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DIVISION III
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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

JUDITH Q. CHAVEZ, KATHLEEN CHRISTIANSON,
ORALIA GARCIA, AND MARRIETTA JONES, individually,
and on behalf of all similarly situated registered nurses employed by
Our Lady of Lourdes Hospital at Pasco, d/b/a Lourdes Medical Center,

Petitioners,

v.

OUR LADY OF LOURDES HOSPITAL AT PASCO,
d/b/a Lourdes Medical Center,
AND JOHN SERLE, individually and in his official capacity
as an agent and officer of Lourdes Medical Center,

Respondents.

PETITIONERS' OPENING BRIEF

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I. Introduction

The record conclusively shows that the Hospital maintained policies and practices that violate Washington wage-and-hour laws respecting rest-and-meal periods and which are common to all nursing departments or units. Before this lawsuit was filed, no nurse working at this acute-care facility was paid additional compensation for missed rest periods that admittedly occurred during the back-pay period. Each nurse was also denied compensation for "on-call" or "on-duty" meal periods and denied proper compensation for missed meal periods. The Nurses sought certification of a class to remedy *only those violations that are most appropriate for class treatment*, but the Superior Court refused to certify any class or subclass. If affirmed, the Superior Court's erroneous denial of class certification will virtually assure that the Hospital's violation of the meals-and-breaks rights of over 100 nurses will remain un-remedied and will continue into the future. If affirmed, the Superior Court's erroneous denial of class certification will also adversely impact patient safety because the Nurses at Lourdes are not receiving breaks that are not only required by law, but that are required to promote patient safety. Thus, reversal is required to both vindicate the Nurses' rights and to promote important public policies and public safety.

II. Assignment of Error and Issues for Appeal

Assignment of Error: The Superior Court erred when it denied Petitioners' Renewed Motion for Class Certification. The primary issues on appeal that relate to Petitioners' assignment of error include whether the Superior Court committed legal error or abused its discretion by: (1) failing to liberally construe Rule 23 in favor of certification when the case meets Rule 23's requirements;[1] (2) failing to err in favor of certifying a class since the class is always subject to the trial court's later modification or decertification by the trial court as the case develops;[2] (3) failing to make sufficient factual findings to justify denying class certification, or, alternatively, implicitly finding facts against Petitioners or ignoring compelling evidence in favor of class certification without conducting an evidentiary hearing;[3] (4) effectively requiring the Nurses to prove their

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[1] *See, e.g., Moeller v. Farmers Ins. Co. of Wash.*, 173 Wn.2d 264, 278, 267 P.3d 998 (2011); *Weston v. Emerald City Pizza, LLC*, 137 Wn. App. 164, 168, 151 P.3d 1090 (2007); *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 250, 63 P.3d 198 (2003).

[2] *See Moeller*, 173 Wn.2d at 278; *Oda v. State*, 111 Wn. App. 79, 91, 44 P.3d 8 (2002); *Brown v. Brown*, 6 Wn. App. 249, 256-57, 492 P.2d 581 (1971).

[3] *See Oda*, 111 Wn. App. at 94; *see also Smith, v. Behr Process Corp.*, 113 Wn. App. 306, 320 & n.4, 54 P.3d 665 (2002) (*citing Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975)); *Ellis v. Costco Wholesale*, 657 F.3d 970, 983 (9th Cir. 2011) (Rule 23 does not authorize a preliminary inquiry into the merits of the suit for purposes other than determining whether certification was proper. To hold otherwise would turn class certification into a mini-trial.); *United Steel, Paper & Forestry, Rubber, Mfg. Energy Union v. ConocoPhilips Co.*, 593 F.3d 802, 807-08 (9th Cir. 2010) (reversing district court's decision not to certify meal-and-breaks class because the district court's determination that the plaintiff's theory of when they were "on-duty" *might* fail was not a ground to justify the refusal to certify the class—courts are not allowed to make

case as a matter of law as a prerequisite to class certification, when the law does not require an "extensive" evidentiary showing that class treatment is appropriate;[4] (5) implicitly requiring the Nurses to prove class damages in a class case on an individualized basis before class certification and before any damage discovery occurred;[5] (6) ruling that "fact issues" preclude summary judgment on whether a nurse's job in an acute-care hospital is consistent with intermittent breaks when it's the Hospital's burden to prove an exception to its scheduling obligations and no evidence supports its position, and then denying class certification on this declaratory issue even though it ruled that there were fact issues;[6] and (7) making additional legal errors in its summary-judgment rulings that contributed to the erroneous denial of class certification, including rejecting the rest-and-meal period regulation that employers must make every effort to provide

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certification decisions based on a preliminary inquiry into the merits); *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 516-546 (N.D. Cal., Sept. 25, 2012) (certifying class after remand from 9th Cir. and containing detailed analysis of class-action certification requirements after *Dukes v. Wal-Mart* and explaining that *Dukes* primarily concerned certification of nation-wide classes).

[4] *See United Steel,* 593 F.3d at 809 ("Here, the district court not only 'judge[d] the validity' of plaintiffs' 'on duty' claims, it did so using a nearly insurmountable standard, concluding that merely because it was not assured that plaintiffs would prevail on their primary legal theory, that theory was not the appropriate basis for the predominance inquiry. But a court can never be assured that a plaintiff will prevail on a given legal theory prior to a dispositive ruling on the merits, and a full inquiry into the merits of a putative class's legal claims is precisely what both the Supreme Court and we have cautioned is not appropriate for a Rule 23 certification inquiry.").

[5] *See Moore v. Wash. State Health Care Auth.*, 181 Wn.2d 299, 305-15, 332 P.3d 461 (2014).

[6] *See, e.g.*, CP1646-47 at ¶¶1-3.

30-minute meal periods to their employees or equivalent wages in connection with on-call meal periods without any basis to do so, and ruling that employers are not required to track missed rest periods. The Nurses specifically contend that the following summary-judgment rulings were legal error or unsupported by the record and contributed to the erroneous denial of class certification: CP1648 at ¶¶5, 7, 9, CP1649 at ¶¶12, 2, CP1650 ¶¶3, 6, 7, 9, 10, 11, and CP1652 at ¶5.

III. Statement of the Case

A. The Nurses filed a putative wage-and-hour class action.

Respondent Our Lady of Lourdes Hospital ("Lourdes" or the "Hospital") is an acute-care hospital with nine departments: (1) ER or ED (Emergency Department); (2) OB (Obstetrics-Birth-Place-Labor-and-Delivery-Postpartum-Nursery Department); (3) ICU (Intensive-Care Unit); (4) Med/Surg (Medical-Surgical Unit); (5) SDS (Same-Day Surgery); (6) OBS (Ambulatory-Observation-GI-Lab Services); (7) Rehab (Rehabilitation); (8) PACU (Post-Anesthesia Care); and (9) Surgery (Operating Room). (CP319, CP357, CP370-371.) The Hospital uses over 100 Registered Nurses to work 8, 10, or 12-hour shifts to cover these departments, but it uses mostly 12-hour shifts except for Same-Day Surgery. (CP370-371, CP399.)

Petitioners Judy Chavez, Kathleen Christianson, Oralia Garcia and

Marrietta Jones (collectively the "Nurses") are current or former Registered Nurses of the Hospital. (*E.g.*, CR866-869.) The named plaintiffs and other nurse-witnesses are long-term employees who combined have worked in every unit and on every shift, *i.e.*, days, nights, midday, weekends, and holidays. (CP866-869.)

On June 21, 2012, the Nurses sued the Hospital for wage-and-hour-and-overtime violations in connection with their statutorily mandated meal-and-rest periods. (CP979-990.) On April 3, 2013, after basic class-document discovery on the Hospital's policies, and limited-pre-class-party-only depositions, the Nurses moved to certify a class of "all registered nurses who worked at least one hourly shift at Our Lady of Lourdes Hospital at Pasco from June 25, 2009 through present" to litigate common liability questions related to the Hospital's illegal meal-and-break policies and practices. (CP938.) The Nurses also alternatively proposed various sub-classes of nurses by shift or department. (CP943.) The Nurses included with the brief a comprehensive statement of facts summarizing the evidence gathered during limited pre-class discovery. (CP865-935.) The Nurses also supported their facts with record evidence. (CP288-864.) The Nurses incorporate their underlying statement of facts herein for purposes of resolving this appeal. (CP865-935.)

On March May 1, 2013, the Hospital filed a response to the

Nurses' motion for class certification. (CP226-287.) The Hospital's response was supported almost exclusively by affidavits provided by its managers that were not subject to cross-examination.[7] The Hospital's basic class-certification defense is that "operational differences" between departments would make it difficult to resolve damage questions on a class basis. (CP226-287.)

Before the class-certification hearing, the Nurses provided a trial plan outlining the common issues that needed to be resolved on a class bases. (CP217-221.) The issues were divided between 15-minute rest periods and 30-minute meal periods. (CP217-221.) The Nurses showed that the Hospital's meals-and-breaks policies were HR policies of general application and that any "operational" differences between departments were legally irrelevant and not a bar to class certification. (CP190-221.)

The common liability questions in the trial plan relating to 15-minute-rest periods included: (1) Did the Hospital have an illegal policy or systemic practice of failing to track hours worked for missed rest periods and failing to compensate the nurses for this time? (2) What is a legal rest period for nurses who are charged with the responsibility of caring for

[7] The Hospital's evidence was not included in the initial record on appeal by the Clerk's office despite its designation. The Nurses have conferred with the Hospital, and confirmed it intends to file a supplemental designation to correct this error. Thus, specific "CP" cites to the Hospital's evidence was not available at the time this Brief was due, but the Hospital's evidence will be part of the appellate record before oral argument.

patients in an acute care hospital, *i.e.* (a) can a nurse who is "in patient assignment" also be on a break without another nurse relieving her from patient assignment; (b) are intermittent breaks consistent with the nature of a nurse's duties *i.e.*, can the hospital require nurses to take intermittent or "mini breaks" while they are assigned patient responsibility; (c) did the Hospital violate its "scheduling" obligations by refusing the schedule 15-minute block rest periods for nurses it assigned this patient responsibility; and (3) Was the Hospital's conduct willful. (CP218-218.)

Regarding meal periods, the Nurses asked the Superior Court to resolve on a class basis whether: (1) the Hospital unlawfully deprived the 12-hour shift nurses of a second-meal period; (2) the Hospital had an unlawful auto-meal-period-deduction policy, including (a) whether the Hospital systematically required the nurses to remain on duty and on the premises during meal periods in the interest of Lourdes such that it was required to provide the nurses with a paid lunch as a matter of course (a misclassification theory);[8] (b) whether the Hospital's automatic-meal-period deduction policy was otherwise illegal such that there was a presumption that the nurses underreported missed unpaid meal periods; and (c) whether the Hospital willfully created or operated an unlawful auto-meal-period-deduction policy such that it knew it was systematically

[8] The Nurses received one unpaid meal period under the Hospital's system.

under-compensating nurses for hours worked. (CP218-219.)

B. The Superior Court held the class-certification ruling in abeyance and directed the Nurses to file a series of summary-judgment motions.

On May 17, 2013, the Superior Court conducted oral argument on the Nurses' motion for class certification. (RP1-5.) At the conclusion of the hearing, the Superior Court indicated that because of the "complexity of all this," it was not going to rule on whether class certification was appropriate. (RP122.) The Superior Court was not "comfortable" with the underlying meals-and-breaks law and instructed *the Nurses* (not the Hospital) to file a series of summary-judgment motions to help the Superior Court better understand the legal issues and controlling law. (RP123-129, RP137.) The Superior Court held the class-certification issue in abeyance pending "doing summary judgments." (RP130.) It appears the Superior Court implicitly believed that the Nurses were required to prevail affirmatively on the merits through summary judgment to obtain class certification. (*E.g.*, RP130.)

C. The Nurses complied with the Superior Court's directive and filed a series of summary-judgment motions.

1. The Hospital systematically failed to track time and pay nurses for missed rest periods.

On July 24, 2014, the Nurses moved for summary judgment on the issue of whether the Hospital routinely failed to comply with its obligation

to track and pay for missed rest periods. (CP118.) The Nurses pointed the Court to undisputed evidence establishing that the Hospital had systematically failed to track time for missed rest periods and that it had never paid a nurse for a missed rest period at least until the time party depositions had occurred. (CP118-134.)

a. The Hospital's meals-and-break policies are general HR policies that apply uniformly to all nursing departments; there are no relevant department-level policies.

Anita Kongslie is the Hospital's Risk Manager and Rule 30(b)(6) representative on the Hospital's policies. (CP303-305, CP858-64 at ¶¶1-3, 6-7, 11.) She helped prepare the Hospital's written discovery responses, including its sworn responses to the first and second set of interrogatories, and verified under oath that the Hospital's interrogatory responses were true and correct. (CP307-309, CP633-663, CP732-740.) The sum-total of the Hospital's official written meal-and-breaks policies are reflected in documents titled: (1) Policy No. 5100.07 (Rest and Meal Periods); (2) Lourdes Medical Center Payroll Policies and Procedures; (3) Payroll General Orientation; (4) Policy No 5100.06 (Advances in Pay); and (5) Payroll Calendar. (CP309, CP742-755.) These policies control, unless expressly modified by the Collective Bargaining Agreement ("CBA"). (CP309, CP690-730.) These meal-and-break policies are HR policies of general application and apply to all nurses in all departments. (CP309.)

Kongslie is tasked with ensuring the Hospital has policies and processes that comply with wage-and-hour laws. (CP304.) The Hospital's "Senior Leadership" is responsible generally for making official policies. (CP309.) An official policy is created when—and only when—there is a "consensus" and Senior Leadership reduces the policy to writing. (CP309-310.) If the policy involves nursing practices, by law it must also be in writing and approved in advance by the Nursing Director.[9] Kongslie admitted that written—as opposed to oral—policies are necessary in a hospital setting to: (1) reduce or eliminate ambiguity; (2) show that the policy was authorized by Senior Leadership; (3) give clear instructions to staff; (4) allow consistent training; and to (5) promote continuity when there is staff or management turnover. (CP310.) Written—as opposed to oral—policies are also required by the CBA and must be communicated to the nurses if they are changed. (CP315, CP697, CBA § 6.7.2.). The Hospital did not produce any department-level written policies governing breaks, although there are department-level policies that cover other matters. (*E.g.*, CP618-621.)

[9] *See* WAC 246-320-136(1) ("The hospital leaders must: (1) Appoint or assign a nurse at the executive level to: (a) Direct the nursing services; and (b) Approve patient care policies, nursing practices and procedures.").

b. "Kronos" and "Meditech" track time and calculate pay.

Another Hospital Rule 30(b)(6) representative, Roberta Jo Wittorf, was designated to testify about the Hospital's Kronos and Meditech software programs, its accounting procedures, and their implementation related to meals-and-breaks. (CP665-667). She explained that: "Kronos is used by our hospital for time and attendance record keeping. It is not used for pay calculations," *i.e.*, Kronos is the system that tracks "hours worked." (CP671.) Kronos can be customized by the Hospital to meet its record-keeping needs. (CP671.)

The Hospital uses Meditech as its standard operating platform. (CP671.) "Meditech is used in all forms of patient care. It tracks the entire revenue-cycle process for patients to generate a bill." (CP671.) "It can pay employees and it can pay vendors. It is the core accounting software." (CP672.) Meditech interfaces with Kronos to complete the accounting system. (CP672.) Meditech includes an internal e-mail system and each employee has his or her own internal e-mail account that the Hospital uses for internal business. (CP682.)

Kronos also identifies time based on shift differentials and an employee's work-role and other variables that affect that employee's pay. (CP632.) Kronos takes the time and interfaces with Meditech, which

calculates the pay. (CP632.) "Meditech would understand that evening hours are paid at this rate; overtime is paid at this rate; overtime is paid at this rate if it's a day shift; overtime is paid at this rate if its an evening shift." (CP632.) Combined, Kronos and Meditech track and calculate each nurse's pay "shift by shift, day by day." (CP672-673.) A Hospital employee programs all the variables—like, for example, pay rate, shift-differentials, charge pay, shift-schedules for purposes of daily overtime—into Kronos and Meditech, and "Meditech takes the time from Kronos, and it does the math and generates payroll." (CP672.)

The Human Resources Department and Payroll share a database, but "HR is responsible for inputting employee rates of pay and any differential values, add-on pay that would be applicable." (CP685.) The differentials are "standard." (CP685.) "So once an employee is tied to whatever differential applies, Payroll would apply that mathematic, so to speak." (CP685.) Variables like "Premium Pay," "Straight Pay," "Regular Rate of Pay," "Advances in Pay," "Garnishments and Wage Assignments," "Pyramiding," are also handled by HR (not department-level managers) as a matter of the Hospital's general policies. (CP685.)

"Kronos stores hours information. Kronos has an employee's schedule, if a manager and an employee deem it appropriate to include those." (CP672.) "Kronos will track in-and-out punches. It will track

overtime calculations. It will track break periods,[10] meal periods. It will track shift time frames, but Kronos has no compensation information in it." (CP672.) "It does not know hourly rates. It does not know shift-differential rates. It works solely in terms of time." (CP672.) Thus, "it would know overtime hours, not overtime compensation." (CP672.) ***Kronos is programmed with the assumption that an employee is entitled to one unpaid meal period and it automatically deducts 30-mintes of time from the shift, unless employee hits a "cancel deduction" button for a missed lunch.*** (CP674-677.) ***There is no similar function to track time or payment for missed rest periods.*** (CP674-677.)

For example, if an employee on a 12-hour shift clocks out 14-hours later, "the software would identify it as two hours in excess of their standard shift and apply it as overtime, pending approval." (CP672.) "Kronos has a red-flag system that says, this employee is over and it goes 'Ding' and goes to a manager, and then a manager has to approve or disapprove of that overtime." (CP672.) ***An employee who works unauthorized overtime is subject to discipline under the Hospital's official written policy***, and hitting the "cancel deduction" button fort a missed lunch results in overtime that can subject a nurse to discipline if its

[10] Kronos does not actually track missed break periods, as Wittorf later clarified in her deposition. (CP674-677.)

unauthorized. (CP324-326, CP746, CP683-684, *see also* CP168-169 at ¶11, CP1721-1727 at ¶12, CP1728-1734 at ¶14.)

c. The Hospital failed to track time for missed rest periods.

The Hospital's CFO and another Rule 30(b)(6) representative, Roberta Wittorf, testified the Hospital tracks an employee's time—or "hours worked"—using Kronos, and it also allegedly has a physical file for "exceptions." (CP670.) Wittorf admitted, however, that the Hospital doesn't keep a physical "exceptions" file for each employee. (CP670.) The physical exceptions file is allegedly organized by pay-period and not by employee (and was never produced despite the Nurse's discovery request). (CP670.) Thus, the Hospital claims it cannot know an employee's complete payroll history by looking solely at their individual file. (CP670.) Emails from employees to payroll or their supervisors are allegedly stored in a physical file (and not electronically) and are subject to a seven-year document retention policy (but, again, this alleged physical file was never produced). (CP670.)

Lourdes knew that its Payroll Department is supposed to track missed-rest-and-meal periods as additional hours worked. (CP641-642, Int. Res. #26.) The Hospital configured Kronos to track missed meal breaks for each Hospital employee. (CP674-677.) Despite Kronos's

awesome capabilities, the Hospital did not program it to track missed rest periods. (CP318, CP674-677.) Kongslie is not aware of a policy that instructs nurses to report missed rest breaks to payroll. (CP318.) Moreover, in answering written discovery, the Hospital didn't do anything to verify whether any nurse had ever been paid for a missed rest period and its representative is not aware of any nurse who has ever been paid for a missed rest period. (CP318.)

d. No evidence shows that any particular nurse in any department was ever paid for a missed rest period during the relevant period and the affirmative evidence shows to the contrary.

As of the date that party depositions occurred in this case, and before the Hospital rolled out its new "Symphony Policy," wherein it started tracking missed-rest periods through its Kronos time-keeping system as a result of this lawsuit (CP833-834), the Hospital admitted that it did not have a written policy that required it to pay an employee for a missed rest period. (CP327.) The Hospital admitted that it did not have a written policy instructing an employee how to get paid for a missed rest period or instructing an employee to notify a supervisor if she misses a rest period. (CP318.) The Hospital admitted that it did not have a written policy instructing nurses that they are to report missing rest periods to their supervisors or payroll for payment via e-mail or through any other

method. (JA333.) The Hospital admitted that it had never provided documents to the nurses stating that they are entitled to compensation for missed rest periods. (JA335.)

In fact, before 2012, Wittorf, the Hospital's CFO and Rule 30(b)(6) representative designated on the Hospital's meal-and-break-payment practices, admitted that she is not aware of any instance in which any hospital employee had been paid for a missed rest period before 2012. (CP673.) Wittorf "believes" that perhaps one such payment may have occurred before this lawsuit was filed on June 25, 2012 (CP674), but the Hospital failed to produce even one document in discovery proving or supporting this "belief." (*E.g.*, RP387-388.)

When asked about whether the Hospital had any way to track missed rest periods through Kronos, Wittorf answered in her representative capacity: "not at this time." (CP674.) In 2012, on "less than five" occasions, Wittorf claims that the Hospital paid an "employee" for a missed rest-period based on the "definition of what we consider to be a rest break," but Wittorf—in her representative capacity—could not confirm whether it ever paid any nurses for a missed rest break. (CP674.) The Hospital also couldn't identify any writing instructing nurses to notify payroll if they miss a break; there's no function on Kronos (the official time-keeping system) that would allow an employee to report a missed

break; and there's no written policy instructing an employee to send an e-mail or letter to payroll if they miss a break. (CP676.) Wittorf also volunteered that, "because there is no standard deduction or standard code for a missed rest break, that it's really hard to determine the extent its actually occurring" and "there isn't a clear, easy way to define the extent of situations in which an employee could take advantage of adding back a rest break." (CP678.) And that's precisely because of the way the Hospital intentionally set up its system. (CP678; *see also* RP51-53.)

For example, the evidence shows how the Hospital tracked missed meal breaks before the new symphony policy was implemented. The Hospital produced a list of 4,890 times where Hospital employees—but not necessarily nurses—reported a missed, unpaid first meal period through Kronos' "cancel deduction" function. (CP678-679.) In contrast, the Hospital found less-than-five times where a Hospital employee—but not necessarily nurses—received credit for a missed rest period. (CP679.) When asked whether this raised any red flags for Wittorf the C.P.A. as to whether the Hospital's system was inadequate to track missed rest periods, Wittorf refused to answer the question. (CP679.)

Dee Hazel is a former nursing manager who reported directly to the Nursing Director. (JA331-332, CP757.) Hazel had nurses who reported directly to her as well. (JA331-332, CP757.) Hazel testified

under oath and on behalf of Lourdes in her management capacity in an unrelated Arbitration hearing involving nurse discipline. (CP771-772.) When asked whether there was a record of the particular nurse "putting in for" a missed break to determine whether that nurse was actually on duty, Hazel responded flatly: "***We don't pay missed breaks***. We pay missed lunches." (JA775) (emphasis added.)

Consistent with the above admissions, the plaintiff-witnesses have all affirmed under oath ***both*** that there was no system in place for tracking time for missed rest periods ***and*** that they had never been paid for a missed rest periods despite missing rest periods regularly. (CP144 at ¶6, CP148-149 at ¶¶3-8, CP155-157 at ¶¶3-8, CP161-163 at ¶¶ 5-9.) The non-party nurse-witnesses who submitted affidavits on behalf of the Nurses also universally testified ***both*** that there was no system in place for paying missed rest periods ***and*** that they, in fact, had never been paid for a missed rest period despite missing rest periods regularly. (CP1721-1727 at ¶7, CP1728-1734 at ¶4, CP598-599 at ¶3, CP604-605 at ¶¶6-7.) Finally, most of the 32 affidavits submitted by the Hospital in opposition to class certification, filed May 1, 2013—which were prepared and gathered by the Hospital's managers and not subject to cross examination—state or imply something to the effect that the "nature of the work of a nurse requires them to occasionally miss rest periods," but not

one of the affidavits pointed to any specific occasion where any nurse in any department was actually paid for a missed rest period at any time before the depositions occurred in this case or during the proposed class-certification back-pay period. (*E.g.*, Barron Aff. ¶¶4, 8; Carr Aff. ¶3; Champagne-Wright Aff. ¶36; Funderburk Aff. ¶22; Gomez-Hodges Aff. ¶23; Gooding Aff. ¶10; Graves Aff. ¶17; Hannigan Aff. ¶41; Huddleston Aff. ¶14; Kelly Aff. ¶18; Pease Aff. ¶24; Pizzo Aff. ¶16-17; Pleyo Aff. ¶¶31-32; Ruzicka Aff. ¶15; Schwarder Aff. ¶¶2-3, 28, 32; Wright Aff. ¶¶16, 20-22.) As of the time of the filing of this brief, and despite the Nurse's timely discovery request, the Hospital has never once identified any particular nurse who was paid for any particular missed rest period during the proposed class-certification period. (RP355-372, RP387-390.)

2. The Hospital systematically failed to comply with its rest-period scheduling obligations.

On September 2, 2014, the Nurses filed motion for partial summary judgment relating to the Hospital's rest-period-scheduling obligations and whether a nurse can legally be "on break" and "in patient assignment" at the same time. (CP53-66.) The Nurses contend that the Hospital never actually schedules 15-minute block rest breaks for nurses in any department and that it does not relieve them of patient assignment to take rest breaks when the Hospital is busy. (CP53-66.) One of the

Hospital's basic positions in this case is that a nurse can legally be "on break" while simultaneously caring for and accepting responsibility for patients as long as he or she isn't that busy. (*E.g.*, RP231-244; CP68-85.) The nurses provided undisputed evidence that they are, by definition, "working" and "on duty" and not on break when they are in patient assignment unless and until they are relieved of duty by another qualified nurse. (*See also* CP6-28 [MSJ Reply Br.].)

a. "Patient assignment," *i.e.*, patient chain-of-custody and the patient "handoff" are standards of nursing that apply to all nursing departments.

Denise Clapp is the Hospital's Chief Nursing Officer and a designated Rule 30(b)(6) representative on the factual application of the Hospital's policies; relevant nurse training; the Hospital's staffing and scheduling procedures by type of shift and type of nurse; and an explanation of some of the documents the Hospital produced in discovery. (CP343-344, CP347, CP858-863.) Clapp is responsible for the "standards for nursing care in the organization" and for "you know, knowing the—overseeing and ensuring the scope of practice for nursing, the law." (CP347.) By "law," she means "the Nurse Practice Act, which is a set of standards that delegate how a nurse can practice" that is "binding on the nurses" and can impact their licenses. (CP347-348.) For example, as discussed below, WAC 246-840-710(4)(c) prohibits nurse abandonment of

a patient and requires every nurse to hand patients off to another qualified nurse when leaving assignment to promote continuity of care.

According to Clapp, the "nursing process" in every department is a set of steps that a nurse goes by to take care of a patient (CP350.) Specifically, the process entails an "initial assessment," a "care plan," "ongoing documentation," and an "end-of-shift report." (CP351.) The end-of-shift report to another incoming nurse is essential to achieve "continuity of care for the patient." (CP351.) The "nursing process" is a nurse's "essential responsibility." (CP350-351.)

The "handoff" or "report" is a standard of care in nursing. (CP351.) Right after the handoff is when the assignment of patient responsibility shifts from one nurse to the other. (CP351.) Before a nurse can be deemed to have left assignment, she has to either properly hand off to another nurse or discharge the patient from the Hospital. (CP351.) If a nurse tried to leave assignment without a handoff, she'd be disciplined. (CP351.) The handoff has been a requirement of nursing since before 1989. (CP351; *see also* TP189-231.) When a nurse in any department is "in assignment" she is working and, by definition, she is not on break. (*E.g.*, CP408, CP1721-1727 at ¶2, CP1728-1734 at ¶2, CP598-599 at ¶2, CP604 at ¶3.)

Because of the nature of a nurses' duties, it is not feasible to

relieve a nurse of her duties—*i.e.*, have her hand off patient assignment 10 or more times a day for "mini" or "intermittent" breaks. According to Garcia, "[I]f I can't find coverage to even give me a 15-minute break, I can't find coverage to do a five-minute one either." (CP564.) According to Chavez, "Mini-breaks" aren't breaks because you can't transfer a patient to another nurse for two minutes—that is not consistent with the nature of an RN's duties. (CP530.) Also, the Hospital has failed to produce any evidence—because none exists—that intermittent breaks are sufficient to combat nursing fatigue or that they promote patient safety.[11] The other nurse-witnesses agree that intermittent breaks are inconsistent with the practice of nursing because: (1) the failure to schedule breaks means nurses who are in patient assignment don't get breaks; it is impractical to hand off a patient for a 2-5 minute "mini-break"; and a nurse who hasn't been relieved of her patient assignment is, by law, still "on duty" and not on break. (CP1721-1727 at ¶¶5, 8, CP1728-1734 at ¶¶6-10, CP599 at ¶¶5-7, CP604-605 at ¶¶5-8.) The Hospital failed to produce any admissible evidence that contradicts this evidence; that shows that it is feasible for a nurse to hand off her patients multiple times for "mini-breaks"; or that this would be consistent with good care.

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[11] *See* WAC 246-320-171(2) (requiring Hospital's to systematically collect, measure, and assess data on processes and outcomes related to patient care and make plans to improve performance and outcomes based on actual data and evidence).

On whether a nurse is on duty when she is in assignment, according to Clapp, "Here's what I would say: That as a nurse, when you're not taking care of your specific patient, someone else needs to be in charge of taking care of that patient." (CP361.) And until they formally check off to another nurse, they are still responsible for that patient. (CP361.) Clapp agrees that "if something goes south, a patient codes or something goes wrong and that nurse isn't there and she hasn't checked off, she's on the hook for that patient." (CP361.) "Until she checks off, she's in assignment and responsible for that patient." (CP361.)

The named plaintiffs and other nurse-witnesses agree with Clapp about the requirements of the nursing process and its relation to meals and breaks. (*See also* RP350-355.) For purposes of meals and breaks, each nurse in each unit is subject to the same problem once she is assigned a patient: whether a nurse can take a rest break is dictated by whether the Hospital provides her with another nurse to report off to or the fortuitous event that there are no patients to care for during a break period. (*E.g.*, CP545, CP548-550, CP552, CP554, 557-558, CP560, CP564, CP574, CP576, CP584, CP1721-1727 at ¶¶2, 6-7, 13, CP1728-1734 at ¶¶2-3, 7, CP598-601 at ¶¶2, 5-6, 10, CP604-606 at ¶¶2-6, 11, CP387, CP389-390, CP394, CP416, CP426-427, CP488-489, CP491-496, CP499-500, CP513-517, CP520, CP525, CP530, CP433, CP440, CP444, CP445-458, CP457,

CP466.)

Nevertheless, the Hospital does not have a policy that requires or sufficiently allows nurses to "hand off" or "check off" their patients to take a meal or rest break and it doesn't keep records of hand offs or check offs for meal and rest periods. (CP326-327.) It does not have a specific policy instructing nurses or their managers on how or when they are supposed to handoff a patient for meal or rest periods and they haven't been trained on any such policies. (CP361.) There is no system in place that would allow a nurse to check off to another nurse to take a scheduled rest break, despite the fact that its Nursing Director knows that being "in assignment" means that nurses are "working" and, by definition, not on break; and the affirmative evidence cited herein shows that the Hospital has no policy to schedule breaks or relieve nurses who are in patient assignment, and the Hospital does not schedule breaks or provide nurses with a way to hand off their patients when they are in patient assignment for mandatory rest periods. (*E.g.*, CP143-144 at ¶¶5-7, CP149-150 at ¶¶5-8, CP155-156 at ¶¶3-8, CP161-162 at ¶¶ 5-9.)

b. The Hospital's actual policy required providing nurses with a scheduled, 15-minute "block break."

The Hospital's official written policy provided for "scheduling" and "a" 15-minute block break and did not authorize intermittent breaks

during the back-pay period; this policy allegedly changed when it rolled out its "Symphony" policy after depositions in this case occurred. (*E.g.*, CP669, CP833-834.) Thus, as part of the Hospital's management rights—to comply with the minimum 10-minute rest period the law requires—it elected to grant the nurses the right to an uninterrupted 15-minute block rest period as a matter of policy. (CP321.) The Nurses independently contend that they had an employment-law/contract right to 15-minute block breaks as a term-and-condition of employment under the Hospital's written policies of general application.

3. The Hospital failed to provide 12-hour shift nurses with a second lunch.

On September 24, 2014, the Nurses moved for summary judgment on behalf of 12-hour shift nurses because the Hospital systematically failed to provide them with a legally required second lunch or pay them when they missed it as a matter of practice and policy. (CP1704-1719; *see also* CP1653-1662.) The Nurses based the motion on the fact that: the Hospital uses mostly 12-hour nursing shifts to staff the Hospital: (2) 12-hour shift nurses are entitled by law to two meal periods in a 12-hour shift; (3) at least through the time of depositions, the Hospital never actually provided 12-hour shift nurses with a second meal period; (4) at least through the time of depositions, Kronos—the Hospital's time-keeping

system—was set up under the assumption that nurses only receive one unpaid meal period; (5) at least through the time of depositions, no evidence shows that any 12-hour shift nurse had ever knowingly waived her right to a second meal period. (CP1704-1705.) The majority of nursing shifts are 12-hour shifts. (CP358-359, CP735-736, Ans. to #6.)

The Hospital's Rule 30(b)(6) representative Kongslie admitted that although there is a Union Contract, the Hospital has inherent "management rights" and "management responsibilities." (CP314.) As the owner, operator and employer the Hospital can exercise management rights, and it knows that it must comply with its legal obligations, independent of anything contained in a CBA. (*E.g.*, CP314, CP320.)

In this regard, Hospital knows—and has known during the entire limitations period—that it is required by law to provide nurses who work a 12-hour shift at least two meal periods and three 15-minute rest periods. (CP322-323, CP742-743.) Despite the law's requirement and the Hospital's official policy, the Hospital only actually allows 12-hour-shift nurses one unpaid meal period. (*E.g.*, CP346, CP395, CP1721-1727 at ¶10, CP1728-1734 at ¶12, CP600 at ¶9, CP605 at ¶10, CP145 at ¶8, CP150 at ¶9, CP157 at ¶9, CP163 at ¶10, CP167 at ¶¶3, 9.)

Furthermore, no evidence shows any nurse has waived or attempted to waive meal periods and the Hospital doesn't consider the

issue of waiver even "relevant" to any issue in dispute. (CP643 Ans. #'s 31-32.) The Hospital maintains one—and only one—official "personnel file," which is supposed to be the complete employment file for every employee. (CP316.) Kongslie isn't aware of any written waivers from any nurses waiving their right to meal periods, and if the Hospital had any such waivers, they would be in a nurse's personnel file. (CP317.) As of the time of Kongslie's deposition, the Hospital had never asked any nurse to waive a meal period. (CP316.) "To the best of my knowledge, no, that's never happened." (CP316.)

Despite the fact that: (1) the plaintiff-nurses and third-party nurses unanimously testified that the Hospital did not provide 12-hour shift nurses with a second lunch of any kind; (2) Kronos is programmed using the assumption that all nurses are entitled to one—and only one—unpaid lunch;[12] and (3) there was no system to report missed second lunches, the Hospital defended the motion with several new affidavits that now incredibly claimed that the Hospital really had a phantom "2-lunch system," in which the first lunch was presumptively unpaid and the second lunch was a paid, working lunch. (CP1664-1687.)

In reply, the Nurses pointed out that WAC 246-320-136(1)

[12] *See, e.g.*, TP38-39 (the Hospital's counsel admitted Kronos is programmed under the assumption the nurses are entitled to only one unpaid meal period).

required the Hospital to appoint a Nursing Director to: (a) Direct the nursing services; and (b) Approve patient care policies, nursing practices and procedures. (CP1653.) Lourdes appointed Denise Clapp to act as its Chief Nursing Office and as its Rule 30(b)(6) representative to testify to the corporate knowledge of Hospital regarding, among other things, the training the nurses received on the Hospital's relevant meals-and-breaks policies. (CP343-344, CP347, CP354-355.) Clapp prepared for her deposition by consulting with the lawyers, talking to her two direct subordinate nursing managers, *i.e.*, Suzanne Hannigan and Joanie Funderburk, and reviewing documents, and she testified she felt comfortable that she was prepared to speak for the Hospital under oath in her representative capacity. (CP343-345.) Clapp reviewed the relevant meal-and-break policies, personnel files, the agenda for new-nurse orientation, and the Hospital's discovery responses. (CP344.) In connection with her testimony with regard to the training the nurses actually received on the Hospital's relevant policies, Clapp volunteered that nurses in a 12-hour shift "would have three 15-minute rest breaks and one meal break." (CP345.) Counsel followed up with Clapp because he wanted to be sure he clearly and specifically understood Clapp's testimony as the Nursing Director and as the Hospital's designated representative regarding, factually, how many meal periods the Hospital provides 12-

hour shift nurses:

> **Q: How many meal breaks does the hospital actually provide nurses in a 12-hour shift?**
>
> **A: One meal break.**

(CP346, Clapp. Dep. 17-18, lns. 24-25 & 1.)

The above testimony occurred without any objection at all and specifically without any objection to the form or that the question was outside the designated scope of the deposition under CR 30(h)(2). (CP346.) Clapp also testified that she understood the difference with a 30-minute meal period and a 15-minute rest break and she clearly and unequivocally testified that the Hospital actually provided the 12-hour nurses with "one meal break." (CP346.) Independent of Clapp's status as a designated Rule 30(b)(6) representative, she is actually responsible for the Hospital's entire nursing operation and the law charges her with being responsible for Hospital's entire nursing function. *See, e.g.*, WAC 246-320-136(1). Clapp and the Hospital had the opportunity to withdraw or correct this testimony through an errata sheet under CR 30(e) but didn't and the Hospital failed to make any objection to the admissibility of this testimony as a binding admission of the Hospital in response to the summary judgment motion.

The evidence also shows that Clapp's testimony isn't the result of a slip of the tongue, a misunderstanding, or some sort of tricky lawyering in a deposition. The Hospital provided a list of 12-hour shifts that the Hospital has in response to Plaintiffs' Second Interrogatory No. 6.

(CP735-736.) Each of the "12-hour shifts" are 12.5 hours long, which is consistent with both Clapp's testimony and the provision in the CBA that "all nurses shall receive an unpaid meal period of one-half (1/2) hour." (CP701-702, CBA § 8.3.) The Hospital also admitted in its response to the Plaintiffs' Motion for Summary Judgment that Kronos is only set up to deduct one unpaid 30-minute meal period for any given 12-hour shift. (CP1669.) In the Hospital's new Kronos policy, which was effective March 10, 2013, it confirmed that the meal breaks the Hospital allows are "unpaid" and no written policy or document that the Hospital has ever produced in discovery that Plaintiffs are aware of discusses a bifurcated "first lunch unpaid/second working lunch paid" system at the hospital or that the Hospital had set up a "paid" lunch system of any kind. (*E.g.*, JA833-841.) Every 12-hour shift nurse who filed a declaration in support of class certification testified that the Hospital never provided them with a second meal period as a matter of course and that its policy was to allow them one unpaid meal break during 12-hour shifts. (CP1655.) The reason Clapp testified that the Hospital provides 12-hour shift nurses with one meal period is because the Hospital only provides 12-hours shift nurses with one meal period. (CP1655.)

4. The Hospital misclassified the first lunches as presumptively "unpaid" when the nurses work through lunch and are "on call" during lunch and "subject to recall."

The undisputed evidence shows that the nurses were "subject to recall" as a matter of course and *on duty* during their first lunch, but that they were subject to an automatic deduction and were not given a paid first lunch as a matter of uniform policy of general application. (CP395; CP1721-1727 at ¶¶10-12, JA312; CP1728-1734 at ¶¶11-13, JA319; CP600-601 at ¶¶9-12, CP605-606 at ¶¶9-12; CP143-144 at ¶¶3-4, 8, CP150-151 at ¶¶9, 13, CP157-158 at ¶¶9-10, JA835, CP163 at ¶10; CP167-168 at ¶¶3, 9-11.) The Hospital's policy required nurses to "clock out" only if they left the premises after receiving special permission to clock out. (*E.g.*, CP746 at ¶9.) No evidence contradicts the fact the Nurses received only an unpaid first lunch and that they ate lunch while being "on call" and "subject to recall" while they ate as a matter of course. Every nurse in the facility was misclassified as being "off duty" and not "subject to recall" during the first lunch and is entitled to compensation. (*See also* RP264-307, 374-380.)

5. The Hospital discouraged reporting even completely missed, presumptively unpaid first lunches through its official no-unauthorized-overtime policy.

The Hospital has exercised its management rights and has decided

to pay nurses who work past their regular shift time daily overtime as a matter of policy. (CP325, CP746 at ¶¶6 & 8.) If a nurse misses a meal period and this pushes the time she worked past her regular shift, the Hospital knows she would be entitled to overtime compensation for that time under its policies. (CP325.) If a nurse misses a meal period without pre-authorization, and this pushes the nurse into daily overtime, the Hospital's official policy subjects him or her to disciplinary action. (CP326, CP746 at ¶¶6 & 8, *see also* CP1721 at ¶12, CP1728-1734 at ¶14, JA315, CP601 at ¶11, CP605-606 at ¶¶11-12.)

D. The Superior Court made a number of legal rulings in its Global Summary Judgment Order.

On February 27, 2015, the Superior Court reduced its legal rulings in connection with the summary-judgment motions to a written order. (CP1646-1652.) Among other things, the Superior Court ruled: (1) employers have no obligation to systematically track time for missed rest periods; (2) a genuine factual issue exists regarding whether nurses at Lourdes have or have not been compensated for all time worked; (3) there is a factual question of whether nurses "in patient assignment" at Lourdes are "vigilant" and engaged in work activities, as was found in the *Brinks* case, so that they can have breaks without being relieved of patient assignment; (4) the Court cannot grant judgment as a matter of law to

either party on whether intermittent breaks are "consistent with the duties" of nursing; (5) "contrary to the interpretive guidelines," an employer is not required to use "every effort" to make sure an employee on a paid lunch receives the full 30 minutes; (6) "intermittent breaks are not, as a matter of law, inconsistent with nursing duties." ***The Nurses take exception to the above specific rulings and contend that they*** **are in error and contributed to the erroneous denial of class certification.**

In contrast, among other things, the Superior Court ruled—***and the Nurses agree***—that: (1) if an employee is "on call" during a meal period and subject to recall during the meal period, the law requires that meal period to be considered a "paid lunch" on the employers time and is considered "hours worked,"; (2) 12-hour shift nurses were entitled to a second, paid meal period; and (3) if a nurse is not sufficiently relieved of her duties during the second paid meal period, she is entitled to an additional 30-minutes of credit for hours worked. (CP1646-1652.) The Hospital did not cross-appeal these rulings.

E. The Nurses filed an amended complaint.

On March 4, 2015, the Nurses filed their First Amended Complaint. (CP1628-1644.) The First Amended Complaint: (1) included their trial plan and basic legal theories; (2) added an express claim for "block breaks" and "scheduling breaks" based on the Hospital's policies

as a binding term-and-condition of the Nurses' employment; and (3) expressly limited the back-pay period to during the limitations period running to March 10, 2013, which is the date the Hospital implemented new meals-and-breaks policies that tracked time for missed rest periods and that required nurses to clock in-and-out for lunch. (CP1628-1644.)

F. The Nurses renewed their motion for class certification based on the state of the record after the summary-judgment ruling and the claims asserted in the First Amended Complaint.

On March 27, 2015, the Nurses filed a Renewed Motion for Class Certification (CP1583-1618) to certify a back-pay class defined as, "**[a]ll registered nurses who worked at least one hourly nursing shift at Our Lady of Lourdes Hospital at Pasco from June 25, 2009 through March 10, 2013**," and, in the alternative, if necessary, to certify sub-classes of these same nurses by department or shift-hours. (CP1583-1584.) The Nurses noted that virtually every case the Superior Court had relied on in making its summary-judgment ruling have come from meals-and-breaks cases that were brought and decided (whether the plaintiffs won or loss) on a collective or class basis, like *Sacred Heart* (acute-care nurses), *Yellow Freight* (truck drivers); *Brinks* (armored-car drivers), *White* (counselors or therapists), *Weeks* (police officers), and *Frese* (prison guards). (CP1584.) The Nurses sought to certify a hybrid Rule 26(b)(1), (b)(2), and (b)(3) class because they sought declaratory, injunctive, and

monetary relief. (CP1584-1585.)

The Nurses indicated that the primary rest-period issues common to the class include: (1) Did the Hospital have an illegal or insufficient custom or policy of failing to adequately track and pay for hours worked for missed rest periods and failing to compensate the nurses for this time? (2) What is a legal rest period in the context of nursing? (3) Can a nurse who is "in assignment" be on break at the same time? (4) Are intermittent breaks consistent with the nature of a nurse's duties in an acute care setting? (5) Can the Hospital rely on them in this case when it failed to have a policy adopting intermittent breaks and its affirmative policy expressly required block breaks? (6) Did the Hospital comply with its scheduling obligations? (7) Does the Hospital's failure to schedule breaks or provide a system that would allow the nurses to hand off their patients to take a break to another qualified nurse in order to take a break create the rebuttable presumption that no nurse in patient assignment was ever provided with a lawful rest break? (8) Was the Hospital's failure to track and pay for missed rest periods done willfully? (CP1585-1586.)

The Nurses indicated that the primary meal-period issues common to the class include: (1) Did the Hospital unlawfully deprive the 12-hour shift nurses of a second meal period or fail to compensate them for missing the second meal period? (2) Did the Hospital willfully deprive

the 12-hour shift nurses of a second meal period or fail to compensate them for missing the second meal period? (3) Did the Hospital have an unlawful auto-meal-period-deduction policy? (4) Did the Hospital systematically require the nurses to remain on duty and on the premises during meal periods in the interest of Lourdes such that it was required to provide the nurses with a paid lunch as a matter of course? (5) Was the Hospital's automatic-meal-period deduction policy otherwise illegal such that there is a presumption that the nurses underreported missed meal periods? (6) Did the Hospital's official policy of disciplining nurses who reported unplanned or authorized overtime result in a policy or custom of underreporting meal-and-rest periods? (7) Did the Hospital willfully create or operate an unlawful auto-meal-period-deduction policy such that it knew it was under-compensating nurses for hours worked? (CP1586.)

In reply, and before the final class-certification hearing, the Nurses specifically argued that they were not required to prevail as a matter of law on the merits to obtain class certification and that they had only conducted limited, threshold discovery on the Hospital's policies. (CP1197-1199.) The Nurses also requested an evidentiary hearing to the extent the Superior Court needed to resolve disputed facts on issues relating to class certification on non-merits issues. (CP1198-1199.)

On April 10, 2015, the Superior Court conducted a hearing on the

Nurses' Renewed Motion for Class Certification. (RP377.) At the conclusion of the hearing, the Superior Court indicated that, although "***there are certainly some important class issues that are there and that exist***," it ruled—without making any specific factual findings or conducting an evidentiary hearing—that "what happens from shift to shift, from nurse to nurse, from nurse type to nurse type, from census to census and so on . . . I believe would consume and overrun the specifics." (RP406-407.) "***It does appear to me that virtually—well, I'll say that all of the other requirements of CR 23 are met***," except for predominance and manageability. (RP407.) The Superior Court's written order ruled that the Nurses had met numerosity, communality, typicality, and adequacy of representation under CR 23(a), but that the Nurses did not meet CR 23(b)(1) and (2) because the Nurses sought monetary relief and did not meet CR 23(b)(3) because "common class issues do not predominate over individual questions because issues regarding shift, nurse type, nurse roles and job duties, patient assignments and census, managers, and department cause the specifics for each class member to overrun the generalities," but it did not explain how or why this was the case or how operational/departmental differences impacted anything other than damage questions when the policies at issue are HR policies of general application. (CP1011-1012.)

Importantly, despite the Superior Court's denial of class certification, at the conclusion of the hearing, it asked whether there were any other individual plaintiffs who wanted to "come on board, and there could be some consolidation of those cases or joinder in this case. ***That would certainly seem the appropriate way to handle others who want to be part of this case.***" (RP409.) The Superior Court did not explain why it thought managing all the individual claims in one case would be easier or more efficient through a clumsy joinder-and-consolidation mechanism than simply certifying the class as contemplated by CR 23. (RP409.)

IV. Argument

A. Legal Standards and Standard of Review

The Washington Supreme Court has described Washington as a "'pioneer'" in assuring payment of wages due to an employee.[13] Toward that end, three wage statutes penalize an employer who willfully withholds wages,[14] fails to pay the statutory minimum wage,[15] or fails to pay wages due upon termination of employment[16].[17] These three statutes work in

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[13] *See Champagne v. Thurston County*, 163 Wn.2d 69, 76, 178 P.3d 936 (2008); *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002); *Drinkwitz* v. *Alliant Techsystems*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000).

[14] The Wage Rebate Act or "WRA".

[15] The Minimum Wage Act, or "MWA".

[16] The Wage Payment Act, "WPA".

[17] *See Champagne*, 163 Wn.2d at 76.

concert with the Industrial Welfare Act ("IWA"), which has mandatory rest-period requirements designed to "promote employee efficiency" and to ensure "nurses can maintain the necessary awareness and focus required to provide safe and quality patient care."[18]

A Washington employer's relevant meal-and-rest period obligations, as well as its payment obligations for missed-meal-and-rest periods, are governed by WAC 296-126-092 (meals and breaks), WAC 296-126-002(c)(8) (hours worked), and Wash. Dep't of Labor & Indus. Admin. Policy ES.C.6 (interpretive guidelines),[19] as interpreted by cases like *Demetrio, Sacred Heart, Yellow Freight, Weeks, Brink's, Frese, Iverson,* and *White.*[20] A nurse's statutory obligations to her patients, including the prohibition of patient abandonment and the requirement of continuity of care, are governed in part by WAC 246-840-710.[21]

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[18] *See Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 830-32 & n.1, 287 P.3d 516 (2012).

[19] Policy ES.C.6 is reproduced at CP36-50.

[20] *Demetrio v. Sakuma Bros. Farms, Inc.*, 183 Wn.2d 649, 355 P.2d 258 (2015) (class-action brought by migrant-workers), *Sacred Heart Med. Ctr.*, 175 Wn.2d at 822-824 (collective action brought by acute-care nurses), *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 50 P.3d 256 (2002) (collective action brought by truck drivers); *Weeks v. Chief of State Patrol*, 96 Wn.2d 893, 639 P.2d 732 (1982) (class action brought by members of Washington State Patrol); *Pellino v. Brink's, Inc.*, 164 Wn. App. 668, 267 P.3d 383 (2011) (class action brought by armored-car drivers), *Frese v. Snohomish County*, 129 Wn. App. 659, 666, 120 P.3d 89 (2005) (collective action brought by 162 prison guards), *Iverson v. Snohomish County*, 117 Wn. App. 618, 72 P.3d 772 (2003) (custody officer), and *White v. Salvation Army*, 118 Wn. App. 272, 75 P.3d 990 (2003) (collective action brought by counselors and therapists).

[21] WAC 246-840-710 is reproduced at CP51-53.

Washington courts are tasked with construing these wage-payment-and-worker-protection laws "liberally" in light of the strong public policy to protect workers' rights.[22] In this vein, wage-and-hour class actions under remedial statutes like the MWA and the IWA are frequently certified in Washington and elsewhere.[23] The Washington Supreme Court also definitively ruled in 2014 that plaintiffs are authorized to prove damages in class cases after certification on an estimated or aggregated basis once liability has been established; so individual damage

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[22] *See Champagne*, 163 Wn.2d at 76; *see also Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 520, 22 P.3d 795 (2001).

[23] *See, e.g., Leyva v. Medline Indus., Inc.*, 716 F.3d 510, 513 (9th Cir. 2013) ("damages determinations are individual in nearly all wage-and-hour class actions," and "the presence of individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3)," and reversing district court's refusal to certify a class on an abuse-of-discretion standard); *Anfinson v. FedEx Ground Package Sys.*, Inc., 174 Wn.2d 851, 863-864, 281 P.3d 289 (2012) (whether workers were misclassified as independent contractors was a common question appropriate for class relief under Rule 23(a)(2)); *Hisle v. Todd Pac. Shipyards*, 151 Wn.2d 853, 861, 93 P.3d 108 (2004) (reversing trial court's dismissal of class action over whether the MWA applies to retroactive payments contained in collective bargaining agreements and holding that it does); *Drinkwitz*, 140 Wn.2d at 306 (ruling on the merits of classification dispute and remanding for class certification on the issue of damages and attorneys' fees); *Brink's*, 164 Wn. App. at 699 (affirming money judgment in favor of Rule 23 class in meals-and-breaks case with issues substantially similar to this case); *see also, e.g., In re Taco Bell Wage & Hour Actions*, No. 07-1314, 2012 U.S. Dist. LEXIS 168219 (E.D. Ca. Jan. 2, 2013) (wage and hour class certified); *Avilez v. Pinkerton Gov. Serv.*, 286 F.R.D. 450 (C.D. Cal. 2012) (same), class certification ruling affirmed in part and reversed in part to exclude employees who signed class-action-waiver agreements, *Avilez v. Pinkerton Gov't Servs.*, 2015 U.S. App. LEXIS 3657 (9th Cir. Mar. 9, 2015); *Schulz v. QualxServ*, LLC, No. 09-2081, 2012 U.S. Dist. LEXIS 58561, 2012 WL 1439066, *4 (S.D. Cal. 2012) (same); *Dilts v. Penske Logistics, LLC*, 267 F.R.D. 625, 640 (S.D. Cal. 2010) (same), appeal of merits-decision by class representatives successful and case remanded for class consideration, *Dilts v. Penske Logistics, LLC*, 769 F.3d 637 (9th Cir. 2014).

questions are not a bar to class certification as a matter of law.[24]

The decision to certify a class is discretionary,[25] but courts must liberally construe Rule 23 in favor of certification when the case meets Rule 23's requirements.[26] Washington courts liberally interpret Rule 23 because the "rule avoids multiplicity of litigation, 'saves members of the class the cost and trouble of filing individual suits[,] and ... also frees the defendant from the harassment of identical future litigation.'"[27] A class suit is also a valuable procedure "for vindicating claims which, taken individually, are too small to justify individual legal action but which are of significant size and importance if taken as a group."[28] Courts should err in favor of certifying a class since the class is always subject to the trial court's later modification or decertification by the trial court as the case develops.[29] In other words, in close cases, courts resolve doubts in favor of allowing or maintaining the class.[30]

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[24] *See Moore*, 181 Wn.2d at 305-15. ***Under Moore, the Nurses should be afforded an opportunity to depose a representative number of nurses to develop a model to aggregate damages either before or after a liability phase after a class is certified and after class discovery has occurred.***

[25] *See Nelson v. Appleway Chevrolet*, Inc., 160 Wn.2d 173, 188-89, 157 P.3d 847 (2007).

[26] *See Moeller*, 173 Wn.2d at 278; *Weston*, 137 Wn. App. at 168.

[27] *See Moeller*, 173 Wn.2d at 278 (alterations in orig.); *Smith*, 113 Wn. App. at 318; *Brown*, 6 Wn. App. at 256-57.

[28] *See Brown*, 6 Wn. App. at 253 (1971).

[29] *See Moeller*, 173 Wn.2d at 278; *Oda*, 111 Wn. App. at 91; *Brown*, 6 Wn. App. at 256.

[30] *See Sitton*, 116 Wn. App. at 250.

Where class certification is sought at the early stages of litigation, courts generally assume that the allegations in the pleadings are true and will not attempt to resolve material factual disputes or make any inquiry into the merits of the claim.[31] Courts may, however, go beyond the pleadings and examine the parties' evidence to the extent necessary to determine whether the requirements of Rule 23 have been met.[32] Plaintiffs need not make an extensive evidentiary showing so long as the court is provided enough information to form a reasonable judgment on each certification requirement.[33] Also, where there are common class questions among some—but not all—class members, it is appropriate under Rule 23(c)(4)(B) to divide the various plaintiffs into subclasses, rather than to deny a class action altogether.

Here, the Nurses assert that the Superior Court erroneously failed to certify the class and abused its discretion because it failed to liberally construe Rule 23 in favor of certification when the case meets Rule 23's requirements. The Superior Court also failed to give appropriate consideration to the purpose of the meal-and-break regulations and the liberally construe the remedial purpose of the state's wage-and-hour

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[31] *See Smith*, 113 Wn. App. at 320 n.4; *see also Ellis*, 657 F.3d 970, 983 (2011); *United Steel*, 593 F.3d at 807-08; *Ellis*, 285 F.R.D. at 516-546.

[32] *See Oda*, 111 Wn. App. at 94.

[33] *See Blackie*, 524 F.2d at 901.

protections laws in favor of class certification. The ruling was arbitrary, unsupported by evidence, and inconsistent the above legal standards.

B. The Nurses meet Rule 23(a).

Rule 23(a) provides the prerequisites for class certification. "One or more members of a class may sue or be sued as representative parties on behalf of all only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class."[34]

It is important to note that "commonality" under Rule 23(a)(2) is a "low threshold test" that "is qualitative rather than quantitative, that is, there need be only a single issue common to all members of the class."[35] A "common question need only exist, not predominate, for the [commonality] requirement to be satisfied."[36] Moreover, differences in

[34] *See* CR 23(a).

[35] *See Smith*, 113 Wn. App. at 321.

[36] *See id.* ("The trial court identified a number of common questions of law and fact, including the chemical formulation of Behr's products, the general dampness and humidity of the western Washington climate, the adequacy of Behr's product labeling and promotional materials, and the question of who has the duty to add additional mildewcide to the products, Behr or the consumer. Any one of these common issues is sufficient to satisfy the CR 23(a) commonality requirement.").

damage calculations alone "cannot defeat certification."[37] Class certification is appropriate where common answers to common questions will assist in resolving the litigation.[38] Here, ***the Superior Court ruled that the Nurses meet all Rule 23(a)'s requirements and the Hospital did not cross-appeal this ruling.*** (CP1011-1012.)

C. The Nurses meet Rule 23(b).

Rule 23(a) provides the prerequisites for class certification. If a party meets these requirements, he or she must also satisfy one of the three requirements of Rule 23(b). Under Rule 23(b), an action may be maintained as a class action if the prerequisites of section (a) are satisfied, and in addition:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; or
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> (2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding

[37] *See Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010); *see also Blackie*, 524 F.2d at 905 ("The amount of damages is invariably an individual question and does not defeat class action treatment.").

[38] *See Ellis*, 657 F.3d at 983.

declaratory relief with respect to the class as a whole; or

> (3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

1. The Nurses meet Rule 23(b)(1)'s requirements.

To invoke Rule 23(b)(1)(A), a plaintiff must show that there is a risk that defendant's efforts to comply with the judgment in one action will require them to act inconsistently with the judgment in another.[39] The phrase "incompatible standards of conduct" refers to the situation where "different results in separate actions would impair the opposing party's ability to pursue a uniform continuing course of conduct."[40]

Here, the Nurses seek, among other things, a declaration that being "in assignment" is tantamount to "working" and that the Hospital is required to schedule rest periods to comply with the law to relieve them of

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[39] *See McDonnell Douglas Corp. v. United States Dist. Court*, 523 F.2d 1083, 1086 (9th Cir. 1975).

[40] *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1193 (9th Cir. 2001).

duty for legally required breaks. The nurses also seek a declaration that the nature of a nurse's work is inconsistent with intermittent breaks. The Hospital obviously has an interest in a uniform meal-and-break system and separate actions on these same issues might result in inconsistent determinations of the Hospital's legal obligations. The Nurses easily meet Rule 23(b)(1)(A)'s requirement for class certification and the Superior Court erred and abused its discretion when it ruled otherwise.

Moreover, an adjudication of these issues could effectively dispose of the claims and defenses of other nurses in other actions if the class is not certified, especially if the Hospital prevails on any of its theories. Class certification would protect the interest of absent class members by ensuring adequate representatives conduct the litigation and that any settlement of the issues in this case is fair. The Nurses easily meet the requirements of Rule 23(b)(1)(B) and the Superior Court erred when it ruled to the contrary.[41]

2. The Nurses meet Rule 23(b)(2)'s requirements.

Class certification under Rule 23(b)(2) does not require courts to examine the viability or bases of class members' claims for declaratory

[41] *See, e.g., Z.D. v. Group Health Coop.*, No. 11-1119, 2012 U.S. Dist. LEXIS 76498, at *16-19 (W.D. Wa. Jun. 1, 2012) (Under Rule 23(b)(1), the "felt necessity for a class action is greatest when the courts are called upon to order or sanction the alteration of the *status quo* in circumstances such that a large number of persons are in a position to call on a single person to alter the *status quo*, or to complain if it is altered, and the possibility exists that [the] actor might be called upon to act in inconsistent ways.").

and injunctive relief, but only to look at whether class members seek uniform relief from a practice applicable to all of them.[42] "It is sufficient" to meet the requirements of Rule 23(b)(2) that "class members complain of a pattern or practice that is generally applicable to the class as a whole." Rule 23(b)(2) is met despite "individual qualities of [the] suit" because of "pattern or practice characteristic of defendants' conduct that is generally applicable to the class." The fact that some class members may have suffered no injury or different injuries from the challenged practice does not prevent the class from meeting the requirements of Rule 23(b)(2). Furthermore, unlike actions brought under one of the other 23(b) prongs, "questions of manageability and judicial economy are . . . irrelevant to 23(b)(2) class actions."[43]

Here, the Nurses seek to enjoin the Hospital's practice of failing to "schedule" rest breaks in violation of the law and seek an order requiring it to provide relief coverage so that its nurses can handoff their patients for regularly scheduled block breaks. The nurses easily meet Rule 23(b)(2)'s requirements and the Superior Court erred when it ruled to the contrary.[44]

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[42] *See Rodriguez v. Hayes*, 578 F.3d 1032, 1051 (9th Cir. 2009).

[43] *See id.*

[44] *See id.*

3. The Nurses meet Rule 23(b)(3)'s requirements.

a. The class issues predominate.

As the Rule 23(a)(3) analysis already considers the issue of commonality, the focus of the Rule 23(b)(3) predominance inquiry is on the balance between individual and common issues.[45] In other words, "[t]he Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation."[46]

Here, the evidence in support of the class motion shows "[a] common nucleus of facts and potential legal remedies dominates this litigation."[47] If individual class members were to sue individually, members of the same proposed class would bring essentially the same claims against the Hospital. The central issues raised the amended complaint, the summary-judgment record, and the renewed class-certification motion concern policies and practices of the Hospital that apply broadly to all the employees in the class and in each proposed subclass. The issues in this case are not materially more difficult to manage on a class or collective basis than, for example the issues in *Demetrio, Sacred Heart*, *Wingert*, *Weeks, Brink's*, *Frese, or White*, which

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[45] *See Schiller v. David's Bridal, Inc.*, No. 10-616, 2012 U.S. Dist. LEXIS 80776 (E.D. Ca. Jun. 11, 2012).

[46] *See Amchem Product v. Windsor*, 521 U.S. 591, 623 (1997).

[47] *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998).

were each decided on a class or collective basis.[48] Thus, despite the minor factual differences among class members regarding their damages—such as actual hours worked and back pay owed for missed breaks—common issues predominate.[49]

Furthermore, although the Hospital argued that the way its managers implemented its policies to some degree required an amount of discretion—and that this reduces the amount of commonality—the vast majority of the Nurses' theories depend on HR policies of general application that are illegal, or, alternatively, involve the Hospital's decision to abrogate its over-site responsibilities over its lower-level managers by failing to provide a system that could allow them to comply with meals-and-breaks law.[50] Moreover, none of the individual managers were responsible for: (1) failing to provide a missed-rest-period payment system or the decision to simply not pay nurses for missed rest periods; (2)

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[48] *See also Kamar v. Radio Shack Corp.*, 254 F.R.D. 387, 399 (C.D. Cal. 2008) (class certification is usually appropriate where 'liability turns on an employer's uniform policy that is uniformly implemented, since in that situation predominance is easily established"); *Perez v. Safety-Kleen Sys., Inc.*, 253 F.R.D. 508, 520 (N.D. Cal. 2008) (common issues predominate meal break claims and claims for failure to provide itemized wage statements because these were class-wide policies, and litigation of these claims involve class-wide proof rather than individualized inquiry).

[49] *See Schiller*, 2012 U.S. Dist. LEXIS 80776, at *24-27.

[50] *See Ellis*, 285 F.R.D. at 518-19 (collecting cases show that some discretion to implement bad or illegal polices will not preclude class certification); *see also Wren v. RGIS Inventory Specialists*, 256 F.R.D. 180, 206 (N.D. Ca. Feb.6, 2009) (having no policy that required managers to comply with the law and pay employees for donning and doffing times—and just "leaving it to their discretion"—was tantamount to having a "policy of no policy" that violated its wage-and-hour obligations on a class-wide basis).

the decision to not provide a second lunch to 12-hour shift nurses; (3) or the decision to misclassify nurses as having a presumptively "unpaid" first lunch when they are all subject to recall; or (4) have a policy that provides for discipline for unauthorized overtime. The Nurses more than meet Rule 23's predominance test regarding back pay for missed rest periods and unpaid mealtime and it was reversible error to rule otherwise.

i. The Nurses' entitlement to payment for missed rest periods is a common-class issue and individual issues do not predominate.

The Nurses incorporate the summary-judgment briefing and evidence on "tracking time" by reference. (CP118-134.) In short, in cases like *Demetrio*, *Sacred Heart*, and *Yellow Freight*, the Washington Supreme Court has consistently held a missed rest period is "hours worked" that must be tracked and compensated.[51] The Superior Court ruled in its Global Summary Judgment Order that ***a genuine factual dispute exists regarding whether nurses at Lourdes have or have not been compensated for all time worked.*** (CP1646-1652.) This ruling is in-and-of-itself is sufficient to support class certification (although the undisputed evidence shows that every nurse at the Hospital misses breaks

[51] *See e.g., Sacred Heart*, 175 Wn.2d at 826 ("We hold that both the missed opportunity to rest and the additional labor nurses provide constitute 'hours worked.' Even though Sacred Heart did not require the nurses to physically remain at the hospital after the end of the workday to make up their rest periods, nurses are entitled to overtime compensation because they provided additional labor to Sacred Heart.").

and was not compensated for this time).

Indeed, the evidence discussed in §III.C., above, would allow a reasonable fact finder to conclude that: (1) the Hospital did not have a system in place for tracking time for missed-rest periods; (2) it never been paid any nurse in any department for a missed-rest period; (3) it affirmatively told nurses that it did not pay for missed rest periods; and that (4) the Nurses routinely and systematically missed rest periods, but were not paid wages for these additional "hours worked." The Hospital violated the law by not paying the Nurses all wages owed. The policy not to pay for rest periods is common to any nurse working in any department of the Hospital and does not depend on the department.

To date, the Hospital has yet to identify even one specific proposed class member who was paid for even one missed break any time during the proposed back-pay period. The undisputed testimony from every single nurse-witness who testified under oath is that she had never been paid for a missed rest period. There was no time tracking or reporting system in place to do so and no evidence shows any nurse ever reported or was paid for a missed rest period. The only individual question for each nurse is how much the Hospital owes in back pay for missed rest periods, which is not, as a matter of law, a lawful reason to deny class

certification.[52] The Superior Court failed to explain how or why "individual questions" predominate when the only individual question is the amount of back pay each nurse is entitled to. The Hospital uniformly treated nurses the same way when he or she missed a break: ***it always failed to pay them.*** The Superior Court's focus should have been on remedial purpose of the statutes and getting the nurses paid the wages they are owed, rather than focusing any perceived difficulties in calculating individual damages. In short, the Superior Court committed reversible error and abused its discretion when it refused to certify a back-pay class for Nurses owed wages for missed rest breaks.[53]

ii. "What is a legal rest period in the context of nursing, *i.e.*, can a nurse who is "in assignment" be on break at the same time, *i.e.*, are intermittent breaks consistent with the nature of a nurse's duties?" is a class issue and individual issues do not predominate.

The Nurse's incorporate the "intermittent breaks" summary-judgment briefing and evidence in this section. (CP6-28.) In short, WAC 296-126-092(4) & (5) mandates non-waivable rest periods of "at least 10 minutes" for every four hours worked that must be "scheduled as near as possible to the midpoint of the work period," unless "the nature of the work allows employees to take intermittent rest periods equivalent

[52] *See Moore*, 181 Wn.2d at 305-15.

[53] *See id.*

to 10 minutes for each 4-hours worked." The Nurses assert that WAC 296-126-092(4) & (5) creates the presumption that an employer must schedule and that the employer has the burden to show that the "nature of the position" would be consistent with intermittent breaks.[54]

In *Dematrio*, the Washington Supreme Court reaffirmed the importance of an employer's mandatory scheduling obligation. The Supreme Court held that the regulation must be interpreted to further its purpose of promoting rest periods: "It is not enough for an employer to simply schedule time throughout the day during which an employee can take a break if he or she chooses. Instead, employers must affirmatively promote meaningful break time. A workplace culture that encourages employees to skip breaks violates WAC 296-126-092 because it deprives employees of the benefit of a rest break 'on the employer's time.'"[55]

As also noted by the Washington Supreme Court in *Sacred Heart*, rest periods are both mandatory and important and the law should be interpreted to prevent a hospital from being "incentivized to employ fewer nurses for each shift, relying on those nurses to bear a heavy burden on busy days."[56] Thus, "compensating employees who forgo their rest

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[54] *E.g., Rivas v. Overlake Hosp. Med. Ctr.*, 164 Wn.2d 261, 267, 189 P.3d 753 (2008) (the party asserting an affirmative defense has the burden of proof.)

[55] *See Dematrio*, 183 Wn.2d at 658 (citations omitted).

[56] *See Sacred Heart*, 175 Wn.2d at 833; ES.C.6 par. 9. (rest periods may not be waived).

periods with overtime pay will help to ensure that employers continue to provide these breaks to their employees." Rest periods ensure nurses maintain the necessary awareness and focus required to provide safe and quality patient care."[57] In other words, for important policy reasons, intermittent breaks should be presumed inconsistent with nursing who are assigned patients in an acute care hospital setting absent compelling evidence that they promote patient safety and are consistent with the practice of nursing.

The Nurses here reassert that "scheduling" rest periods in block breaks is mandatory unless the Hospital proves the "nature of the work" allows employees to take intermittent rest periods equivalent to ten minutes for each 4 hours worked.[58] To be on break, an employee must be relieved of both "work" and "exertion."[59] Policy ES.C.6 also requires a rest period to be a "relief from duty." The evidence discussed in § III.C.2 above shows that a nurse who is "in patient assignment" cannot take a break unless she is relieved and she makes a handoff, *i.e.*, she is "working" and "on duty" and responsible for patient care until she is actually relieved of this responsibility. Under cases like *Dematrio* and

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[57] *See id.*

[58] *See* WAC 296-126-092(4)-(5); *Brink's*, 164 Wn. App. at 687.

[59] *See Brink's*, 164 Wn. App. at 696 (citing Administrative Policy ES.C.6, § 12, at 5.)

Sacred Heart, the Hospital's failure to provide a system that allows the nurses the hand off their patients for regularly scheduled rest breaks violates the letter and purpose of WAC 296-126-092 as a matter of law, and the Superior Court committed reversible error when it ruled that "fact issues" preclude summary judgment on this issue. (CP1646-1652.)

Thus, the Nurses respectfully disagree and contend that the Superior Court erred in its legal ruling that: (1) a nurse can legally be "in assignment" and on a break at the same time; and that (2) "individualized inquiry into the duties of nurses across departments and shifts is necessary to determine if a particular nurse had a rest break," at least when a nurse is "in assignment." (CP1646-1652.) It is undisputed that the nurses are governed by uniform meal-and-break policies; that they are all part of the same bargaining unit; and that they are all responsible for patient care when they are in assignment until relieved of duty.[60] It is, frankly, completely impractical and contrary to law to engage in an "individualized inquiry" into any particular nurse's day to determine, after the fact,

[60] The NLRB, through rule making, established eight appropriate bargaining units in acute care hospitals: (1) all registered nurses; (2) all physicians; (3) all professionals except for registered nurses and physicians; (4) all technical employees; (5) all skilled maintenance employees; (6) all business office clerical employees; (7) all guards; and (8) all nonprofessional employees except for technical employees, skilled maintenance employees, business office clerical employees and guards. Outside of acute-care hospitals the Board applies a community-of-interest standard to establish bargaining units. *See* 29 C.F.R. § 103.30. The above rule recognizes the unique nature of an acute-care hospital setting.

whether the Hospital had a prior scheduling obligation and whether the "nature of a nurses duties" or the general "nature of the work" render intermittent breaks inconsistent with the nature of the position. (*See, e.g.*, CP702-704, CBA, granting all nurses in the bargaining unit the same meal-and-break rights and providing for block breaks and scheduling). The WAC itself requires a general examination of the "nature of the position," not an examination of what any individual employee might be doing on any particular day.

Moreover, the Superior Court did not rule in favor of the Hospital as a matter of law and, instead, ruled that genuine issue of material fact as to whether a nurse's duties are consistent with intermittent breaks. (CP1646-1652.) Thus, even if the Superior Court was legally correct that there is a fact question on this issue, the significance of this ruling is that a trial on the merits must be conducted to resolve the nature of a nurses' work in an acute-care facility. Calling the same five-to-ten witnesses a hundred separate times in a hundred separate trials to determine what the essential functions of an acute-care nurse are to determine whether the Hospital has scheduling obligations will not promote judicial economy or serve any purpose. Both the Nurses and the Hospital need to know whether the Hospital has scheduling obligations based on the "nature of the position" before missed-break damages can even be calculated.

iii. "Whether the Hospital may rely on intermittent breaks in this case when it failed to have a policy adopting intermittent breaks and its policy required block breaks?" is a class issue and individual issues do not predominate.

Independently, the Nurses have a class claim on whether the Hospital is allowed to rely on intermittent breaks in litigation when it never used or relied on intermittent breaks before the lawsuit was filed and, to the contrary, contractually promised block breaks. As discussed in § III.C.2.b., above, the Hospital ***had an express, official policy that required scheduling block breaks***. The Hospital's actual, official policy that it implemented—as part of the Hospital's management rights and to comply with the minimum 10-minute rest period the law requires—promised every nurse in every department the right to "a" 15-minute block rest period to be "scheduled by the Department Director/Manager/Supervisor" as a matter of its own official policy. (CP742.) The Hospital then systematically violated this policy.

Moreover, when the Hospital's official policy of general application: (1) directs a Department Director/Manager/Supervisor to schedule block breaks; and (2) the evidence shows that the Hospital doesn't do this as a matter of actual custom, then the presumption should be that the official custom discourages nurses from actually taking breaks. In other words, the Hospital officially told the nurses to wait for scheduled

block breaks, when, in fact, those scheduled breaks never actually came. The Hospital can't now claim—contrary to its official, written policy—that it really expected the nurses and their supervisors to violate its own written meals-and-break policy and sneak in intermittent-mini breaks when they were not scheduled.

In *Storti v. Univ. of Wash.*, 181 Wn.2d 28, 330 P.3d 159 (2014), the Washington Supreme Court addressed how an employer's policy can form a unilateral contract over the terms and conditions of employment that is completed once an employee accepts the terms by performing work. In this case, as a matter of law, the Hospital's written promise to provide 15-minute, scheduled block breaks as a term-and-condition of employment that was binding on the Hospital every day that the written policy existed and that the nurses performed work. Further, such a policy discourages the use of intermittent breaks. That is, the nurses accepted these terms by working, and the Hospital cannot now claim that its unilateral offer was meaningless or non-binding after the nurses performed their end of the bargain by performing work for that day. At minimum, the Court should resolve the Hospital's policies-and-unilateral contract obligations on a class basis, even if the merits-resolution of the issue results in a judgment in favor of the Hospital. The Hospital only had one

uniform policy regarding block breaks and it applied across the board to every nurse in the Hospital.

iv. **"Did the Hospital comply with its scheduling obligations and does the Hospital's failure to schedule breaks or provide a system that would allow the nurses to hand off their patients to take a break to another qualified nurse create the rebuttable presumption that no nurse in patient assignment was ever provided with a lawful rest break?" is a class issue and individual questions do not predominate.**

The Hospital is fighting its scheduling obligation because no evidence shows that the Hospital has any systemic scheduling system. To the contrary, the Hospital's basic litigation-position is that it is allowed to let the nurses fend for themselves and hope the Hospital isn't busy to comply with its meals-and-breaks obligations. The consequences and remedies for this systemic failure should be resolved on a class-wide basis and is a necessary pre-cursor to resolving damage and back-pay issues. What constitutes a lawful break in the nursing context is a necessary precondition of determining back pay for any particular nurse.

v. **"Did the Hospital unlawfully deprive the 12-hour shift nurses of a second meal period or fail to compensate them for missing the second meal period, and did the Hospital willfully deprive the 12-hour shift nurses of a second meal period fail to compensate them for missing the second meal period?" are class issues and individual questions do not predominate.**

The Nurses incorporate the summary-judgment briefing regarding

second lunches for the 12-hours shift nurses. (CP1704-1719; *see also* CP1653-1662.) In connection with the summary-judgment motions, the Superior Court ruled that: (1) If an employee is "on call" during a meal period and subject to recall during the meal period, the law requires that the meal period be considered a "paid lunch" on the employers time and is considered "hours worked"; (2) If an employee on a "paid lunch" is denied the ability to have a 30-minute paid meal period, the employee is entitled to payment for an extra 30-minutes of "hours worked"; (3) Contrary to the interpretative guidelines—an employer is not required to use its "every effort" to make sure an employee on a paid lunch receives the full 30 minutes; (4) 12-hour nurses at Lourdes were entitled to, and were paid for second meal periods; (5) Although paid, a 12-hour nurse would still be considered to have missed the second meal period and be entitled to another 30 minutes of pay if the nurse was not sufficiently relieved of duties to have 30 minutes for lunch; (6) For a paid meal period, being "on call" or subject to recall does not negate the meal period. The question is whether the nurse was sufficiently relieved of duties for 30 minutes, and the 30 minutes can be either interrupted or in a block; (7) Whether or not a particular nurse was sufficiently relieved of duties and received a second meal period is a complex question of fact based on differences between departments and shifts. A genuine factual dispute remains on this issue;

and (8) An employer has no duty to schedule a paid meal period. (CP1646-1652.) The Nurses assert that that propositions (1), (2), (5), (6), and (7) are correct, but that (3), (4), and (8) are legally erroneous.

Both *Sacred Heart* and *Brinks* treated Administrative Policy ES.C.6 as the law in Washington on meals-and-breaks based on its persuasive authority.[61] Under Policy ES.C.6, a meal period "must be provided," and must be paid when the employer requires the employee to remain on premises or on call during lunch. In a paid-lunch situation, the employer still must make "every effort" to "provide employees with an uninterrupted meal period," or the employer is required to pay the employee an additional half hour for the missed paid lunch.[62] This standard is consistent with the Supreme Court holding in *Dematrio* that employers must actively promote meal-and-rest periods.

The Superior Court erred in finding that, as a matter of law, an employer need not make every effort to provide employees with uninterrupted meal periods or the equivalent in wages. The evidence discussed in § III.C.3. above shows that the Hospital provided 12-hours shift nurses with only one unpaid meal period, despite the fact that it knew it was legally obligated to provide those nurses with two or pay each nurse

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[61] *See Sacred Heart*, 175 Wn.2d at 831; *Brinks*, 164 Wn. App. at 688.

[62] *See, e.g., Brinks*, 164 Wn. App. at 688-691.

when he or she missed lunch. There is no real dispute that every 12-hour shift nurse is entitled to pay for missed second meal periods—even if some evidence shows that a nurse occasionally or rarely had no patients and could take a meal period because of the fortuitous event that there were no patients to care for on an unusually slow day—the only real question is how much back pay is each nurse entitled to. This is a significant issue that should be decided on a class basis. (CP1646-1652.).[63]

vi. "Did the Hospital have an unlawful auto-meal-period-deduction policy, in that it systematically required the nurses to remain on duty and on the premises during meal periods in the interest of Lourdes such that it was required to provide the nurses with a paid lunch as a matter of course?" is a class issue and individual issues do not predominate.

The Superior Court has already ruled, consistent with *Brinks* and Policy ES.C.6, that if an employee is "on call" during a meal period and subject to recall during the meal period, the law requires that the meal period be considered a "paid lunch" on the employers time and is considered "hours worked." (CP1646-1652.) Here, the evidence discussed in § III.C.4. above shows that the nurses were uniformly "subject to recall" as a matter of course and on duty during lunch. Yet. It

[63] WAC 296-126-092(2) prohibits employers from working employees more than five hours without a meal period. Consequently, nurses who work twelve-hour shifts must be afforded two meal periods.

is undisputed that they were given only one unpaid meal period and uniformly subject to an automatic deduction of thirty minutes from their daily hours worked. The auto-deduct system wrongly assumed they received 30 minutes of unpaid time for lunch even though they were subject to recall. Each and every nurse at the Hospital is entitled to compensation for this uniform misclassification. The Superior Court erred when it failed to certify this issue for class treatment.

vii. "Was the Hospital's automatic-meal-period deduction policy otherwise illegal such that there is a presumption that the nurses underreported missed meal periods, *i.e.*, did the Hospital's official policy of disciplining nurses who reported unplanned or authorized overtime result in a policy or custom of underreporting meal-and-rest periods, and did the Hospital willfully create or operate an unlawful auto-meal-period-deduction policy such that it knew it was under-compensating nurses for hours worked?" are class issues and individual issues do not predominate.

The evidence discussed in Section III.C., above, shows the Hospital has exercised its management rights and has decided to pay nurses who worked past their regular shift time daily overtime as a matter of policy and as a term of their employment. If a nurse misses a meal period and pushes the "cancel deduction" button, then Kronos assumes she worked past her regular shift and treats the time as overtime. If nurse misses a meal period without pre-authorization, and then pushes cancel deduction button, the Hospital's official policy subjects her to disciplinary

action for unauthorized overtime. The Superior Court ruled from the bench that determining liability on a class-wide basis for missed breaks requires only "some evidence" that there is a "policy or culture" that breaks are "prohibited or discouraged or that there won't be compensation." (RP180-181.) The Nurses meet the Superior Court's test and it abused its discretion in denying class treatment on this issue.

Even assuming that a nurse was properly classified as not entitled to a paid lunch as a matter of course, there was a policy discouraging reporting of missed lunches because it would result in unauthorized overtime; and if the nurse was entitled to a paid lunch as a matter of course because she was subject to recall (which Lourdes has never classified any nurse as entitled to a paid first lunch), then the policy discouraged reporting second missed lunches. This issue is common to each class member and should be resolved on a class basis. The Superior Court erred when it ruled otherwise and when it failed to certify this issue.

b. The class-action vehicle is superior to multiple, individual actions.

In addition to the predominance requirement, Rule 23(b)(3) provides a non-exhaustive list of matters relevant to the Court's determination that class action treatment is superior to other methods of adjudication.

c. The interest of members of the class in individually controlling the prosecution or defense of separate actions favors class certification.

The first factor considers the interest of each member in "individually controlling the prosecution or defense of separate actions."[64] This factor weighs against class certification where each class member has suffered sizeable damages; in contrast, where the damages are relatively small on an individual basis, the class vehicle is usually deemed to be superior.[65] The class vehicle is superior because it "avoids multiplicity of litigation, 'saves members of the class the cost and trouble of filing individual suits, and ... also frees the defendant from the harassment of identical future litigation.'"[66]

Here, although the back pay the nurses seek is not *de minimis*, on an individual basis, it would not make financial sense for lawyers to take any one particular case on a contingent fee. Absent class certification, it is unlikely that any one nurse will have her rights vindicated due to the amount in controversy for each individual case. The Superior Court made no findings to the contrary.

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[64] *See* CR 23(b)(3)(A).

[65] *See Moeller*, 173 Wn.2d at 279; *Smith*, 113 Wn. App. at 318; *Brown*, 6 Wn. App. at 256-57.

[66] *See Moeller*, 173 Wn.2d at 278.

d. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class favors class certification.

The only known current litigation against the Hospital over it meals-and-breaks policies is the instant litigation, which favors certification.[67] The Superior Court made no findings to the contrary.

e. The desirability or undesirability of concentrating the litigation of the claims in the particular forum favor class certification.

The Nurses have presented more than *prima facie* evidence that the Hospital: (1) has actively mislead the class members on their meal-and-breaks rights to the nurses' detriment; (2) instilled a culture that discourages nurses to assert their meal-and-break rights; (3) maintained a system (pre-symphony policy) that suppressed the reporting of missed rest periods and withheld wages from employees who missed rest periods ; and (4) actively and willfully ignores the pleas from the nurses to remedy or address the problems. Adequate meals-and-breaks are presumed by law to be necessary for the health, safety and welfare of both the patients and the nurses. Unless the Court concentrates the claims into one forum and certifies this as a class, the nurses' rights will undoubtedly go un-vindicated and patent safety will suffer. The evidence shows that unless the Hospital is forced to pay the nurses what they are owed and ordered to

[67] *See Schiller*, 2012 U.S. Dist. LEXIS 80776, at *26-29.

comply with its obligations, it simply (and willfully) won't do so. The class vehicle is the only practical way to proceed. The Superior Court made no findings to the contrary.

f. The difficulties likely to be encountered in the management of a class action favor class certification.

The fourth factor "encompasses the whole range of practical problems that may render the class format inappropriate for a particular suit."[68] Here, this class will not be difficult to manage. It is limited to employees from one Hospital during the relevant limitations period, and doesn't present the problems that, for example, a nationwide class might present. The Superior Court can conduct a "phase one" trial to resolve any fact questions on the common liability issues. The Court can conduct a "phase two" trial on back pay and other damages. The Hospital's duties and obligations to provide meal-and-breaks or pay for missed breaks under the "system" it set up need to be established and clarified before any individual claims for back pay can be resolved, and it doesn't make sense to litigate these common issues 100 different times in a hundred different cases. Questions of judicial economy remain central to the certification issue,[69] and the fact that class members may have to make individual showings of damages does not preclude class certification as a matter of

[68] *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 164 (1974).

[69] *See Sitton*, 116 Wn. App. at 255.

law,[70] and the law in Washington allows plaintiffs—after merits discovery—to prove damages through class estimates.[71] Virtually every meals-and-breaks case decided on appeal in Washington was decided on a class or collective basis.

D. The Nurses are not required to prevail *affirmatively* on summary-judgment to obtain class certification.

The Superior Court retains the discretion to delay certification pending ruling on dispositive motions if it appears that *the defendant might prevail on the motion and dispose of the case on the merits.*[72] There is absolutely no authority, however, that a plaintiff is required to win *affirmatively* on liability on summary judgment as a precondition to class certification, especially before merits discovery.[73] The Superior Court at least implicitly expected the Nurses to prevail affirmatively on summary judgment as a pre-condition to class certification, (*E.g.*, RP122-130), which is legal error and an abuse of discretion.

E. The Nurses were entitled to an evidentiary hearing to the extent the Superior Court resolved any fact issues against them.

Although the Superior Court is not required to conduct an

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[70] *See Smith*, 113 Wn. App. at 323.

[71] *See Moore*, 181 Wn.2d at 305-15.

[72] *See Sheehan v. Transit Auth.*, 155 Wn.2d 790, 807, 123 P.3d 88 (2005).

[73] *See United Steel*, 593 F.3d at 809.

evidentiary hearing to resolve class motions in every case, it is required to conduct an evidentiary hearing to the extent resolving fact questions are essential to determining whether CR 23's requirements have been met.[74] Here, because the Superior Court did not conduct an evidentiary hearing, and made no class-based-fact findings other than to state whether the general requirements of Rule 23 have been met, the Court should view evidence in the record in a light most favorable to the Nurses on appeal.[75]

F. The Superior Court's erroneous summary-judgment rulings contributed to the erroneous denial of class certification.

The Nurses specifically contend that the following summary-judgment rulings were legal error and/or unsupported by the record and contributed to the erroneous denial of class certification: CP1648 at ¶¶5, 7, 9, CP1649 at ¶¶12, 2, CP1650 ¶¶3, 6, 7, 9, 10, 11, CP1652 at ¶5. For the reasons stated throughout this brief, these ruling are inconsistent with the record, WAC 296-126-092, WAC 296-126-002(c)(8), Wash. Dep't of Labor & Indus. Admin. Policy ES.C.6, and WAC 246-840-710, as interpreted by cases like *Demetrio*, *Sacred Heart*, *Yellow Freight Systems, Inc.*, *Weeks*, *Brink's*, *Frese*, *Iverson*, and *White*.

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[74] *See Oda*, 111 Wn. App. at 93 & n.4.

[75] *Cf. id.*; *cf. also United Steel*, 593 F.3d at 807-08; *Ellis*, 285 F.R.D. at 516-546; *Smith*, 113 Wn. App. at 320 & n.4.

V. Conclusion and Relief Sought

The Nurses request that the Court reverse the Superior Court's denial of their class-certification motion and direct certification of a class consistent with the renewed motion and the issues discussed in this appeal. In the alternative, if necessary, the Nurses request any subset of relief that the Court believes the Nurses are entitled to, including: (1) a partial reversal on one-or-more class issues; (2) a reversal with instructions for the Superior Court to certify one-or-more subclasses of nurses based on department or shift; or (3) a reversal with instructions to the Superior Court to conduct an evidentiary hearing to make specific fact-findings. The Nurses also request that the Court correct all legal errors in the Superior Court's summary-judgment rulings, as these rulings will impact the case going forward, regardless of whether a class is certified.

Signed January 7, 2016:

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PROOF OF SERVICE

I, Jack B. Krona Jr., certify that on this date, I caused a true and correct copy of the foregoing **"PETITIONERS' OPENING BRIEF"** to be served on Aaron Bass and Rebecca Watkins, Sather, Byerly & Holloway, LLP, 111 SW Fifth Ave, Suite 1200, Portland, OR 97204, by e-mail transmission by party agreement to serve documents electronically.

DATED this JANUARY 7, 2015

By:_____
Jack B. Krona Jr., Esq.

ORIGINAL

No. 33556-9-III

FILED

JAN 08 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

JUDITH Q. CHAVEZ, KATHLEEN CHRISTIANSON,
ORALIA GARCIA, AND MARRIETTA JONES, individually,
and on behalf of all similarly situated registered nurses employed by
Our Lady of Lourdes Hospital at Pasco, d/b/a Lourdes Medical Center,

Petitioners,

v.

OUR LADY OF LOURDES HOSPITAL AT PASCO,
d/b/a Lourdes Medical Center,
AND JOHN SERLE, individually and in his official capacity
as an agent and officer of Lourdes Medical Center,

Respondents.

APPENDIX TO PETITIONERS' OPENING BRIEF

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PROOF OF SERVICE

I, Jack B. Krona Jr., certify that on this date, I caused a true and correct copy of the foregoing **"PETITIONERS' APPENDIX TO OPENING BRIEF"** to be served on Aaron Bass and Rebecca Watkins, Sather, Byerly & Holloway, LLP, 111 SW Fifth Ave, Suite 1200, Portland, OR 97204, by e-mail transmission by party agreement to serve documents electronically.

DATED this JANUARY 7, 2015

By:_____
Jack B. Krona Jr., Esq.

The Honorable Bruce Spanner

IN THE SUPERIOR COURT OF WASHINGTON

IN AND FOR THE COUNTY OF FRANKLIN

ORIGINAL FILED

MAY 21 2015

MICHAEL J. KILLIAN
FRANKLIN COUNTY CLERK

JUDITH Q. CHAVEZ, KATHLEEN CHRISTIANSON, ORALIA GARCIA, AND MARRIETTA JONES, individually, and on behalf of all similarly situated registered nurses employed by Our Lady of Lourdes Hospital at Pasco, d/b/a Lourdes Medical Center, Plaintiffs vs. OUR LADY OF LOURDES HOSPITAL AT PASCO, d/b/a Lourdes Medical Center, and JOHN SERLE, individually and in his capacity as an agent and officer of Lourdes Medical Center. Defendants.	No. 12-2-50575-9 ORDER ON PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

On May 17, 2013, Plaintiffs' Motion for Class Certification came before the Court. The Court reviewed the submitted evidence and arguments and did not certify a class at that time. Instead, it instructed plaintiffs to file summary judgment motions on proposed legal theories as a pre-cursor to renewing the class certification motion. By Order dated February 27, 2015, the Court ruled on those motions. The Court also granted plaintiffs' motion to amend the complaint, and plaintiffs filed a First Amended Complaint on March 2, 2015. Plaintiffs have now renewed their motion to certify a class, and the renewed motion came before the Court on April 10, 2015. Having fully considered the briefs, the evidence, and the arguments of the

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parties, the Court hereby makes specific findings regarding the requirements of class certification as follows:

1. On the prerequisite to a class under CR 23(a)(1), the Court finds plaintiffs met the required showing that the proposed class is numerous enough to make joinder impractical.
2. On the prerequisite to a class under CR 23(a)(2), the Court finds plaintiffs met the required showing that there are questions of law or fact common to the proposed class or subclasses.
3. On the prerequisite to a class under CR 23(a)(3), the Court finds plaintiffs met the required showing that the representative plaintiffs have claims typical of those of the proposed class or subclasses.
4. On the prerequisite to a class under CR 23(a)(4), the Court finds plaintiffs met the required showing of adequate representation by the representative plaintiffs and their attorneys.
5. The Court finds plaintiffs have not met the required showing that a mandatory class action would be maintainable under CR23(b)(1) because the primary objective of this lawsuit is monetary damages and plaintiffs have failed to show prejudice to absent class members would occur.
6. The Court finds plaintiffs have not met the required showing that a mandatory class action would be maintainable under CR23(b)(2) because the primary objective of this lawsuit is monetary damages and plaintiffs have failed to establish the necessity of declaratory or injunctive relief.

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7. The Court finds plaintiffs have not met the required showing that a class action would be maintainable under CR23(b)(3). The Court finds that common class issues do not predominate over individual questions because issues regarding shift, nurse type, nurse roles and job duties, patient assignments and census, managers, and department cause the specifics for each class member to overrun any generalities. The Court also finds that a class action is not superior to alternatives such as joinder or individual lawsuits for fair and efficient adjudication of the claims. Finally, the Court also finds that the proposed class, or the proposed nine subclasses by department, would be unmanageable at trial.

For the reasons set out above, the Court hereby DENIES plaintiffs' motion to certify a class of all RNs who have worked one or more hourly shifts in the relevant time period and the proposed subclasses.

IT IS SO ORDERED this 21 day of May, 2015.

HON. BRUCE SPANNER

Submitted by:

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on May 12, 2013, I filed the foregoing via US Mail with the following:

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I also hereby certify that on May 12, 2013, I served the foregoing via US Mail on the following:

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HONORABLE BRUCE SPANNER

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF FRANKLIN

JUDITH Q. CHAVEZ, KATHLEEN CHRISTIANSON, ORALIA GARCIA, AND MARRIETTA JONES, individually, and on behalf of all similarly situated registered nurses employed by Our Lady of Lourdes Hospital at Pasco, d/b/a Lourdes Medical Center, Plaintiffs vs. **OUR LADY OF LOURDES HOSPITAL AT PASCO**, d/b/a Lourdes Medical Center, and **JOHN SERLE**, individually and in his capacity as an agent and officer of Lourdes Medical Center. Defendants.	No. 12-2-50575-9 **ORDER ON CROSS MOTIONS FOR PARTIAL SUMMARY JUDGMENT ON CERTAIN LEGAL ISSUES RELATING TO NON-MEAL-REST PERIODS**

The following matters came before the court on the parties' motions for partial summary judgment:

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1) Plaintiffs' July 23, 2014 Motion for Partial Summary Judgment of Issues Relating to Non-Meal-Rest Periods, Tracking Time, and Paying for Missed Rest Periods, which came before the court on August 22, 2014. Plaintiffs appeared by and through their attorneys Jack Krona, Jr., Jim McGuinness, and Aaron Streepy. Defendants appeared by and through their attorney of record, Aaron Bass.

2) Plaintiffs' August 22, 2014 (as amended September 18, 2014) Motion for Partial Summary Judgment on Certain Legal Issues Related to Non-Meal Rest Periods; and Defendants' September 11, 2014 Cross Motion for Summary Judgment And Opposition to Plaintiffs' Motion Regarding "In Assignment" and "Intermittent Breaks", which came before the court on September 26, 2014. Plaintiffs appeared by and through their attorney, Jack Krona, Jr.; defendants appeared by and through their attorney, Aaron Bass.

3) Plaintiffs' September 22, 2014 Amended Motion for Partial Summary Judgment on Issues Relating to Second Meal Periods for 12-Hour Shift Nurses, which came before the court on October 17, 2014. Plaintiffs appeared by and through their attorneys Jack Krona, Jr. and Aaron Streepy. Defendants appeared by and through their attorney, Aaron Bass.

The court made specific rulings on these motions as outlined below.

1) Plaintiffs' Motion for Partial Summary Judgment of Issues Relating to Non-Meal-Rest Periods, Tracking Time, and Paying for Missed Rest Periods.

Having considered the evidence and arguments submitted by the parties, the Court made the following rulings::

1. Employees have a private right to action for missed rest breaks.

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2. Employees are entitled to ten minutes of rest break for every four[1] hours worked and if they miss a rest break, they are entitled to an additional ten minutes of pay.

3. Rest breaks cannot be waived.

4. There is no duty under Washington law to schedule rest breaks when intermittent breaks are appropriate for the nature of the employment.

5. An employee can be on call, and if not otherwise engaged in work activity, on a rest break. If an employee must perform any work activities, mental or physical, they are not on a rest break.

6. An individualized inquiry into the duties of nurses across departments and shifts is necessary to determine if a particular nurse had a rest break.

7. A policy of "vigilance", as was found after trial in the Brinks case (Pellino v Brinks, 164 Wn App 668 (2011) may make on call time such that a break was never received. There is a genuine issue of material fact as to whether the duties of any nurse, or group of nurses are performing work activities without being relieved of patient responsibility.

8. If an employer willfully fails to pay rest breaks, employees may recover double damages and attorney fees.

9. Employers have an obligation to maintain records of all hours worked, but there is no requirement to systematically track missed rest breaks specifically.

10. Liability does not follow automatically from violation of a recordkeeping requirement. Instead, employees must first prove an employee was not

[1] From the bench, the Court indicated employees receive a non-meal rest break every three hours. WAC 296-126-092 states employees shall be allowed a rest period of not less than ten minutes, on the employer's time, for each four hours of working time, where the rest periods must be as near as possible to the mid-point of the work period, and that "[n] employee shall be required to work more than three hours without a rest period."

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compensated for all time work, and then must produce sufficient evidence of the amount and extent of the uncompensated work by a fair preponderance of the evidence. If an employee meets that burden, then the burden shifts to the employer to disprove damages.

11. The employer can rely on the efforts of employees to record time and prepare records of necessity, but if the records are wrong, incomplete or inadequate, the employer bears the risk of the bad or inadequate record keeping.

12. A genuine factual dispute exists regarding whether nurses at Lourdes have or have not been compensated for all time worked. Plaintiffs provided no evidence to the court as to the amount and extent of uncompensated work, although that was not determinative in the summary judgment proceedings.

Based on these rulings, the Court hereby DENIES plaintiff's motion in full.

2) Plaintiffs' Amended Motion for Partial Summary Judgment on Certain Legal Issues Related to Non-Meal Rest Periods; and Defendants' Cross Motion for Summary Judgment And Opposition to Plaintiffs' Motion Regarding "In Assignment" and "Intermittent Breaks."

Having considered the evidence and arguments submitted by the parties, the Court made the following findings and conclusions:

1. There is a factual question of whether nurses "in patient assignment" at Lourdes are "vigilant" and engaged in work activities, as was found after trial in the Brinks case, so that they can have breaks without being relieved of assignment.

2. The Court does not have enough factual information to determine with sufficient specificity what a nurse does while she is "on duty.

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3. The Court cannot grant judgment as a matter of law to either party on the issue of whether intermittent breaks are consistent with the duties of nursing because of genuine disputed issues of material fact.

4. If an employee is "on call" during a meal period and subject to recall during the meal period, the law requires that the meal period be considered a "paid lunch" on the employers time and is considered "hours worked."

5. If an employee on a "paid lunch" is denied the ability to have a 30-minute paid meal period that is interrupted for work duties, the employee is entitled to payment for an extra 30-minutes of "hours worked."

6. The Court ruled that—contrary to the interpretative guidelines—an employer is not required to use its "every effort" to make sure an employee on a paid lunch receives the full 30 minutes.

7. A material question of fact exists as to whether a particular nurse on a particular shift with a particular patient assignment can be on a break while in patient assignment.

8. Plaintiffs failed to plead a contract claim so the Court will not entertain a motion on that basis.

9. As a matter of law, the lack of a written policy on intermittent breaks or failure to mention intermittent breaks in a rest break policy does not preclude intermittent breaks on any given shift.

10. Intermittent breaks are not, as a matter of law, inconsistent with nursing duties. This is an individualized factual question dependent on shift, case load, duties and

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the practicality of taking intermittent breaks. A material question of fact exists on if and when any particular nurse may be able to take intermittent breaks.

11. Employers do not have to schedule breaks when intermittent breaks are appropriate for the nature of the employment. Because when intermittent breaks are appropriate is a question of fact, a question of fact also remains on whether Lourdes routinely failed to comply with scheduling obligations.

Except as otherwise stated above, the Court DENIES the cross-motions for summary judgment in full.

3) Plaintiffs' Amended Motion for Partial Summary Judgment on Issues Relating to Second Meal Periods for 12-Hour Shift Nurses, which came before the court on October 17, 2014.

Having considered the evidence and arguments submitted by the parties, the Court made the following ruilings::

1. 12-hour nurses at Lourdes were entitled to, and were paid for second meal periods.

2. Although paid, a 12-hour nurse would still be considered to have missed the second meal period and be entitled to another 30 minutes of pay if the nurse was not sufficiently relieved of duties to have 30 minutes for lunch.

3. For a paid meal period, being "on call" or subject to recall does not negate the meal period. The question is whether the nurse was sufficiently relieved of duties for 30 minutes, and the 30 minutes can be either interrupted or in a block.

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4. Whether or not a particular nurse was sufficiently relieved of duties and received a second meal period is a complex question of fact based on differences between departments and shifts. A genuine factual dispute remains on this issue.

5. An employer has no duty to schedule a paid meal period.

6. Plaintiffs did not sufficiently plead a waiver issue, so a motion on that basis will not be addressed by the Court.

Based on these findings of law and fact, the Court hereby DENIES plaintiff's motion for summary judgment in full.

DATED this 27 day of ~~January~~ Feb. 2015.

Judge Bruce Spanner

SUBMITTED BY:

Aaron Bass, WSB #39073
Tel. (503) 225-5858
Fax (503) 721-9272
abass@sbhlegal.com
Attorneys for Defendants

WASHINGTON STATE LEGISLATURE

WAC 246-320-136

Leadership.

This section describes leadership's role in assuring care is provided consistently throughout the hospital and according to patient and community needs.

The hospital leaders must:

(1) Appoint or assign a nurse at the executive level to:

(a) Direct the nursing services; and

(b) Approve patient care policies, nursing practices and procedures;

(2) Establish hospital-wide patient care services appropriate for the patients served and available resources which includes:

(a) Approving department specific scope of services;

(b) Integrating and coordinating patient care services;

(c) Standardizing the uniform performance of patient care processes;

(d) Establishing a hospital-approved procedure for double checking certain drugs, biologicals, and agents by appropriately licensed personnel; and

(e) Ensuring immediate access and appropriate dosages for emergency drugs;

(3) Adopt and implement policies and procedures which define standards of care for each specialty service;

(4) Provide practitioner oversight for each specialty service with experience in those specialized services. Specialized services include, but are not limited to:

(a) Surgery;

(b) Anesthesia;

(c) Obstetrics;

(d) Neonatal;

(e) Pediatrics;

(f) Critical or intensive care;

(g) Alcohol or substance abuse;

(h) Psychiatric;

(i) Emergency; and

(j) Dialysis;

(5) Provide all patients access to safe and appropriate care;

(6) Adopt and implement policies and procedures addressing patient care and nursing practices;

(7) Require that individuals conducting business in the hospital comply with hospital policies and procedures;

(8) Establish and implement processes for:

(a) Gathering, assessing and acting on information regarding patient and family satisfaction with the services provided;

(b) Posting the complaint hotline notice according to RCW **70.41.330**; and

(c) Providing patients written billing statements according to RCW **70.41.400**;

(9) Plan, promote, and conduct organization-wide performance-improvement activities according to WAC **246-320-171**;

(10) Adopt and implement policies and procedures concerning abandoned newborn babies and hospitals as a safe haven according to RCW **13.34.360**;

(11) Adopt and implement policies and procedures to require that suspected abuse, assault, sexual assault or other possible crime is reported within forty-eight hours to local police or the appropriate law enforcement agency according to RCW **26.44.030**.

[Statutory Authority: Chapter **70.41** RCW and RCW **43.70.040**. WSR 09-07-050, § 246-320-136, filed 3/11/09, effective 4/11/09.]

WASHINGTON STATE LEGISLATURE

WAC 246-320-171

Improving organizational performance.

The purpose of this section is to ensure that performance improvement activities of staff, medical staff, and outside contractors result in continuous improvement of patient health outcomes. In this section "near miss" means an event which had the potential to cause serious injury, death, or harm but did not happen due to chance, corrective action or timely intervention.

Hospitals must:

(1) Have a hospital-wide approach to process design and performance measurement, assessment, and improving patient care services according to RCW **70.41.200** and include, but not be limited to:

(a) A written performance improvement plan that is periodically evaluated;

(b) Performance improvement activities which are interdisciplinary and include at least one member of the governing authority;

(c) Prioritize performance improvement activities;

(d) Implement and monitor actions taken to improve performance;

(e) Education programs dealing with performance improvement, patient safety, medication errors, injury prevention; and

(f) Review serious or unanticipated patient outcomes in a timely manner;

(2) Systematically collect, measure and assess data on processes and outcomes related to patient care and organization functions;

(3) Collect, measure and assess data including, but not limited to:

(a) Operative, other invasive, and noninvasive procedures that place patients at risk;

(b) Infection rates, pathogen distributions and antimicrobial susceptibility profiles;

(c) Death;

(d) Medication use;

(e) Medication management or administration related to wrong medication, wrong dose, wrong time, near misses and any other medication errors and incidents;

(f) Injuries, falls; restraint use; negative health outcomes and incidents injurious to patients in the hospital;

(g) Adverse events listed in chapter **246-302** WAC;

(h) Discrepancies or patterns between preoperative and postoperative (including pathologic) diagnosis, including pathologic review of specimens removed during surgical or invasive procedures;

(i) Adverse drug reactions (as defined by the hospital);

(j) Confirmed transfusion reactions;

(k) Patient grievances, needs, expectations, and satisfaction; and

(l) Quality control and risk management activities.

[Statutory Authority: Chapter **70.56** RCW. WSR 12-16-057, § 246-320-171, filed 7/30/12, effective 10/1/12. Statutory Authority: Chapter **70.41** RCW and RCW **43.70.040**. WSR 09-07-050, § 246-320-171, filed 3/11/09, effective 4/11/09.]

WASHINGTON STATE LEGISLATURE

WAC 296-126-002

Definitions.

(1) "Employer" means any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees, unless exempted by chapter **49.12** RCW or these rules. For purposes of these rules, the state or its political subdivisions, municipal corporations, or quasi-municipal corporations (collectively called "public employers") are considered to be "employers" and subject to these rules in the following manner:

(a) Before May 20, 2003, public employers are not subject to these rules unless the rules address:

(i) Sick leave and care of family members under RCW **49.12.265** through **49.12.295**.

(ii) Parental leave under RCW **49.12.350** through **49.12.370**.

(iii) Compensation for required employee uniforms under RCW **49.12.450**.

(iv) Employers' duties towards volunteer firefighters and reserve officers under RCW **49.12.460**.

(b) On or after May 20, 2003, public employers are subject to these rules only if these rules do not conflict with the following:

(i) Any state statute or rule.

(ii) Any local resolution, ordinance, or rule adopted before April 1, 2003.

(2) "Employee" means an employee who is employed in the business of his employer whether by way of manual labor or otherwise. "Employee" does not include:

(a) Any individual registered as a volunteer with a state or federal volunteer program or any person who performs any assigned or authorized duties for an educational, religious, governmental or nonprofit charitable corporation by choice and receives no payment other than reimbursement for actual expenses necessarily incurred in order to perform such volunteer services;

(b) Any individual employed in a bona fide executive, administrative or professional capacity or in the capacity of outside salesperson;

(c) Independent contractors where said individuals control the manner of doing the work and the means by which the result is to be accomplished.

(3) "Employ" means to engage, suffer or permit to work.

(4) "Adult" means any person eighteen years of age or older.

(5) "Minor" means any person under eighteen years of age.

(6) "Student learner" means a person enrolled in a bona fide vocational training program accredited by a national or regional accrediting agency recognized by the United States Office of Education, or authorized and approved by the Washington state commission for vocational education, who may be employed part time in a definitely organized plan of instruction.

(7) "Learner" means a worker whose total experience in an authorized learner occupation is less than the period of time allowed as a learning period for that occupation in a learner certificate issued by the director pursuant to regulations of the department of labor and industries.

(8) "Hours worked" shall be considered to mean all hours during which the employee is authorized or required by the employer to be on duty on the employer's premises or at a prescribed

work place.

(9) "Conditions of labor" shall mean and include the conditions of rest and meal periods for employees including provisions for personal privacy, practices, methods and means by or through which labor or services are performed by employees and includes bona fide physical qualifications in employment, but shall not include conditions of labor otherwise governed by statutes and rules and regulations relating to industrial safety and health administered by the department.

(10) "Department" means the department of labor and industries.

(11) "Director" means the director of the department of labor and industries or the director's designated representative.

[Statutory Authority: Chapter **49.12** RCW. WSR 10-04-092, § 296-126-002, filed 2/2/10, effective 3/15/10; Order 76-15, § 296-126-002, filed 5/17/76; Order 74-9, § 296-126-002, filed 3/13/74, effective 4/15/74.]

WASHINGTON STATE LEGISLATURE

WAC 296-126-092

Meal periods—Rest periods.

(1) Employees shall be allowed a meal period of at least thirty minutes which commences no less than two hours nor more than five hours from the beginning of the shift. Meal periods shall be on the employer's time when the employee is required by the employer to remain on duty on the premises or at a prescribed work site in the interest of the employer.

(2) No employee shall be required to work more than five consecutive hours without a meal period.

(3) Employees working three or more hours longer than a normal work day shall be allowed at least one thirty-minute meal period prior to or during the overtime period.

(4) Employees shall be allowed a rest period of not less than ten minutes, on the employer's time, for each four hours of working time. Rest periods shall be scheduled as near as possible to the midpoint of the work period. No employee shall be required to work more than three hours without a rest period.

(5) Where the nature of the work allows employees to take intermittent rest periods equivalent to ten minutes for each 4 hours worked, scheduled rest periods are not required.

[Order 76-15, § 296-126-092, filed 5/17/76.]

THE HONORABLE BRUCE SPANNER

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

JUDY Q. CHAVEZ, KATHLEEN CHRISTIANSEN, ORALIA GARCIA, AND MARRIETA JONES, individually, and on behalf of all similarly situated registered nurse employed by Our Lady of Lourds Hospital at Pasco, d/b/a Lourdes Medical Center, Plaintiffs, vs. OUR LADY OF LOURDES HOSPITAL AT PASCO, d/b/a Lourdes Medical center, and JOHN SERLE individually and in his capacity as an agent and officer of Lourdes Medical Center, Defendants.	No. 12-2-50575-9 **DECLARATION OF JACK B. KRONA JR., ESQ.**

I, Jack B. Krona Jr., Esq, hereby declare as follows:

1. I am one of the attorneys representing the Plaintiffs in the above-entitled cause of action. I am seeking to be appointed as class counsel. I give this declaration in support of the **PLAINTIFFS' REPLY REGARDING MOTION FOR PARTIAL SUMMARY JUDGMENT ON CERTAIN LEGAL ISSUES RELATING TO NON-MEAL-REST PERIODS AND BRIEF IN SUPPORT.**

2. I am an attorney licensed in the Washington, California, and Texas. I am also admitted to practice in a number of federal districts and circuits. I have never been sanctioned for any reason or subject to discipline in any jurisdiction.

3. A true and correct printout of a September 19, 2014 transmittal e-mail from David Johnson, L&I Wage and Hour Technical Specialist, to Jack Krona, is Exhibit 1 to this Declaration, which was transmitted in connection with a records request to obtain a copy of the Jan. 2, 2002 version of Administrative Policy ES.C.6.

4. A true and correct printout of the Jan. 2, 2002 Version of ES.C.6 forwarded by D. Johnson is Exhibit 2 to this Declaration, which was an attachment to Exhibit 1.

5. A true and correct printout from the Washington Code Reviser website, WSR 05-18-091, showing the purpose of the 2005 revision to ES.C.6 is attached as Exhibit 3 to this Declaration.

6. A true and correct copy of the current ES.C.6 obtained from the L&I's public website is attached to this Declaration as Exhibit 4.

7. A true and correct printout of WAC 246-840-710 from http://app.leg.wa.gov/wac/default.aspx?cite=246-840-710 is attached to this declaration as Exhibit 5.

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

Executed in Pierce County, Washington, this 22nd day of September 2014.

Jack B. Krona Jr., Esq.

Exhibit 1

Johnson, David L (LNI)
Sep 19 at 9:07 AM
To
Jack Krona Jr.

I got this from Elaine Fisher, she had kept electronic copies of the policies filed in 2002.

From: Jack Krona Jr. [mailto:j_krona@yahoo.com] **Sent:** Friday, September 19, 2014 8:39 AM**To:** Johnson, David L (LNI)**Subject:** Re: LNI policy

I have not had any luck. An electronic copy or any copy would be great. Thanks so much for your help.

Jack B. Krona Jr., Esq.
(253) 341-9331

From: "Johnson, David L (LNI)" <jodc235@LNI.WA.GOV>**To:** "j_krona@yahoo.com" <j_krona@yahoo.com> **Sent:** Friday, September 19, 2014 8:35 AM**Subject:** LNI policy

Mr. Krona:

Did you have any luck on that 2002 policy? If not, I was able to get an electronic copy from Elaine Fisher.

Let me know if you have it.

Thanks,

David Johnson
Wage and Hour Technical Specialist
Department of Labor and Industries
PO Box 44510, Olympia, WA 98504-4510
360-902-5552

ESC6 Breaks (2002).docDownload

Exhibit 2

ADMINISTRATIVE POLICY

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
EMPLOYMENT STANDARDS

TITLE:	MEAL AND REST PERIODS	NUMBER:	ES.C.6
CHAPTER:	RCW 49.12 WAC 296-126-092	REPLACES:	ES-026
		ISSUED:	1/2/2002

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.

Meal and rest periods are conditions of labor that may be regulated by the department under RCW 49.12, the Industrial Welfare Act. The department has the specific authority to make rules governing conditions of labor, and all employees subject to the Industrial Welfare Act are entitled to the protections of the rules on meal and rest breaks. The actual meal and rest break requirements are not in the statute but appear in WAC 296-126-092, Standards of Labor.

Note: **Minor employees** (under 18) and **agricultural workers** are not covered by these rules. The regulations for minors are found in WAC 296-125-0285 and –0287. The regulations for agricultural employees are found in WAC 296-131-020.

When is a meal period required?

Meal period requirements are triggered by more than five hours of work:

- Employees working five consecutive hours or less need not be allowed a meal period. Employees working over five hours shall be allowed a meal period. See WAC 296-126-092(1).
- The 30-minute meal period must be provided between the second and fifth working hour.

- The provision in WAC 296-126-092(4) that no employee shall be required to work more than five consecutive hours without a meal period applies to the employee's normal workday. For example, an employee who normally works a 12-hour shift shall be allowed to take a 30-minute meal period no later than at the end of each five hours worked.

- Employees working at least three hours longer than a normal workday shall be allowed a meal period before or during the overtime portion of the shift. A "normal work day" is the shift the employee is regularly scheduled to work. If the employee's scheduled shift is changed by working a double shift, or working extra hours, the additional meal period may be required. Employees working a regular 12-hour shift who work 3 hours or more after the regular shift will be entitled to a meal period and possibly to additional meal periods depending upon the number of hours to be worked. See WAC 296-126-092(3).

- The second 30-minute meal period must given within five hours from the end of the first meal period and for each five hours worked thereafter.

When may meal periods be unpaid?

Meal periods are not considered hours of work and may always be unpaid as long as employees are completely relieved from duty and receive 30 minutes of uninterrupted mealtime.

It is not necessary that an employee be permitted to leave the premises if he/she is otherwise *completely* free from duties during the meal period. In such a case, payment of the meal period is not required, however, employees must be completely relieved from duty and free to spend their meal period on the premises as they please. These situations must be evaluated on a case-by-case basis to determine if the employee is on the premises in the in the interest of the employer. If so, the employee is "on duty" during the meal period and must be paid.

Employees who remain on the premises during their meal period on their own initiative and are completely free from duty are not required to be paid when they keep their pager, cell phone, or radio on *if* they are under no obligation to respond to the pager or cell phone or to return to work. The circumstances in determining when employees carrying cell phones, pagers, radios, etc., are subject to payment of wages must be evaluated on a case-by-case basis.

When must the meal period be paid?

Meal periods are considered hours of work when the employer requires employees to remain on duty on the premises or at a prescribed work site *and* requires the employee to act in the interest of the employer.

When employees are required to remain on duty on the premises or at a prescribed work site and act in the interest of the employer, the employer must make every effort to provide employees with an uninterrupted meal period. If the meal period should be interrupted due to the employee's performing a task, upon completion of the task, the meal period will be continued until the employee has received 30 minutes total of mealtime. Time spent performing the task is not considered part of the meal period. The entire meal period must be paid without regard to the number of interruptions.

Can an employee waive the meal period?

Employees may choose to waive the meal period requirements. The regulation states employees "shall be allowed," and "no employee shall be required to work more than five hours without a meal period." The department interprets this to mean than an employer may not require more than five consecutive hours of work and must allow a 30-minute meal period when employees work five hours or longer.

If an employee wishes to waive that meal period, the employer may agree to it. The employee may at any time request the meal period. While it is not required, the department recommends obtaining a written request from the employee(s) who chooses to waive the meal period.

If, at some later date, the employee(s) wishes to receive a meal period, any agreement would no longer be in effect. Employees must still receive a rest period of at least ten minutes for each four hours of work.

An employer can refuse to allow the employee to waive the meal period and require that an employee take a meal period.

What is the rest period requirement?

Employees shall be allowed a rest period of not less than ten minutes, on the employer's time, for each four hours of working time. Employees may not waive their right to a rest period.

Rest periods must be paid. The term "rest period" is a relief from duty. Rest periods are considered hours worked. Nothing in this regulation prohibits an employer from requiring employees to remain on the premises during their rest periods. The term "on the employer's time" is considered to mean that the employer is responsible for paying the employee for the time spent on a rest period.

Scheduling of rest periods. The rest period of time must be scheduled as near as possible to the midpoint of the four hours of working time. No employee may be required to work more than three consecutive hours without a rest period.

Intermittent Rest Periods. Employees need not be given a scheduled rest period when the nature of the work allows intermittent rest period equal to ten minutes during each four hours of work. "Intermittent" is defined as intervals of short duration in which

employees are allowed to relax and rest, or a brief inactivity from work or exertion. Generally, if the nature of the work on a production line, for example, does not allow for intermittent rest periods, employees must be given scheduled ten-minute rest periods.

Variances from required meal and rest periods. Employers who need to change the meal and rest periods times from those provided in WAC 296-126-092 due to the nature of the work may, for good cause, apply for a variance from the department. The variance request must be submitted on a form provided by the department, and employers must give notice to the employees or their representatives so they may also submit their written views to the department. **See ES.C.9**, Variances.

A Collective Bargaining Agreement cannot provide for meal and rest periods that are less than those required by WAC 296-126-092. The department's interpretation of RCW 49.12 is that that statute and rules promulgated under it, including WAC 296-126-092, establish a minimum standard for working conditions for all employees in the state. Provisions of a collective bargaining agreement covering specific requirements for meal and rest periods must be least equal to or more favorable than the provisions of these standards.

Exhibit 3

WSR 05-18-091

INTERPRETIVE AND POLICY STATEMENT

DEPARTMENT OF

LABOR AND INDUSTRIES

[Filed September 7, 2005, 10:11 a.m.]

In accordance with RCW 34.05.230(12), following are the policy and interpretive statements issued by the department for June - August 2005.

If you have any questions or need additional information, please call Carmen Moore at (360) 902-4206.

POLICY AND INTERPRETIVE STATEMENTS

WISHA

WISHA Regional Directive (WRD) 18.35, "Grounding Requirements for Temporary Substation Fences."

This policy will remain in effect indefinitely. It applies to all WISHA enforcement and consultation activities involving WAC 296-45-475(3) (installation of temporary substation fences). It replaces all previous guidance on the subject, whether formal or informal. This new policy was issued August 19, 2005.

Contact Marcia Benn, Mailstop 44648, phone (360) 902-5503.

SPECIALTY COMPLIANCE SERVICES

Employment Standards.

Contact person for all policies below: Janis Kerns, Mailstop 44510, phone (360) 902-5552.

Minimum Wage Act Applicability, ES.A.1.

This policy clarifies the MWA may apply to public employees and that public employees are subject to the salary basis regulations. It also clarifies that the exemption for employees of charitable institutions charged with childcare responsibilities applies only to recreational camps run by such organizations. Major paragraphs in the policy have been numbered for easier reference. This policy was amended June 24, 2005.

Collective Bargaining Agreements, ES.A.6.

New language was added in the industrial welfare section to reflect changes made by 2003 legislature to bring public employees under chapter 49.12 WAC, the Industrial Welfare Act. The policy was amended to explain that new information on construction companies that have collective bargaining agreements may

bargain their meal and rest periods to vary from the meal and rest periods provided in WAC 296-126-092. New language was added to explain that meal and rest periods under collective bargaining agreements can vary from or supersede the Industrial Welfare Act for public employees. Major paragraphs in the policy have been numbered for easier reference. This policy was amended June 24, 2005.

Questions and Answers About Salary Basis, Administrative Policy #ES.A.9.1.

This policy was amended to clarify that if an employee is not qualified under a bona fide sick leave plan, the employer may deduct wages in full-day increments. This policy was amended June 24, 2005.

Industrial Welfare Act, Administrative Policy ES.C.1.

This policy is amended to explain conditions of labor and explain that public employees are now covered under the Industrial Welfare Act, chapter 49.12 RCW. Major paragraphs in the policy were numbered for easier reference. This policy was amended June 24, 2005.

Hours Worked, ES.C.2.

This policy clarifies that public employers are not required to obtain a state minor work permit when they employ persons under the age of eighteen and adds note that public employers are required to comply with federal child labor regulations. Major paragraphs in the policy have been numbered for easier reference. This policy was amended June 24, 2005.

Meal and Rest Periods, Administrative Policy ES.C.6.

This policy was amended to explain that public employees are now entitled to meal and rest periods under chapter 49.12 RCW and WAC 296-126-092 and that labor/management agreement or collective bargaining agreement (CBA) can vary from or supersede the WAC. The policy was also amended to explain that construction workers with a CBA can vary meal and rest periods from the WAC. The definition of rest periods and intermittent rest periods were also clarified. Major paragraphs in the policy have been numbered for easier reference. This policy was amended June 24, 2005.

Administrative Policy ES.A.9.2: General Information Applicable to Exemptions from Minimum Wage and Overtime Requirements for White-Collar Workers (Executive, Administrative, Professional, Computer Professional and Outside Sales).

This new policy replaces the April 1992 Interpretive Guideline, ES-006. This policy is an introduction to the department's interpretation of the state's regulations exempting certain office and nonmanual type work, known as "white collar regulations" and contains general information applicable to all of the regulations under WAC 296-128-500 and 296-128-540. These policies expand ES-006, which had brief summaries of each of the exemptions. ES-006 was withdrawn from the other administrative policies revised and issued January 2, 2002. Each of the "white-collar" classifications was given separate administrative policy numbers. This new policy was issued June 24, 2005.

Administrative Policy ES.A.9.3: Exemption from Minimum Wage and Overtime Requirements for Executive Positions.

This new policy interprets the executive positions (white-collar) exemption, WAC 296-128-510. Major

paragraphs in the policy have been numbered for easier reference.

This new policy was issued June 24, 2005.

Administrative Policy ES.A.9.4: Exemption from Minimum Wage and Overtime Requirements for Administrative Positions.

This new policy interprets the administrative (white-collar) exemption, WAC 296-128-520. Major paragraphs in the policy have been numbered for easier reference. This new policy was issued June 24, 2005.

Administrative Policy ES.A.9.5: Exemption from Minimum Wage and Overtime Requirements for Professional Positions.

This new policy interprets the state's professional (white-collar) exemption, WAC 296-128-530. Major paragraphs in the policy have been numbered for easier reference. This expands the 1992 Interpretive Guideline ES-006, which was repealed January 2, 2002. This new policy was issued June 24, 2005.

Administrative Policy ES.A.9.6: Exemption from Minimum Wage and Overtime Requirements for Computer Professional Positions.

This new policy interprets the state's computer professional (white-collar) exemption, WAC 296-128-535. Major paragraphs in the policy have been numbered for easier reference. This new policy was issued June 24, 2005.

Administrative Policy ES.A.9.7: Exemption from Minimum Wage and Overtime Requirements for Outside Sales Positions.

This new policy interprets the state's outside sales (white-collar) exemption, WAC 296-128-540. Major paragraphs in the policy have been numbered for easier reference. This expands the 1992 Interpretive Guideline ES-006, which was repealed January 2, 2002. This new policy was issued June 24, 2005.

Administrative Policy ES.A.9.8: Definition of Fee Basis in Administrative, Professional and Outside Sales Positions.

This new policy interprets fee basis payments under the administrative, professional, and outside sales exemptions under WAC 296-128-520, 296-128–530, and 296-128-540. These exemptions may be paid either on a salary or fee basis. Major paragraphs in the policy have been numbered for easier reference. This new policy was issued June 24, 2005.

Carmen Moore

Rules Coordinator

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Exhibit 4

ADMINISTRATIVE POLICY

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
EMPLOYMENT STANDARDS

TITLE:	MEAL AND REST PERIODS FOR NONAGRICULTURAL WORKERS AGE 18 AND OVER	NUMBER:	ES.C.6
		REPLACES:	ES-026
CHAPTER:	RCW 49.12 WAC 296-126-092	ISSUED: REVISED:	1/2/2002 6/24/2005

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.

1. Are meal and rest periods conditions of labor that may be regulated by the department under RCW 49.12, the Industrial Welfare Act?

Yes, the department has the specific authority to make rules governing conditions of labor, and all employees subject to the Industrial Welfare Act (IWA) are entitled to the protections of the rules on meal and rest breaks. The actual meal and rest break requirements are not in the statute but appear in WAC 296-126-092, Standards of Labor.

Note: Minor employees (under 18) and **agricultural workers** are not covered by these rules. The regulations for minors are found in WAC 296-125-0285 and WAC 296-125-0287. The regulations for agricultural employees are found in WAC 296-131-020.

2. Are both private and public employees covered by these meal and rest period regulations?

Yes. The IWA and related rules establish a minimum standard for working conditions for all covered employees working for both public sector and private sector businesses in the state, including non-profit organizations that employ workers.

3. Does a collective bargaining agreement (CBA) or a labor/management agreement allow public employers to give meal and rest periods different from those under WAC 296-126-092?

Yes. Effective May 20, 2003, the legislature amended RCW 49.12.005 to include "the state, any state institution, state agency, political subdivisions of the state, and any municipal corporation or quasi-municipal corporation". Thus it brought public employees under the protections of the IWA, including the meal and rest period regulations, WAC 296-126-092. *See Administrative Policy ES.C.1 Industrial Welfare Act and ES.A.6 Collective Bargaining Agreements.*

Exceptions--The meal and rest periods under WAC 296-126-092 do not apply to:

- Public employers with a local resolution, ordinance, or rule in effect prior to April 1, 2003 that has provisions for meal and rest periods different from those under WAC 296-126-092, or
- Employees of public employers who have entered into collective bargaining contracts, labor/management agreements, or other mutually agreed to employment agreements that specifically vary from or supersede, in part or in total, the rules regarding meal and rest periods, or
- Public employers with collective bargaining agreements (CBA) in effect prior to April 1, 2003 that provide for meal and rest periods different from the requirements of WAC 296-126-092. The public employer may continue to follow the CBA until its expiration. Subsequent collective bargaining agreements may provide for meal and rest periods that are specifically different, in whole or in part, from the requirements under WAC 296-126-092.

If public employers do not meet one of the above exceptions, then public employees are included in the requirements for meal and rest periods under WAC 296-126-092.

4. May a collective bargaining agreement have different provisions for meal and rest periods for employees in construction trades?

Yes. Effective May 20, 2003, RCW 49.12.187 was amended to include a provision that the rules regarding appropriate meal and rest periods (WAC 296-126-092) for employees in the construction trades, i.e., laborers, carpenters, sheet metal, ironworkers, etc., may be superseded by a CBA negotiated under the National Labor Relations Act. The terms of the CBA covering such employees must specifically require rest and meal periods and set forth the conditions for the rest and meal periods. However, the conditions for meal and rest periods can vary from the requirements of WAC 296-126-092.

Construction trades may include, but are not necessarily limited to, employees working in construction, alteration, or repair of any type of privately, commercially, or publicly-owned building, road, or parking lot, or erecting playground or school yard equipment, or other related industries where the employees are in a recognized construction trade covered by a CBA.

This exception does not apply to employees of construction companies without a CBA.

5. When is a meal period required?

Meal period requirements are triggered by more than five hours of work:

- Employees working five consecutive hours or less need not be allowed a meal period. Employees working over five hours shall be allowed a meal period. See WAC 296-126-092(1).

- The 30-minute meal period must be provided between the second and fifth working hour.

- The provision in WAC 296-126-092(4) that no employee shall be required to work more than five consecutive hours without a meal period applies to the employee's normal workday. For example, an employee who normally works a 12-hour shift shall be allowed to take a 30-minute meal period no later than at the end of each five hours worked.

- Employees working at least three hours longer than a normal workday shall be allowed a meal period before or during the overtime portion of the shift. A "normal work day" is the shift the employee is regularly scheduled to work. If the employee's scheduled shift is changed by working a double shift, or working extra hours, the additional meal period may be required. Employees working a regular 12-hour shift who work 3 hours or more after the regular shift will be entitled to a meal period and possibly to additional meal periods depending upon the number of hours to be worked. See WAC 296-126-092(3).

- The second 30-minute meal period must given within five hours from the end of the first meal period and for each five hours worked thereafter.

6. When may meal periods be unpaid?

Meal periods are not considered hours of work and may always be unpaid as long as employees are completely relieved from duty and receive 30 minutes of uninterrupted mealtime.

It is not necessary that an employee be permitted to leave the premises if he/she is otherwise *completely* free from duties during the meal period. In such a case, payment of the meal period is not required; however, employees must be completely relieved from duty and free to spend their meal period on the premises as they please. These situations must be evaluated on a case-by-case basis to determine if the employee is on the premises in the in the interest of the employer. If so, the employee is "on duty" during the meal period and must be paid.

Employees who remain on the premises during their meal period on their own initiative and are completely free from duty are not required to be paid when they keep their pager, cell phone, or radio on *if* they are under no obligation to respond to the pager or cell phone or to return to work. The circumstances in determining when employees carrying cell phones, pagers, radios, etc., are subject to payment of wages must be evaluated on a case-by-case basis.

7. When must the meal period be paid?

Meal periods are considered hours of work when the employer requires employees to remain on duty on the premises or at a prescribed work site *and* requires the employee to act in the interest of the employer.

When employees are required to remain on duty on the premises or at a prescribed work site and act in the interest of the employer, the employer must make every effort to provide employees with an uninterrupted meal period. If the meal period should be interrupted due to the employee's performing a task, upon completion of the task, the meal period will be continued until the employee has received 30 minutes total of mealtime. Time spent performing

the task is not considered part of the meal period. The entire meal period must be paid without regard to the number of interruptions.

As long as the employer pays the employees during a meal period in this circumstance and otherwise complies with the provisions of WAC 296-126-092, there is no violation of this law, and payment of an extra 30-minute meal break is not required.

8. May an employee waive the meal period?

Employees may choose to waive the meal period requirements. The regulation states employees "shall be allowed," and "no employee shall be required to work more than five hours without a meal period." The department interprets this to mean than an employer may not require more than five consecutive hours of work and must allow a 30-minute meal period when employees work five hours or longer.

If an employee wishes to waive that meal period, the employer may agree to it. The employee may at any time request the meal period. While it is not required, the department recommends obtaining a written request from the employee(s) who chooses to waive the meal period.

If, at some later date, the employee(s) wishes to receive a meal period, any agreement would no longer be in effect. Employees must still receive a rest period of at least ten minutes for each four hours of work.

An employer can refuse to allow the employee to waive the meal period and require that an employee take a meal period.

9. What is the rest period requirement?

Employees shall be allowed a rest period of not less than ten minutes on the employer's time in each four hours of working time. The rest break must be allowed no later than the end of the third working hour. Employees may not waive their right to a rest period.

10. What is a rest period?

The term "rest period" means to stop work duties, exertions, or activities for personal rest and relaxation. Rest periods are considered hours worked. Nothing in this regulation prohibits an employer from requiring employees to remain on the premises during their rest periods. The term "on the employer's time" is considered to mean that the employer is responsible for paying the employee for the time spent on a rest period.

11. When must rest periods be scheduled?

The rest period of time must be scheduled as near as possible to the midpoint of the four hours of working time. No employee may be required to work more than three consecutive hours without a rest period.

12. What are intermittent rest periods?

Employees need not be given a full 10-minute rest period when the nature of the work allows intermittent rest periods equal to ten minutes during each four hours of work. Employees must be permitted to start intermittent rest breaks not later than the end of the third hour of their shift.

An "intermittent rest period" is defined as intervals of short duration in which employees are allowed to relax and rest, or for brief personal inactivities from work or exertion. A series of ten one-minute breaks is not sufficient to meet the intermittent rest break requirement. The nature of the work on a production line when employees are engaged in continuous activities, for example, does not allow for intermittent rest periods. In this circumstance, employees must be given a full ten-minute rest period.

13. How do rest periods apply when employees are required to remain on call during their rest breaks?

In certain circumstances, employers may have a business need to require employees to remain on call during their paid rest periods. This is allowable provided the underlying purpose of the rest period is not compromised. This means that employees must be allowed to rest, eat a snack or drink a beverage, make personal telephone calls, attend to personal business, close their door to indicate they are taking a break, or make other personal choices as to how they spend their time during their rest break. In this circumstance, no additional compensation for the 10-minute break is required. If they are called to duty, then it transforms the on-call time to an intermittent rest period and they must receive the remainder of the 10-minute break during that four-hour work period.

14. May an employer obtain a variance from required meal and rest periods?

Employers who need to change the meal and rest period times from those provided in WAC 296-126-092 due to the nature of the work may, for good cause, apply for a variance from the department. The variance request must be submitted on a form provided by the department, and employers must give notice to the employees or their representatives so they may also submit their written views to the department. *See ES.C.9, Variances.*

15. May a Collective Bargaining Agreement negotiate meal and rest periods that are different from those required by WAC 296-126-092?

No. The requirements of RCW 49.12 and WAC 296-126-092, establish a minimum standard for working conditions for covered employees. Provisions of a collective bargaining agreement (CBA) covering specific requirements for meal and rest periods must be least equal to or more favorable than the provisions of these standards, with the exception of public employees and construction employees covered by a CBA. *See Administrative Policy ES.A.6 and/or ES.C.1.*

Exhibit 5

WAC 246-840-710 No agency filings affecting this section since 2003

Violations of standards of nursing conduct or practice.

The following conduct may subject a nurse to disciplinary action under the Uniform Disciplinary Act, chapter 18.130 RCW:

(1) Engaging in conduct described in RCW 18.130.180;

(2) Failure to adhere to the standards enumerated in WAC 246-840-700 which may include, but are not limited to:

(a) Failing to assess and evaluate a client's status or failing to institute nursing intervention as required by the client's condition;

(b) Willfully or repeatedly failing to report or document a client's symptoms, responses, progress, medication, or other nursing care accurately and/or legibly;

(c) Willfully or repeatedly failing to make entries, altering entries, destroying entries, making incorrect or illegible entries and/or making false entries in employer or employee records or client records pertaining to the giving of medication, treatments, or other nursing care;

(d) Willfully or repeatedly failing to administer medications and/or treatments in accordance with nursing standards;

(e) Willfully or repeatedly failing to follow the policy and procedure for the wastage of medications where the nurse is employed or working;

(f) Nurses shall not sign any record attesting to the wastage of controlled substances unless the wastage was personally witnessed;

(g) Willfully causing or contributing to physical or emotional abuse to the client;

(h) Engaging in sexual misconduct with a client as defined in WAC 246-840-740; or

(i) Failure to protect clients from unsafe practices or conditions, abusive acts, and neglect;

(3) Failure to adhere to the standards enumerated in WAC 246-840-700(2) which may include:

(a) Delegating nursing care function or responsibilities to a person the nurse knows or has reason to know lacks the ability or knowledge to perform the function or responsibility, or delegating to unlicensed persons those functions or responsibilities the nurse knows or has reason to know are to be performed only by licensed persons. This section should not be construed as prohibiting delegation to family members and other caregivers exempted by RCW 18.79.040(3), 18.79.050, 18.79.060 or 18.79.240; or

(b) Failure to supervise those to whom nursing activities have been delegated. Such supervision shall be adequate to prevent an unreasonable risk of harm to clients;

(4)(a) Performing or attempting to perform nursing techniques and/or procedures for which the nurse lacks the appropriate knowledge, experience, and education and/or failing to obtain instruction, supervision and/or consultation for client safety;

(b) Violating the confidentiality of information or knowledge concerning the client, except where required by law or for the protection of the client; or

(c) Writing prescriptions for drugs unless authorized to do so by the commission;

(5) Other violations:

(a) Appropriating for personal use medication, supplies, equipment, or personal items of the client, agency, or institution. The nurse shall not solicit or borrow money, materials or property from clients;

(b) Practicing nursing while affected by alcohol or drugs, or by a mental, physical or emotional condition to the extent that there is an undue risk that he or she, as a nurse, would cause harm to him or herself or other persons; or

(c) Willfully abandoning clients by leaving a nursing assignment, when continued nursing care is required by the condition of the client(s), without transferring responsibilities to appropriate personnel or caregiver;

(d) Conviction of a crime involving physical abuse or sexual abuse including convictions of any crime or plea of guilty, including crimes against persons as defined in chapter 43.830 RCW [RCW 43.43.830] and crimes involving the personal property of a patient, whether or not the crime relates to the practice of nursing; or

(e) Failure to make mandatory reports to the Nursing Care Quality Assurance Commission concerning unsafe or unprofessional conduct as required in WAC 246-840-730;

Other:

(6) The nurse shall only practice nursing in the state of Washington with a current Washington license;

(7) The licensed nurse shall not permit his or her license to be used by another person;

(8) The nurse shall have knowledge of the statutes and rules governing nursing practice and shall function within the legal scope of nursing practice;

(9) The nurse shall not aid, abet or assist any other person in violating or circumventing the laws or rules pertaining to the conduct and practice of professional registered nursing and licensed practical nursing; or

(10) The nurse shall not disclose the contents of any licensing examination or solicit, accept or compile information regarding the contents of any examination before, during or after its administration.

[Statutory Authority: RCW 18.79.110. WSR 02-06-117, § 246-840-710, filed 3/6/02, effective 4/6/02. Statutory Authority: Chapter 18.79 RCW. WSR 97-13-100, § 246-840-710, filed 6/18/97, effective 7/19/97.]

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Citation: **29 C.F.R. § 103.30**

29 CFR 103.30

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*** This document is current through December 28, 2015 with the ***
*** exception of amendments appearing at 80 FR 80258 and 80 FR 80643 ***

TITLE 29 -- LABOR
SUBTITLE B -- REGULATIONS RELATING TO LABOR
CHAPTER I -- NATIONAL LABOR RELATIONS BOARD
PART 103 -- OTHER RULES
SUBPART C -- APPROPRIATE BARGAINING UNITS

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29 CFR 103.30

§ 103.30 Appropriate bargaining units in the health care industry.

(a) This portion of the rule shall be applicable to acute care hospitals, as defined in paragraph (f) of this section: Except in extraordinary circumstances and in circumstances in which there are existing non-conforming units, the following shall be appropriate units, and the only appropriate units, for petitions filed pursuant to section 9(c)(1)(A)(i) or 9(c)(1)(B) of the National Labor Relations Act, as amended, except that, if sought by labor organizations, various combinations of units may also be appropriate:

(1) All registered nurses.

(2) All physicians.

(3) All professionals except for registered nurses and physicians.

(4) All technical employees.

(5) All skilled maintenance employees.

(6) All business office clerical employees.

(7) All guards.

(8) All nonprofessional employees except for technical employees, skilled maintenance employees, business office clerical employees, and guards.

Provided That a unit of five or fewer employees shall constitute an extraordinary circumstance.

(b) Where extraordinary circumstances exist, the Board shall determine appropriate units by adjudication.

(c) Where there are existing non-conforming units in acute care hospitals, and a petition for additional units is filed pursuant to sec. 9(c)(1)(A)(i) or 9(c)(1)(B), the Board shall find appropriate only units which comport, insofar as practicable, with the appropriate unit set forth in paragraph (a) of this section.

(d) The Board will approve consent agreements providing for elections in accordance with paragraph (a) of this section, but nothing shall preclude regional directors from approving stipulations not in accordance with paragraph (a), as long as the stipulations are otherwise acceptable.

(e) This rule will apply to all cases decided on or after May 22, 1989.

(f) For purposes of this rule, the term:

(1) Hospital is defined in the same manner as defined in the Medicare Act, which definition is incorporated herein (currently set forth in 42 U.S.C. 1395x(e), as revised 1988);

(2) Acute care hospital is defined as: either a short term care hospital in which the average length of patient stay is less than thirty days, or a short term care hospital in which over 50% of all patients are admitted to units where the average length of patient stay is less than thirty days. Average length of stay shall be determined by reference to the most recent twelve month period preceding receipt of a representation petition for which data is readily available. The term "acute care hospital" shall include those hospitals operating as acute care facilities even if those hospitals provide such services as, for example, long term care, outpatient care, psychiatric care, or rehabilitative care, but shall exclude facilities that are primarily nursing homes, primarily psychiatric hospitals, or primarily rehabilitation hospitals. Where, after issuance of a subpoena, an employer does not produce records sufficient for the Board to determine the facts, the Board may presume the employer is an acute care hospital.

(3) Psychiatric hospital is defined in the same manner as defined in the Medicare Act, which definition is incorporated herein (currently set forth in 42 U.S.C. 1395x(f)).

(4) The term rehabilitation hospital includes and is limited to all hospitals accredited as such by either Joint Committee on Accreditation of Healthcare Organizations or by Commission for Accreditation of Rehabilitation Facilities.

(5) A non-conforming unit is defined as a unit other than those described in paragraphs (a) (1) through (8) of this section or a combination among those eight units.

(g) Appropriate units in all other health care facilities: The Board will determine appropriate units in other health care facilities, as defined in section 2(14) of the National Labor Relations Act, as amended,

by adjudication.

HISTORY:
[54 FR 16347, Apr. 21, 1989]

AUTHORITY:
AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
29 U.S.C. 156, in accordance with the procedure set forth in 5 U.S.C. 553.

NOTES:
NOTES APPLICABLE TO ENTIRE SUBTITLE:
CROSS REFERENCES: Railroad Retirement Board: See Employees' Benefits, 20 CFR chapter II.
Social Security Administration: See Employees' Benefits, 20 CFR chapter III.
EDITORIAL NOTE: Other regulations issued by the Department of Labor appear in 20 CFR chapters I, IV, V, VI, VII; 30 CFR chapter I; 41 CFR chapters 50, 60, and 61; and 48 CFR chapter 29.

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING SECTION --
American Hosp. Ass'n v NLRB (1991) 499 US 606, 113 L Ed 2d 675, 111 S Ct 1539
Highlands Hosp. Corp. (1999) 327 NLRB 1049, 162 BNA LRRM 1125
St. Mary's Duluth Clinic Health Sys. (2000) 332 NLRB 1419, 166 BNA LRRM 1057, 2000-1 CCH NLRB P15685

LexisNexis (R) Notes:

CASE NOTES
Healthcare Law
...Business Administration & Organization > Collective Bargaining & Labor Unions

Labor & Employment Law
...Collective Bargaining & Labor Relations > Bargaining Units

...Collective Bargaining & Labor Relations > Duty to Bargain

...Collective Bargaining & Labor Relations > Right to Organize

Healthcare Law
...Business Administration & Organization > Collective Bargaining & Labor Unions

Alta Bates Corp. v. NLRB, 1997 U.S. App. LEXIS 13190 (9th Cir June 4, 1997).

Overview: *A decision by the National Labor Relations Board that three employers were a single employer was supported by substantial evidence, and the Board's decision that the medical technologists of the employers were appropriate bargaining unit was not an abuse of discretion. The unit was a permitted existing nonconforming unit under 29 CFR § 103.30(a).*

- The Health Care Rules, 29 CFR § 103.30, enumerate eight appropriate bargaining units for acute care facilities. 29 CFR § 103.30(a). The Rules also provide three exceptions: cases that present extraordinary circumstances; cases in which nonconforming units already exist; and cases in

which labor organizations seek to combine two or more of the eight specified units. Go To Headnote

Duke Univ. v. NLRB, 1994 U.S. App. LEXIS 34408 (DC Cir Nov. 3, 1994).

Overview: *University's petition to review was denied and NLRB's application for enforcement of its order was granted where NLRB did not abuse its discretion under § 9(b) of NLRA to determine appropriate collective bargaining units by finding university's primary function was not patient care and declaring its bus drivers to be appropriate bargaining unit.*

- In the Final Rule on Appropriate Bargaining Units in the Health Care Industry, the National Labor Relations Board defined a "hospital" (in relevant part) as an institution that is primarily engaged in providing diagnostic services and therapeutic services to injured, disabled, or sick persons, 29 C.F.R. § 103.30(f)(1) (adopting Medicare Act's definition of same term, 42 U.S.C.S. § 1395x). Go To Headnote

Fair Oaks Anesthesia Assoc., P.C. v. NLRB, 975 F.2d 1068, 1992 U.S. App. LEXIS 22396 (4th Cir Sept. 17, 1992).

Overview: *The board did not abuse its discretion by giving more weight to the distinctions between two categories of employees than to their similarities and in concluding that certified registered nurse anesthetists could comprise a separate bargaining unit.*

- Except in extraordinary circumstances, a maximum of eight bargaining units in acute care hospitals is appropriate: (1) all registered nurses; (2) all physicians; (3) all professionals other than registered nurses and physicians; (4) all technical employees; (5) all skilled maintenance employees; (6) all business office clerical employees; (7) all guards; and (8) all nonprofessional employees other than those categories already specified. 29 C.F.R. § 103.30(a). Go To Headnote
- The acute care facility rule at 29 C.F.R. § 103.30(a) requires all registered nurses to be included in one unit. Go To Headnote

Labor & Employment Law

...Collective Bargaining & Labor Relations > Bargaining Units

NLRB v. Health Mgmt. Assocs., Inc., 1999 U.S. App. LEXIS 3945 (4th Cir Mar. 11, 1999).

Overview: *An order requiring respondent hospital to cease and desist refusing to bargain with an employees' union was enforced by the court where the court determined that the agency was within its discretion in making the order.*

- Business office clerical employees may constitute a separate bargaining unit in acute care hospitals. 29 C.F.R. § 103.30(a) (1998). Go To Headnote

Alta Bates Corp. v. NLRB, 1997 U.S. App. LEXIS 13190 (9th Cir June 4, 1997).

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...Collective Bargaining & Labor Relations > Duty to Bargain

American Hosp. Ass'n v. NLRB, 499 U.S. 606, 59 U.S.L.W. 4331, 111 S. Ct. 1539, 113 L. Ed. 2d 675, 1991 U.S. LEXIS 2398 (Apr. 23, 1991).

Overview: *Board properly promulgated rule addressing individual bargaining units in hospital because National Labor Relations Act (Act) contemplated possibility that board would reshape its policies on basis of more information and experience with Act.*

- The National Labor Relations Board promulgates a substantive rule defining the employee units appropriate for collective bargaining in a particular line of commerce. The rule is applicable to acute care hospitals and provides, with three exceptions, that eight, and only eight, units shall be appropriate in any such hospital. The three exceptions are for cases that present extraordinary circumstances, cases in which nonconforming units already exist, and cases in which labor organizations seek to combine two or more of the eight specified units. The extraordinary circumstance exception applies automatically to hospitals in which the eight-unit rule will produce a unit of five or fewer employees. 29 C.F.R. § 103.30. Go To Headnote

...Collective Bargaining & Labor Relations > Right to Organize

NLRB v. Health Mgmt. Assocs., Inc., 1999 U.S. App. LEXIS 3945 (4th Cir Mar. 11, 1999).

Overview: *An order requiring respondent hospital to cease and desist refusing to bargain with an employees' union was enforced by the court where the court determined that the agency was within its discretion in making the order.*

- Business office clerical employees may constitute a separate bargaining unit in acute care hospitals. 29 C.F.R. § 103.30(a) (1998). Go To Headnote

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TOC: Code of Federal Regulations > TITLE 29-- LABOR > SUBTITLE B-- REGULATIONS RELATING TO LABOR > CHAPTER I-- NATIONAL LABOR RELATIONS BOARD > PART 103-- OTHER RULES > SUBPART C-- APPROPRIATE BARGAINING UNITS > **§ 103.30 Appropriate bargaining units in the health care industry.**
Citation: **29 C.F.R. § 103.30**
View: Full
Date/Time: Thursday, January 7, 2016 - 1:15 PM EST

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FILED

JAN 08 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

January 7, 2016

Washington Court of Appeals,
Division III
Clerk of Court
500 N. Cedar St.
Spokane, WA 99201

Re: *Chavez v. Lourdes Medical Center*, Court of Appeals No. 33556-9-III, On Appeal From Franklin County Civil No. 12-2-50575-9

Dear Clerk of Court (Attn. Case Manager Bridget-Anne Lochelt):

Enclosed please find for filing Petitioners': Unopposed First Motion for Leave to File Over-Length Opening Brief; Opening Brief; and Appendix to Petitioners' Opening Brief.

Thank you for your assistance in this matter. Please let me know if you have any questions or need anything further or if my papers are not in order. The undersigned has conferred with opposing counsel, who expressly indicated that Respondents/Appellees do not oppose the motion to extend page limits of the Opening Brief.

Cordially,

Jack B. Krona Jr., Esq.
(Lic. WA, TX, CA)