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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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No. \_\_\_\_\_

SUPREME COURT  
OF THE STATE OF WASHINGTON

No. 29366-1-III

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

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WASHINGTON STATE NURSES ASSOCIATION, on behalf of certain  
employees it represents, and VIVIAN MAE HILL, individually and on  
behalf of others similarly situated,

Petitioners,

v.

SACRED HEART MEDICAL CENTER,

Respondent.

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PETITION FOR REVIEW

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David Campbell, WSBA # 13896  
Carson Glickman-Flora, WSBA # 37608  
SCHWERIN CAMPBELL BARNARD  
IGLITZIN & LAVITT LLP  
18 W. Mercer Street, Suite 400  
Seattle, WA 98119  
206-285-2828

*Attorneys for Petitioners*

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## **IDENTITY OF PETITIONER**

Petitioner Washington State Nurses Association (“WSNA”) is a labor organization representing the approximately 1,200 Registered Nurses employed by Sacred Heart Medical Center (“SHMC”) in Spokane, Washington. Its mission includes fostering high standards of nursing, promoting the professional development of nurses, and advancing nurses’ economic and general welfare. CP 742. WSNA was the respondent in the Court of Appeals and the plaintiff in the Spokane County Superior Court.

## **COURT OF APPEALS DECISION AND ORDER**

The Court of Appeals filed its published decision on August 24, 2011 (Appendix, A-1 through A-14).

## **ISSUES PRESENTED FOR REVIEW**

Three issues merit Supreme Court review pursuant to RAP 13.4:

1. Did the Court of Appeals err when it held that the Minimum Wage Act’s overtime pay requirement, RCW 49.46.130 (App., A-45 – A-47), does not apply to time worked due to missed rest periods, on the grounds that the Industrial Welfare Act, RCW 49.12 (App., A-17 – A-37) , and not the Minimum Wage Act, mandates these rest periods?
2. Did the Court of Appeals err when it held that, because nurses who missed rest periods provided the resulting additional labor during their regular “workday” and not during an extension of their shift at the workplace, the Minimum Wage Act did not apply to this type of “additional labor”?
3. Did the Court of Appeals err in determining that the superior court could only have reached its conclusion regarding the Minimum Wage Act violation by improperly “interpreting” the collective bargaining agreement between the parties?

## STATEMENT OF THE CASE

### I. Nature of the Lawsuit

This lawsuit seeks overtime pay due pursuant to the Minimum Wage Act (“MWA”), RCW 49.46.130 (App. A-45 – A-47), for work performed by the approximately 1,200 registered nurses (“RNs” or “nurses”) employed by SHMC. The growing body of evidence demonstrating the importance of rest periods to ensure nurses can maintain the necessary alertness and focus required to provide safe and quality patient care has prompted the petitioner, WSNA, to elevate the issue of missed rest periods to the top of its organizational priorities for the past decade.

SHMC, at all times pertinent hereto, was obligated by its collectively bargained agreement (“CBA”) with WSNA to provide its nurses with a 15-minute block rest period each four-hour work period. CP 216. In 2006, a mutually agreed-upon labor arbitrator (“the Arbitrator”) determined that SHMC had breached the CBA by failing to provide nurses the required 15-minute uninterrupted rest periods. As SHMC had failed to keep records of the missed rest periods, the Arbitrator also ordered that, for the period between January 2005 and May 2006, nurses at SHMC were to complete sworn affidavits indicating how many rest periods they had missed in order to receive a payment, and that SHMC provide nurses with the required rest periods on a going-forward basis. CP 233; 237-8; 491-492.

Since approximately June of 2006, nurses who cannot take a rest period complete a “Missed Break Request” form and submit it to a nurse

manager or payroll department. CP 233, 235. From these forms, SHMC timekeepers make notations in the electronic time keeping system. Between June 2006 and December 2009, SHMC nurses recorded 23,018 missed rest periods, about 57 percent of which resulted in overtime hours worked or occurred while the nurse was already in overtime. CP 1256-1258. SHMC does not dispute that it makes a payment equal to 15 minutes of straight time for each of the missed 15-minute rest periods, regardless of whether or not the time associated with that missed rest period was overtime.

After completing the missed rest period form, a nurse must obtain the signature of a manager. CP 235. The form is then forwarded to SHMC's timekeeping department where a timekeeper records 15 minutes of regular "hours" in the electronic timekeeping program, regardless of whether the missed rest period resulted in overtime hours worked. CP 1266-67. SHMC does not dispute that it has recorded missed rest periods in the manner described above, or that it has failed to pay overtime on the 15 minutes of regular "hours" recorded for a missed rest period even if that time resulted in overtime hours worked.

Along with one of its members, Vivian Mae Hill, WSNA brought this suit to obtain money damages for its members due to SHMC's failure to pay overtime for missed rest periods that resulted in time worked in excess of 40 hours in one week.

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## II. The Superior Court's Decision

Because SHMC's failure was not factually in dispute, and because the superior court agreed with WSNA that time worked by WSNA's members in lieu of the 15-minute rest periods to which they were entitled had to be calculated as "hours worked" for the purpose of calculating the employer's overtime obligation under RCW 49.46.130 (App., A-45 – A-47), the superior court granted WSNA's motion for summary judgment on March 13, 2009. CP 918-923.

The superior court's final order on August 20, 2010, was based in large part upon its earlier, March 2009 order, which similarly held that a missed rest period is "time worked" under the MWA and must be compensated accordingly. The superior court based its holding on this Court's holding in *Wingert v. Yellow Freight*, 146 Wn.2d 841, 50 P.3d 256 (2002). CP 918-923. The trial court also determined that every 10-minute rest period that has been worked through, which, when added to the work week, extends the work week beyond 40 hours, must be paid at the overtime rate of pay, *i.e.*, time and one-half the regular rate of pay. *Id.*

The superior court also determined that because these particular nurses are entitled to a 15-minute rest break, the nurses must be paid for a missed rest break resulting in overtime hours at "10 minutes at time and one-half and 5 minutes of straight time." CP 1097-1098. Thus, the court held, for a missed rest break resulting in overtime hours, the nurses are owed a total of 20 minutes of pay (10 minutes at time and one-half for a total of 15 minutes of pay, plus five minutes of straight time). The Superior Court

rejected SHMC's argument that its payment of 15 minutes of pay at the straight time rate satisfied its obligation under the MWA.

### **III. Court of Appeals, Division III Decision**

The Court of Appeals rejected the superior court's reasoning, holding instead that it was improper to rely on the MWA for a time-and-one-half pay requirement for the additional labor provided due to a missed rest period. App., A-10. It further held that, because nurses who missed rest periods provided the resulting additional labor during their regular "workday" and not during an extension of their shift at the workplace, the MWA did not apply to this type of "additional labor."

The Court of Appeals also concluded that, even if the overtime pay rate did apply to the additional labor provided due to a missed rest period, SHMC was permitted to use a payment made for another purpose to satisfy any overtime pay requirement under the MWA for this labor.

The Court of Appeals also ruled, finally, that the superior court could only have reached its conclusion regarding the MWA violation by impermissibly "interpreting" the collective bargaining agreement in place between the parties.

### **ARGUMENT**

- I. THE COURT OF APPEALS DECISION CONFLICTS WITH *WINGERT V. YELLOW FREIGHT*, 146 WN.2D 841, 50 P.3D 256 (2002), WHICH REQUIRED EMPLOYERS TO PAY EMPLOYEES FOR MISSED REST PERIODS ON THE BASIS THAT THE EMPLOYEES PROVIDED ADDITIONAL LABOR. THE DECISION ALSO INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST. THUS, REVIEW IS APPROPRIATE PURSUANT TO RAP 13.4(b)(1) AND (4).**

The Court of Appeals decision throws into doubt an established wage and-hour requirement that obligates Washington state employers to compensate employees with wages when those employees are not provided state-mandated paid rest periods. In *Wingert v. Yellow Freight Systems*, 146 Wn.2d 841, 50 P.3d 256 (2002), this Court held that workers have the right to be compensated with wages for missed rest periods. This Court reasoned that employers obtain additional labor from employees when those employees are worked through a rest period rather than rested as required by law. Because the Court of Appeals held that missed rest periods which resulted in hours worked over forty in one week did not qualify as “hours worked,” its decision conflicts with *Wingert* and review is warranted pursuant to RAP 13.4(b)(1).

In addition, because the Court of Appeals decision threatens the ability of all Washington workers to be paid for missed rest periods, this petition involves an issue of substantial public interest that is appropriately reviewed by the Supreme Court pursuant to RAP 13.4(b)(4). *See, e.g., State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005) (finding a “prime example of an issue of substantial public interest” where the Court of Appeals’ holding “has the potential to affect every sentencing proceeding in Pierce County”); *In re Marriage of Ortiz*, 108 Wn.2d 643, 644-46, 740 P.2d 843 (1987) (finding that appeal presenting issue of “whether a custodial parent, or that parent's assignee, must repay the noncustodial parent for all payments made by the noncustodial parent

pursuant to an invalid escalation clause in a child support decree” involved an issue of substantial public interest).

**II. THE COURT OF APPEALS ERRONEOUSLY HELD THAT THE MINIMUM WAGE ACT OVERTIME PAY REQUIREMENT DOES NOT APPLY WHEN THE ADDITIONAL TIME WORKED BY THE EMPLOYEE IS DUE TO THE EMPLOYER’S VIOLATION OF THE INDUSTRIAL WELFARE ACT.**

**A. Washington’s Minimum Wage Act (“MWA”), Industrial Welfare Act (“IWA”), and the Wage Rebate Act.**

The Court of Appeals drew erroneous conclusions about the relationship between the MWA and Industrial Welfare Act, RCW 49.12 (“IWA”) (App., A-17 – A-37), finding that a violation of the IWA does not bring the overtime protections of the MWA “into play.” App., A-12. However, this Court has long recognized that the IWA and MWA work together – along with the Wage Rebate Act RCW 49.52 (App., A-49 – A-52) and other worker protection measures the legislature has adopted – to protect workers’ rights to fair wages and decent employment conditions. *See, e.g., SPEEA v. Boeing*, 139 Wn.2d 824, 831-836, 38 Wn.2d 824 (2000) (summarizing many of Washington’s wage protection statutes and their relationship with each other).

The MWA provides, in pertinent part, that “no employer shall employ any of his or her employees for a work week longer than forty hours unless such employee receives compensation for his or her employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he or she is employed.”

RCW 49.46.130 (App., A-45).<sup>1</sup> The MWA broadly defines “employ” as “permit to work.” RCW 49.46.010 (App., A-39).

The IWA is a state statute with the purpose of eradicating the “pernicious effect” of “inadequate wages and unsanitary conditions of labor.” RCW 49.12.010 (App., A-19). It makes unlawful the employment of any person in Washington “under conditions of labor detrimental to their health” or “at wages which are not adequate for their maintenance.” RCW 49.12.020 (App., A-19). The Washington Administrative Code (“WAC”), which provides employees with a minimum rest period of at least 10 minutes every four hours of work, was adopted pursuant to the DLI’s authority under the IWA. *See* WAC 296-126-092 (App., A-55).

The Department of Labor & Industries has explained the interaction between these two worker protection statutes:

The MWA is an additional protection to workers employed in Washington State who are already protected by the Industrial Welfare Act (IWA), RCW 49.12. While the IWA makes it illegal for an employer to employ workers at wages that are not adequate for their maintenance or under conditions of labor detrimental to their health, the MWA specifically sets forth an “adequate” wage (the current statutory minimum) and provides the additional protection of overtime compensation.

*See* DLI Administrative Policy No. ES.A.1 at 1 (App., A-56).

This lawsuit claims a breach of the IWA for failing to provide rest periods, and seeks damages for failure to pay the time associated with the missed rest periods at the overtime rate set forth in the MWA when the

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<sup>1</sup> Although there are exemptions from the overtime pay requirement, *see, e.g.*, RCW 49.46.130(2) (App., A-45 – A-46), these exemptions are not at issue here.

additional time worked due to the missed rest period results in more than 40 hours per week. Because SHMC has failed to pay the statutory overtime rate for this additional time worked as a result of the missed rest periods, the lawsuit also seeks double damages and costs as provided for in RCW 49.52 (App., A-51). These statutes work together – not in distinct silos that leave certain types of labor uncovered by the MWA as the Court of Appeals found – to ensure that workers receive the pay due them under law. They are the core statutes that are part of “Washington’s long and proud history of being a pioneer in the protection of employee rights.” *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.3d 582 (2000).

**B. The Minimum Wage Act Overtime Pay Requirement Applies To All Time Worked By An Employee, Regardless of Whether That Additional Time Worked Was Due To A Violation Of the Industrial Welfare Act Or For Another Reason.**

As described above, WSNA relied on the MWA, IWA, and the Wage Rebate Act statutes to obtain overtime pay for missed rest periods that resulted in overtime hours worked. The trial court held that, pursuant to *Wingert, supra*, WSNA’s members had provided additional labor to SHMC when they were worked through a rest period. It then concluded that this additional labor was subject to the MWA, and awarded overtime pay to nurses who had worked forty or more hours in one week, but had missed one or more rest periods during that week.

While SHMC had paid nurses a lump sum of 15 minutes of pay for each missed rest period, it admitted that it did not treat this time as time

worked, and therefore did not pay the required overtime rate when so required. The trial court granted damages only for the unpaid overtime for the missed rest periods that resulted in hours worked over forty in one week, as the Court recognized that the nurses had already received a straight time payment for the time.

While the Court of Appeals appeared to correctly recognize that the nurses at issue had provided “additional labor” to SHMC, see App., A-10 – A-11, as it must pursuant to this Court’s holding in *Wingert*, it refused to apply the MWA overtime requirement to the additional missed rest period time on the basis “the additional labor was provided during, not after, the employees’ work assignment” and therefore “the 40-hour workweek [was] not exceeded.”

This conclusion is internally inconsistent, and inconsistent with *Wingert*. If the Court of Appeals agreed, as it must, that the missed rest breaks were “additional labor,” then there is no basis in Washington law to deny the nurses the overtime rate for this additional labor, and the Court of Appeals put forth no policy reason for this new exemption from the overtime requirement. It relied on no Washington case law, and did not put forth any statutory interpretation of either the MWA or the IWA which would support a conclusion that “additional labor” provided to an employer due to a missed rest period is not subject to the overtime requirements in the MWA. There is no separate category of “labor” in Washington wage and-hour law that treats some work time as eligible for

overtime and other “labor” as not eligible, with the exception that hours worked less than 40 in a week are not eligible for the overtime rate.

In *Wingert*, the defendant-employer similarly contended that “its employees do not have a statutory wage because [the IWA] defines rest break requirements as ‘conditions of labor’ rather than wages.” *Wingert, supra*, 146 Wn.2d at 841. This Court rejected that argument and concluded that “a rest period violation can constitute both a condition of labor violation and a wage violation.” *Id.* While the statute at issue in *Wingert* was the Wage Rebate Act, RCW 49.52 (App., A-49 – A-52), and not also the MWA, as in this case, there is no reason that the “additional labor” due to a missed rest period would be considered hours of work under the Wage Rebate Act but not the MWA.<sup>2</sup>

Under the Court of Appeals' analysis, moreover, a worker who works 100 minutes beyond a normal 40-hour workweek is not entitled to one-and-one-half times his/her regular rate of pay for the additional 100 minutes, because 100 minute of his/her regular workweek consisted of ten paid 10-minute rest periods, one for each four hours worked. This is clearly inconsistent with the mandate of RCW 49.46.130 (App., A-45), which requires overtime to be paid for all time worked over 40 hours in a week, and which has always been understood to be referencing a 40-hour workweek which is inclusive of paid rest periods.

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<sup>2</sup> The missed rest breaks at issue in *Wingert* occurred during an overtime shift. The Plaintiff in *Wingert* had not asserted a Minimum Wage Act claim because all of the missed rest periods occurred in overtime shifts in which the overtime rate was already being paid.

While the Court of Appeals correctly notes that the overtime rate was “never discussed in *Wingert*,” App., A-9, there was no need to do so, as the *Wingert* employees sought pay under the IWA and the Wage Rebate Act and not the MWA because the unpaid missed rest periods at issue were during shifts in which the overtime rate was already being paid. Once this Court determined that the missed rest periods provided the *Wingert* employer with “additional labor,” the *Wingert* employer never suggested that it should only have to pay the straight time rate for missed rest periods in the overtime shifts. Moreover, there is nothing in the *Wingert* decision that suggests this Court would not have held that the MWA overtime requirement applied to the “additional labor” resulting from the missed rest breaks had it been an issue.

The Court of Appeals contended that because an employer would not be required to pay overtime if it violated the IWA’s prohibition on certain meal and lodging charges to employees or the requirement of sanitary conditions, SHMC should not be required to pay overtime for its IWA rest break violation. However, the violations the court pointed to do not involve “additional labor” provided to the employer, as a missed rest period does, and therefore the overtime requirements of the MWA would have no imaginable applicability in any case.

Washington’s “long and proud history of being a pioneer in the protection of employee rights,” *Drinkwitz, supra*, 140 Wn.2d at 300, compels the opposite conclusion absent plain statutory language directing the contrary. The Court of Appeals relies on no case law or statute to

reach its conclusion that the additional labor due to a rest break IWA violation is not subject to the MWA. As Washington law directs that superior state courts liberally interpret and apply the Minimum Wage statute to protect workers' rights to receive fair wages in a timely manner, *see International Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002), the superior court ruled correctly when it found that the additional labor provided due to a missed rest period was subject to the overtime requirements of the MWA if that additional labor resulted in hours worked over 40 in one week.

**III. THE COURT OF APPEALS ALSO ERRONEOUSLY HELD THAT THE MINIMUM WAGE ACT DOES NOT REQUIRE OVERTIME PAY WHEN THE ADDITIONAL TIME WORKED BY THE EMPLOYEE OCCURS DURING THE EMPLOYEE'S NORMAL WORKDAY, AND THAT ENTITLEMENT TO THIS PAY HINGES ON WHETHER THE EMPLOYER "REQUIRED" THIS ADDITIONAL TIME TO BE WORKED**

As was noted above, the Court of Appeals created a new distinction between types of labor: one type that is provided "during the workday" and one type of labor "that extends the work day." App., A-10. It then concluded that the additional labor provided by employees who are worked through a rest period is of the first type of labor – the kind of labor that is "additional labor during the workday." App., A-10. It concluded that if additional labor does not "extend" the workday (such as, in the

Court of Appeal's view, a missed rest period) the MWA overtime requirements do not apply. See App., A-10.<sup>3</sup>

As a threshold matter, the Court of Appeals' creation of two types of labor – one type of labor subject to the MWA and one not – has no basis in law. A fair reading of *Wingert* cannot result in what would be a new concept in Washington state wage and hour law: separate kinds of “hours worked” that are treated differently under the Minimum Wage Act. As explained above, the Court of Appeals incorrectly understood *Wingert* as establishing two types of “time worked,” and then concluded that one type of labor is subject to the Minimum Wage Act, while the other is not.<sup>4</sup>

The error is compounded when the Court of Appeals concludes that “entitlement to time and one half under the MWA turns on the amount of time an employee is actually required to be at the prescribed workplace.” App., A-10 – A-11. No citation to any legal authority is provided in support of this conclusion.

In fact, there is no prerequisite to receipt of overtime pay under the MWA that turns on whether the employee was “actually required to be at the prescribed workplace” as the Court of Appeals concluded. App., A-10 – A-11. As noted above, the MWA requires overtime pay for all hours over forty for which employers “employ any of his or her employees for a work week longer than forty hours.” RCW 49.46.130 (App., A-45).

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<sup>3</sup> WSNA does not claim, and the trial court did not order, overtime pay for missed rest periods that occurred in a week in which a nurse did not work 40 hours in one week.

<sup>4</sup> The Court of Appeals appears to put undue emphasis on the term “during the workday” as used in *Wingert*. There, as noted above, this Court held that an employee worked through a rest break is “providing the employer with additional labor *during the workday*” App., A-10 – A-11 (emphasis added).

Employ is defined in the MWA as “permit to work.” RCW 49.46.010 (App., A-39). The MWA requires payment at the overtime rate for any hour that an employer “permits” an employee to work more than 40 hours in one week, and this Court has explained that it requires “employers to pay their employees...overtime pay for the hours they work over 40 hours per week.” *Stevens v. Brinks*, 162 Wash.2d 42, 47, 169 P.3d 473 (2007).

The Court of Appeals relied on WAC 296-126-002(8) (App., A-53), which defines hours worked as “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” to reach its conclusion denying the nurses overtime pay. The Department of Labor & Industries has explained the meaning of this regulation:

The department’s interpretation of “hours worked” means all work requested, suffered, permitted or allowed and includes travel time, training and meeting time, wait time, on-call time, preparatory and concluding time, and may include meal periods. “Hours worked” includes all time worked regardless of whether it is a full hour or less. “Hours worked” includes, for example, a situation where an employee may voluntarily continue to work at the end of the shift. The employee may desire to finish an assigned task or may wish to correct errors, prepare time reports or other records. The reason or pay basis is immaterial. If the employer knows or has reason to believe that the employee is continuing to work, such time is working time.

ES.C.2 at 1 (App., A-62).

Here, the nurses provided the “additional labor” while “on duty” and while at the hospital – the additional labor was provided the moment they were worked through a state mandated rest break.

**IV. IT WAS ERROR FOR THE COURT OF APPEALS TO DETERMINE THAT THE SUPERIOR COURT WOULD HAVE NEEDED TO “INTERPRET” THE COLLECTIVE BARGAINING AGREEMENT IN ORDER TO RULE THAT SHMC’S PAYMENT OF 15 MINUTES’ COMPENSATION FOR CONTRACTED-FOR BREAKS DID NOT CONSTITUTE PROPER COMPENSATION FOR FORGONE 10-MINUTE STATE-MANDATED REST PERIODS.**

In addition to deciding that the “additional labor” due to being worked through a rest period did not warrant protection under the MWA, the Court of Appeals also found that SHMC did not violate the MWA because the superior court could only avoid the conclusion that SHMC had in fact paid the nurses 15 minutes’ worth of compensation for forgone 10-minute state-mandated rest periods by “interpreting the CBA,” App., A-11, which the Court of Appeals implicitly suggests would not have been proper for the superior court to do.

Petitioner presumes that the Court of Appeals was alluding to the body of federal labor law that acts to preempt state court enforcement of collective bargaining agreements (often referred to as “Section 301 preemption” because that is the statutory section in the Labor Management Relations Act). 29 U.S.C. § 185(a) (App., A-15 – A-16). In general, Section 301 preempts all state law claims that are “substantially dependent” on an analysis of the parties’ CBA. *Burnside v. Kiewit Pac. Corp.*, 491 F.3d 1053, 1059 (9th Cir. 2007). The purpose of the Section 301 preemption doctrine is to ensure that a uniform body of federal law is

enforced. *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683, 693 (9<sup>th</sup> Cir. 2001).

However, Section 301 preemption does not operate to eviscerate Washington workers' state statutory rights to mandated minimum wages or labor conditions, as the Court of Appeals seems to have casually decided here.

SHMC removed the instant lawsuit in 2008, which resulted in this finding by the Washington Eastern District Federal Court:

...the Court turns to the second analytical step, which is whether the Association's MWA-based claims are "substantially dependant" on an analysis of the CBA. *See Burnside*, 491 F.3d at 1059-60. The Court concludes the CBA need not be interpreted in order to determine whether Sacred Heart complied with the MWA. In the event that the Association is successful and damages need to be calculated, *reference* to the CBA will be required, but there is no indication that determining a particular nurse's wage rate will require *interpretation* of the CBA. *See Burnside*, 491 F.3d at 1074. Accordingly, even though the state court may need to refer to the CBA in order to determine damages, the Court concludes using the CBA in this manner does not result in LMRA preemption. *See id.*

*Washington State Nurses Association v. Sacred Heart Medical Center*, No. 08-CV-0054 (E.D. Wash., filed May 5, 2008) (App., A-71) (emphasis in original).

In cases in which workers covered by a CBA claim a violation of the MWA, Washington courts have consistently held that Section 301 does not mean workers cannot press claims due to violations of state labor protections, even if a *reference* to the contract is necessary as part of the

MWA claim. See *Ervin v. Columbia Distributing Inc.*, 84 Wn.App. 882, 889, 930 P.2d 947 (1997). It is only that the state law claim cannot rely on an interpretation of the CBA. *Id.* (holding that reference to the CBA's rate of pay to determine the denied overtime rate did not prevent the workers' MWA claim). *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 863, 93 P.3d 108 (2004) (preemption of state law claims occur only where the state claim "is inextricably intertwined with consideration of the terms of the labor contract" and application of state law "requires the interpretation of a collective-bargaining agreement") (citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985) ("[a] state statutory or common law claim is independent of the CBA – and therefore should not be preempted by section 301 – if it could be asserted without reliance on an employment contract"); *Commodore v. University Mechanical Contractors, Inc.*, 120 Wn.2d 120, 131, 839 P.2d 314 (1992) ("section 301 should not preempt nonnegotiable or independent negotiable claims").

Thus, the Court of Appeals was mistaken in concluding that the superior court must necessarily have improperly interpreted the CBA to reach its conclusion that the 15 minutes' worth of compensation received by the nurses for the contractual violations could not properly be cited or relied upon by SMHC as compensation paid to the nurses to meet SMHC's overtime pay obligations. The Court of Appeals appears to confuse "interpret" with "reference," and this distinction is critical as it is the necessary prerequisite for Section 301 preemption.

Indeed, SHMC admitted in its Answer and other filings that it paid a 15 minute lump sum for each 15-minute break, regardless of whether that break resulted in overtime hours worked. CP 216. Thus, the superior court's acknowledgement of the fact of the 15-minute contractual rest period, and SMHC's compensation of nurses for that rest period, when missed, did not even require a reference to the CBA, much less interpretation.

This Court has previously directed that “[a] collective bargaining agreement cannot thwart the fundamental purpose of the statute which ‘evidences a strong legislative intent that employees be afforded healthy working conditions and adequate wages.’” *Wingert* at 852. In this case, no reference to the CBA was necessary to determine damages (SHMC provided its payroll records for this purpose, not the CBA). CP 1557-1559.

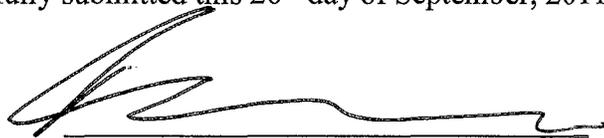
For this reason, the Court of Appeals erroneously accepted SHMC's legerdemain with its payroll practice to evade its overtime obligation, a defense that the trial court correctly rejected. SHMC offered as a defense that it could retroactively re-designate the straight time payment it had made to comply with its contract obligation for the last 5 minutes of each missed rest break period as “overtime” for the first ten minutes of the rest period. As the superior court recognized, this deception was not consistent with the CBA, because the final five minutes of these nurses' rest periods would be unpaid if missed. SHMC's defense, which was adopted by the Court of Appeals, would essentially mean that a

nurse will not be paid for the last five minutes of her missed rest period if SHMC could merely re-purpose that same five minutes of pay as “overtime” for the first ten minutes. It is hard to reconcile such a result with this Court’s prior direction that a CBA “cannot thwart the fundamental purpose” of Washington’s statutory wage and hour protections.” *Wingert* at 852.

### CONCLUSION

The Washington State Nurses Association respectfully requests review of the Court of Appeals decision and its reversal.

Respectfully submitted this 26<sup>th</sup> day of September, 2011.



David Campbell, WSBA # 13896  
Carson Glickman-Flora, WSBA # 37608  
Schwerin Campbell Barnard  
Iglitzin & Lavitt LLP  
18 West Mercer Street, Ste. 400  
Seattle, WA 98119-3971  
(206) 285-2828 (phone)  
(206) 378-4132 (fax)  
Campbell@workerlaw.com  
Flora@workerlaw.com

*Attorneys for Petitioner WSNA*

**CERTIFICATE OF SERVICE**

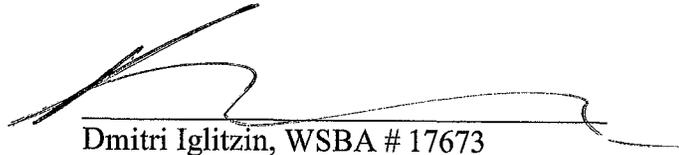
I hereby certify that on this 26<sup>th</sup> day of September, 2011, I caused the foregoing Petition for Review to be sent via facsimile and a true and correct copy of the same, along with an Appendix, to be sent via UPS overnight mail to:

Clerk of the Court  
Washington State Court of Appeals, Division III  
500 N Cedar Street  
Spokane, WA 99201  
Fax: 509-456-4288

And a true and correct copy of the same, along with an Appendix, to be sent via UPS overnight mail to:

Paula L. Lehmann  
Michael J. Killeen  
Davis Wright Tremaine LLP  
1201 Third Avenue, Ste. 2200  
Seattle, WA 98101-3045

Timothy J. O'Connell  
Karin Jones  
Stoel Rives LLP  
600 University St., 3600  
Seattle, WA 98101



Dmitri Iglitzin, WSBA # 17673

**FILED**

SEP 27 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. \_\_\_\_\_

SUPREME COURT  
OF THE STATE OF WASHINGTON

No. 29366-1-III

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

---

WASHINGTON STATE NURSES ASSOCIATION, on behalf of certain  
employees it represents, and VIVIAN MAE HILL, individually and on  
behalf of others similarly situated,

Petitioners,

v.

SACRED HEART MEDICAL CENTER,

Respondent.

---

APPENDIX TO PETITION FOR REVIEW

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David Campbell, WSBA #13896  
Carson Glickman-Flora, WSBA #37608  
SCHWERIN CAMPBELL BARNARD  
IGLITZIN & LAVITT LLP  
18 W. Mercer Street, Suite 400  
Seattle, WA 98119  
206-285-2828

*Attorneys for Petitioner*

 **COPY**

**Court of Appeals  
Decision**

Renee S. Townsley  
Clerk/Administrator

(509) 456-3082  
TDD #1-800-833-6388

The Court of Appeals  
of the  
State of Washington  
Division III



August 24, 2011

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Spokane, WA 99201-1905

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Schwerin Campbell Barnard  
Iglitzin & Levitt LLP

Paula Lee Lehmann  
Davis Wright Tremaine LLP  
777 108th Ave NE Ste 2300  
Bellevue, WA 98004-6149

David Charles Campbell  
Carson Glickman-Flora  
Schwerin Campbell Barnard & Iglitzin LLP  
18 W Mercer St Ste 400  
Seattle, WA 98119-3971

Michael John Killeen  
Davis Wright Tremaine LLP  
1201 3rd Ave Ste 2200  
Seattle, WA 98101-3045

Karin Dwelle Jones  
Timothy J. O'Connell  
Stoel Rives LLP  
600 University St Ste 3600  
Seattle, WA 98101-4109

CASE # 293661  
Washington State Nurses Association v. Sacred Heart Medical Center  
SPOKANE COUNTY SUPERIOR COURT No. 072057662

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

A handwritten signature in cursive script that reads "Renee S. Townsley".

Renee S. Townsley  
Clerk/Administrator

RST:jcs  
Enclosure

c: Honorable Kathleen M. O'Connor

A-1

**FILED**

AUG 25 2011

In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

<b>WASHINGTON STATE NURSES</b>	)	<b>No. 29366-1-III</b>
<b>ASSOCIATION, on behalf of certain of</b>	)	
<b>the employees it represents, and</b>	)	
<b>VIVIAN MAE HILL, individually and</b>	)	
<b>on behalf of others similarly situated,</b>	)	
	)	
<b>Respondents,</b>	)	<b>Division Three</b>
	)	
<b>v.</b>	)	
	)	
<b>SACRED HEART MEDICAL</b>	)	
<b>CENTER,</b>	)	
	)	
<b>Appellant.</b>	)	<b>PUBLISHED OPINION</b>

SIDDOWAY, J. — Employers in Washington are required by state law to pay a minimum wage and to pay overtime at time and one half. These rights are not subject to negotiation or collective bargaining. Here, the Washington State Nurses Association and one of its members (collectively Nurses) sued their employer hospital for violation of Washington's Minimum Wage Act (MWA)<sup>1</sup> based on the way the hospital compensated them for missed rest breaks. We conclude that the employer did not violate the MWA by

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<sup>1</sup> Chapter 49.46 RCW.

No. 29366-1-III

*Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*

the way in which it compensated the Nurses for the missed breaks and reverse the superior court's judgment to the contrary.

#### FACTS AND PROCEDURAL BACKGROUND

Sacred Heart Medical Center<sup>2</sup> is a full service medical center located in Spokane, Washington. Registered nurses staff nearly all of its departments. The nurses belong to a union and are represented by the Washington State Nurses Association. Sacred Heart and the Nurses have entered into a collective bargaining agreement (CBA) that spells out terms and conditions of employment including wages, work schedules, and rest breaks.

In 2004, the Nurses filed a grievance because Sacred Heart did not consistently provide two CBA-mandated 15-minute rest breaks during an 8-hour workday. The grievance went to labor arbitration. The arbitrator ordered that Sacred Heart ensure that the Nurses get their 15-minute breaks and pay the Nurses for any rest breaks missed in the past at a straight time rate. Clerk's Papers (CP) at 491-92.

Following the arbitrator's decision, Sacred Heart implemented a system to track the missed rest breaks. It required nurses who missed a break to complete a "Missed Break Request" form and submit it to a nurse manager for signature. A report of each missed break was entered into Sacred Heart's electronic timekeeping system and nurses

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<sup>2</sup> We note the medical center is now referred to as Providence Sacred Heart Medical Center.

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*Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*

were compensated for the missed breaks at their straight time rate. Accordingly, if a nurse missed a rest break (15 minutes) in an 8-hour period, the nurse received 15 additional minutes of pay (8.25 total hours of pay) at the regular rate.

In 2007, the Nurses brought this action against Sacred Heart, claiming entitlement to overtime pay, not straight time, for a portion of their missed rest breaks. They claimed that Sacred Heart had violated the MWA by failing to pay them time and one half for a 10-minute portion of the missed rest breaks. The Nurses' claim involved only rest breaks that were missed during the first 40 hours of a nurse's workweek. This case does not present a dispute over Sacred Heart's responsibility to pay overtime with respect to hours worked and rest breaks earned when a nurse is on duty and working at the prescribed workplace for more than 40 hours in a workweek.

Key to the Nurses' claim is a Washington industrial welfare regulation, WAC 296-126-092(4), which provides, with respect to all Washington employers and employees, that for every 4 hours worked, an employee must be afforded a paid 10-minute rest break. The Nurses claim that the same work demands that prevented them from taking their CBA-mandated 15-minute breaks were preventing them from enjoying even the 10-minute break required by state law. The Nurses contended that the remedy for deprivation of their state-mandated 10-minute breaks should be time and one half under the MWA.

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*Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*

Sacred Heart took the position that the Nurses' claim implicated the CBA, was therefore subject to federal jurisdiction, and removed the case to federal court. The Nurses responded that their claims were based exclusively on the MWA and would not require interpretation of the CBA. The federal district court agreed with the Nurses, concluded there was therefore no federal jurisdiction, and remanded the matter to state court.

In superior court, the Nurses argued, relying on *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 848, 50 P.3d 256 (2002), that when a state-mandated rest break is missed it constitutes additional "hours worked." They argued that these "hours worked" should be added onto their other hours worked during the week and, if the sum is in excess of 40 hours, they should receive overtime pay. Sacred Heart responded that the Nurses were not working in excess of 40 hours a week when they missed the rest breaks, because the break periods were included in, and a part of, the Nurses' 40-hour week. As a result, Sacred Heart argued, the straight time compensation they received was sufficient under both state law and the CBA.

The superior court ultimately agreed with the Nurses. In determining entitlement to overtime, the court also agreed with the Nurses that the 15 minutes of straight time they were paid for a missed CBA-mandated rest break should not be taken into consideration in determining whether overtime was owed; in other words, missed breaks

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*Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*

should be compensated at time and one half for the first 10 minutes missed but still compensated at straight time for the remaining 5 minutes of break time provided by the CBA.

The court awarded \$52,361.41 in compensation and prejudgment interest; \$52,361.41 in double damages for a willful violation; \$200,000 in attorney fees for a willful violation; and \$22,545.42 in expenses, including \$11,800 in expenses for a statistician for a total judgment of \$327,268.24.

Sacred Heart appeals.

#### ANALYSIS

This dispute was resolved by summary judgment, the material facts are undisputed, and the questions presented are all questions of law. For all of those reasons our review is de novo. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 530-31, 70 P.3d 126 (2003). Whether a dispute is properly the subject of labor arbitration is a question of law that we will also review de novo. *Yakima County v. Yakima County Law Enforcement Officers Guild*, 157 Wn. App. 304, 325-26, 237 P.3d 316 (2010).

Federal labor law generally requires employees to seek redress for grievances through arbitration if there is an applicable CBA providing for such dispute resolution, but not all employment grievances must be arbitrated under the CBA. State labor laws guaranteeing a minimum wage and minimum pay for overtime are not preempted by

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*Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*

federal labor policy; those rights are nonnegotiable, substantive, and do not depend on the collective bargaining agreement. *Wilson v. City of Monroe*, 88 Wn. App. 113, 117, 943 P.2d 1134 (1997), *review denied*, 134 Wn.2d 1028 (1998); *Huntley v. Frito-Lay, Inc.*, 96 Wn. App. 398, 401-02, 979 P.2d 488 (1999), *cert. denied*, 531 U.S. 818 (2000).

The Nurses' complaint asserts their claim on pure MWA grounds and the federal district court remanded the suit to state court after accepting the Nurses' arguments that their claim was based on a violation of state minimum wage law and did not require interpretation of the CBA. We accept this characterization of the claim and pass on whether Sacred Heart has violated the MWA by the way in which it compensates the Nurses' for lost rest breaks.

The MWA generally requires that no employer employ any employee "*for a work week longer than forty hours unless such employee receives compensation for his or her employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he or she is employed.*" RCW 49.46.130(1)<sup>3</sup> (emphasis added). "Hours worked" is defined by WAC 296-126-002(8) 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." The definition in WAC 296-

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<sup>3</sup> We quote the current version of RCW 49.46.130(1), which was amended by LAWS OF 2010, chapter 8, section 12045 to make the language gender neutral.

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*Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*

126-002(8) has been followed by the Washington Supreme Court in MWA cases.

*Stevens v. Brink's Home Sec., Inc.*, 162 Wn.2d 42, 47, 169 P.3d 473 (2007).

As noted above, the asserted "overtime" at issue in this case is for all missed rest breaks during the first 40 hours that a nurse works in a given workweek. During that first 40 hours, WAC 296-126-092(4) requires that for every 4 hours worked, they must be afforded a paid 10-minute rest period.<sup>4</sup> For an 8-hour day, then, two 10-minute rest periods are mandated. The Nurses were unable to take the mandated 10-minute rest periods due to demands of their employment. WAC 296-126-092(4) was adopted under the authority of the industrial welfare act, chapter 49.12 RCW, not the MWA. *Wingert*, 146 Wn.2d at 847.

The regulation does not provide for a remedy when employees are denied the mandated rest periods. In *Wingert*, the Washington Supreme Court held that employees enjoy both a statutory claim under RCW 49.52.070 and an implied private right of action under chapter 49.12 RCW for breach of the industrial welfare regulation. *Id.* at 849-50. It acknowledged that since the rest periods are already compensated "[t]his case does not present the usual situation where employees seek to recover wages for uncompensated

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<sup>4</sup> The relevant section of WAC 296-126-092 provides in full:

"(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."

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*Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*

work” because, as Yellow Freight argued, “its employees [had] been paid for all the time they worked, so its failure to provide rest periods [did] not [result] in lost wages.” *Id.* at 848-49. But as noted by the court, employees required to work through what was supposed to be a paid rest period “are, in effect, providing Yellow Freight with an additional 10 minutes of labor during the first . . . hours of their . . . assignments”<sup>5</sup> and “[w]hen the employees are not provided with the mandated rest period, their workday is extended by 10 minutes.” *Id.* at 849. Taking the regulation into account, the court held that where an employee was deprived of the respite to which she or he was entitled during a mandated rest period, the employee was entitled to be compensated by Yellow Freight for an additional 10 minutes of work. *Id.* For an 8-hour workday, the Nurses’ clear entitlement under *Wingert*, then, is to be paid at their regular rate for any 10-minute rest period they were unable to take.

As a result of procedures followed after the 2006 arbitration decision, the Nurses have documented their missed 15-minute rest breaks and Sacred Heart has compensated them for the full amount at their regular hourly rate. Accordingly, a Nurse who is on

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<sup>5</sup> Yellow Freight’s employees were complaining of its failure to provide rest periods not during the first 40 hours of their employment during the workweek (they conceded receiving paid breaks during that period) but instead during periods of overtime, which was frequently required. We omit references to the “overtime” setting of the Yellow Freight claims, since it is irrelevant and potentially confusing.

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*Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*

duty at the prescribed workplace 8 hours, for an 8-hour workday, and who misses both rest periods, is compensated for 8 hours and 30 minutes. The Nurse thereby receives more than double-time for the WAC-mandated rest period: regular compensation for the 30 minutes in the workday during which she or he was entitled to take rest periods but was unable to, and another 30 minutes' compensation because Sacred Heart received an additional 30 minutes of labor that it would not have received had the rest periods been taken.

In this case, the Nurses seek a remedy never discussed in *Wingert*. Relying on *Wingert*'s language that "[w]hen the employees are not provided with the mandated rest period, their workday is *extended* by 10 minutes," *id.* (emphasis added), the Nurses argue that this so-called "extension" of their workday takes them beyond a 40-hour workweek, thereby entitling them, under the MWA, to be compensated for the time "exceeding" 40 hours at time and one half. Rather than being paid more than double-time for a forgone rest period, then, they seek compensation amounting to 2.5 times their regular rate of pay.

But argument from the statement in *Wingert* that the workday is "extended" ignores *Wingert*'s adjoining statement that employees deprived of rest periods "in effect, provid[e] Yellow Freight with an additional 10 minutes of labor *during* the first . . . hours of their . . . assignments." *Id.* (emphasis added). Of the two *Wingert* characterizations, and for purposes of applying the MWA, the description of the forgone rest period as

No. 29366-1-III

*Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*

providing the employer with additional labor *during* the workday is more accurate than treating it as an extension, since entitlement to time and one half under the MWA turns on the amount of time an employee is actually required to spend at the prescribed workplace, with no reference to a number of hours she or he is "deemed" to have worked.

Reaching out to the MWA for a time and one half payment remedy where an employer violates an industrial welfare regulation dealing with rest periods is then no more called for than reaching out to the MWA for a time and one half payment remedy where an employer violates other industrial welfare regulations, such as WAC 296-126-210 (dealing with impermissible meal or lodging charges) or WAC 296-126-222 (sanitation and safety). And of course *Wingert* holds that the proper remedy for a violation of the rest period regulation is to compensate the employee for the work, without any reference to the MWA or to any enhanced rate of pay. 146 Wn.2d at 849. Because the additional labor is provided during, not after, the employee's work assignment, and because the Nurses' claims are for rest periods denied during the first 40 hours of a given workweek, the 40-hour workweek is not exceeded and neither the language of, nor the policy reflected by, the MWA comes into play.

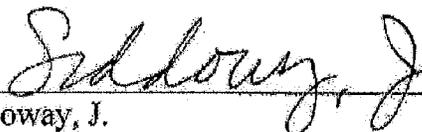
Additionally, even if the MWA applied, Sacred Heart—although not obliged to do so by the MWA—has in fact paid the Nurses 15 minutes' worth of compensation for every rest break missed. This is undisputed. Nonetheless, the Nurses persuaded the

No. 29366-1-III

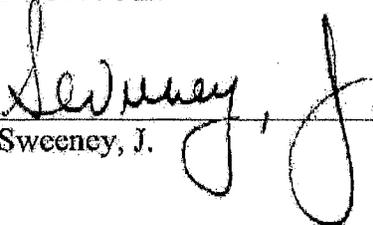
*Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*

superior court that it should not take Sacred Heart's payment of 15 minutes' compensation for their contracted-for breaks under the CBA into consideration because to treat Sacred Heart's payment for 15-minute rest breaks as sufficient overtime payment for a forgone 10-minute state-mandated rest period "would essentially leave the nurses without pay for five minutes of their *contractually obligated* rest break period." CP at 925 (emphasis added). We see no way that the trial court or we can conclude that the CBA is thereby violated without interpreting the CBA. Clearly Sacred Heart has a different view of the CBA. For this additional reason, we find no violation of the MWA. If the Nurses believe that their rights *under the CBA* are offended by this application of the MWA, then they have a claim under the CBA, not the MWA.

We conclude that Sacred Heart has satisfied its obligation under Washington's version of the MWA by the way in which it compensates the Nurses for missed rest breaks. We reverse the decision of the trial court and dismiss the suit.

  
Siddoway, J.

I CONCUR:

  
Sweeney, J.

No. 29366-1-III

BROWN, J. (dissenting) — The problem here is Sacred Heart Medical Center's extraction of additional labor by working its nurses through their breaks. The question is not whether the nurses bargained for 15-minute breaks under their collective bargaining agreement (CBA), but whether Washington law applies when the nurses work without any break, collectively bargained for or not. When more than a 40-hour week is worked by the nurses, then the Minimum Wage Act (MWA) requires payment for a lost 10-minute rest period in a 4-hour working period at time and one half. RCW 49.46.130; WAC 296-126-092(4).

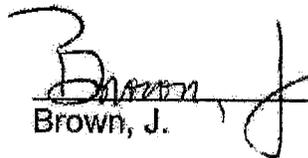
The federal court correctly recognized our legal landscape when remanding this matter to the superior court and noting the nurses' "claims are based on a right conferred by the MWA, not the CBA" and while the CBA reference will be required, "there is no indication that determining a particular nurse's wage will require *interpretation* of the CBA." Clerk's Papers (CP) at 249-50.

No. 29366-1-III—dissent

*Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*

In my view, the superior court correctly applied *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 849, 50 P.3d 256 (2002) when granting partial summary relief to the nurses, and reasoning “for purposes of this case, ten minutes of nurses’ missed rest break is at issue here and must be compensated at the appropriate time and one-half rate of a nurse’s ‘regular rate of pay’ when it results in overtime pursuant to RCW 49.46.130.” CP at 921. The final order correctly clarifies that nurses who missed a rest break resulting in overtime hours are owed 10 minutes at time and one half for a total of 15 minutes of pay, plus 5 minutes of straight time pay pursuant to the CBA. I solely differ with the superior court’s grant of double damages because, considering the lack of authority regarding missed rest periods as hours worked, I would hold this is a bona fide dispute regarding the payment of wages. *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 160, 961 P.2d 371 (1998).

Because I would affirm the superior court except for double damages, I respectfully dissent.

  
Brown, J.

# Statutes and Authorities

Westlaw

29 U.S.C.A. § 185

Page 1

**C****Effective:[See Text Amendments]**

United States Code Annotated Currentness

Title 29. Labor

Chapter 7. Labor-Management Relations (Refs &amp; Annos)

Subchapter IV. Liabilities of and Restrictions on Labor and Management

→ § 185. Suits by and against labor organizations

**(a) Venue, amount, and citizenship**

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

**(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments**

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

**(c) Jurisdiction**

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

**(d) Service of process**

The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

**(e) Determination of question of agency**

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so

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29 U.S.C.A. § 185

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as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

CREDIT(S)

(June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.)

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Chapter 49.12 RCW  
Industrial welfare

RCW Sections

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**Notes:**

**Reviser's note:** Throughout this chapter, the words "the committee" have been substituted for "the industrial welfare commission" or "the commission."

The industrial welfare commission was abolished and its powers and duties transferred to a new agency by the administrative code of 1921. In particular, 1921 c 7 § 135 abolished the commission while 1921 c 7 § 82 created an unnamed committee "which shall have the power and it shall be its duty:

(1) To exercise all the powers and perform all the duties now vested in, and required to be performed by, the industrial welfare commission."

1921 c 7 § 82 was codified by the 1941 Code Committee as RCW 43.22.280, wherein the Code Committee revised the wording of the session law to designate the unnamed committee as the "industrial welfare committee." The committee was apparently commonly known by that name, but such designation has no foundation in the statutes. RCW 43.22.280 was repealed by 1982 c 163 § 23. Powers, duties, and functions of the industrial welfare committee were transferred to the director of labor and industries. See RCW 43.22.282.

Child labor: RCW 26.28.060, 26.28.070.

Food and beverage establishment workers' permits: Chapter 69.06 RCW.

Hours of labor: Chapter 49.28 RCW.

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**49.12.005**  
**Definitions.**

For the purposes of this chapter:

- (1) "Department" means the department of labor and industries.
- (2) "Director" means the director of the department of labor and industries, or the director's designated representative.

(3)(a) Before May 20, 2003, "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 but does not include the state, any state institution, any state agency, political subdivision of the state, or any municipal corporation or quasi-municipal corporation. However, for the purposes of RCW

49.12.265 through 49.12.295, 49.12.350 through 49.12.370, 49.12.450, and 49.12.460 only, "employer" also includes the state, any state institution, any state agency, political subdivisions of the state, and any municipal corporation or quasi-municipal corporation.

(b) On and after May 20, 2003, "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, and includes the state, any state institution, state agency, political subdivisions of the state, and any municipal corporation or quasi-municipal corporation. However, this chapter and the rules adopted thereunder apply to these public employers only to the extent that this chapter and the rules adopted thereunder do not conflict with: (i) Any state statute or rule; and (ii) respect to political subdivisions of the state and any municipal or quasi-municipal corporation, any local resolution, ordinance, or rule adopted under the authority of the local legislative authority before April 1, 2003.

(4) "Employee" means an employee who is employed in the business of the employee's employer whether by way of manual labor or otherwise.

(5) "Conditions of labor" means and includes 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.

(6) For the purpose of chapter 16, Laws of 1973 2nd ex. sess. a minor is defined to be a person of either sex under the age of eighteen years.

[2003 c 401 § 2; 1998 c 334 § 1; 1994 c 164 § 13; 1988 c 236 § 8; 1973 2nd ex.s. c 16 § 1.]

**Notes:**

**Findings -- Purpose -- Intent -- Effective date -- 2003 c 401:** See notes following RCW 49.12.187.

**Construction -- 1998 c 334:** See note following RCW 49.12.450.

**Legislative findings -- Effective date -- Implementation -- Severability -- 1988 c 236:** See notes following RCW 49.12.270.

**49.12.010**

**Declaration.**

The welfare of the state of Washington demands that all employees be protected from conditions of labor which have a pernicious effect on their health. The state of Washington, therefore, exercising herein its police and sovereign power declares that inadequate wages and unsanitary conditions of labor exert such pernicious effect.

[1973 2nd ex.s. c 16 § 2; 1913 c 174 § 1; RRS § 7623.]

**49.12.020**

**Conditions of employment — Wages.**

It shall be unlawful to employ any person in any industry or occupation within the state of Washington under conditions of labor detrimental to their health; and it shall be unlawful to employ workers in any industry within the state of Washington at wages which are not adequate for their maintenance.

[1973 2nd ex.s. c 16 § 3; 1913 c 174 § 2; RRS § 7624.]

**49.12.033****Administration and enforcement of chapter by director of labor and industries.**

See RCW

43.22.270(5).

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**49.12.041****Investigation of wages, hours and working conditions — Statements, inspections authorized.**

It shall be the responsibility of the director to investigate the wages, hours and conditions of employment of all employees, including minors, except as may otherwise be provided in chapter 16, Laws of 1973 2nd ex. sess. The director, or the director's authorized representative, shall have full authority to require statements from all employers, relative to wages, hours and working conditions and to inspect the books, records and physical facilities of all employers subject to chapter 16, Laws of 1973 2nd ex. sess. Such examinations shall take place within normal working hours, within reasonable limits and in a reasonable manner.

[1994 c 164 § 14; 1973 2nd ex.s. c 16 § 5.]

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**49.12.050****Employer's record of employees.**

Every employer shall keep a record of the names of all employees employed by him or her, and shall on request permit the director to inspect such record.

[2010 c 8 § 12004; 1994 c 164 § 15; 1973 2nd ex.s. c 16 § 14; 1913 c 174 § 7; RRS § 7626.]

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**49.12.091****Investigation information — Findings — Rules prescribing minimum wages, working conditions.**

After an investigation has been conducted by the department of wages, hours and conditions of labor subject to chapter 16, Laws of 1973 2nd ex. sess., the director shall be furnished with all information relative to such investigation of wages, hours and working conditions, including current statistics on wage rates in all occupations subject to the provisions of chapter 16, Laws of 1973 2nd ex. sess. Within a reasonable time thereafter, if the director finds that in any occupation, trade or industry, subject to chapter 16, Laws of 1973 2nd ex. sess., the wages paid to employees are inadequate to supply the necessary cost of living, but not to exceed the state minimum wage as prescribed in RCW

49.46.020, as now or hereafter amended, or that the conditions of labor are detrimental to the health of employees, the director shall have authority to prescribe rules and regulations for the purpose of adopting minimum wages for occupations not otherwise governed by minimum wage requirements fixed by state or federal statute, or a rule or regulation adopted under such statute, and, at the same time have the authority to prescribe rules and regulations fixing standards, conditions and hours of labor for the protection of the safety, health and welfare of employees for all or specified occupations subject to chapter 16, Laws of 1973 2nd ex. sess. Thereafter, the director shall conduct a public hearing in accordance with the procedures of the administrative procedure act, chapter 34.05 RCW, for the purpose of the adoption of rules and regulations fixing minimum wages and standards, conditions and hours of labor subject to the provisions of chapter 16, Laws of 1973 2nd ex. sess. After such rules become effective, copies thereof shall be supplied to employers who may be affected by such rules and such employers shall post such rules, where possible, in such place or places, reasonably accessible to all employees of such employer. After the effective date of such rules, it shall be unlawful for any employer in any occupation subject to chapter 16, Laws of 1973 2nd ex. sess. to employ any person for less than the rate of wages specified in such rules or under conditions and hours of labor prohibited for any occupation specified in such rules: PROVIDED, That this section shall not apply to sheltered workshops.

[1994 c 164 § 16; 1973 2nd ex.s. c 16 § 6.]

**49.12.101  
Hearing.**

Whenever wages, standards, conditions and hours of labor have been established by rule and regulation of the director, the director may upon application of either employers or employees conduct a public hearing for the purpose of the adoption, amendment or repeal of rules and regulations adopted under the authority of chapter 16, Laws of 1973 2nd ex. sess.

[1994 c 164 § 17; 1973 2nd ex.s. c 16 § 7.]

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**49.12.105  
Variance order — Application — Issuance — Contents — Termination.**

An employer may apply to the director for an order for a variance from any rule or regulation establishing a standard for wages, hours, or conditions of labor adopted by the director under this chapter. The director shall issue an order granting a variance if the director determines or decides that the applicant for the variance has shown good cause for the lack of compliance. Any order so issued shall prescribe the conditions the employer must maintain, and the practices, means, methods, operations, standards and processes which the employer must adopt and utilize to the extent they differ from the standard in question. At any time the director may terminate and revoke such order, provided the employer was notified by the director of the termination at least thirty days prior to said termination.

[1994 c 164 § 18; 1973 2nd ex.s. c 16 § 8.]

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**49.12.110  
Exceptions to minimum scale — Special certificate or permit.**

For any occupation in which a minimum wage has been established, the director may issue to an employer, a special certificate or permit for an employee who is physically or mentally handicapped to such a degree that he or she is unable to obtain employment in the competitive labor market, or to a trainee or learner not otherwise subject to the jurisdiction of the apprenticeship council, a special certificate or permit authorizing the employment of such employee for a wage less than the legal minimum wage; and the director shall fix the minimum wage for said person, such special certificate or permit to be issued only in such cases as the director may decide the same is applied for in good faith and that such certificate or permit shall be in force for such length of time as the director shall decide and determine is proper.

[1994 c 164 § 19; 1977 ex.s. c 80 § 35; 1973 2nd ex.s. c 16 § 13; 1913 c 174 § 13; RRS § 7632.]

**Notes:**

**Purpose -- Intent -- Severability -- 1977 ex.s. c 80:** See notes following RCW 4.16.190.

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**49.12.121  
Wages and working conditions of minors — Special rules — Work permits.**

(1) The department may at any time inquire into wages, hours, and conditions of labor of minors employed in any trade, business, or occupation in the state of Washington and may adopt special rules for the protection of the safety, health, and welfare of minor employees. However, the rules may not limit the hours per day or per week, or other specified work period, that may be worked by minors who are emancipated by court order.

(2) The department shall issue work permits to employers for the employment of minors, after being assured the proposed employment of a minor meets the standards for the health, safety, and welfare of minors as set forth in the rules adopted by the department. No minor person shall be employed in any occupation, trade, or industry subject to chapter 16, Laws of 1973 2nd ex. sess., unless a work permit has been properly issued, with the consent of the parent, guardian, or other person having legal custody of the minor and with the approval of the school which such minor may then be attending. However, the consent of a parent, guardian, or other person, or the approval of the school which the minor may then be attending, is unnecessary if the minor is emancipated by court order.

(3) The minimum wage for minors shall be as prescribed in RCW

49.46.020.

[1993 c 294 § 9; 1989 c 1 § 3 (Initiative Measure No. 518, approved November 8, 1988); 1973 2nd ex.s. c 16 § 15.]

**Notes:**

**Effective date -- 1993 c 294:** See RCW 13.64.900.

**Effective date -- 1989 c 1 (Initiative Measure No. 518):** See note following RCW 49.46.010.

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**49.12.123**

**Work permit for minor required.**

In implementing state policy to assure the attendance of children in the public schools it shall be required of any person, firm or corporation employing any minor under the age of eighteen years to obtain a work permit as set forth in RCW

49.12.121 and keep such permit on file during the employment of such minor, and upon termination of such employment of such minor to return such permit to the department of labor and industries.

[1991 c 303 § 8; 1983 c 3 § 156; 1973 c 51 § 3.]

**Notes:**

**Severability -- 1973 c 51:** See note following RCW 28A.225.010.

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**49.12.124**

**Actors or performers — Work permits and variances for minors.**

For all minors employed as actors or performers in film, video, audio, or theatrical productions, the department shall issue a permit under RCW

49.12.121 and a variance under RCW 49.12.105 upon finding that the terms of the employment sufficiently protect the minor's health, safety, and welfare. The findings shall be based on information provided to the department including, but not limited to, the minor's working conditions and planned work schedule, adult supervision of the minor, and any planned educational programs.

[1994 c 62 § 2.]

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**49.12.130**

**Witness protected — Penalty.**

Any employer who discharges, or in any other manner discriminates against any employee because such employee has testified or is about to testify, or because such employer believes that said employee may testify in any investigation or proceedings relative to the enforcement of RCW

49.12.010 through 49.12.180, shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine of from twenty-five dollars to one hundred dollars for each such misdemeanor.

[1913 c 174 § 16; RRS § 7635.]

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**49.12.140**

**Complaint of noncompliance.**

Any worker or the parent or guardian of any minor to whom RCW

49.12.010 through 49.12.180 applies may complain to the director that the wages paid to the workers are less than the minimum rate and the director shall investigate the same and proceed under RCW 49.12.010 through 49.12.180 in behalf of the worker.

[1994 c 164 § 20; 1913 c 174 § 17 1/2; RRS § 7637.]

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**49.12.150****Civil action to recover underpayment.**

If any employee shall receive less than the legal minimum wage, except as hereinbefore provided in RCW

49.12.110, said employee shall be entitled to recover in a civil action the full amount of the legal minimum wage as herein provided for, together with costs and attorney's fees to be fixed by the court, notwithstanding any agreement to work for such lesser wage. In such action, however, the employer shall be credited with any wages which have been paid upon account.

[1913 c 174 § 18; RRS § 7638.]

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**49.12.170****Penalty.**

Except as otherwise provided in RCW

49.12.390 or 49.12.410, any employer employing any person for whom a minimum wage or standards, conditions, and hours of labor have been specified, at less than said minimum wage, or under standards, or conditions of labor or at hours of labor prohibited by the rules and regulations of the director; or violating any other of the provisions of chapter 16, Laws of 1973 2nd ex. sess., shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be punished by a fine of not less than twenty-five dollars nor more than one thousand dollars.

[1994 c 164 § 21; 1991 c 303 § 6; 1973 2nd ex.s. c 16 § 16; 1913 c 174 § 17; RRS § 7636.]

**Notes:**

Witnesses protected -- Penalty: RCW 49.12.130.

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**49.12.175****Wage discrimination due to sex prohibited — Penalty — Civil recovery.**

Any employer in this state, employing both males and females, who shall discriminate in any way in the payment of wages as between sexes or who shall pay any female a less wage, be it time or piece work, or salary, than is being paid to males similarly employed, or in any employment formerly performed by males, shall be guilty of a misdemeanor. If any female employee shall receive less compensation because of being discriminated against on account of her sex, and in violation of this section, she shall be entitled to recover in a civil action the full amount of compensation that she would have received had she not been discriminated against. In such action, however, the employer shall be credited with any compensation which has been paid to her upon account. A differential in wages between employees based in good faith on a factor or factors other than sex shall not constitute discrimination within the meaning of RCW

49.12.010 through 49.12.180.

[1943 c 254 § 1; Rem. Supp. 1943 § 7636-1. Formerly RCW 49.12.210.]

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**49.12.180****Annual report.**

The director shall report annually to the governor on its investigations and proceedings.

[1994 c 164 § 22; 1977 c 75 § 73; 1913 c 174 § 20; RRS § 7640.]

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**49.12.185****Exemptions from chapter.**

Chapter 16, Laws of 1973 2nd ex. sess. shall not apply to newspaper vendors or carriers and domestic or casual labor in or about private residences and agricultural labor as defined in RCW

50.04.150, as now or hereafter amended.

[1973 2nd ex.s. c 16 § 17.]

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**49.12.187****Collective bargaining rights not affected.**

This chapter shall not be construed to interfere with, impede, or in any way diminish the right of employees to bargain collectively with their employers through representatives of their own choosing concerning wages or standards or conditions of employment. However, rules adopted under this chapter regarding appropriate rest and meal periods as applied to employees in the construction trades may be superseded by a collective bargaining agreement negotiated under the national labor relations act, 29 U.S.C. Sec. 151 et seq., if the terms of the collective bargaining agreement covering such employees specifically require rest and meal periods and prescribe requirements concerning those rest and meal periods.

Employees of public employers may enter 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, rules adopted under this chapter regarding appropriate rest and meal periods.

[2003 c 401 § 3; 2003 c 146 § 1; 1973 2nd ex.s. c 16 § 18.]

**Notes:**

**Reviser's note:** This section was amended by 2003 c 146 § 1 and by 2003 c 401 § 3, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

**Findings -- Purpose -- Intent -- 2003 c 401:** "The legislature finds that the enactment of chapter 236, Laws of 1988 amended the definition of employer under the industrial welfare act, chapter 49.12 RCW, to ensure that the family care provisions of that act applied to the state and political subdivisions. The legislature further finds that this amendment of the definition of employer may be interpreted as creating an ambiguity as to whether the other provisions of chapter 49.12 RCW have applied to the state and its political subdivisions. The purpose of this act is to make retroactive, remedial, curative, and technical amendments to clarify the intent of chapter 49.12 RCW and chapter 236, Laws of 1988 and resolve any ambiguity. It is the intent of the legislature to establish that, prior to May 20, 2003, chapter 49.12 RCW and the rules adopted thereunder did not apply to the state or its agencies and political subdivisions except as expressly provided for in RCW 49.12.265 through 49.12.295, 49.12.350 through 49.12.370, 49.12.450, and 49.12.460." [2003 c 401 § 1.]

**Effective date -- 2003 c 401:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 20, 2003]." [2003 c 401 § 6.]

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**49.12.200****Women may pursue any calling open to men.**

That hereafter in this state every avenue of employment shall be open to women; and any business, vocation, profession and calling followed and pursued by men may be followed and pursued by women, and no person shall be disqualified from engaging in or pursuing any business, vocation, profession, calling or employment or excluded from any premises or place of work or employment on account of sex.

[1963 c 229 § 1; 1890 p 519 § 1; RRS § 7620.]

**Notes:**

Qualifications of electors: State Constitution Art. 6 § 1 (Amendment 63).

Sex equality -- Rights and responsibility: State Constitution Art. 31 §§ 1, 2 (Amendment 61).

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**49.12.240**

**Employee inspection of personnel file.**

Every employer shall, at least annually, upon the request of an employee, permit that employee to inspect any or all of his or her own personnel file(s).

[1985 c 336 § 1.]

**Notes:**

Destruction or retention of information relating to state employee misconduct: RCW 41.06.450 through 41.06.460.

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**49.12.250**

**Employee inspection of personnel file — Erroneous or disputed information.**

(1) Each employer shall make such file(s) available locally within a reasonable period of time after the employee requests the file(s).

(2) An employee annually may petition that the employer review all information in the employee's personnel file(s) that are regularly maintained by the employer as a part of his business records or are subject to reference for information given to persons outside of the company. The employer shall determine if there is any irrelevant or erroneous information in the file(s), and shall remove all such information from the file(s). If an employee does not agree with the employer's determination, the employee may at his or her request have placed in the employee's personnel file a statement containing the employee's rebuttal or correction. Nothing in this subsection prevents the employer from removing information more frequently.

(3) A former employee shall retain the right of rebuttal or correction for a period not to exceed two years.

[1985 c 336 § 2.]

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**49.12.260**

**Employee inspection of personnel file — Limitations.**

RCW

49.12.240 and 49.12.250 do not apply to the records of an employee relating to the investigation of a possible criminal offense. RCW 49.12.240 and 49.12.250 do not apply to information or records compiled in preparation for an impending lawsuit which would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts.

[1985 c 336 § 3.]

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**49.12.265**

**Sick leave, time off — Care of family members — Definitions.**

The definitions in this section apply throughout RCW

49.12.270 through 49.12.295 unless the context clearly requires otherwise.

(1) "Child" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis who is: (a) Under eighteen years of age; or (b) eighteen years of age or older and incapable of self-care because of a mental or physical disability.

(2) "Grandparent" means a parent of a parent of an employee.

(3) "Parent" means a biological or adoptive parent of an employee or an individual who stood in loco parentis to an employee when the employee was a child.

(4) "Parent-in-law" means a parent of the spouse of an employee.

(5) "Sick leave or other paid time off" means time allowed under the terms of an appropriate state law, collective bargaining agreement, or employer policy, as applicable, to an employee for illness, vacation, and personal holiday. If paid time is not allowed to an employee for illness, "sick leave or other paid time off" also means time allowed under the terms of an appropriate state law, collective bargaining agreement, or employer policy, as applicable, to an employee for disability under a plan, fund, program, or practice that is: (a) Not covered by the employee retirement income security act of 1974, 29 U.S.C. Sec. 1001 et seq.; and (b) not established or maintained through the purchase of insurance.

(6) "Spouse" means a husband or wife, as the case may be.

[2005 c 499 § 1; 2002 c 243 § 2.]

**Notes:**

**Effective date -- 2002 c 243:** "This act takes effect January 1, 2003." [2002 c 243 § 4.]

**49.12.270**

**Sick leave, time off — Care of family members.**

(1) If, under the terms of a collective bargaining agreement or employer policy applicable to an employee, the employee is entitled to sick leave or other paid time off, then an employer shall allow an employee to use any or all of the employee's choice of sick leave or other paid time off to care for: (a) A child of the employee with a health condition that requires treatment or supervision; or (b) a spouse, parent, parent-in-law, or grandparent of the employee who has a serious health condition or an emergency condition. An employee may not take advance leave until it has been earned. The employee taking leave under the circumstances described in this section must comply with the terms of the collective bargaining agreement or employer policy applicable to the leave, except for any terms relating to the choice of leave.

(2) Use of leave other than sick leave or other paid time off to care for a child, spouse, parent, parent-in-law, or grandparent under the circumstances described in this section shall be governed by the terms of the appropriate collective bargaining agreement or employer policy, as applicable.

[2002 c 243 § 1; 1988 c 236 § 3.]

**Notes:**

**Effective date -- 2002 c 243:** See note following RCW 49.12.265.

**Legislative findings -- 1988 c 236:** "The legislature recognizes the changing nature of the workforce brought about by increasing numbers of working mothers, single parent households, and dual career families. The legislature finds that the needs of families must be balanced with the demands of the workplace to promote family stability and economic security. The legislature further finds that it is in the public interest for employers to accommodate employees by providing reasonable leaves from work for family reasons. In order to promote family stability, economic security, and the public interest, the legislature hereby establishes a minimum standard for family care. Nothing contained in this act shall prohibit any employer from establishing family care standards more generous than the minimum standards set forth in this act." [1988 c 236 § 1.]

**Effective date -- 1988 c 236:** "This act shall take effect on September 1, 1988." [1988 c 236 § 12.]

**Implementation -- 1988 c 236:** "Prior to September 1, 1988, the department of labor and industries may take such steps as are necessary to ensure that chapter 236, Laws of 1988 is implemented on September 1, 1988." [1988 c 236 § 10.]

**Severability -- 1988 c 236:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1988 c 236 § 11.]

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**49.12.275****Sick leave, time off — Care of family members — Poster required.**

The department shall develop and furnish to each employer a poster which describes an employer's obligations and an employee's rights under RCW

49.12.270 through 49.12.295. The poster must include notice about any state law, rule, or regulation governing maternity disability leave and indicate that federal or local ordinances, laws, rules, or regulations may also apply. The poster must also include a telephone number and an address of the department to enable employees to obtain more information regarding RCW 49.12.270 through 49.12.295. Each employer must display this poster in a conspicuous place. Every employer shall also post its leave policies, if any, in a conspicuous place. Nothing in this section shall be construed to create a right to continued employment.

[1988 c 236 § 2.]

**Notes:**

**Legislative findings -- Effective date -- Implementation -- Severability -- 1988 c 236:** See notes following RCW 49.12.270.

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**49.12.280****Sick leave, time off — Care of family members — Administration and enforcement.**

The department shall administer and investigate violations of RCW

49.12.270 and 49.12.275.

[1988 c 236 § 4.]

**Notes:**

**Legislative findings -- Effective date -- Implementation -- Severability -- 1988 c 236:** See notes following RCW 49.12.270.

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**49.12.285****Sick leave, time off — Care of family members — Monetary penalties.**

The department may issue a notice of infraction if the department reasonably believes that an employer has failed to comply with RCW

49.12.270 or 49.12.275. The form of the notice of infraction shall be adopted by rule pursuant to chapter 34.05 RCW. An employer who is found to have committed an infraction under RCW 49.12.270 or 49.12.275 may be assessed a monetary penalty not to exceed two hundred dollars for each violation. An employer who repeatedly violates RCW 49.12.270 or 49.12.275 may be assessed a monetary penalty not to exceed one thousand dollars for each violation. For purposes of this section, the failure to comply with RCW 49.12.275 as to an employee or the failure to comply with RCW 49.12.270 as to a period of leave sought by an employee shall each constitute separate violations. An employer has twenty days to appeal the notice of infraction. Any appeal of a violation determined to be an infraction shall be heard and determined by an administrative law judge. Monetary penalties collected under this section shall be deposited into the general fund.

[1988 c 236 § 5.]

**Notes:**

**Legislative findings -- Effective date -- Implementation -- Severability -- 1988 c 236:** See notes following RCW 49.12.270.

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**49.12.287**

**Sick leave, time off — Care of family members — Discharge of employee not permitted.**

An employer shall not discharge, threaten to discharge, demote, suspend, discipline, or otherwise discriminate against an employee because the employee: (1) Has exercised, or attempted to exercise, any right provided under RCW

49.12.270 through 49.12.295; or (2) has filed a complaint, testified, or assisted in any proceeding under RCW 49.12.270 through 49.12.295.

[2002 c 243 § 3.]

**Notes:**

**Effective date -- 2002 c 243:** See note following RCW 49.12.265.

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**49.12.290**

**Sick leave, time off — Care of family members — Collective bargaining agreement not reduced.**

Nothing in RCW

49.12.270 through 49.12.295 shall be construed to reduce any provision in a collective bargaining agreement.

[1988 c 236 § 6.]

**Notes:**

**Legislative findings -- Effective date -- Implementation -- Severability -- 1988 c 236:** See notes following RCW 49.12.270.

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**49.12.295**

**Sick leave, time off — Care of family members — Notification of employers.**

The department shall notify all employers of the provisions of RCW

49.12.270 through 49.12.290.

[1988 c 236 § 7.]

**Notes:**

**Legislative findings -- Effective date -- Implementation -- Severability -- 1988 c 236:** See notes following RCW 49.12.270.

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**49.12.300**

**House-to-house sales by minor — Registration of employer.**

(1) No person under sixteen years of age may be employed in house-to-house sales unless the department grants a variance permitting specific employment under criteria adopted by department rule.

(2) No person sixteen or seventeen years of age may be employed in house-to-house sales unless the employer:

(a) Obtains and maintains a validated registration certificate issued by the department. Application for registration shall be made on a form prescribed by the director, which shall include but not be limited to:

(i) The employer's name, permanent address, and telephone number;

(ii) The employer's social security number and industrial insurance number or, in lieu of these numbers, the employer's unified business identifier account number; and

(iii) A description of the work to be performed by persons aged sixteen or seventeen and the working conditions under which the work will be performed;

(b) Provides each employee sixteen or seventeen years of age, before beginning work, an identification card in a form prescribed by the director. The card shall include, but not be limited to, a picture of the employee, the employee's name, the name and address of the employer, a statement that the employer is registered with the department of labor and industries, and the registration number. The person employed in house-to-house sales shall show the identification card to each customer or potential customer of the person;

(c) Ensures supervision by a person aged twenty-one years or over during all working hours, with each supervisor responsible for no more than five persons; and

(d) If transporting an employee sixteen or seventeen years of age to another state, obtains the express written consent of the employee's parent or legal guardian.

(3) An employer may not employ a person sixteen or seventeen years of age in house-to-house sales after the hour of nine p.m.

(4) The department shall adopt by rule procedures for the renewal, denial, or revocation of registrations required by this section.

[1989 c 216 § 1.]

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#### **49.12.310**

#### **House-to-house sales by minor — Advertising by employer — Penalty.**

(1) Any person advertising to employ a person in house-to-house sales with an advertisement specifically prescribing a minimum age requirement that is under the age of twenty-one shall:

(a) Register with the department as provided in RCW

49.12.300(2)(a); and

(b) Include the following information in any advertisement:

(i) The registration number required by subsection (1)(a) of this section;

(ii) The specific nature of the employment and the product or services to be sold; and

(iii) The average monthly compensation paid in the previous six months to new employees, taking into account any deductions made pursuant to the employment contract.

(2) Advertising to recruit or employ a person in house-to-house sales shall not be false, misleading, or deceptive.

(3) A violation of this section is an unfair act or practice in violation of the consumer protection act, chapter 19.86 RCW. The remedies and sanctions provided under chapter 19.86 RCW shall not preclude application of other available remedies and sanctions.

(4) No publisher, radio broadcast licensee, advertising agency, or agency or medium for the dissemination of an advertisement may be subject to penalties by reason of dissemination of any false, misleading, or deceptive advertisement, or for an advertisement that fails to meet the requirements of subsection (1) of this section, unless he or she has refused on the request of the director to furnish the name and address of the person purchasing the advertising.

[1989 c 216 § 2.]

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**49.12.320****Definitions.**

For the purposes of RCW

49.12.300 and 49.12.310:

(1) "Employ" includes to engage, suffer, or permit to work, but does not include voluntary or donated services performed for no compensation, or without expectation or contemplation of compensation as the adequate consideration for the services performed, for an educational, charitable, religious, state or local government body or agency, or nonprofit organization, or services performed by a newspaper vendor or a person in the employ of his or her parent or stepparent.

(2) "House-to-house sales" includes a sale or other transaction in consumer goods, the demonstration of products or equipment, the obtaining of orders for consumer goods, or the obtaining of contracts for services, in which the employee personally solicits the sale or transaction at a place other than the place of business of the employer.

[1989 c 216 § 3.]

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**49.12.330****Rules.**

The department shall adopt rules to implement RCW

49.12.300 through 49.12.320.

[1989 c 216 § 4.]

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**49.12.350****Parental leave — Legislative findings.**

The legislature finds that employers often distinguish between biological parents, and adoptive parents and stepparents in their employee leave policies. Many employers who grant leave to their employees to care for a newborn child either have no policy or establish a more restrictive policy regarding whether an adoptive parent or stepparent can take similar leave. The legislature further finds that many employers establish different leave policies for men and women regarding the care of a newborn or newly placed child. The legislature recognizes that the bonding that occurs between a parent and child is important to the nurturing of that child, regardless of whether the parent is the child's biological parent and regardless of the gender of the parent. For these reasons, the legislature declares that it is the public policy of this state to require that employers who grant leave to their employees to care for a newborn child make the same leave available upon the same terms for adoptive parents and stepparents, men and women.

[1989 1st ex.s. c 11 § 22.]

**Notes:**

**Severability -- Effective date -- 1989 1st ex.s. c 11:** See RCW 49.78.900 and 49.78.901.

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**49.12.360****Parental leave — Discrimination prohibited.**

(1) An employer must grant an adoptive parent or a stepparent, at the time of birth or initial placement for adoption of a child under the age of six, the same leave under the same terms as the employer grants to biological parents. As a term of leave, an employer may restrict leave to those living with the child at the time of birth or initial placement.

(2) An employer must grant the same leave upon the same terms for men as it does for women.

(3) The department shall administer and investigate violations of this section. Notices of infraction, penalties, and appeals shall be administered in the same manner as violations under RCW

49.12.285.

(4) For purposes of this section, "leave" means any leave from employment granted to care for a newborn or a newly adopted child at the time of placement for adoption.

(5) Nothing in this section requires an employer to:

(a) Grant leave equivalent to maternity disability leave; or

(b) Establish a leave policy to care for a newborn or newly placed child if no such leave policy is in place for any of its employees.

[2003 c 401 § 4; 1989 1st ex.s. c 11 § 23.]

**Notes:**

**Findings -- Purpose -- Intent -- Effective date -- 2003 c 401:** See notes following RCW 49.12.187.

**Severability -- Effective date -- 1989 1st ex.s. c 11:** See RCW 49.78.900 and 49.78.901.

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**49.12.370**

**Parental leave — Collective bargaining agreement or employee benefit plan — Application.**

In the case of employees covered by an unexpired collective bargaining agreement that expires on or after September 1, 1989, or by an employee benefit program or plan with a stated year ending on or after September 1, 1989, the effective date of RCW

49.12.360 shall be the later of: (1) The first day following expiration of the collective bargaining agreement; or (2) the first day of the next plan year.

[1989 1st ex.s. c 11 § 24.]

**Notes:**

**Severability -- Effective date -- 1989 1st ex.s. c 11:** See RCW 49.78.900 and 49.78.901.

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**49.12.380**

**Child labor laws — Information program.**

Upon adoption of the rules under \*section 1 of this act, the department of labor and industries shall implement a comprehensive program to inform employers of the rules adopted. The program shall include mailings, public service announcements, seminars, and any other means deemed appropriate to inform all Washington employers of their rights and responsibilities regarding the employment of minors.

[1991 c 303 § 2.]

**Notes:**

**\*Reviser's note:** Section 1 of this act, which amended RCW 49.12.121, was vetoed by the governor.

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**49.12.390**

**Child labor laws — Violations — Civil penalties — Restraining orders.**

(1)(a) Except as otherwise provided in subsection (2) of this section, if the director, or the director's designee, finds that an employer has violated any of the requirements of RCW

49.12.121 or 49.12.123, or a rule or order adopted or variance granted under RCW 49.12.121 or 49.12.123, a citation stating the violations shall be issued to the employer. The citation shall be in writing, describing the nature of the violation including reference to the standards, rules, or orders alleged to have been violated. An initial citation for failure to comply with RCW 49.12.123 or rules requiring a minor work permit and maintenance of records shall state a specific and reasonable time for abatement of the violation to allow the employer to correct the violation without penalty. The director or the director's designee may establish a specific time for abatement of other nonserious violations in lieu of a penalty for first time violations. The citation and a proposed penalty assessment shall be given to the highest management official available at the workplace or be mailed to the employer at the workplace. In addition, the department shall mail a copy of the citation and proposed penalty assessment to the central personnel office of the employer. Citations issued under this section shall be posted at or near the place where the violation occurred.

(b) Except when an employer corrects a violation as provided in (a) of this subsection, he or she shall be assessed a civil penalty of not more than one thousand dollars depending on the size of the business and the gravity of the violation. The employer shall pay the amount assessed within thirty days of receipt of the assessment or notify the director of his or her intent to appeal the citation or the assessment penalty as provided in RCW 49.12.400.

(2) If the director, or the director's designee, finds that an employer has committed a serious or repeated violation of the requirements of RCW 49.12.121 or 49.12.123, or any rule or order adopted or variance granted under RCW 49.12.121 or 49.12.123, the employer is subject to a civil penalty of not more than one thousand dollars for each day the violation continues. For the purposes of this subsection, a serious violation shall be deemed to exist if death or serious physical harm has resulted or is imminent from a condition that exists, or from one or more practices, means, methods, operations, or processes that have been adopted or are in use by the employer, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

(3) In addition to any other authority provided in this section, if, upon inspection or investigation, the director, or director's designee, believes that an employer has violated RCW 49.12.121 or 49.12.123, or a rule or order adopted or variance granted under RCW 49.12.121 or 49.12.123, and that the violation creates a danger from which there is a substantial probability that death or serious physical harm could result to a minor employee, the director, or director's designee, may issue an order immediately restraining the condition, practice, method, process, or means creating the danger in the workplace. An order issued under this subsection may require the employer to take steps necessary to avoid, correct, or remove the danger and to prohibit the employment or presence of a minor in locations or under conditions where the danger exists.

(4) An employer who violates any of the posting requirements of RCW 49.12.121 or rules adopted implementing RCW 49.12.121 shall be assessed a civil penalty of not more than one hundred dollars for each violation.

(5) A person who gives advance notice, without the authority of the director, of an inspection to be conducted under this chapter shall be assessed a civil penalty of not more than one thousand dollars.

(6) Penalties assessed under this section shall be paid to the director and deposited into the general fund.

[1991 c 303 § 3.]

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#### **49.12.400**

#### **Child labor laws — Appeal.**

A person, firm, or corporation aggrieved by an action taken or decision made by the department under RCW

49.12.390 may appeal the action or decision to the director by filing notice of the appeal with the director within thirty days of the department's action or decision. A notice of appeal filed under this section shall stay the effectiveness of a citation or notice of the assessment of a penalty pending review of the appeal by the director, but such appeal shall not stay the effectiveness of an order of immediate restraint issued under RCW 49.12.390. Upon receipt of an appeal, a hearing shall be held in accordance with chapter 34.05 RCW. The director shall issue all final orders after the hearing. The final orders are subject to appeal in accordance with chapter 34.05 RCW. Orders not appealed within the time period specified in chapter 34.05 RCW are final and binding.

[1991 c 303 § 4.]

**49.12.410**

**Child labor laws — Violations — Criminal penalties.**

(1) An employer who knowingly or recklessly violates the requirements of RCW

49.12.121 or 49.12.123, or a rule or order adopted under RCW 49.12.121 or 49.12.123, is guilty of a gross misdemeanor.

(2) An employer whose practices in violation of the requirements of RCW 49.12.121 or 49.12.123, or a rule or order adopted under RCW 49.12.121 or 49.12.123, result in the death or permanent disability of a minor employee is guilty of a class C felony punishable according to chapter 9A.20 RCW.

[2003 c 53 § 273; 1991 c 303 § 5.]

**Notes:**

**Intent -- Effective date -- 2003 c 53:** See notes following RCW 2.48.180.

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**49.12.420**

**Child labor laws — Exclusive remedies.**

The penalties established in RCW

49.12.390 and 49.12.410 for violations of RCW 49.12.121 and 49.12.123 are exclusive remedies.

[1991 c 303 § 7.]

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**49.12.450**

**Compensation for required employee work apparel — Exceptions — Changes — Rules — Expiration of subsection.**

(1) Notwithstanding the provisions of chapter

49.46 RCW or other provisions of this chapter, the obligation of an employer to furnish or compensate an employee for apparel required during work hours shall be determined only under this section.

(2) Employers are not required to furnish or compensate employees for apparel that an employer requires an employee to wear during working hours unless the required apparel is a uniform.

(3) As used in this section, "uniform" means:

(a) Apparel of a distinctive style and quality that, when worn outside of the workplace, clearly identifies the person as an employee of a specific employer;

(b) Apparel that is specially marked with an employer's logo;

(c) Unique apparel representing an historical time period or an ethnic tradition; or

(d) Formal apparel.

(4) Except as provided in subsection (5) of this section, if an employer requires an employee to wear apparel of a common color that conforms to a general dress code or style, the employer is not required to furnish or compensate an employee for that apparel. For the purposes of this subsection, "common color" is limited to the following colors or light or dark variations of such colors: White, tan, or blue, for tops; and tan, black, blue, or gray, for bottoms. An employer is permitted to require an employee to obtain two sets of wearing apparel to accommodate for the seasonal changes in weather which necessitate a change in wearing apparel.

(5) If an employer changes the color or colors of apparel required to be worn by any of his or her employees during a two-year period of time, the employer shall furnish or compensate the employees for the apparel. The employer shall be required to furnish or compensate only those employees who are affected by the change. The two-year time period begins on the date the change in wearing apparel goes into effect and ends two years from this date. The beginning and end of the two-year time

period applies to all employees regardless of when the employee is hired.

(6) The department shall utilize negotiated rule making as defined by RCW 34.05.310(2)(a) in the development and adoption of rules defining apparel that conforms to a general dress code or style. This subsection expires January 1, 2000.

(7) For the purposes of this section, personal protective equipment required for employee protection under chapter 49.17 RCW is not deemed to be employee wearing apparel.

[1998 c 334 § 2.]

**Notes:**

**Construction -- 1998 c 334:** "Nothing in this act shall be construed to alter the terms, conditions, or practices contained in any collective bargaining agreement in effect at the time of June 11, 1998, until the expiration date of such agreement." [1998 c 334 § 3.]

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**49.12.460**

**Volunteer firefighters, reserve officers, civil air patrol members — Employer duties — Violations — Definitions.**

(1) An employer may not discharge from employment or discipline:

- (a) A volunteer firefighter or reserve officer because of leave taken related to an alarm of fire or an emergency call; or
- (b) A civil air patrol member because of leave taken related to an emergency service operation.

(2)(a) A volunteer firefighter or reserve officer or civil air patrol member who believes he or she was discharged or disciplined in violation of this section may file a complaint alleging the violation with the director. The volunteer firefighter or reserve officer or civil air patrol member may allege a violation only by filing such a complaint within ninety days of the alleged violation.

(b) Upon receipt of the complaint, the director must cause an investigation to be made as the director deems appropriate and must determine whether this section has been violated. Notice of the director's determination must be sent to the complainant and the employer within ninety days of receipt of the complaint.

(c) If the director determines that this section was violated and the employer fails to reinstate the employee or withdraw the disciplinary action taken against the employee, whichever is applicable, within thirty days of receipt of notice of the director's determination, the volunteer firefighter or reserve officer or civil air patrol member may bring an action against the employer alleging a violation of this section and seeking reinstatement or withdrawal of the disciplinary action.

(d) In any action brought under this section, the superior court shall have jurisdiction, for cause shown, to restrain violations under this section and to order reinstatement of the employee or withdrawal of the disciplinary action.

(3) For the purposes of this section:

(a) "Alarm of fire or emergency call" means responding to, working at, or returning from a fire alarm or an emergency call, but not participating in training or other nonemergency activities.

(b) "Civil air patrol member" means a person who is a member of the Washington wing of the civil air patrol.

(c) "Emergency service operation" means the following operations of the civil air patrol:

- (i) Search and rescue missions designated by the air force rescue coordination center;
- (ii) Disaster relief, when requested by the federal emergency management agency or the department of homeland security;
- (iii) Humanitarian services, when requested by the federal emergency management agency or the department of homeland security;
- (iv) United States air force support designated by the first air force; and
- (v) Counterdrug missions.

(d) "Employer" means an employer who had twenty or more full-time equivalent employees in the previous year.

(e) "Reinstatement" means reinstatement with back pay, without loss of seniority or benefits, and with removal of any related adverse material from the employee's personnel file, if a file is maintained by the employer.

(f) "Withdrawal of disciplinary action" means withdrawal of disciplinary action with back pay, without loss of seniority or benefits, and with removal of any related adverse material from the employee's personnel file, if a file is maintained by the employer.

(g) "Volunteer firefighter" means a firefighter who:

(i) Is not paid;

(ii) Is not already at his or her place of employment when called to serve as a volunteer, unless the employer agrees to provide such an accommodation; and

(iii) Has been ordered to remain at his or her position by the commanding authority at the scene of the fire.

(h) "Reserve officer" has the meaning provided in RCW

41.24.010.

(4) The legislature declares that the public policies articulated in this section depend on the procedures established in this section and no civil or criminal action may be maintained relying on the public policies articulated in this section without complying with the procedures set forth in this section, and to that end all civil actions and civil causes of action for such injuries and all jurisdiction of the courts of this state over such causes are hereby abolished, except as provided in this section.

[2010 c 170 § 1; 2004 c 44 § 1; 2003 c 401 § 5; 2001 c 173 § 1.]

**Notes:**

**Findings -- Purpose -- Intent -- Effective date -- 2003 c 401:** See notes following RCW 49.12.187.

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**49.12.465**

**Farm internship pilot project — Special certificate required. (Expires December 31, 2011.)**

(1) The director shall establish a farm internship pilot project until December 1, 2011, for the employment of farm interns on small farms under special certificates at wages, if any, as authorized by the department and subject to such limitations as to time, number, proportion, and length of service as provided in this section and as prescribed by the department. The pilot project shall consist of two counties, one a county consisting entirely of islands with fewer than fifty thousand residents and one a county that is bordered by the crest of the Cascade mountain range and salt waters with fewer than one hundred fifty thousand residents.

(2) A small farm may employ no more than three interns per year under this section.

(3) A small farm must apply for a special certificate on a form made available by the director. The application must set forth: The name of the farm and a description of the farm seeking the certificate; the type of work to be performed by a farm intern; a description of the internship program; the period of time for which the certificate is sought and the duration of an internship; the number of farm interns for which a special certificate is sought; the wages, if any, that will be paid to the farm intern; any room and board, stipends, and other remuneration the farm will provide to a farm intern; and the total number of workers employed by the farm.

(4) Upon receipt of an application, the department shall review the application and issue a special certificate to the requesting farm within fifteen days if the department finds that:

(a) The farm qualifies as a small farm;

(b) There have been no serious violations of chapter

49.46 RCW or Title 51 RCW that provide reasonable grounds to believe that the terms of an internship agreement may not be complied with;

(c) The issuance of a certificate will not create unfair competitive labor cost advantages nor have the effect of impairing or depressing wage or working standards established for experienced workers for work of a like or comparable character in the industry or occupation at which the intern is to be employed;

(d) A farm intern will not displace an experienced worker; and

(e) The farm demonstrates that the interns will perform work for the farm under an internship program that: (i) Provides a curriculum of learning modules and supervised participation in farm work activities designed to teach farm interns about farming practices and farm enterprises; (ii) is based on the bona fide curriculum of an educational or vocational institution; and (iii) is reasonably designed to provide the intern with vocational knowledge and skills about farming practices and enterprises. In assessing an internship program, the department may consult with relevant college and university departments and extension programs and state and local government agencies involved in the regulation or development of agriculture.

(5) A special certificate issued under this section must specify the terms and conditions under which it is issued, including: The name of the farm; the duration of the special certificate allowing the employment of farm interns and the duration of an internship; the total number of interns authorized under the special certificate; the authorized wage rate, if any; and any room and board, stipends, and other remuneration the farm will provide to the farm intern. A farm worker may be paid at wages specified in the certificate only during the effective period of the certificate and for the duration of the internship.

(6) If the department denies an application for a special certificate, notice of denial must be mailed to the farm. The farm listed on the application may, within fifteen days after notice of such action has been mailed, file with the director a petition for review of the denial, setting forth grounds for seeking such a review. If reasonable grounds exist, the director or the director's authorized representative may grant such a review and, to the extent deemed appropriate, afford all interested persons an opportunity to be heard on such review.

(7) Before employing a farm intern, a farm must submit a statement on a form made available by the director stating that the farm understands: The requirements of the industrial welfare act, chapter 49.12 RCW, that apply to farm interns; that the farm must pay workers' compensation premiums in the assigned intern risk class and must pay workers' compensation premiums for nonintern work hours in the applicable risk class; and that if the farm does not comply with subsection (8) of this section, the director may revoke the special certificate.

(8) The director may revoke a special certificate issued under this section if a farm fails to: Comply with the requirements of the industrial welfare act, chapter 49.12 RCW, that apply to farm interns; pay workers' compensation premiums in the assigned intern risk class; or pay workers' compensation premiums in the applicable risk class for nonintern work hours.

(9) Before the start of a farm internship, the farm and the intern must sign a written agreement and send a copy of the agreement to the department. The written agreement must, at a minimum:

(a) Describe the internship program offered by the farm, including the skills and objectives the program is designed to teach and the manner in which those skills and objectives will be taught;

(b) Explicitly state that the intern is not entitled to minimum wages for work and activities conducted pursuant to the internship program for the duration of the internship;

(c) Describe the responsibilities, expectations, and obligations of the intern and the farm, including the anticipated number of hours of farm activities to be performed by the intern per week;

(d) Describe the activities of the farm and the type of work to be performed by the farm intern; and

(e) Describe any wages, room and board, stipends, and other remuneration the farm will provide to the farm intern.

(10) The definitions in this subsection apply throughout this section unless the context clearly requires otherwise.

(a) "Farm intern" means an individual who provides services to a small farm under a written agreement and primarily as a means of learning about farming practices and farm enterprises.

(b) "Farm internship program" means an internship program described under subsection (4)(e) of this section.

(c) "Small farm" means a farm:

(i) Organized as a sole proprietorship, partnership, or corporation;

(ii) That reports on the applicant's schedule F of form 1040 or other applicable form filed with the United States internal revenue service annual sales less than two hundred fifty thousand dollars; and

(iii) Where all the owners or partners of the farm provide regular labor to and participate in the management of the farm,

and own or lease the productive assets of the farm.

(11) The department shall monitor and evaluate the farm internships authorized by this section and report to the appropriate committees of the legislature by December 31, 2011. The report shall include, but not be limited to: The number of small farms that applied for and received special certificates; the number of interns employed as farm interns; the nature of the educational activities provided to the farm interns; the wages and other remuneration paid to farm interns; the number of and type of workers' compensation claims for farm interns; the employment of farm interns following farm internships; and other matters relevant to assessing farm internships authorized in this section.

[2010 c 160 § 1.]

**Notes:**

**Expiration date -- 2010 c 160:** "This act expires December 31, 2011." [2010 c 160 § 6.]

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**49.12.900**

**Severability — 1973 2nd ex.s. c 16.**

If any provision of this 1973 amendatory act, or its application to any person or circumstances is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected.

[1973 2nd ex.s. c 16 § 20.]

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**49.12.901**

**Severability — 1991 c 303.**

If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

[1991 c 303 § 10.]

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**49.12.902**

**Effective date — 1991 c 303 §§ 3-7.**

Sections 3 through 7 of this act shall take effect April 1, 1992.

[1991 c 303 § 12.]

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**49.12.903**

**Construction — Chapter applicable to state registered domestic partnerships — 2009 c 521.**

For the purposes of this chapter, the terms spouse, marriage, marital, husband, wife, widow, widower, next of kin, and family shall be interpreted as applying equally to state registered domestic partnerships or individuals in state registered domestic partnerships as well as to marital relationships and married persons, and references to dissolution of marriage shall apply equally to state registered domestic partnerships that have been terminated, dissolved, or invalidated, to the extent that such interpretation does not conflict with federal law. Where necessary to implement chapter 521, Laws of 2009, gender-specific terms such as husband and wife used in any statute, rule, or other law shall be construed to be gender neutral, and applicable to individuals in state registered domestic partnerships.

[2009 c 521 § 130.]

Chapter 49.46 RCW  
Minimum wage act

RCW Sections

- 49.46.005 Declaration of necessity and police power.
- 49.46.010 Definitions.
- 49.46.020 Minimum hourly wage.
- 49.46.040 Investigation -- Services of federal agencies -- Employer's records -- Industrial homework.
- 49.46.060 Exceptions for learners, apprentices, messengers, disabled.
- 49.46.065 Individual volunteering labor to state or local governmental agency -- Amount reimbursed for expenses or received as nominal compensation not deemed salary for rendering services or affecting public retirement rights.
- 49.46.070 Records of employer -- Contents -- Inspection -- Sworn statement.
- 49.46.080 New or modified regulations -- Judicial review -- Stay.
- 49.46.090 Payment of wages less than chapter requirements -- Employer's liability -- Assignment of wage claim.
- 49.46.100 Prohibited acts of employer -- Penalty.
- 49.46.110 Collective bargaining not impaired.
- 49.46.120 Chapter establishes minimum standards and is supplementary to other laws -- More favorable standards unaffected.
- 49.46.130 Minimum rate of compensation for employment in excess of forty hour work week -- Exceptions.
- 49.46.140 Notification of employers.
- 49.46.160 Automatic service charges.
- 49.46.900 Severability -- 1959 c 294.
- 49.46.910 Short title.
- 49.46.920 Effective date -- 1975 1st ex.s. c 289.

Notes:

Enforcement of wage claims: RCW 49.48.040.

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**49.46.005**  
**Declaration of necessity and police power.**

Whereas the establishment of a minimum wage for employees is a subject of vital and imminent concern to the people of this state and requires appropriate action by the legislature to establish minimum standards of employment within the state of Washington, therefore the legislature declares that in its considered judgment the health, safety and the general welfare of the citizens of this state require the enactment of this measure, and exercising its police power, the legislature endeavors by this chapter to establish a minimum wage for employees of this state to encourage employment opportunities within the state. The provisions of this chapter are enacted in the exercise of the police power of the state for the purpose of protecting the immediate and future health, safety and welfare of the people of this state.

[1961 ex.s. c 18 § 1.]

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**49.46.010**  
**Definitions. (Effective until December 31, 2011.)**

\*\*\* CHANGE IN 2011 \*\*\* (SEE

**5931-S.SL) \*\*\***

As used in this chapter:

- (1) "Director" means the director of labor and industries;
- (2) "Wage" means compensation due to an employee by reason of employment, payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value, subject to such deductions, charges, or allowances as may be permitted by rules of the director;
- (3) "Employ" includes to permit to work;
- (4) "Employer" includes any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee;
- (5) "Employee" includes any individual employed by an employer but shall not include:
  - (a) Any individual (i) employed as a hand harvest laborer and paid on a piece rate basis in an operation which has been, and is generally and customarily recognized as having been, paid on a piece rate basis in the region of employment; (ii) who commutes daily from his or her permanent residence to the farm on which he or she is employed; and (iii) who has been employed in agriculture less than thirteen weeks during the preceding calendar year;
  - (b) Any individual employed in casual labor in or about a private home, unless performed in the course of the employer's trade, business, or profession;
  - (c) Any individual employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesperson as those terms are defined and delimited by rules of the director. However, those terms shall be defined and delimited by the director of personnel pursuant to chapter 41.06 RCW for employees employed under the director of personnel's jurisdiction;
  - (d) Any individual engaged in the activities of an educational, charitable, religious, state or local governmental body or agency, or nonprofit organization where the employer-employee relationship does not in fact exist or where the services are rendered to such organizations gratuitously. If the individual receives reimbursement in lieu of compensation for normally incurred out-of-pocket expenses or receives a nominal amount of compensation per unit of voluntary service rendered, an employer-employee relationship is deemed not to exist for the purpose of this section or for purposes of membership or qualification in any state, local government, or publicly supported retirement system other than that provided under chapter 41.24 RCW;
  - (e) Any individual employed full time by any state or local governmental body or agency who provides voluntary services but only with regard to the provision of the voluntary services. The voluntary services and any compensation therefor shall not affect or add to qualification, entitlement, or benefit rights under any state, local government, or publicly supported retirement system other than that provided under chapter 41.24 RCW;
  - (f) Any newspaper vendor or carrier;
  - (g) Any carrier subject to regulation by Part 1 of the Interstate Commerce Act;
  - (h) Any individual engaged in forest protection and fire prevention activities;
  - (i) Any individual employed by any charitable institution charged with child care responsibilities engaged primarily in the development of character or citizenship or promoting health or physical fitness or providing or sponsoring recreational opportunities or facilities for young people or members of the armed forces of the United States;
  - (j) Any individual whose duties require that he or she reside or sleep at the place of his or her employment or who otherwise spends a substantial portion of his or her work time subject to call, and not engaged in the performance of active duties;
  - (k) Any resident, inmate, or patient of a state, county, or municipal correctional, detention, treatment or rehabilitative institution;
  - (l) Any individual who holds a public elective or appointive office of the state, any county, city, town, municipal corporation or quasi municipal corporation, political subdivision, or any instrumentality thereof, or any employee of the state legislature;
  - (m) All vessel operating crews of the Washington state ferries operated by the department of transportation;

(n) Any individual employed as a seaman on a vessel other than an American vessel;

(o) Any farm intern providing his or her services to a small farm which has a special certificate issued under RCW 49.12.465;

(6) "Occupation" means any occupation, service, trade, business, industry, or branch or group of industries or employment or class of employment in which employees are gainfully employed;

(7) "Retail or service establishment" means an establishment seventy-five percent of whose annual dollar volume of sales of goods or services, or both, is not for resale and is recognized as retail sales or services in the particular industry.

[2010 c 160 § 2; 2010 c 8 § 12040; 2002 c 354 § 231; 1997 c 203 § 3; 1993 c 281 § 56; 1989 c 1 § 1 (Initiative Measure No. 518, approved November 8, 1988); 1984 c 7 § 364; 1977 ex.s. c 69 § 1; 1975 1st ex.s. c 289 § 1; 1974 ex.s. c 107 § 1; 1961 ex.s. c 18 § 2; 1959 c 294 § 1.]

**Notes:**

**Reviser's note:** This section was amended by 2010 c 8 § 12040 and by 2010 c 160 § 2, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

**Expiration date -- 2010 c 160:** See note following RCW 49.12.465.

**Short title -- Headings, captions not law -- Severability -- Effective dates -- 2002 c 354:** See RCW 41.80.907 through 41.80.910.

**Construction -- 1997 c 203:** See note following RCW 49.46.130.

**Effective date -- 1993 c 281:** See note following RCW 41.06.022.

**Effective date -- 1989 c 1 (Initiative Measure No. 518, approved November 8, 1988):** "This act shall take effect January 1, 1989." [1989 c 1 § 5.]

**Severability -- 1984 c 7:** See note following RCW 47.01.141.

Effect of offset of military pay on status of bona fide executive, administrative, and professional employees: RCW 73.16.080.

49.46.010

Definitions. (Effective December 31, 2011.)

\*\*\* CHANGE IN 2011 \*\*\* (SEE 5931-S.SL) \*\*\*

As used in this chapter:

(1) "Director" means the director of labor and industries;

(2) "Wage" means compensation due to an employee by reason of employment, payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value, subject to such deductions, charges, or allowances as may be permitted by rules of the director;

(3) "Employ" includes to permit to work;

(4) "Employer" includes any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee;

(5) "Employee" includes any individual employed by an employer but shall not include:

(a) Any individual (i) employed as a hand harvest laborer and paid on a piece rate basis in an operation which has been, and is generally and customarily recognized as having been, paid on a piece rate basis in the region of employment; (ii) who commutes daily from his or her permanent residence to the farm on which he or she is employed; and (iii) who has been employed in agriculture less than thirteen weeks during the preceding calendar year;

(b) Any individual employed in casual labor in or about a private home, unless performed in the course of the employer's trade, business, or profession;

(c) Any individual employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesperson as those terms are defined and delimited by rules of the director. However, those terms shall be defined and delimited by the director of personnel pursuant to chapter 41.06 RCW for employees employed under the director of personnel's jurisdiction;

(d) Any individual engaged in the activities of an educational, charitable, religious, state or local governmental body or agency, or nonprofit organization where the employer-employee relationship does not in fact exist or where the services are rendered to such organizations gratuitously. If the individual receives reimbursement in lieu of compensation for normally incurred out-of-pocket expenses or receives a nominal amount of compensation per unit of voluntary service rendered, an employer-employee relationship is deemed not to exist for the purpose of this section or for purposes of membership or qualification in any state, local government, or publicly supported retirement system other than that provided under chapter 41.24 RCW;

(e) Any individual employed full time by any state or local governmental body or agency who provides voluntary services but only with regard to the provision of the voluntary services. The voluntary services and any compensation therefor shall not affect or add to qualification, entitlement, or benefit rights under any state, local government, or publicly supported retirement system other than that provided under chapter 41.24 RCW;

(f) Any newspaper vendor or carrier;

(g) Any carrier subject to regulation by Part 1 of the Interstate Commerce Act;

(h) Any individual engaged in forest protection and fire prevention activities;

(i) Any individual employed by any charitable institution charged with child care responsibilities engaged primarily in the development of character or citizenship or promoting health or physical fitness or providing or sponsoring recreational opportunities or facilities for young people or members of the armed forces of the United States;

(j) Any individual whose duties require that he or she reside or sleep at the place of his or her employment or who otherwise spends a substantial portion of his or her work time subject to call, and not engaged in the performance of active duties;

(k) Any resident, inmate, or patient of a state, county, or municipal correctional, detention, treatment or rehabilitative institution;

(l) Any individual who holds a public elective or appointive office of the state, any county, city, town, municipal corporation or quasi municipal corporation, political subdivision, or any instrumentality thereof, or any employee of the state legislature;

(m) All vessel operating crews of the Washington state ferries operated by the department of transportation;

(n) Any individual employed as a seaman on a vessel other than an American vessel;

(6) "Occupation" means any occupation, service, trade, business, industry, or branch or group of industries or employment or class of employment in which employees are gainfully employed;

(7) "Retail or service establishment" means an establishment seventy-five percent of whose annual dollar volume of sales of goods or services, or both, is not for resale and is recognized as retail sales or services in the particular industry.

[2010 c 8 § 12040; 2002 c 354 § 231; 1997 c 203 § 3; 1993 c 281 § 56; 1989 c 1 § 1 (Initiative Measure No. 518, approved November 8, 1988); 1984 c 7 § 364; 1977 ex.s. c 69 § 1; 1975 1st ex.s. c 289 § 1; 1974 ex.s. c 107 § 1; 1961 ex.s. c 18 § 2; 1959 c 294 § 1.]

**Notes:**

**Short title -- Headings, captions not law -- Severability -- Effective dates -- 2002 c 354:** See RCW 41.80.907 through 41.80.910.

**Construction -- 1997 c 203:** See note following RCW 49.46.130.

**Effective date -- 1993 c 281:** See note following RCW 41.06.022.

**Effective date -- 1989 c 1 (Initiative Measure No. 518, approved November 8, 1988):** "This act shall take effect January 1, 1989." [1989 c 1 § 5.]

**Severability -- 1984 c 7:** See note following RCW 47.01.141.

Effect of offset of military pay on status of bona fide executive, administrative, and professional employees: RCW 73.16.080.

#### 49.46.020

##### Minimum hourly wage.

(1) Until January 1, 1999, every employer shall pay to each of his or her employees who has reached the age of eighteen years wages at a rate of not less than four dollars and ninety cents per hour.

(2) Beginning January 1, 1999, and until January 1, 2000, every employer shall pay to each of his or her employees who has reached the age of eighteen years wages at a rate of not less than five dollars and seventy cents per hour.

(3) Beginning January 1, 2000, and until January 1, 2001, every employer shall pay to each of his or her employees who has reached the age of eighteen years wages at a rate of not less than six dollars and fifty cents per hour.

(4)(a) Beginning on January 1, 2001, and each following January 1st as set forth under (b) of this subsection, every employer shall pay to each of his or her employees who has reached the age of eighteen years wages at a rate of not less than the amount established under (b) of this subsection.

(b) On September 30, 2000, and on each following September 30th, the department of labor and industries shall calculate an adjusted minimum wage rate to maintain employee purchasing power by increasing the current year's minimum wage rate by the rate of inflation. The adjusted minimum wage rate shall be calculated to the nearest cent using the consumer price index for urban wage earners and clerical workers, CPI-W, or a successor index, for the twelve months prior to each September 1st as calculated by the United States department of labor. Each adjusted minimum wage rate calculated under this subsection (4)(b) takes effect on the following January 1st.

(5) The director shall by regulation establish the minimum wage for employees under the age of eighteen years.

[1999 c 1 § 1 (Initiative Measure No. 688, approved November 3, 1998); 1993 c 309 § 1; 1989 c 1 § 2 (Initiative Measure No. 518, approved November 8, 1988); 1975 1st ex.s. c 289 § 2; 1973 2nd ex.s. c 9 § 1; 1967 ex.s. c 80 § 1; 1961 ex.s. c 18 § 3; 1959 c 294 § 2.]

##### Notes:

**Effective date -- 1993 c 309:** "This act shall take effect January 1, 1994." [1993 c 309 § 2.]

**Effective date -- 1989 c 1 (Initiative Measure No. 518):** See note following RCW 49.46.010.

Notification of employers: RCW 49.46.140.

#### 49.46.040

##### Investigation — Services of federal agencies — Employer's records — Industrial homework.

(1) The director or his or her designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he or she may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter.

(2) With the consent and cooperation of federal agencies charged with the administration of federal labor laws, the director may, for the purpose of carrying out his or her functions and duties under this chapter, utilize the services of federal agencies and their employees and, notwithstanding any other provision of law, may reimburse such federal agencies and their employees for services rendered for such purposes.

(3) Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him or her and of the wages, hours, and other conditions and practices of employment maintained by him or her, and shall preserve such records for such periods of time, and shall make reports therefrom to the director as he or she shall prescribe by regulation as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations thereunder.

(4) The director is authorized to make such regulations regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this chapter, and all existing regulations of the director relating to industrial homework are hereby continued in full force and effect.

[2010 c 8 § 12041; 1959 c 294 § 4.]

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**49.46.060****Exceptions for learners, apprentices, messengers, disabled.**

The director, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations provide for (1) the employment of learners, of apprentices, and of messengers employed primarily in delivering letters and messages, under special certificates issued pursuant to regulations of the director, at such wages lower than the minimum wage applicable under RCW

49.46.020 and subject to such limitations as to time, number, proportion, and length of service as the director shall prescribe, and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the director, at such wages lower than the minimum wage applicable under RCW 49.46.020 and for such period as shall be fixed in such certificates.

[1959 c 294 § 6.]

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**49.46.065****Individual volunteering labor to state or local governmental agency — Amount reimbursed for expenses or received as nominal compensation not deemed salary for rendering services or affecting public retirement rights.**

When an individual volunteers his or her labor to a state or local governmental body or agency and receives pursuant to a statute or policy or an ordinance or resolution adopted by or applicable to the state or local governmental body or agency reimbursement in lieu of compensation at a nominal rate for normally incurred expenses or receives a nominal amount of compensation per unit of voluntary service rendered such reimbursement or compensation shall not be deemed a salary for the rendering of services or for purposes of granting, affecting or adding to any qualification, entitlement or benefit rights under any state, local government or publicly supported retirement system other than that provided under chapter

41.24 RCW.

[1977 ex.s. c 69 § 2.]

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**49.46.070****Records of employer — Contents — Inspection — Sworn statement.**

Every employer subject to any provision of this chapter or of any regulation issued under this chapter shall make, and keep in or about the premises wherein any employee is employed, a record of the name, address, and occupation of each of his or her employees, the rate of pay, and the amount paid each pay period to each such employee, the hours worked each day and each work week by such employee, and such other information as the director shall prescribe by regulation as necessary or appropriate for the enforcement of the provisions of this chapter or of the regulations thereunder. Such records shall be open for inspection or transcription by the director or his or her authorized representative at any reasonable time. Every such employer shall furnish to the director or to his or her authorized representative on demand a sworn statement of such records and information upon forms prescribed or approved by the director.

[2010 c 8 § 12042; 1959 c 294 § 7.]

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**49.46.080****New or modified regulations — Judicial review — Stay.**

(1) As new regulations or changes or modification of previously established regulations are proposed, the director shall call a public hearing for the purpose of the consideration and establishment of such regulations following the procedures used in the promulgation of standards of safety under chapter

49.17 RCW.

(2) Any interested party may obtain a review of the director's findings and order in the superior court of county of petitioners' residence by filing in such court within sixty days after the date of publication of such regulation a written petition praying that the regulation be modified or set aside. A copy of such petition shall be served upon the director. The finding of facts, if supported by evidence, shall be conclusive upon the court. The court shall determine whether the regulation is in accordance with law. If the court determines that such regulation is not in accordance with law, it shall remand the case to the director with directions to modify or revoke such regulation. If application is made to the court for leave to adduce additional evidence by any aggrieved party, such party shall show to the satisfaction of the court that such additional evidence is material, and that there were reasonable grounds for the failure to adduce such evidence before the director. If the court finds that such evidence is material and that reasonable grounds exist for failure of the aggrieved party to adduce such evidence in prior proceedings, the court may remand the case to the director with directions that such additional evidence be taken before the director. The director may modify the findings and conclusions, in whole or in part, by reason of such additional evidence.

(3) The judgment and decree of the court shall be final except that it shall be subject to review by the supreme court or the court of appeals as in other civil cases.

(4) The proceedings under this section shall not, unless specifically ordered by the court, operate as a stay of an administrative regulation issued under the provisions of this chapter. The court shall not grant any stay of an administrative regulation unless the person complaining of such regulation shall file in the court an undertaking with a surety or sureties satisfactory to the court for the payment to the employees affected by the regulation, in the event such regulation is affirmed, of the amount by which the compensation such employees are entitled to receive under the regulation exceeds the compensation they actually receive while such stay is in effect.

[1983 c 3 § 157; 1971 c 81 § 117; 1959 c 294 § 8.]

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**49.46.090****Payment of wages less than chapter requirements — Employer's liability — Assignment of wage claim.**

(1) Any employer who pays any employee less than wages to which such employee is entitled under or by virtue of this chapter, shall be liable to such employee affected for the full amount of such wage rate, less any amount actually paid to such employee by the employer, and for costs and such reasonable attorney's fees as may be allowed by the court. Any agreement between such employee and the employer to work for less than such wage rate shall be no defense to such action.

(2) At the written request of any employee paid less than the wages to which he or she is entitled under or by virtue of this chapter, the director may take an assignment under this chapter or as provided in RCW

49.48.040 of such wage claim in trust for the assigning employee and may bring any legal action necessary to collect such claim, and the employer shall be required to pay the costs and such reasonable attorney's fees as may be allowed by the court.

[2010 c 8 § 12043; 1959 c 294 § 9.]

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**49.46.100****Prohibited acts of employer — Penalty.**

(1) Any employer who hinders or delays the director or his or her authorized representatives in the performance of his or her duties in the enforcement of this chapter, or refuses to admit the director or his or her authorized representatives to any place of employment, or fails to make, keep, and preserve any records as required under the provisions of this chapter, or falsifies any such record, or refuses to make any record accessible to the director or his or her authorized representatives upon

demand, or refuses to furnish a sworn statement of such record or any other information required for the proper enforcement of this chapter to the director or his or her authorized representatives upon demand, or pays or agrees to pay wages at a rate less than the rate applicable under this chapter, or otherwise violates any provision of this chapter or of any regulation issued under this chapter shall be deemed in violation of this chapter and shall, upon conviction therefor, be guilty of a gross misdemeanor.

(2) Any employer who discharges or in any other manner discriminates against any employee because such employee has made any complaint to his or her employer, to the director, or his or her authorized representatives that he or she has not been paid wages in accordance with the provisions of this chapter, or that the employer has violated any provision of this chapter, or because such employee has caused to be instituted or is about to cause to be instituted any proceeding under or related to this chapter, or because such employee has testified or is about to testify in any such proceeding shall be deemed in violation of this chapter and shall, upon conviction therefor, be guilty of a gross misdemeanor.

[2010 c 8 § 12044; 1959 c 294 § 10.]

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**49.46.110****Collective bargaining not impaired.**

Nothing in this chapter shall be deemed to interfere with, impede, or in any way diminish the right of employees to bargain collectively with their employers through representatives of their own choosing in order to establish wages or other conditions of work in excess of the applicable minimum under the provisions of this chapter.

[1959 c 294 § 11.]

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**49.46.120****Chapter establishes minimum standards and is supplementary to other laws — More favorable standards unaffected.**

This chapter establishes a minimum standard for wages and working conditions of all employees in this state, unless exempted herefrom, and is in addition to and supplementary to any other federal, state, or local law or ordinance, or any rule or regulation issued thereunder. Any standards relating to wages, hours, or other working conditions established by any applicable federal, state, or local law or ordinance, or any rule or regulation issued thereunder, which are more favorable to employees than the minimum standards applicable under this chapter, or any rule or regulation issued hereunder, shall not be affected by this chapter and such other laws, or rules or regulations, shall be in full force and effect and may be enforced as provided by law.

[1961 ex.s. c 18 § 4; 1959 c 294 § 12.]

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**49.46.130****Minimum rate of compensation for employment in excess of forty hour work week — Exceptions.**

(1) Except as otherwise provided in this section, no employer shall employ any of his or her employees for a work week longer than forty hours unless such employee receives compensation for his or her employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he or she is employed.

(2) This section does not apply to:

(a) Any person exempted pursuant to RCW

49.46.010(5). The payment of compensation or provision of compensatory time off in addition to a salary shall not be a factor in determining whether a person is exempted under RCW 49.46.010(5)(c);

(b) Employees who request compensating time off in lieu of overtime pay;

(c) Any individual employed as a seaman whether or not the seaman is employed on a vessel other than an American vessel;

(d) Seasonal employees who are employed at concessions and recreational establishments at agricultural fairs, including those seasonal employees employed by agricultural fairs, within the state provided that the period of employment for any seasonal employee at any or all agricultural fairs does not exceed fourteen working days a year;

(e) Any individual employed as a motion picture projectionist if that employee is covered by a contract or collective bargaining agreement which regulates hours of work and overtime pay;

(f) An individual employed as a truck or bus driver who is subject to the provisions of the Federal Motor Carrier Act (49 U.S.C. Sec. 3101 et seq. and 49 U.S.C. Sec. 10101 et seq.), if the compensation system under which the truck or bus driver is paid includes overtime pay, reasonably equivalent to that required by this subsection, for working longer than forty hours per week;

(g) Any individual employed (i) on a farm, in the employ of any person, in connection with the cultivation of the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wildlife, or in the employ of the owner or tenant or other operator of a farm in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment; or (ii) in packing, packaging, grading, storing or delivering to storage, or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; or (iii) commercial canning, commercial freezing, or any other commercial processing, or with respect to services performed in connection with the cultivation, raising, harvesting, and processing of oysters or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption;

(h) Any industry in which federal law provides for an overtime payment based on a work week other than forty hours. However, the provisions of the federal law regarding overtime payment based on a work week other than forty hours shall nevertheless apply to employees covered by this section without regard to the existence of actual federal jurisdiction over the industrial activity of the particular employer within this state. For the purposes of this subsection, "industry" means a trade, business, industry, or other activity, or branch, or group thereof, in which individuals are gainfully employed (section 3(h) of the Fair Labor Standards Act of 1938, as amended (Public Law 93-259));

(i) Any hours worked by an employee of a carrier by air subject to the provisions of subchapter II of the Railway Labor Act (45 U.S.C. Sec. 181 et seq.), when such hours are voluntarily worked by the employee pursuant to a shift-trading practice under which the employee has the opportunity in the same or in other work weeks to reduce hours worked by voluntarily offering a shift for trade or reassignment.

(3) No employer shall be deemed to have violated subsection (1) of this section by employing any employee of a retail or service establishment for a work week in excess of the applicable work week specified in subsection (1) of this section if:

(a) The regular rate of pay of the employee is in excess of one and one-half times the minimum hourly rate required under RCW 49.46.020; and

(b) More than half of the employee's compensation for a representative period, of not less than one month, represents commissions on goods or services.

In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate is to be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

(4) No employer of commissioned salespeople primarily engaged in the business of selling automobiles, trucks, recreational vessels, recreational vessel trailers, recreational vehicle trailers, recreational campers, manufactured housing, or farm implements to ultimate purchasers shall violate subsection (1) of this section with respect to such commissioned salespeople if the commissioned salespeople are paid the greater of:

(a) Compensation at the hourly rate, which may not be less than the rate required under RCW 49.46.020, for each hour worked up to forty hours per week, and compensation of one and one-half times that hourly rate for all hours worked over forty hours in one week; or

(b) A straight commission, a salary plus commission, or a salary plus bonus applied to gross salary.

(5) No public agency shall be deemed to have violated subsection (1) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if: (a) In a work period of twenty-eight consecutive days the employee receives for tours of duty which in the aggregate exceed two hundred forty hours; or (b) In the case of such an employee to whom a work period of at least seven but less than twenty-eight days applies, in his or her work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his or her work period as two hundred forty hours bears to twenty-eight days; compensation at a rate not less than one and one-half times the regular rate at which he or she is employed.

[2010 c 8 § 12045; 1998 c 239 § 2. Prior: 1997 c 311 § 1; 1997 c 203 § 2; 1995 c 5 § 1; 1993 c 191 § 1; 1992 c 94 § 1; 1989 c 104 § 1; prior: 1977 ex.s. c 4 § 1; 1977 ex.s. c 74 § 1; 1975 1st ex.s. c 289 § 3.]

**Notes:**

**Findings -- Intent -- 1998 c 239:** "The legislature finds that employees in the airline industry have a long-standing practice and tradition of trading shifts voluntarily among themselves. The legislature also finds that federal law exempts airline employees from the provisions of federal overtime regulations. This act is intended to specify that airline industry employers are not required to pay overtime compensation to an employee agreeing to work additional hours for a coemployee." [1998 c 239 § 1.]

**Intent -- Collective bargaining agreements -- 1998 c 239:** "This act does not alter the terms, conditions, or practices contained in any collective bargaining agreement." [1998 c 239 § 3.]

**Retroactive application -- 1998 c 239:** "This act is remedial in nature and applies retroactively." [1998 c 239 § 4.]

**Severability -- 1998 c 239:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1998 c 239 § 5.]

**Construction -- 1997 c 203:** "Nothing in this act shall be construed to alter the terms, conditions, or practices contained in any collective bargaining agreement in effect at the time of the effective date of this act [July 27, 1997] until the expiration date of such agreement." [1997 c 203 § 4.]

**Intent -- Application -- 1995 c 5:** "This act is intended to clarify the original intent of RCW 49.46.010(5)(c). This act applies to all administrative and judicial actions commenced on or after February 1, 1995, and pending on March 30, 1995, and such actions commenced on or after March 30, 1995." [1995 c 5 § 2.]

**Effective date -- 1995 c 5:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [March 30, 1995]." [1995 c 5 § 3.]

**49.46.140**

**Notification of employers.**

The director of the department of labor and industries and the commissioner of employment security shall each notify employers of the requirements of chapter 289, Laws of 1975 1st ex. sess. through their regular quarterly notices to employers.

[1975 1st ex.s. c 289 § 4.]

**49.46.160**

**Automatic service charges.**

(1) An employer that imposes an automatic service charge related to food, beverages, entertainment, or portorage provided to a customer must disclose in an itemized receipt and in any menu provided to the customer the percentage of the automatic service charge that is paid or is payable directly to the employee or employees serving the customer.

(2) For purposes of this section:

(a) "Employee" means nonmanagerial, nonsupervisory workers, including but not limited to servers, busers, banquet attendant, banquet captains, bartenders, barbacks, and porters.

(b) "Employer" means employers as defined in RCW

49.46.010 that provide food, beverages, entertainment, or portorage, including but not limited to restaurants, catering houses, convention centers, and overnight accommodations.

(c) "Service charge" means a separately designated amount collected by employers from customers that is for services provided by employees, or is described in such a way that customers might reasonably believe that the amounts are for such services. Service charges include but are not limited to charges designated on receipts as a "service charge," "gratuity," "delivery charge," or "portage charge." Service charges are in addition to hourly wages paid or payable to the employee or employees serving the customer.

[2010 c 8 § 12046; 2007 c 390 § 1. Formerly RCW 19.48.130.]

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**49.46.900**

**Severability — 1959 c 294.**

If any provision of this chapter, or the application thereof to any person or circumstances, is held invalid, the remainder of the chapter and the application thereof to other persons or circumstances shall not be affected thereby.

[1959 c 294 § 13.]

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**49.46.910**

**Short title.**

This chapter may be known and cited as the "Washington Minimum Wage Act."

[1961 ex.s. c 18 § 6; 1959 c 294 § 14.]

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**49.46.920**

**Effective date — 1975 1st ex.s. c 289.**

This 1975 amendatory act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect September 1, 1975.

[1975 1st ex.s. c 289 § 5.]

Chapter 49.52 RCW  
Wages — deductions — contributions — rebates

## RCW Sections

- 49.52.010 Employees' benefit deductions and employer contributions are trust funds -- Enforcement.
- 49.52.020 Lien of party rendering service.
- 49.52.030 Deductions in extrahazardous employment -- Medical aid fund deductions excluded.
- 49.52.040 Actions to recover for service -- Lien -- Priority.
- 49.52.050 Rebates of wages -- False records -- Penalty.
- 49.52.060 Authorized withholding.
- 49.52.070 Civil liability for double damages.
- 49.52.080 Presumption as to intent.
- 49.52.090 Rebates of wages on public works -- Penalty.

## Notes:

Chattel liens: Chapter 60.08 RCW.

Mechanics' and materialmen's liens: Chapter 60.04 RCW.

Mutual savings bank employees, pension, retirement, or health insurance benefits: RCW 32.04.082.

Public employees, payroll deductions: RCW 41.04.020, 41.04.030, 41.04.035, and 41.04.036.

**49.52.010****Employees' benefit deductions and employer contributions are trust funds — Enforcement.**

All moneys collected by any employer from his or her or its employees and all money to be paid by any employer as his or her contribution for furnishing, either directly, or through contract, or arrangement with a hospital association, corporation, firm, or individual, of medicine, medical or surgical treatment, nursing, hospital service, ambulance service, dental service, burial service, or any or all of the above enumerated services, or any other necessary service, contingent upon sickness, accident, or death, are hereby declared to be a trust fund for the purposes for which the same are collected. The trustees (or their administrator, representative, or agent under direction of the trustees) of such fund are authorized to take such action as is deemed necessary to ensure that the employer contributions are made including, but not limited to filing actions at law, and filing liens against moneys due to the employer from the performance of labor or furnishing of materials to which the employees contributed their services. Such trust fund is subject to the provisions of \*chapter

48.52 RCW.

[2010 c 8 § 12053; 1975 c 34 § 1; 1927 c 307 § 1; RRS § 7614-1.]

## Notes:

\*Reviser's note: Chapter 48.52 RCW was repealed by 1979 ex.s. c 34 § 1.

**49.52.020****Lien of party rendering service.**

In case any employer collecting moneys from his or her employees or making contributions to any type of benefit plan for any or all of the purposes specified in RCW

49.52.010, shall enter into a contract or arrangement with any hospital association, corporation, firm, or individual, to furnish any such service to its employees, the association, corporation, firm, or individual contracting to furnish such services, shall have a lien upon such trust fund prior to all other liens except taxes. The lien hereby created shall attach from the date of the

arrangement or contract to furnish such services and may be foreclosed in the manner provided by law for the foreclosure of other liens on personal property.

[2010 c 8 § 12054; 1975 c 34 § 2; 1927 c 307 § 2; RRS § 7614-2.]

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**49.52.030****Deductions in extrahazardous employment — Medical aid fund deductions excluded.**

All moneys realized by any employer from the employer's employees either by collection or by deduction from the wages or pay of employees intended or to be used for the furnishing to workers engaged in extrahazardous work, their families or dependents, of medical, surgical or hospital care and treatment, or for nursing, ambulance service, burial or any or all of the above enumerated services, or any service incidental to or furnished or rendered because of sickness, disease, accident or death, and all moneys owing by any employer therefor, shall be and remain a fund for the purposes for which such moneys are intended to be used, and shall not constitute or become any part of the assets of the employer making such collections or deductions: PROVIDED, HOWEVER, That RCW

49.52.030 and 49.52.040 shall not apply to moneys collected or deducted as aforesaid for, or owing by employers to the state medical aid fund. Such moneys shall be paid over promptly to the physician or surgeon or hospital association or other parties to which such moneys are due and for the purposes for which such collections or deductions were made.

[1989 c 12 § 16; 1929 c 136 § 1; RRS § 7713-1.]

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**49.52.040****Actions to recover for service — Lien — Priority.**

If any such employer shall default in any such payment to any physician, surgeon, hospital, hospital association or any other parties to whom any such payment is due, the sum so due may be collected by an action at law in the name of the physician, surgeon, hospital, hospital association or any other party to whom such payment is owing, or their assigns and against such defaulting employer, and in addition to such action, such claims shall have the same priority and lien rights as granted to the state for claims due the accident and medical aid funds by section 7682 of Remington's Compiled Statutes of Washington, 1922 [RCW

51.16.150 through 51.16.170], and acts amendatory thereto, which priority and lien rights shall be enforced in the same manner and under the same conditions as provided in said section 7682 [RCW 51.16.150 through 51.16.170]: PROVIDED, HOWEVER, That the said claims for physicians, surgeons, hospitals and hospital associations and others shall be secondary and inferior to any claims of the state and to any claims for labor. Such right of action shall be in addition to any other right of action or remedy.

[1929 c 136 § 2; RRS § 7713-2.]

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**49.52.050****Rebates of wages — False records — Penalty.**

Any employer or officer, vice principal or agent of any employer, whether said employer be in private business or an elected public official, who

(1) Shall collect or receive from any employee a rebate of any part of wages theretofore paid by such employer to such employee; or

(2) Wilfully and with intent to deprive the employee of any part of his or her wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract; or

(3) Shall wilfully make or cause another to make any false entry in any employer's books or records purporting to show the payment of more wages to an employee than such employee received; or

(4) Being an employer or a person charged with the duty of keeping any employer's books or records shall wilfully fail or cause another to fail to show openly and clearly in due course in such employer's books and records any rebate of or

deduction from any employee's wages; or

(5) Shall wilfully receive or accept from any employee any false receipt for wages;

Shall be guilty of a misdemeanor.

[2010 c 8 § 12055; 1941 c 72 § 1; 1939 c 195 § 1; Rem. Supp. 1941 § 7612-21.]

**Notes:**

**Severability -- 1939 c 195:** "If any section, subsection, sentence or clause of this act shall be adjudged unconstitutional, such adjudication shall not affect the validity of the act as a whole or of any section, subsection, sentence or clause thereof not adjudged unconstitutional." [1939 c 195 § 5; RRS § 7612-25.] This applies to RCW 49.52.050 through 49.52.080.

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**49.52.060**

**Authorized withholding.**

The provisions of RCW

49.52.050 shall not make it unlawful for an employer to withhold or divert any portion of an employee's wages when required or empowered so to do by state or federal law or when a deduction has been expressly authorized in writing in advance by the employee for a lawful purpose accruing to the benefit of such employee nor shall the provisions of RCW 49.52.050 make it unlawful for an employer to withhold deductions for medical, surgical, or hospital care or service, pursuant to any rule or regulation; PROVIDED, That the employer derives no financial benefit from such deduction and the same is openly, clearly and in due course recorded in the employer's books.

[1939 c 195 § 2; RRS § 7612-22.]

**Notes:**

Penalty for coercion as to purchase of goods, meals, etc.: RCW 49.48.020.

Public employment, payroll deductions: RCW 41.04.020, 41.04.030, 41.04.035, and 41.04.036.

Wages to be paid in lawful money or negotiable order, penalty: RCW 49.48.010.

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**49.52.070**

**Civil liability for double damages.**

Any employer and any officer, vice principal or agent of any employer who shall violate any of the provisions of RCW

49.52.050 (1) and (2) shall be liable in a civil action by the aggrieved employee or his or her assignee to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees; PROVIDED, HOWEVER, That the benefits of this section shall not be available to any employee who has knowingly submitted to such violations.

[2010 c 8 § 12056; 1939 c 195 § 3; RRS § 7612-23.]

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**49.52.080**

**Presumption as to intent.**

The violations by an employer or any officer, vice principal, or agent of any employer of any of the provisions of subdivisions (3), (4), and (5) of RCW

49.52.050 shall raise a presumption that any deduction from or underpayment of any employee's wages connected with such violation was wilful.

[1939 c 195 § 4; RRS § 7612-24.]

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**49.52.090**

**Rebates of wages on public works — Penalty.**

Every person, whether as a representative of an awarding or public body or officer, or as a contractor or subcontractor doing public work, or agent or officer thereof, who takes or receives, or conspires with another to take or receive, for his or her own use or the use of any other person acting with him or her any part or portion of the wages paid to any laborer, worker, or mechanic, including a piece worker and working subcontractor, in connection with services rendered upon any public work within this state, whether such work is done directly for the state, or public body or officer thereof, or county, city and county, city, town, township, district or other political subdivision of the said state or for any contractor or subcontractor engaged in such public work for such an awarding or public body or officer, shall be guilty of a gross misdemeanor.

[2010 c 8 § 12057; 1935 c 29 § 1; RRS § 10320-1.]

**Notes:**

Prevailing wages must be paid on public works: RCW 39.12.020.

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. 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.]

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.]



## ADMINISTRATIVE POLICY

### STATE OF WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES EMPLOYMENT STANDARDS

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<b>TITLE:</b>	<b>MINIMUM WAGE ACT APPLICABILITY</b>	<b>NUMBER:</b>	<b>ES.A.1</b>
<b>CHAPTER:</b>	<b><u>RCW 49.46</u> <u>WAC 296-128</u></b>	<b>REPLACES:</b>	<b>ES-005</b>
		<b>ISSUED:</b>	<b>1/2/2002</b>
		<b>REVISED:</b>	<b>6/24/2005</b>
		<b>REVISED:</b>	<b>3/24/2006</b>

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#### ADMINISTRATIVE POLICY DISCLAIMER

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

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

#### **1. When does Chapter 49.46, the Washington Minimum Wage Act, apply?**

The Washington Minimum Wage Act (MWA), RCW 49.46, establishes a minimum wage for employees in Washington State in RCW 49.46.005 and RCW 49.46.020. The MWA also requires employers to pay overtime wages of at least one and one-half an employee's regular rate of pay for hours worked in excess of 40 in a week, per RCW 49.46.130.

The MWA is an additional protection to workers employed in Washington State who are already protected by the Industrial Welfare Act (IWA), RCW 49.12. While the IWA makes it illegal for an employer to employ workers at wages that are not adequate for their maintenance or under conditions of labor detrimental to their health, the MWA specifically sets forth an "adequate" wage (the current statutory minimum) and provides the additional protection of overtime compensation.

The MWA is in addition and supplementary to not only the IWA, but to all other standards (state, federal or local law, ordinance, rule or regulation) relating to wages, hours and working conditions. See RCW 49.46.120. If, however, the alternative standard provides either more protection or is more favorable to an employee, the more protective authority will apply. Individuals with questions as to the more protective standards found in federal law should contact the U.S. Department of Labor, Wage and Hour Division.

WAC 296-128 generally contains rules promulgated subject to RCW 49.46. All of these rules have the same force of law as the provisions of RCW 49.46 itself.

## **2. Which employers are subject to RCW 49.46?**

Generally, an "employer" under RCW 49.46.010(4) is "any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee."

Public agencies subject to the MWA may nonetheless, in certain situations, be exempt from the requirement to pay overtime wages. See ES.A.8.1 Overtime.

Employers who do business in other states, in addition to Washington, may be engaged in interstate commerce and are subject to the Fair Labor Standards Act (FLSA), in addition to the MWA. FLSA is administered by the U.S. Department of Labor, and clarification must be obtained from that agency.

Employers must follow the laws that are more protective to the worker when there is a difference between the applicability of state and federal laws.

## **3. Which employees are subject to the protections of RCW 49.46?**

The protections of the MWA apply to all "employees." An "employee" is defined as "any individual employed by an employer" *except* those employees specifically excluded by the legislature in RCW 49.46.010(5)(a) through (n). Minimum wage is not required for employees who are excluded from the MWA. Note that there are additional exceptions to overtime, and as a result an employee can be entitled to minimum wage even if overtime pay is not required. See RCW 49.46.130 and administrative policy ES.A.8.1, related to overtime.

**4. Definition of employ.** "Employ" means to engage, suffer or permit to work. See RCW 49.46.010 (3) and WAC 296-126-002 (3).

See ES.C.2 for a detailed discussion of the hours worked for which the employee must be paid at least the applicable minimum wage. The same concepts apply to employers and employees subject to the MWA.

**5. Independent contractors are not employees.** A bona fide independent contractor is exempt from the MWA because that person is not "employed" by an employer. However, an employer cannot avoid conforming to the MWA by merely referring to someone as an "independent contractor." Whether a worker is an independent contractor must be carefully evaluated on a case-by-case basis.

## **6. Which employees are excluded from the protections of the MWA?**

The following exemptions are found in RCW 49.46.010(5). Application of these exemptions depends on the facts, which must be carefully evaluated on a case-by-case basis:

- (a) **Certain agricultural employees:** An individual who is employed as a hand harvest pieceworker in the region of employment, *and* who commutes daily from his or her permanent residence to the farm upon which he or she is employed *and* who has been employed in agriculture less than thirteen weeks during the preceding calendar year. Each of the elements listed above must be met in order for the exemption to apply.

Note: All other agricultural workers are covered under MWA. The employer has the burden of proving that agricultural workers fall within the above exemption.

- (b) **Casual Laborers:** Any individual "employed in casual labor in or about a private home" unless the labor is performed in the course of the employer's trade, business, or profession.

Casual refers to employment that is irregular, uncertain or incidental in nature and duration. This must be determined on a case-by-case basis by looking at the scope, duration and continuity of employment. Employment that is intended to be permanent in nature is not casual, and is not exempt, regardless of the type of work performed. Employment of housekeepers, caregivers, or gardeners on a regular basis is not considered "employed in casual labor" and such workers may be subject to the protections of the MWA.

- (c) **Executive, Administrative, Professional, Computer Professional or Outside Sales.** See ES.A.9.2 through ES.A.9.8 for further discussion of the "white collar" exemptions.

Note: The rules promulgated by the Washington State Department of Personnel affecting civil service employees have no bearing on department rules for wage and hour purposes. Public employees in executive, administrative, or professional positions are included in the "salary basis" regulation, WAC 296-128-532 and 533. See *administrative policy ES.A.9.1*.

- (d) **Volunteer work for an educational, charitable, religious, state or local governmental body or agency or non-profit organization:** Any person engaged in the activities of the above type of organizations as long as there is no employer-employee relationship between the organization and the individual or the individual gives his or her services gratuitously to the organization

**The department uses the following interpretation in determining whether workers are volunteers exempt from the MWA:** Individuals will be considered volunteers only where their services are offered freely and without pressure or coercion, direct or implied, from an employer. Individuals who volunteer or donate their services, usually on a part-time basis, for public service or for humanitarian objectives, not as employees and without contemplation of pay, are not considered employees of the entities that received their services. However, if these people are paid for their services beyond reimbursement for expenses, reasonable benefits or a nominal fee, they are employees and not volunteers.

Individuals do not lose their volunteer status if they receive a nominal fee or stipend. A nominal fee is not a substitute for wage compensation and must not be tied to productivity. An individual who volunteers to provide periodic services on a year-round basis may receive a nominal monthly or annual fee without losing volunteer status.

An individual will not be considered a volunteer if he or she is otherwise employed by the same agency or organization to perform similar or identical services as those for which the individual proposes to volunteer. Any individual providing services as a volunteer who then receives wages for services, is no longer exempt and must be paid at least minimum wage and overtime pay for hours worked in excess of 40 hours per workweek. Unpaid employment is unlawful. An employee-employer relationship is deemed to exist

where there is a contemplation or expectation of payment for goods or services provided.

Note that this interpretation is identical to that used to determine whether a worker is a volunteer and thus exempt from the protections of RCW 49.12, the Industrial Welfare Act.

**Volunteers are not allowed in a "for-profit" business.** Any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer, who permits any individual to work, is subject to the provisions of the MWA.

- (e) **Individuals who are employed full time by a state or local governmental agency or nonprofit educational, charitable, or religious organization and who also do volunteer work for the agency.** Such individuals are exempt from the MWA only with respect to the voluntary services.
- (f) **Newspaper vendors or carriers.** The department construes "newspaper vendors or carriers" very narrowly and does not include magazine carriers or vendors, those who distribute advertising circulars, or persons who sell or distribute literature at sporting events etc.
- (g) **Employees of carriers subject to Part I of the Interstate Commerce Act (Railroads and Pipelines):** Part I of the Interstate Commerce Act is limited to railroads and pipelines only. Interstate motor carriers are covered under Part II of the Interstate Commerce Act and are not exempted from the MWA by this definition.

Non-railroad employees may also be subject to this exemption from the MWA if their activity is integral to the interstate commerce of the railroads. Whether non-railroad employees are exempt should be considered on a case-by-case basis.

- (h) **Forest protection and fire prevention.** Any persons engaged in forest protection and fire prevention activities.
- (i) **Employees of charitable institutions charged with child care responsibilities.** Employees of charitable institutions charged with child care responsibilities as long as the charitable institution is "engaged primarily in the development of character or citizenship or promoting health or physical fitness or providing or sponsoring recreational opportunities or facilities for young people or members of the armed forces of the United States."

"Charitable institution" traditionally includes churches and other organizations commonly set up under the not-for-profit corporations act if they are recognized by the United States Internal Revenue Service under the tax exemption provision, section 501(c)(3). Typical examples may include the YMCA or YWCA, Girl Scout or Boy Scout organizations, etc. "Charged with child care responsibilities" would include reference to this activity in the organization's by-laws and incorporation documents.

- (j) **Individuals whose duties require they reside or sleep at their place of employment or who otherwise spend a substantial portion of their work time subject to call.**

This exemption encompasses two categories of workers: (1) Those individuals whose duties require that they reside or sleep at their place of employment, and (2) Those individuals who otherwise spend a substantial portion of work time subject to call and not engaged in the performance of active duties.

(1) **Reside or sleep:** Employees whose job duties require them to reside at the place of employment exempt from both the minimum wage and overtime requirements. Merely residing or sleeping at the place of employment does not exempt individuals from the Minimum Wage Act. In order for individuals to be exempt, their duties must require that they sleep or reside at the place of their employment. An agreement between the employee and employer for the employee to reside or sleep at the place of employment for convenience or merely because housing is available at the place of their employment would not meet the exemption.

Typical examples of this exemption if their duties require them to reside or sleep at the place of their employment may include apartment managers, maintenance personnel, hotel/motel managers, managers of self-storage facilities, and agricultural workers such as shepherders.

**Pending:** (2) The department's administrative policy on paragraph 6 (j) regarding individuals who spend a substantial portion of their work time subject to call and not engaged in the performance of active duties is in the process of being written. For information, contact the Department of Labor & Industries at [esgeneral@lni.wa.gov](mailto:esgeneral@lni.wa.gov) or call 360.902.5552.

- (k) **Inmates and others in custody.** Residents, inmates or patients of state, county or municipal correctional, detention, treatment or rehabilitative institution would not be required to be paid minimum wage if they perform work directly for, and at, the institution's premises where they are incarcerated, and remain under the direct supervision and control of the institution. State inmates assigned by prison officials to work on prison premises for a private corporation at rates established and paid for by the state are not employees of the private corporation and would not be subject to the MWA.
- (l) **Elected or appointed public officials and employees of the state legislature.** The MWA does not apply to any individual who holds a public elective or appointive office of the state, any county, city, town, municipal corporation, political subdivision, or any instrumentality thereof, or any employee of the state legislature.
- (m) **Washington State ferry crews.** Vessel operating crews of the Washington State ferries, as long as the Department of Transportation operates the ferries.
- (n) **Crews of non-American vessels.** The MWA applies to persons employed as seamen on an American vessel but does not apply to seamen employed on non-American vessels.

## 7. What is the scope of the department's authority under the Minimum Wage Act?

Assuming that the type of employees and employers involved in a particular case are covered under the MWA, the department has the authority to investigate and gather data and may enter workplaces, examine and copy records, question employees and investigate such facts

conditions practices or matters deemed necessary or appropriate to determine whether there has been a violation of the MWA. RCW 49.46.040.

See ES.D.1 for a complete discussion of the record keeping types of records employers subject to the MWA must maintain and produce to the department and to employees.

#### **8. What is the department's enforcement authority regarding violations of the Minimum Wage Act?**

If, after investigation, the Department determines that there has been a violation of the MWA in that an employer has paid an employee less than minimum wage or has not paid overtime to an entitled employee, the department may, on the employees' behalf, bring a civil action against an employer to recover unpaid wages. An employee also has the express right to bring a private action for unpaid wages or overtime and to seek costs and attorney fees. See RCW 49.46.090(1). Also see ES.A.5 for additional discussion of payment of wages less than minimum wage and the employer's liability.

An employer who fails or refuses to comply with the record keeping requirements found in the MWA and in the department's corresponding rules or an employer who refuses to cooperate with the department's reasonable investigation could be subject to criminal prosecution. See RCW 49.46.100.

An employer who pays less than minimum wage or violates other provisions of the MWA (including overtime) could also be subject to criminal prosecution under RCW 49.46.100. Also see ES.A.3 for definition of wage and methods of calculation to determine whether employee has been paid the applicable minimum wage.

Finally, an employer who fires or discriminates against an employee because the employee has complained to the department about unpaid wages or any other provision of the MWA (including record keeping responsibilities) may be subject to criminal prosecution under RCW 49.46.100. The department does not have the authority to assert criminal charges and criminal fines against such employers. A county or city prosecutor must take such action.

Notwithstanding the department's authority to investigate and bring legal action against an employer for violations of RCW 49.46 on behalf of workers, aggrieved workers retain the right to seek private counsel in order to file a civil action against the employer.



## ADMINISTRATIVE POLICY

### STATE OF WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES EMPLOYMENT STANDARDS

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<b>TITLE:</b>	<b>HOURS WORKED</b>	<b>NUMBER:</b>	<b>ES.C.2</b>
<b>CHAPTER:</b>	<b><u>RCW 49.12</u></b> <b><u>WAC 296-126</u></b>	<b>REPLACES:</b>	<b>ES-016</b>
		<b>ISSUED:</b>	<b>1/2/2002</b>
		<b>REVISED:</b>	<b>6/24/2005</b>
		<b>REVISED:</b>	<b>11/28/2007</b>
		<b>REVISED:</b>	<b>9/2/2008</b>

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#### **1. The department has the authority to investigate and regulate "hours worked" under the Industrial Welfare Act.**

**"Hours worked,"** means all hours during which the employee is authorized or required, known or reasonably believed by the employer to be on duty on the employer's premises or at a prescribed work place. An analysis of "hours worked" must be determined on a case-by-case basis, depending on the facts. See WAC 296-126-002(8). See Administrative Policy ES.C.1.

The department's interpretation of "hours worked" means all work requested, suffered, permitted or allowed and includes travel time, training and meeting time, wait time, on-call time, preparatory and concluding time, and may include meal periods. "Hours worked" includes all time worked regardless of whether it is a full hour or less. "Hours worked" includes, for example, a situation where an employee may voluntarily continue to work at the end of the shift. The employee may desire to finish an assigned task or may wish to correct errors, prepare time reports or other records. The reason or pay basis is immaterial. If the employer knows or has reason to believe that the employee is continuing to work, such time is working time.

**An employer may not avoid or negate payment of regular or overtime wages by issuing a rule or policy that such time will not be paid or must be approved in advance. If the work is performed, it must be paid. It is the employer's responsibility to ensure that employees do not perform work that the employer does not want performed.**

The following definitions and interpretations of "hours worked" apply to all employers bound by the Industrial Welfare Act, even those not subject to the Minimum Wage Act. There is no similar

definition of "hours worked" in RCW 49.46, the Minimum Wage Act, or in WAC 296-128, Minimum Wage rules. Therefore, these definitions and interpretations apply to all employers subject to RCW 49.12, regardless of whether they may be exempt from or excluded from the Minimum Wage Act.

## **2. What is travel time and when it is considered hours worked?**

### **Introductory statement to the policy:**

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.

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The purpose of this policy statement is to update section two of Labor and Industries' administrative policy ES.C.2 (section 2) pertaining to hours worked. Following the *Stevens v. Brink's Home Security* decision, Labor and Industries committed to updating this section of the policy to reflect the Supreme Court decision in the *Brink's* case and address ambiguity created by that case. [*Stevens v. Brink's Home Security*, 162 Wn.2d 42, 169 P.3d 473 (2007)]. This policy is not intended to address or cover all employee travel time issues. Instead, it is limited to the particular issues raised in the *Brink's* case regarding whether time spent driving a company-provided vehicle between home and the first or last job site of the day constitutes compensable "hours worked."

### **Whether time spent driving in a company-provided vehicle constitutes paid work time depends on whether the drive time is considered "hours worked."**

Whether travel or commute time is compensable depends on the specific facts and circumstances of each individual employee, employer, and work week. If the travel or commute time is considered "hours worked" under RCW 49.46.020 and WAC 296-126-002(8), then it is compensable and the employee must be paid for this time. These statutory and regulatory requirements cannot be waived through a collective bargaining agreement or other agreement.

"Hours worked" means all hours when an employee is authorized or required by the employer to be on duty on the employer's premises or at a prescribed workplace. WAC 296-126-002(8).

There are three elements to the definition of hours worked:

- 1- An employee is authorized or required by the employer,
- 2- to be on duty,
- 3- On the employer's premises or at a prescribed workplace.

If any of the three elements is not satisfied, then the time spent driving in a company-provided vehicle is not considered "hours worked." The specific factors used to establish the "authorized

or required" element are not listed in this policy. However, the element must be met for "hours worked" under the law.

Time spent driving a company-provided vehicle during an employee's ordinary travel, when the employee is not on duty and performs no work while driving between home and the first or last job site of the day, is not considered hours worked.

Time spent driving a company-provided vehicle from the employer's place of business to the job site is considered hours worked. Time spent riding in a company-provided vehicle from the employer's place of business to the job site is not considered hours worked when an employee voluntarily reports to the employer's location merely to obtain a ride as a passenger for the employee's convenience, is not on duty, and performs no work. Time spent driving or riding as a passenger from job site to job site is considered hours worked.

**Factors to consider in determining IF AN EMPLOYEE IS "on duty" when driving a company-provided vehicle between home and work.**

To determine if the employee is on duty, you must evaluate the extent to which the employer restricts the employee's personal activities and controls the employee's time. This includes an analysis of the frequency and extent of such restrictions and control. Following is a non-exclusive list of factors to consider when making a determination if an employee is "on duty." There may be additional relevant factors that the Supreme Court or L&I have not considered. All factors must be considered and weighed in combination with each other. The mere presence or absence of any single factor is not determinative.

1. The extent to which the employee is free to make personal stops and engage in personal activities during the drive time between home and the first or last job site of the day, or whether the vehicle may only be used for company business.
2. The extent to which the employee is required to respond to work related calls or to be redirected while en route.
3. Whether the employee is required to maintain contact with the employer.
4. The extent to which the employee receives assignments at home and must spend time writing down the assignments and mapping the route to reach the first job site before beginning the drive.

**Factors to consider in determining if an employee is "on the employer's premises or at a prescribed work place" when driving a company-provided vehicle between home and work.**

To determine if a company-provided vehicle constitutes a "prescribed work place," you must evaluate whether driving the particular vehicle is an integral part of the work performed by the employee. Following is a non-exclusive list of factors to consider when making a determination if an employee is "on the employer's premises or at a prescribed work place." There may be additional relevant factors that the Supreme Court or L&I have not considered. All factors must

be considered and weighed in combination with each other. The mere presence or absence of any single factor is not determinative.

1. Whether the nature of the business requires the employee to drive a particular vehicle provided by the employer to carry necessary nonpersonal tools and equipment to the work site.
2. The extent to which the company-provided vehicle serves as a location where the employer authorizes or requires the employee to complete business required paperwork or load materials or equipment.
3. The extent to which the employer requires the employee to ensure that the vehicle is kept clean, organized, safe, and serviced.

**The following are two examples of how this policy may be used to determine whether or not drive time between home and the first or last job site of the day in a company-provided vehicle is compensable. These examples are illustrative and are not intended to create additional factors or address other scenarios where the facts differ from those below.**

**COMPENSABLE EXAMPLE:**

1. In this example, the facts establish that the drive time between home and the first or last job site of the day in a company-provided vehicle is compensable. For purposes of this example, all of the following facts are present. The employee drives between home and the first or last job site of the day in a company-provided vehicle:

- As a matter of accepted company practice, the employee is prohibited from any personal use of the vehicle, which must be used exclusively for business purposes; and
- The employer regularly requires the employee to perform services for the employer during the drive time including being redirected to a different location; and
- The employee regularly transports necessary nonpersonal tools and equipment in the vehicle between home and the first or last job site of the day; and
- The employee receives his/her daily job site assignments at home in a manner that requires the employee to spend more than a de minimis amount of time writing down the assignments and mapping travel routes for driving to the locations.

**NON COMPENSABLE EXAMPLE:**

2. In this example, the facts establish that the drive time between home and the first or last job site of the day in a company-provided vehicle is not compensable. For purposes of this example, all of the following facts are present. The employee drives between home and the first or last job site of the day in a company-provided vehicle:

- The employer does not strictly control the employee's ability to use the vehicle for personal purposes. E.g., the employee, as a matter of accepted company practice, is

able to use the vehicle for personal stops or errands while driving between home and the job site; and

- The employee is not required to perform any services for the employer during the drive including responding to work related calls or redirection; and
- The employee does not perform any services for the employer during the drive including work related calls or redirection.

### **3. What constitutes training and meeting time and when is it considered "hours worked"?**

Training and meeting time is generally interpreted to mean all time spent by employees attending lectures, meetings, employee trial periods and similar activities required by the employer, or required by state regulations, and shall be considered hours worked.

Time spent by employees in these activities need *not* be counted as hours worked if all of the following tests are met:

**3.1** Attendance is voluntary; and

**3.2** The employee performs no productive work during the meeting or lecture; and

**3.3** The meeting takes place outside of regular working hours; and

**3.4** The meeting or lecture is not directly related to the employee's current work, as distinguished from teaching the employee another job or a new, or additional, skill outside of skills necessary to perform job.

If the employee is given to understand, or led to believe, that the present working conditions or the continuance of the employee's employment, would be adversely affected by non-attendance, time spent shall be considered hours worked.

Time spent in training programs mandated by state or federal regulation, but *not* by the employer, need not be paid if the first three provisions are met; that is, if attendance is voluntary, the employee performs no productive work during the training time, and the training takes place outside of normal working hours.

A state regulation may require that certain positions successfully complete a course in Cardio-Pulmonary Resuscitation (CPR). The rules may require that in order to be employed in such a position the person must be registered with the state or have successfully completed a written examination, approved by the state, and further fulfilled certain continuous education requirements. However, should the employer require all employees to attend training, all employees attending the training must be paid for the hours spent in the training course.

Although the training course may be directly related to the employee's job, the training is of a type that would be offered by independent institutions in the sense that the courses provide generally applicable instruction which enables an individual to gain or continue employment with any employer which would require the employee to have such training, then this training would be regarded as primarily for the benefit of the employee and not the employer. In training of this type, where the employee is the primary beneficiary, the employee need not be paid for attending.

Where an employer (or someone acting on the employer's behalf), either directly or indirectly, requires an employee to undergo training, the time spent is clearly compensable. The employer in such circumstances has controlled the employee's time and must pay for it. However, where

the state has required the training, as in the example stated above, a different situation arises. When such state-required training is of a general applicability, and not tailored to meet the particular needs of individual employers, the time spent in such training would not be compensable.

When state or federal regulations require a certificate or license of the employee for the position held, time spent in training to obtain the certificate or license, or certain continuous education requirements, will not be considered hours worked. The cost of maintaining the certificate or license may be borne by the employee.

#### **4. What determines an employment relationship with trainees or interns?**

As the state and federal definition of "employ" are identical, the department looks to the federal Fair Labor Standards Act for certain training conditions exempted from that act. Under certain conditions, persons who without any expressed or implied compensation agreement may work for their own advantage on the premises of another and are not necessarily employees. Whether trainees are employees depends upon all of the circumstances surrounding their activities on the premises of the employer. If all six of the following criteria are met, the trainees are not considered employees:

- 4.1** The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school; and
- 4.2** The training is for the benefit of the trainee; and
- 4.3** The trainees do not displace regular employees, but work under their close observation; and
- 4.4** The business that provides the training derives no immediate advantage from the activities of the trainees, and may in fact be impeded; and
- 4.5** The trainees are not necessarily entitled to a job at the conclusion of the training period; and
- 4.6** The trainees understand they are not entitled to wages for the time spent in the training.

#### **5. What constitutes paid or unpaid work for students in a school-to-work program?**

Students may be placed in a school-to-work program on a paid or unpaid basis. The department will not require payment of minimum wage provided all of the following criteria are met. If all five requirements are not met, the business will not be relieved of its obligation to pay minimum wage, as required by the Minimum Wage Act.

- 5.1** The training program is a bona fide program certified and monitored by the school district or the Office of the Superintendent of Public Instruction; and
- 5.2** A training plan exists that establishes a link to the academic work, e.g., a detailed outline of the competencies to be demonstrated to achieve specific outcomes and gain specific skills. The worksite effectively becomes an extension of the classroom activity and credit is given to the student as part of the course; and
- 5.3** The school has a designated district person as an agent/instructor for the worksite activity and monitors the program; and
- 5.4** The worksite activity is observational, work shadowing, or demonstrational, with no substantive production or benefit to the business. The business has an

investment in the program and actually incurs a burden for the training and supervision of the student that offsets any productive work performed by the student. Students may not displace regular workers or cause regular workers to work fewer hours as a result of any functions performed by the student, and

**5.5** The student is not entitled to a job at the completion of the learning experience. The parent, student, and business all understand the student is not entitled to wages for the time spent in the learning experience.

If a minor student is placed in a paid position, all requirements of the Minimum Wage Act, the Industrial Welfare Act, and minor work regulations must be met. Minor students placed in a paid position with public agencies are subject to the Industrial Welfare Act.

Public agencies are not subject to the state minor work regulations, but they are subject to payment of the applicable state minimum wage. Note: Public agencies employing persons under age 18 are subject to the federal Child Labor Regulations and should contact the United States Department of Labor for specific information on hours and prohibited occupations.

#### **6. What constitutes "waiting time" and when is it considered "hours worked"?**

In certain circumstances employees report for work but due to lack of customers or production, the employer may require them to wait on the premises until there is sufficient work to be performed. "Waiting time" is all time that employees are required or authorized to report at a designated time and to remain on the premises or at a designated work site until they may begin their shift. During this time, the employees are considered to be engaged to wait, and all hours will be considered hours worked.

When a shutdown or other work stoppage occurs due to technical problems, such time spent waiting to return to work will be considered hours worked *unless* the employees are completely relieved from duty and can use the time effectively for their own purposes. For example, if employees are told in advance they may leave the job and do not have to commence work until a certain specified time, such time will not be considered hours worked. If the employees are told they must "stand by" until work commences, such time must be paid.

#### **7. Is there a requirement for "show up" pay?**

An employer is not required by law to give advance notice to change an employee's shift or to shorten it or lengthen it, thus there is no legal requirement for show-up pay. That is, when employees report to work for their regularly scheduled shift but the employer has no work to be performed, and the employees are released to leave the employer's premises or designated work site, the employer is not required to pay wages if no work has been performed.

**8. What constitutes "on-call" time and when is it considered "hours worked"?**

Whether or not employees are "working" during on-call depends upon whether they are required to remain on or so close to the employer's premises that they cannot use the time effectively for their own purposes.

Employees who are not required to remain on the employer's premises but are merely required to leave word with company officials or at their homes as to where they may be reached are not working while on-call. If the employer places restrictions on where and when the employee may travel while "on call" this may change the character of that "on call" status to being engaged in the performance of active duty. The particular facts must be evaluated on a case-by-case basis.

**9. What constitutes preparatory and concluding activities and when is this time considered "hours worked"?**

Preparatory and concluding activities are those activities that are considered integral or necessary to the performance of the job. Those duties performed in readiness and/or completion of the job shall be considered hours worked. When an employee does not have control over when and where such activities can be made, such activities shall be considered as hours worked.

Examples may include the following:

**9.1** Employees in a chemical plant who cannot perform their principle activities without putting on certain clothes, or changing clothes, on the employer's premises at the beginning and end of the workday. Changing clothes would be an integral part of the employee's principle activity.

**9.2** Counting money in the till (cash register) before and after the shift, and other related paperwork.

**9.3** Preparation of equipment for the day's operation, i.e., greasing, fueling, warming up vehicles; cleaning vehicles or equipment; loading, and similar activities.

**10. When are meal periods considered "hours worked"?**

Meal periods are considered hours worked if the employee is required to remain on the employer's premises at the employer's direction subject to call to perform work in the interest of the employer. In such cases, the meal period time counts toward total number of hours worked and is compensable. See Administrative Policy ES.C.6.

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

WASHINGTON STATE NURSES  
ASSOCIATION, on behalf of  
certain employees it  
represents,

Plaintiff,

v.

SACRED HEART MEDICAL CENTER,  
Defendant.

NO. CV-08-0054-EFS

**ORDER GRANTING PLAINTIFF'S  
MOTION FOR REMAND TO STATE  
COURT AND DENYING MOTION FOR  
AWARD OF COSTS AND EXPENSES**

Before the Court, without oral argument, is Plaintiff Washington State Nurses Association's (the Association) Motion to Remand to State Court and for an Award of Costs and Expenses. (Ct. Rec. 5.) The Association argues federal subject matter jurisdiction is lacking because (1) its claims are based on state law and (2) it lacks standing to represent the nurses in a federal court action for monetary damages based on state law and, therefore, remand is necessary. Defendant Sacred Heart Medical Center (Sacred Heart) opposes the Association's motion, maintaining the Association's claims involve the parties' collective bargaining agreement (CBA) and, therefore, are preempted by the Labor Management Relations Act. After reviewing the submitted materials and

1 relevant authority, the Court is fully informed and finds Sacred Heart  
2 failed to establish that federal jurisdiction exists. Therefore, the  
3 Association's motion to remand is granted for the reasons given below;  
4 however, the Court denies the Association's request for fees and  
5 expenses.

6 **A. Standard**

7 This Court has jurisdiction, and removal is proper, for actions  
8 "arising under the Constitution, treaties or laws of the United States."  
9 28 U.S.C. § 1441(b). The removing-defendant has the burden of  
10 establishing federal jurisdiction. *Emrich v. Touche Ross & Co.*, 846 F.2d  
11 1190, 1195 (9th Cir. 1988) (citing *Wilson v. Republic Iron & Steel Co.*,  
12 257 U.S. 92, 97 (1921)). The removal statute is strictly construed  
13 against removal jurisdiction. *Id.*

14 **B. Remand Authority and Analysis**

15 The Court's inquiry into whether the Association's claims are  
16 preempted by the Labor Management Relations Act (LMRA), 29 U.S.C. §  
17 185(a), begins with asking whether "the asserted cause of action involves  
18 a right conferred upon an employee by virtue of state law, not by a CBA."  
19 *Burnside v. Kiewit Pac. Corp.*, 491 F.3d 1053, 1059 (9th Cir. 2007). The  
20 Association is claiming that Sacred Heart violated the Washington Minimum  
21 Wage Act (MWA), RCW 49.46.130, by failing to pay nurses one and one-half  
22 time their regular rate of pay for missed required rest breaks. The  
23 Court concludes the Association's claims are based on a right conferred  
24 by the MWA, not the CBA.

25 Accordingly, the Court turns to the second analytical step, which  
26 is whether the Association's MWA-based claims are "substantially

1 dependant" on an analysis of the CBA. See *Burnside*, 491 F.3d at 1059-  
2 60. The Court concludes the CBA need not be interpreted in order to  
3 determine whether Sacred Heart complied with the MWA. In the event that  
4 the Association is successful and damages need to be calculated,  
5 reference to the CBA will be required, but there is no indication that  
6 determining a particular nurse's wage rate will require *interpretation*  
7 of the CBA. See *Burnside*, 491 F.3d at 1074. Accordingly, even though  
8 the state court may need to refer to the CBA in order to determine  
9 damages, the Court concludes using the CBA in this manner does not result  
10 in LMRA preemption. See *id.*

11 Because the Court finds Sacred Heart failed to establish that  
12 federal subject matter jurisdiction exists, the Court need not address  
13 whether the Association has standing to bring its claims in federal  
14 court.

15 **C. Attorneys Fees and Costs**

16 The Court declines to exercise its discretion to award attorney's  
17 fees and costs under 28 U.S.C. § 1447(c).

18 For the foregoing reasons, **IT IS HEREBY ORDERED:**

19 1. Plaintiff's Motion to Remand to State Court and for an Award of  
20 Costs and Expenses (**Ct. Rec. 5**) is **GRANTED** (remand) and **DENIED** (attorneys  
21 fees and costs) **IN PART**.

22 2. This matter is **REMANDED** to Spokane County Superior Court (Case  
23 No. 07205766-2) for further proceedings.

24 **IT IS SO ORDERED.** The District Court Executive is directed to enter  
25 this Order and provide copies to counsel and a certified copy to the  
26

1 Clerk of the Superior Court of the State of Washington for Spokane  
2 County, Case No. 07205766-2.

3 **DATED** this 5<sup>th</sup> day of May 2008.

4  
5 S/ Edward F. Shea  
6 EDWARD F. SHEA  
7 United States District Judge

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