effect before submission of a request for approval: using data from the period constituting at least 26 consecutive weeks in the past two years, calculate what each employee in the data provided would have been paid under the company's compensation system, and what the employee actually was paid under the compensation system in effect at the time. If the system in effect was not a traditional overtime system, calculate what each employee would have been paid under traditional overtime.
- iii. If the company employs truck drivers who are paid under traditional overtime as well as truck drivers who are or will be paid under a compensation system that the company proposes as reasonably equivalent to traditional overtime, then comparison calculations should be based on similarly situated drivers at the company under both payment methods. For example, a company employs both local drivers who are paid hourly under traditional overtime and line haul drivers who are paid on a mileage basis. For purposes of calculations submitted to L&I, the company should compare for each workweek what each line haul driver's gross pay was relative to what the gross pay would have been if each line haul driver was paid hourly, as if a local driver. Companies may use different base hourly rates for their comparison calculations if use of such rates is substantiated to L&I's satisfaction.
- iv. If the company employs or employed no truck drivers who are or were paid under traditional overtime, then for purposes of the calculations submitted to L&I, the company shall substantiate to L&I's satisfaction what is the comparable base hourly rate for each employee who, under the compensation system, is paid on a non-hourly basis. The company shall perform comparison calculations using such rate.
- v. All calculations of wages that were paid or would have been paid under the company's compensation system should be shown in gross wage totals for each employee. Comparisons to traditional overtime wages should also be reflected in terms of gross wages for each employee.
- vi. For the employees whose data is submitted to L&I, the spreadsheet calculations must show comparisons of the pay under the company's compensation system relative to pay under RCW

49.46.130(1) for each employee for each and every workweek in the period for which data is submitted.

- vii. **Note:** L&I may require additional calculations based on data for different employees or time periods as described above, to include a requirement that the company supply additional spreadsheets.
- d. Certification of accuracy and validity. An authorized representative of the company must certify under penalty of perjury under the laws of the State of Washington that the data and calculations provided to L&I for review are accurate, and are either complete or are reflective of the actual number of hours worked and work units projected to be accomplished by persons performing the same type of work over the time period for which records are submitted.

**Note:** L&I may for good cause or by agreement extend the deadlines within which it requires the company to provide records or information.

**Note:** Any and all documents submitted to L&I for review are subject to public disclosure both during and after completion of L&I's review.

**C. General protocol for L&I's review of requests for evaluation of compensation system:**

1. After it receives a request for evaluation of a company's compensation system, L&I will determine whether the compensation system is reasonably equivalent under all requirements of RCW 49.46.130(2)(f) and WAC 296-128-011 and -012. L&I's determination is an agency interpretation of whether the facts under review comply with RCW 49.46.130(2)(f), considering L&I's specialized expertise in this area. As a practical matter, this interpretation may be further scrutinized by courts. See *Schneider v. Snyder's Food, Inc.*, 116 Wn. App. 706, 66 P.3d 640 (2003).
2. In evaluating a company's compensation system, L&I may consider factors that include but are not limited to:
  - a. The basis for pay (e.g., mileage-based pay system, combination of mileage and piece rate, etc.);
  - b. Extent to which the compensation system includes compensation for overtime in the rate of pay for each employee;
  - c. Size of the company and the number of drivers subject to the plan;
  - d. Notice provided to employees of the their rate(s) of pay;
  - e. Quantitative difference from traditional overtime, if any, when comparing employees' gross pay under the compensation system relative to what they would receive if they were paid under RCW 49.46.130(1) (i.e., how many drivers receive compensation less than, how many equal to, and how many greater than what they would receive under traditional overtime for each workweek?);

- f. Qualitative difference from traditional overtime, if any, when comparing each employee's gross pay under the compensation system relative to what each employee would receive if he/she was paid under RCW 49.46.130(1) (i.e., for drivers who receive greater or less compensation under the company compensation system than under traditional overtime for each workweek, what is the amount of difference?);
  - g. Accuracy and completeness of data, calculations, and information submitted by company or provided upon L&I's request.
  - h. Timeliness of company's submission of data or information requested by L&I (e.g., company's responsiveness to requests for copies of payroll records or to requests for additional information on the compensation system or on the contents of the raw data or calculations). If a company does not provide data or information by deadlines established by L&I, then L&I may choose to take no action on the request for approval, set new deadlines for submission of such data or information, or issue a determination that the proposed compensation system is not reasonably equivalent because the company has not substantiated to L&I's satisfaction its deviation from payment on an hourly basis.
3. L&I may require that the company and/or its representatives put on a presentation describing its compensation system submitted for evaluation. Such presentation will typically be held in L&I's Tumwater offices.
4. L&I may require that it be given a list of all employees of the company for the two years preceding the request for approval who are/were subject to the compensation system. L&I may require that the company provide payroll records or calculations for any or all of these employees.
5. L&I may visit the company's worksite to view company payroll records in order to verify the accuracy and/or completeness of data, calculations, and information submitted.
6. L&I may require that the company provide additional information and documentation that includes, but is not limited to, additional descriptions of the company's compensation system, additional payroll records or calculations for different employees, different data or calculations within the period for which records were furnished, and/or data or calculations for different periods of time within the two years preceding the request for approval of the compensation system. L&I may require information or records not specifically referenced in these protocols.
7. L&I may condition its approval or continued approval of a compensation system on fulfillment or continued fulfillment of specified criteria, or may limit the future duration of its approval, or may require that additional information or documentation be submitted at specified future points to ensure continued compliance with the reasonably equivalent exemption from traditional overtime. Companies may need to make adjustments for unforeseen changes or circumstances for a reasonably

equivalent compensation system to be valid in the future. Changes in circumstances may affect continuing approval. Continuing approval is also based on consistency with the approved compensation system.

No. 86757-7

SUPREME COURT OF THE STATE OF WASHINGTON

Julie Palmer, Michael Ballew, and Larry G. Westberry, Petitioners

v.

Department of Labor and Industries, Respondent

**BRIEF OF RESPONDENT**

**APPENDIX C**

EXPEDITE  
 No hearing set  
 Hearing is set:  
 Date: December 16, 2011  
 Time: 11:00 a.m.  
 Judge/Calendar: Honorable Lisa Sutton

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF THURSTON

JULIE PALMER, MICHAEL BALLEW,  
AND LARRY G. WESTBERRY,

No. 10-2-00598-3

PETITIONERS/PLAINTIFFS,

FINDINGS OF FACT,  
CONCLUSIONS OF LAW, ORDER,  
AND JUDGMENT

V.

Clerk's Action Required

DEPARTMENT OF LABOR AND  
INDUSTRIES OF THE STATE OF  
WASHINGTON,

DEFENDANT/RESPONDENT.

JUDGMENT SUMMARY (RCW 4.64.030)

- |   |  |
|---|--|
| 1. Judgment Creditor:   | State of Washington Department of Labor and Industries |
| 2. Judgment Debtors:  | Julie Palmer, Michael Ballew, and Larry G. Westberry   |
| 3. Principal Amount of Judgment:                                  | - 0 -  |
| 4. Interest to Date of Judgment:                                  | - 0 -  |
| 5. Attorney Fees:   | \$200.00   |
| 6. Costs:   | \$57.75  |
| 7. Other Recovery Amounts:  | - 0 -  |
| 8. Principal Judgment Amount shall bear interest at 0% per annum. |  |

1 9. Attorney Fees, Costs and Other Recovery Amounts shall bear Interest at 12% per annum.

2 10. Attorney for Judgment Creditor: Eric D. Peterson, Assistant Attorney General  
3 WSBA #35555  
4 800 Fifth Ave., Ste. 2000  
Seattle, WA 98104-3188  
(206) 464-5347

5 11. Attorney for Judgment Debtor: David F. Stobaugh, WSBA #6376  
6 Bendich, Stobaugh & Strong, P.C.  
7 701 Fifth Ave., Ste. 6550  
Seattle, WA 98104  
(206) 622-3536

8 This action arises over a rule making challenge by the Petitioners against the Washington  
9 State Department of Labor and Industries. The Petitioners challenge WAC 296-128-012, both  
10 the original rule enacted in 1989 and the amended rule enacted in 2008.

11 Petitioners appeared through their counsel, David F. Stobaugh. The Washington State  
12 Department of Labor and Industries appeared through its counsel, Robert M. McKenna, Attorney  
13 General, per Eric D. Peterson, Assistant Attorney General.

14 The Court reviewed the Agency Record, filed on April 22, 2010, the Supplemental  
15 Agency Record, filed on November 5, 2010, and the pleadings, briefs and declarations on file,  
16 and heard argument. The Court issued its letter opinion on November 10, 2011, which is filed  
17 with the Clerk of the Court. Pursuant to that decision the Court enters the following Findings of  
18 Fact and Conclusions of Law.  
19  
20

### 21 FINDINGS OF FACT

22 1. The Petitioners are Julie Palmer, Michael Ballew and Larry Westberry. They  
23 were employed as interstate truck drivers for Interstate Distributor Company. Palmer was  
24 employed from March 2007 to February 2008, Ballew from 2004 to December 2007, and  
25 Westberry from 2003 through 2007.

26 3. The defendant/respondent is the Department of Labor and Industries ("the  
27

1 Department”), an agency of the State of Washington.

2 4. On March 1, 2007, the Washington Supreme Court invalidated portions of the  
3 Department’s overtime pay regulations related to interstate truckers in *Bostain v. Food Express,*  
4 *Inc.*, 159 Wn.2d 700, 153 P.3d 845, *cert denied*, 552 U.S. 1040 (2007). Prior to *Bostain*, the  
5 Department’s rules adopted in 1989 required overtime to be paid for interstate truck drivers only  
6 for their hours worked within Washington State. The Supreme Court in *Bostain* held that under  
7 the State’s Minimum Wage Act: “The overtime provisions of RCW 49.46.130 apply to all hours  
8 worked by a Washington-based truck driver engaged in interstate transportation, whether within  
9 Washington State or outside of the state.” *Id.* at 724.

11 5. The Department initially adopted WAC 296-128-012 in 1989, following the  
12 Legislature’s enactment of RCW 49.46.130(2)(f). After the Supreme Court of Washington’s  
13 decision in *Bostain*, the Department was approached by representatives of the trucking industry  
14 who urged amendment of WAC 296-128-012 to allow retroactive approval by the Department of  
15 the employers’ compensation systems before March 1, 2007, as reasonably equivalent to  
16 overtime wages.

18 6. The Department filed with the Code Reviser on May 6, 2008 its CR 101  
19 Preproposal Statement of Inquiry for amendments to WAC 296-128-011 and -012. The CR 101  
20 filing stated why rules on the subject may be needed and what they might accomplish,  
21 specifically referencing the *Bostain* decision and the need to amend language with respect to  
22 overtime hours worked out of state, and adding that: “Language will also be added that allows  
23 employers to submit their compensation systems to the department for review and approval.”  
24 The CR 101 filing specified the process by which interested parties could effectively participate

1 in the decision to adopt a new rule and formulation of a proposed rule before its publication,  
2 directing contact to Department employee Sally Elliott, whose contact information was provided.

3 7. The public was given the opportunity before proposal of amendment to WAC  
4 296-128-012 to participate in the decision to adopt a new rule and formulation of proposed  
5 language. There is no evidence in the record of a lack of such participation or opportunity for  
6 such participation before proposal of the amended rule. Petitioners' counsel contacted the  
7 Department on June 30, 2008, before its initially intended CR 102 rule proposal filing date,  
8 expressing concern on behalf of Larry Westberry that he and other interstate truck drivers were  
9 being denied the opportunity to effectively participate. Upon this, the Department delayed filing  
10 the CR 102 by more than three weeks, allowing Westberry's counsel to submit additional  
11 comments, which his counsel did on July 18, 2008.

12  
13 8. The Department filed with the Code Reviser its CR 102 Proposed Rule Making  
14 on July 23, 2008.

15  
16 9. The Department provided an opportunity for notice and comment and received  
17 comments from multiple stakeholders, including Petitioner Larry Westberry, through his  
18 counsel, which firm represents the Petitioners here.

19  
20 10. Since the adoption of RCW 49.46.130(2)(f) and WAC 296-128-012 in 1989, the  
21 Department has claimed the discretionary authority to assess, upon such companies' voluntary  
22 requests for review, whether trucking companies' compensation systems provide reasonably  
23 equivalent compensation. Approval by the Department of a company's compensation system is  
24 not mentioned in nor a prerequisite to operation of the statutory exemption from compliance with  
25 RCW 49.46.130(1).

26 11. The Department's approval of a company's compensation system as reasonably  
27

1 equivalent under RCW 49.46.130(2)(f) and WAC 296-128-012 is not binding on workers such as  
2 Petitioners, who do not have notice of or participate in the Department's review.

3 12. The standards for the Department's review and approval of companies'  
4 compensation systems as reasonably equivalent under WAC 296-128-012 did not change before  
5 and after adoption of amended WAC 296-128-012. The amended rule changed the process for  
6 the Department's review of an interstate trucking company's pay practices. The 2008  
7 amendments to WAC 296-128-012 allowing retroactive approvals did not affect Petitioners who  
8 remained free to file suits against their employers for overtime wages.

10 13. Petitioners were employed by Interstate Distributor Company as interstate truck  
11 drivers. ~~They did not receive any additional compensation for hours worked in excess of 40~~  
12 ~~hours per week.~~ Interstate Distributor Company applied to the Department for approval of its  
13 compensation system under former WAC 296-128-012 as reasonably equivalent on  
14 December 13, 2007. The Department approved the compensation system by letter dated July 18,  
15 2008. Within 90 days of adoption of amended WAC 296-128-012, Interstate Distributor  
16 Company on January 15, 2009 applied to the Department for retroactive approval of its  
17 compensation system. The Department granted such retroactive approval on May 4, 2009 for the  
18 time period July 1, 2005 to March 1, 2007. Petitioners did not appeal these approvals.

20 14. Petitioner Westberry and an alleged class of similarly situated individuals brought  
21 suit on May 29, 2008 against Interstate Distributor Company for overtime wages owed. Pierce  
22 County Superior Court case number 08-2-08739-1. The trial court and the Court of Appeals  
23 ruled against Westberry. The Court of Appeals, Division Two, ruled in a published decision, No.  
24 40687-0 \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2011 WL 4552467. The Court of Appeals denied  
25 reconsideration.  
26  
27



1 Interstate Distributor Company, Petitioners did not timely file for judicial review in this matter.  
2 Petitioners failed to file judicial review under the APA (RCW 34.05.542) within 30 days of the  
3 challenged agency action (the Department's reasonably equivalent determinations of Interstate  
4 Distributor's compensation system). The Department's approval of Interstate's compensation  
5 plan was not challenged by Petitioners, and therefore the relief they request, to invalidate WAC  
6 296-128-012, will not redress Petitioners' claimed harm in this matter. Petitioners thus lack  
7 standing under the APA.  
8

9 6. Adoption of former and amended WAC 296-128-012 did not exceed the  
10 Department's authority under the Minimum Wage Act.

11 7. Petitioners are not harmed by the 2008 amendments to WAC 296-128-012.

12 8. WAC 296-128-012, in its former and amended forms, is consistent with *Bostain*  
13 and the Minimum Wage Act.  
14

15 9. Because Petitioners lack standing, the Court declines to consider their  
16 constitutional arguments, including their separation of powers and due process arguments.

17 10. The CR 101 notice did not use the term "retroactive" to describe the approval  
18 process. No precise or magic words are required with respect to the CR 101 preproposal  
19 statement of inquiry. The CR 101 filing sufficiently put the public on notice of the general  
20 impact of the proposed rule revisions. The Department's amended WAC 296-128-012 was  
21 adopted in compliance with the Administrative Procedures Act.  
22

23 11. Petitioners' requests for declaratory and injunctive relief are denied.

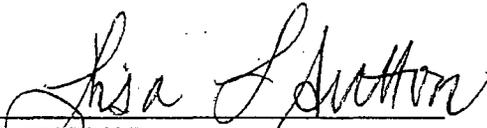
24 12. The Department is entitled to an award of statutory attorney's fees of \$200 under  
25 RCW 4.84.080 and costs of \$57.75 under RCW 34.05.566(3) and RCW 4.84.030 for preparation  
26 of the agency record.  
27

1 From the FINDINGS OF FACT AND CONCLUSIONS OF LAW, the Court enters the  
2 following:

3 **ORDER AND JUDGMENT**

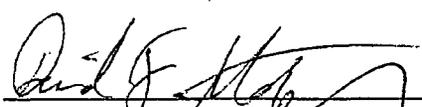
4 It is hereby ORDERED, ADJUDGED, AND DECREED that the Petition for Judicial  
5 Review and Injunction is DENIED, and is DISMISSED with prejudice. The Department is  
6 awarded, and Petitioners are ordered to pay, statutory attorney's fees and costs totaling \$257.75.

7  
8 DONE IN OPEN COURT this 16<sup>th</sup> day of DECEMBER 2011.

9  
10   
11 LISA L. SUTTON  
12 Superior Court Judge

13 Presented by:

14 BENDICH, STOBAUGH & STRONG, P.C.

15   
16 David F. Stobaugh, WSBA #6376  
17 Attorney for Petitioners

18 Approved as to form, notice of presentation  
19 waived:

20 ROBERT M. MCKENNA  
21 Attorney General

22   
23 Eric D. Peterson, WSBA #35555  
24 Attorney for Department

NO. 86757-7

RECEIVED BY E-MAIL

**SUPREME COURT OF THE STATE OF WASHINGTON**

JULIE PALMER, MICHAEL  
BALLEW, and LARRY G.  
WESTBERRY,

Petitioners,

v.

DEPARTMENT OF LABOR AND  
INDUSTRIES,

Respondent.

CERTIFICATE OF  
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on April 27, 2012, she caused to be served the Department's Brief of Respondent and this Certificate of Service in the below described manner:

**Via Email filing to:**

Ronald R. Carpenter  
Supreme Court Clerk  
Supreme Court  
[Supreme@courts.wa.gov](mailto:Supreme@courts.wa.gov)

**Via First Class United States Mail, Postage Prepaid to:**

David Stobaugh  
Stephen K. Strong  
Bendich Stobaugh & Strong PC  
701 - 5th Ave, Ste 6550  
Seattle, WA 98104

Catherine Smith  
Smith Goodfriend, P.S.  
500 Watermark Tower, Suite 500  
1109 First Avenue  
Seattle, WA 98101-2988

Philip A. Talmadge  
Sidney C. Tribe  
Talmadge/Fitzpatrick  
18010 Southcenter Parkway  
Tukwila, WA 98188-4630

**Courtesy copy via electronic mail addressed to:**

David Stobaugh at [davidfstobaugh@bs-s.com](mailto:davidfstobaugh@bs-s.com)

Stephen K. Strong at [skstrong@bs-s.com](mailto:skstrong@bs-s.com)

Monica Dragoiu at [mdragoiu@bs-s.com](mailto:mdragoiu@bs-s.com)

Catherine Smith at [cate@washingtonappeals.com](mailto:cate@washingtonappeals.com)

Tara Friesen at [taraf@washingtonappeals.com](mailto:taraf@washingtonappeals.com)

Philip Talmadge at [phil@tal-fitzlaw.com](mailto:phil@tal-fitzlaw.com)

Sidney Tribe at [sidney@tal-fitzlaw.com](mailto:sidney@tal-fitzlaw.com)

Signed this 27th day of April, 2012, in Seattle, Washington by:

  
ROBIN E. HANEY  
Legal Assistant  
Office of the Attorney General  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104-3188  
(206) 389-3896

**OFFICE RECEPTIONIST, CLERK**

---

**To:** Haney, Robin (ATG)  
**Cc:** Peterson, Eric (ATG)  
**Subject:** RE: 86757-7 Julie Palmer et al v. DLI

Rec. 4-27-12

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

---

**From:** Haney, Robin (ATG) [<mailto:RobinH1@ATG.WA.GOV>]  
**Sent:** Friday, April 27, 2012 4:50 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** Peterson, Eric (ATG)  
**Subject:** 86757-7 Julie Palmer et al v. DLI

RE: *Julie Palmer et al v. DLI*

Case Number: 86757-7

<<Respondent's Brief final 042712.pdf>> <<2012 04 27 COS.pdf>>

Dear Mr. Carpenter,

Please file the Department's Brief of Respondent and Certificate of Service in the above referenced matter.

Thank you.

Robin Haney

Legal Assistant to

Eric Peterson, Assistant Attorney General

WSBA No. 35555

(206) 464-5347