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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CERTIFICATION FROM
THE UNITED STATES DISTRICT COURT
FOR
THE WESTERN DISTRICT OF WASHINGTON

ANA LOPEZ DEMETRIO and FRANCISCO EUGENIO PAZ,
individually and on behalf of all others similarly situated,

Petitioners/Plaintiffs,

v.

SAKUMA BROTHERS FARMS, INC.,

Respondent/Defendant.

BRIEF OF *AMICI CURIAE*
THE ASSOCIATION OF WASHINGTON BUSINESS,
THE WASHINGTON FARM BUREAU FEDERATION
AND
THE WESTERN GROWERS ASSOCIATION

Filed
Washington State Supreme Court

FEB 12 2015

Ronald R. Carpenter
Clerk

 ORIGINAL

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I. INTRODUCTION

The Association of Washington Business, the Washington Farm Bureau Federation and the Western Growers Association (together, “Amici”) approach this Court concerned about the attempt by the plaintiffs in this matter to create from whole cloth a new obligation for Washington employers. Simply put, nothing in the controlling regulation, WAC 296-131-020(2), expressly requires any separate or additional payment for piece-rate workers for the rest breaks required by that regulation. The Department of Labor and Industries (“L&I”) was correct to not require any such payment because compliant employers, fully providing their employees with rest breaks to which they are entitled, have fully priced into the piece rates paid to their employees for the time they are on rest breaks. Economic theory permits no other conclusion.

Moreover, Amici submit that plaintiffs can articulate no rationale by which the new obligation they seek to create can be limited to agricultural piece-rate paid workers. The disruption that plaintiffs’ new theory will create will be widespread, impacting virtually any nonexempt employee paid anything other than a straight hourly wage. The fact of such widespread disruption should cause the court to consider that no such additional obligation was ever intended by L&I.

Finally, while the Court should not reach the certified second question, there is nothing unlawful about having a separate and distinct rate of pay for nonproductive time, such as rest breaks. Therefore, there can be no legal basis to require payment for rest breaks by a compliant employer, fully permitting its employees those periods of rest, to pay for those rest breaks at anything other than minimum wage.

II. IDENTITY AND INTEREST OF AMICI CURIAE

A. The Association of Washington Business.

The Association of Washington Business (“AWB”) is Washington State’s Chamber of Commerce and principal representative of the state’s business community. AWB is the state’s oldest and largest general business membership federation, representing the interests of approximately 8,500 Washington companies who in turn employ over 700,000 employees, approximately one-quarter of the state’s workforce. AWB members are located in all areas of Washington, represent a broad array of industries, and range from sole proprietors and very small employers to the large, recognizable, Washington-based corporations which do business across the country and around the world. AWB members include both agricultural and non-agricultural employers which routinely employ employees in Washington using a variety of

compensation methods beyond a simple salary or hourly wage. AWB members of all types are thus vitally interested in any proceeding that has the substantial risk of upending the economic realities of compensation programs that have been used for many years to the mutual benefit of employers and employees in this state.

B. The Washington Farm Bureau Federation

The Washington Farm Bureau Federation (“WFB”) is a voluntary, grassroots advocacy organization representing the social and economic interests of Washington’s farm and ranch families at the local, state and national levels. Originally formed in 1920, WFB is a 501(c)(5) non-profit corporation organized under the laws of Washington. WFB consists of 25 local Farm Bureaus, representing more than 42,000 voluntary members across all of Washington’s 39 counties. WFB members are thus vitally concerned about plaintiffs’ attempt to create a new obligation for some separate and additional payment on top of long-standing compensation systems in use throughout the state.

C. The Western Growers Association

Established in 1926, the Western Growers Association (“WGA”) has represented family farmers growing fresh produce in the western United States for 88 years. While many of the members are located in

California and Arizona, WGA includes more than a dozen members either based in Washington or with operations in Washington. WGA's approximately 2,500 members provide roughly half the nation's fresh fruits, vegetables and tree nuts including a third of America's fresh organic produce. WGA is thus vitally interested the proper application of legal principles to the compensation of agricultural workers.

III. ISSUE OF CONCERN TO *AMICI CURIAE*

This Brief of *Amici Curiae* addresses the questions certified to this Court from the United States District Court for the Western District of Washington:

1. Does a Washington agricultural employer have an obligation under WAC 296-131-020(2) and/or the Washington Minimum Wage Act to separately pay piece-rate workers for the rest breaks to which they are entitled?
2. If the answer is "yes," how must Washington agricultural employers calculate the rate of pay for the missed break time to which piece-rate workers are entitled?

Amici respectfully submit that when the economic realities of how compensation systems are structured is considered, the answer to the first certified question must be "no." Further, *Amici* point out that if the Court were to create the new obligation sought by plaintiffs, it would disrupt numerous other compensation systems in addition to a piece rate system,

for both agricultural and non-agricultural employers. Finally, Amici also submit that if the Court were to reach the second certified question, which it should not, any such payment to be mandated by law should be only at the minimum wage rate also mandated by law.

IV. STATEMENT OF THE CASE

Amici adopt and join in the Statement of the Case in the Sakuma Brothers Farms, Inc.'s Responsive Brief on Certified Questions ("Sakuma Brief").

V. ARGUMENT

A. The Department of Labor and Industries Correctly Imposed No Requirements for Additional Payment for Rest Breaks Because Compensation for Rest Breaks Is Fully Reflected In The Piece Rate.

In the rulemaking proceeding that resulted in WAC 296-131-020, the Department of Labor and Industries ("L&I") was explicit that it had assumed "that most employees currently take rest breaks during the work day." Thus, L&I believed that "the proposed rules essentially established in a rule a practice that currently exists." Washington State Register, 90-09-078, at 176. Notwithstanding that express factual underpinning for its rule-making, L&I simply did not expressly mandate what plaintiffs seek to now impose on Washington agricultural employers: an obligation to pay some separate and additional amount on top of the piece rate for the rest

breaks L&I assumed were already the norm. L&I chose to forego such an express requirement¹, even though the very text of the same regulation reveals that L&I was cognizant that the time spent on rest breaks would impact the calculation of the rate of pay for those employees (“For purposes of computing the minimum wage on a piece rate basis, the time allotted an employee for rest periods shall be included in the number of hours for which the minimum wage must be paid”). L&I was correct to forego imposing any such additional obligation, because, as a matter of economic reality the required compensation for rest breaks -- the “practice that currently exists” -- is already fully incorporated into the piece rate paid to an employee.

¹ Plaintiffs cannot possibly claim that there is any express requirement for the new obligation they seek to create. Indeed, guidance for employees sponsored in part by the Washington Courts makes no suggestion that piece-rate paid employees are entitled to separate and additional compensation for rest breaks:

Piece Rate: You must be paid minimum wage even if your work is by piece rate. Example: Samuel works for a janitorial service that pays its workers \$200 for each floor of a big office building they clean. Samuel recently spent a 40-hour work week cleaning a single floor. If he is paid \$200 for the week, he has earned less than the minimum wage, which is $\$9.32 \times 40$, or \$372.80. Samuel's employer underpaid him by \$172.80.

Minimum wage is counted by the week, not the day. If some days you earn less than minimum wage, and others you earn more, it is legal as long as you earn at least the minimum wage by the end of the week.

Northwest Justice Project, “Your Rights and Responsibilities as an Employee in Washington,” *available at* <http://www.washingtonlawhelp.org/resource/your-rights-and-responsibilities-as-an-employ?ref=FIVHI> (last visited January 30, 2015).

A moment's reflection demonstrates that this must be so. From the perspective of the operator of a farm, just as any entrepreneur operating any firm, the cost of labor is not merely the compensation paid directly to the employee, but all other costs associated with hiring that employee. Thus, the cash compensation paid to an employee affectively "prices" all costs associated with that employee's employment.

This principle is so commonly accepted by economists as to have become virtually a truism. The issue has long been settled regarding "payroll taxes," those taxes that are applied to employers because of their employment of employees. The non-partisan Congressional Budget Office summarized the analysis:

CBO's analysis of effective tax rates assumes that households bear the burden of the taxes they pay directly, such as individual income taxes and employees' share of payroll taxes. CBO assumes that—as do most economists—that employers' share of payroll taxes is passed onto employees in the form of lower wages than would otherwise be paid. Therefore, the amount of those taxes is included in employees' income, and the taxes are counted as part of employees' tax burden.

Congressional Budget Office, "Historical Effective Federal Tax Rates: 1979 to 2004," December 2006, available at:

<http://www.cbo.gov/sites/default/files/EffectiveTaxRates2006.pdf> (last visited January 5, 2015). The Congressional Budget Office was correct to

note that this analysis is the consensus of economists. *E.g.*, James Davies et al., “Some Calculations of Lifetime Tax Incidence,” 74 *The American Economic Review* 633, 635 (Sept. 1984) (“Social security is treated either exclusively or predominantly as a payroll tax on labor”); John A. Brittain, “The Incidence of Social Security Payroll Taxes,” 61 *The American Economic Review* 110, 118 (Mar. 1971) (The analysis “shows a direct and complete tradeoff between the basic wage rate and the tax per worker, or a 100 percent shifting of the tax burden at the expense of labor’s basic wage.”)

Beyond taxes, economists similarly conclude that wages calculated to reflect the cost of all mandated benefits, in general. Indeed, in his seminal analysis, “Some Simple Economics of Mandated Benefits,”² Professor Lawrence H. Summers (prior to his service as Secretary of the Treasury of the United States), accepted as a given the direct tradeoff between the cost of benefits provided and the cash wages paid to an employee:

If a health benefit that would cost an employer \$20 to provide is worth \$30 to prospective employees, employers

² 79 *The American Economic Review* 177 (May 1989) available at <http://www.jstor.org/discover/10.2307/1827753?sid=21105202779461&uid=3739856&uid=4&uid=3739256&uid=2> (last visited on January 5, 2015).

could provide the benefit and reduce the employees' salary by between \$20 and \$30 leaving both better off.

79 *The American Economic Review* at 178. Other economists reach the same conclusion. For example, when Jonathan Gruber, Professor of Economics at the Massachusetts Institute of Technology, analyzed one particular benefit, he found "substantial shifting of the costs of these mandates to the wages of the targeted group." Gruber, "The Incidence of Mandated Maternity Benefits," 84 *The American Economic Review*, 622, 622 (June, 1994); Joseph M. Eno, "The Effect of Health Insurance Regulation on Wages: A Study in Maternity Benefits," at 1, available at http://economics.nd.edu/assets/31979/eno_bernoulli.pdf (last visited January 5, 2015) ("the incidence of the required benefits falls almost entirely on the beneficiaries, as predicted by an equilibrium view of the markets for labor and insurance.")

Given the universal acceptance of the economic principle that providing benefits – such as rest periods – results in the equivalent impact on the employees' pay, it is no wonder that L&I correctly concluded that no specific additional payment was required for the practice that L&I concluded was already in place. That is, the piece rates actually paid to workers already incorporated compensation for rest periods in the piece rate.

For example, assume that a farmer concludes that in order to attract high quality agricultural workers, the total cash compensation to the employee for a day's work must be between \$105 and \$107.³ In a typical harvest day of nine hours -- including two ten minute rest periods -- a worker picking strawberries may pick as many as 563 pounds of fruit. From the perspective of the farmer, *and the worker*, there simply is no difference if the worker is paid minimum wage for the two ten minute rest periods (\$9.47 per hour for twenty minutes, approximately \$3.16) and \$0.1844 per pound (a piece rate payment of \$103.81, for total compensation for the day of \$106.97) or a piece rate payment of \$0.19 per pound (for the same 563 pounds in a day) of \$106.97. Given that L&I indicated that it was merely incorporating existing practices into its regulation when it refrained from requiring a separate payment for rest breaks, the pricing of piece rates reflects precisely this economic reality. It is wrong to suggest that some additional payment is called for.

³ Amici offer the following example solely as a hypothetical example, but submit that all facts are reasonable approximations of the current agricultural labor market in Washington.

B. Requiring a Separate Additional Payment for Rest Breaks for Employees Paid on a Piece Rate Will Disrupt Numerous Compensation Systems.

Plaintiffs' attempt to focus on additional compensation for piece-rate workers, without acknowledging, much less dealing with, the impact on other compensation systems. The disruption plaintiffs would create demonstrates that the outcome they seek—an obligation never expressly adopted by L&I—cannot be appropriate.

Preliminarily, it cannot seriously be disputed that it is wholly legal for Washington employers to pay their employees something other than an hourly wage. Indeed, under Washington law an employer is at legal liberty to structure the compensation system for its employees in any manner it chooses, so long as it meets the requirements of Chapter 49.46 RCW, the Washington Minimum Wage Act ("WMWA"). L&I, the same agency that adopted WAC 296-131-020, has long recognized that nonexempt employees may be compensated in a variety of manners. L&I currently summarizes its interpretation of the WMWA in "Administrative Policies." The current versions of those Administrative Policies are available at

<http://www.lni.wa.gov/WorkplaceRights/Rules/Policies/default.asp>

The version of this guidance around the time L&I adopted WAC 296-131-020 was referred to as L&I's "Interpretive Guidelines." Attached hereto as Appendix A is Interpretive Guideline ES-032, titled "Regular Rate of Pay" (hereinafter, the "IG").

The IG recognized a number of different payment systems for non-exempt employees in addition to a straight hourly wage, including "Piecework," "Day Rates/ Job Rates," IG, at 2; "Salaries," IG, at 2-3; and "Commission Payments." IG, at 4. L&I continues to recognize such lawful compensation programs, currently providing guidance as to the manner to compute the regular rate of pay for employees compensated through such systems. L&I Administrative Policy ES.A.8.2 ("How to Compute Overtime"), available at <http://www.lni.wa.gov/WorkplaceRights/files/policies/esa82.pdf> (hereinafter, the "AP"). A copy is attached as Appendix B. All such systems would be compromised if the outcome sought by plaintiffs was imposed by this Court.

For example, L&I has recognized that it is common for employees to be paid a "flat rate" or on a "task basis" whereby the employee is paid a pre-set rate for a particular task, regardless of the amount of time that it takes the employee to actually complete the task. AP, at 3. A flat rate paid

employee is entitled to rest breaks, but L&I's guidance on how to compute the employee's regular rate makes no suggestion that the employee is entitled to some additional payment for the time allotted for rest breaks – even though taking a rest break means the employee is not working to complete the task on which basis the employee is paid. Plaintiffs will be unable to offer any logical distinction why the additional obligation they seek to create is not equally applicable to flat rate paid employees.

A similar analysis applies to nonexempt employees paid on a commission. While some commission-paid employees are exempt from the WMWA, RCW 49.46.010(3)(c) (“outside sales person”), employees not satisfying the stringent requirements for this exception⁴ are generally⁵ covered by WMWA. L&I's guidance treats commission-paid employees in precisely the same manner as other nonexempt employees: their regular rate is computed by “dividing total earnings for the week by the hours

⁴ See, “Exemption from Minimum Wage and Overtime Requirements for Outside Sales Positions,” Administrative Policy ES.A.9.7, *available at* <http://www.lni.wa.gov/WorkplaceRights/files/policies/esa97.pdf>.

⁵ Amici are also aware that certain commission-paid employees of retail and service establishments are exempt from the WMWA's overtime requirements. RCW 49.46.130. Again, however, there are certain requirements to come within this exception and if those requirements are not met, all WMWA requirements apply. See “Retail or Service Establishment Commission Overtime Exception” Administrative Policy ES.A.10.1, *available at* <http://www.lni.wa.gov/WorkplaceRights/files/policies/esa101.pdf>.

worked during the week.” *Id.* There is no suggestion that commission-paid employees are entitled to some additional compensation for their rest periods, even though those employees are not performing the work that earns them commission during this rest periods. Again, plaintiffs will be unable to offer any logical reason why the obligation they seek to create would not extend to commission paid employees.

Finally, plaintiffs’ theory would also wreak havoc with nonexempt salary-paid employees. L&I’s guidance provides information as to computing the regular rate of pay for salaried employees depending upon whether there is an express understanding that the salary is compensation for all hours worked, or for some specified number of hours. AP, at 2. There is no suggestion from L&I that the rest period is somehow to be computed outside of or in addition to these regular hours of work, or that any additional payment is to be made. Plaintiffs proposed theory again, has no limitation as to how it would disrupt employees paid on a salary.

Finally, plaintiffs focus their attention on the impact of their proposed obligation on agricultural employees. However, it will be impossible to limit the operation of the theory that plaintiffs propose to agricultural employees. This is because the obligation for rest breaks is, in this regard, substantially similar to the rest break obligations applicable to

Washington's non-agricultural employees, articulated in WAC 296-126-092. Just as WAC 296-131-020(2), WAC 296-126-092 also requires rest breaks for every four hours of labor, and does not expressly require the additional payment sought by plaintiffs for employees paid on the basis of a piece rate, commissions, flat rate, task basis, or salaries. Given the nature of plaintiffs' fundamental theory -- that piece rate employees are receiving no compensation for the time on a rest break -- plaintiffs will be unable to offer any limiting principle that will constrain the operation of the flawed theory they seek to impose.

The Court should hesitate before creating such wide-spread disruption. More importantly, the fact that plaintiffs' theory would disrupt such a wide variety of compensation programs is reason in and of itself to doubt that L&I intended, in adopting WAC 296-131-020(2), to affect so many different employers and employees without saying so expressly. Plaintiffs' theory must be rejected.

C. There is No Legal Basis to Require Employers Offering Rest Breaks to Pay for Those Rest Breaks at Anything Other Than the Minimum Wage.

Amici do not believe that the Court should reach the second certified question, because the answer to the first certified question is plainly "no." If, however, the Court was to reach that issue, Amici concur

in the analysis of Sakuma that the matter is controlled by *Seattle Professional Engineering Employees Ass'n v. The Boeing Company*, 139 Wn.2d 824, 835, 991 P.2d 1126 (2000). Amici write separately only to make one additional observation.

The most critical fact underlying the second certified question is that this issue concerns compliant employers. That is to say, plaintiffs are seeking to impose an obligation for a separate and additional payment on employers who have fully complied with the obligation to provide their employees with rest periods. The certified questions do not deal with noncompliant employers that have not provided their employees with rest periods. Thus, plaintiffs seek to conflate the remedy for a violation of the law under *Wingert*⁶ (payment of additional compensation equivalent to the rest break not taken) with an obligation that is to be imposed on employers that have complied with the law (payment of some additional compensation for a rest break even though it was taken).

In this regard, there is no legal requirement that a rest period be paid at any *specific* rate. Rather, the controlling regulation only requires that the rest period be “on the employer’s time.” It is plainly permissible

⁶ *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 50 P.3d 256 (2002).

under Washington law to have an employee paid at two (or more) hourly rates. Indeed, L&I's guidance on the computation of the regular rate of pay accepts as wholly permissible a system under which "an employee in a single workweek works at two or more different types of work for which different rates of pay (of not less than the applicable minimum wage) have been established." AP, at 1. Plainly, productive hours picking fruit and nonproductive rest periods are "different types of work." Thus, an employer is legally entitled to pay for rest breaks at some rate other than the rate paid for productive hours, so long as it exceeds the minimum wage. Plaintiffs can offer no legal rationale⁷ why a compliant employer, fully allowing its employees all the rest breaks to which they are entitled, should be required to pay for those rest breaks at anything other than minimum wage. If the Court was to reach the second question, the only permissible answer that the Court may conclude is mandated by the law is that such an additional obligation can only be at the only rate mandated by law, the applicable minimum wage.

⁷ Amici make this observation notwithstanding Section V(C) of Plaintiffs' Opening Brief on Certified Questions, pp. 21-26. Plaintiffs offer various policy reasons why they believe payment at the worker's piece rate payment, converted to a regular rate of pay, would be preferable. They offer no legal rationale other than the inapposite reliance on *Wingert*.

VI. CONCLUSION

For the reasons stated above, Amici urge this Court to refrain from creating an entirely new obligation for Washington employers not called for by the regulation that governs rest and meal breaks. Doing so is contrary to the economic realities of the compensation system for employees paid on a piece rate, and cannot help but be disruptive of a wide variety of employment relationships for both agricultural and non-agricultural employers and employees.

The first certified question should be answered “no.” As a consequence, it is unnecessary to reach the second certified question, but in any event there is no basis to call for payment of rest breaks actually received to be paid at anything other than the State’s minimum wage.

DATED this 30th day of January, 2015.

THE ASSOCIATION OF WASHINGTON
BUSINESS

THE WASHINGTON FARM BUREAU
FEDERATION

THE WESTERN GROWERS ASSOCIATION

By



Robert A. Battles WSBA No. 22163
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APPENDIX A

INTERPRETIVE GUIDELINE
DEPARTMENT OF LABOR AND INDUSTRIES
EMPLOYMENT STANDARDS, APPRENTICESHIP AND CRIME VICTIMS
(ESAC) DIVISION

SECTION: Employment Standards	NUMBER: ES-032
STATUTE AUTHORITY: RCW 49.46.130	ISSUED: April 1992
REGULATION: WAC 296-128-550	REPLACES:
TITLE: Regular Rate of Pay	SEE ALSO: ES-013

WAC 296-128-550 REGULAR RATE OF PAY

The overtime provision of the WMWA, RCW 49.46.130, requires the payment of one and one-half the regular rate of pay for hours worked in excess of 40 in a 7 day work week.

Prior to computing overtime pay, it is necessary to determine the employee's regular rate. The regular rate may exceed the minimum wage pursuant to RCW 49.46.020, but may not be less.

The regular rate includes all remuneration for employment except for certain payments excluded by law. Payments which are not part of the regular rate include:

- reimbursement for expenses incurred on the employer's behalf
- premium payments for overtime work and any premium payments received for work on Saturdays, Sundays and holidays, providing, payments made are at least one and one half the regular rate paid
- discretionary bonuses, gifts and payments in the nature of gifts on or for special occasions
- payments received for periods of time when no work is performed such as vacation, holidays or illness

The regular rate is determined by actual hours of work performed by an employee. Therefore it is important that an employer record all actual hours of work, regardless of whether an employee is paid on salary, piece-work, commission or other basis.

**Interpretive Guideline No. ES-032
Employment Standards Section**

The state wage and hour laws do not require employers to pay employees on an hourly rate, and certain employees will be paid on a piece-rate, salary, commission or some other basis, and in such cases the overtime pay due must be computed on the basis of the regular rate derived from such earnings. The regular hourly rate of pay of an employee is then determined by dividing the total remuneration for employment in any work week by the total number of hours actually worked in the workweek.

Following are a few examples to illustrate the above application.

Hourly Rate: When an employee is paid solely on the basis of a single hourly rate, the hourly rate is the "regular rate". For overtime hours the employee must be paid one and one-half times the hourly rate for each hour over 40 in the work week.

Piecework: When an employee is paid on a piece-rate basis the regular rate of pay is computed by adding together the total earnings for the work week from piece rate and all other earnings (such as bonuses) and any sums that may be paid for other hours worked. This sum is divided by the number of hours worked in that week to yield the piece worker's "regular rate" for that week. For the overtime work the employee is entitled to be paid, in addition to the total straight-time weekly earnings, one-half this regular rate for each hour over 40 in the work week. When the employee has already received straight-time compensation for all hours worked, only additional half-time pay is required.

Day Rates/Job Rates: When an employee is paid a flat sum for a day's work or for doing a particular job, without regard to the number of hours worked in the day or at the job, and receives no other form of compensation. In such a case, the employee's "regular rate" is found by totaling all the sums received at such day rates or job rates in the work week and divided by the total hours actually worked. The employee is entitled to extra half-time pay at this rate for each hour over 40 in the work week.

Salary--Weekly: When an employee is employed solely on a weekly salary basis, the regular hourly rate of pay is computed by dividing the salary by the number of hours which the salary is intended to compensate.

Interpretive Guideline No. ES-032
Employment Standards Section

Example: Employee is hired at a salary of \$250.00 and it is understood that the salary is compensation for a 35 hour work week (or \$7.14 per hour) when overtime is worked the employee is entitled to receive \$7.14 for each of the first 40 hours and \$10.71 for each hour over 40. When an employee is hired at a salary of \$250.00 for a 40 hour work week, the regular rate is then \$6.25 per hour to be paid for each of the first 40 hours and \$9.375 for each hour over 40.

Salary--Other than Weekly: When the salary covers a period longer than a work week, such as a month, it must be reduced to its equivalent weekly wage by multiplying by 12 (the number of months) and dividing by 52 (the number of weeks). A semi-monthly salary is converted to its weekly equivalent by multiply by 24 and dividing by 52.

Salary--Fluctuating Hours: When an employee is employed on a fixed salary and it is understood that the hours will fluctuate from week to week, and it is clearly understood that the fixed salary constitutes straight time pay for all hours of work, whatever the number. The regular rate is obtained for each week by dividing the salary by the number of hours worked in the week. Since it was understood that all hours would constitute straight time, all hours worked have already been paid at straight time compensation; however, the employee is still entitled to receive additional overtime compensation for each hour over 40 in the week at not less than one-half the regular rate.

Example: An employee is hired at a fixed salary of \$1,500.00 per month, with the understanding that this salary represents compensation regardless of the number of hours worked each week. The salary is converted to its weekly equivalent ($\$1,500.00 \times 12 \div 52$). The weekly salary (\$346.15) is then divided by the number of hours worked that week. During the course of three weeks the employee works 45, 48 and 50 hours. The regular hourly rate of pay in each of these weeks, respectively, is: \$7.69, 7.21 and 6.92; straight time pay for all hours worked has already been paid at these regular rates, and only an additional half-time paid is due for each hour over 40. In addition to receiving the weekly salary of \$346.15 for each week, the first week an additional payment of \$19.25 ($5.0 \times \3.85) is due, second week \$28.88 ($8 \times \3.61), and the third week \$34.60 ($10 \text{ hrs} \times \3.46).

Interpretive Guideline No. ES-032
Employment Standards Section

Employee working at two or more rates: When an employee works at two or more different types of work for which different straight time rates have been established, the employee, upon reaching the 41 hour receives one and one-half times the rate at which the employee is being paid for the type of work performed.

When circumstances are such that it is impossible to establish which rate the employee was working at on the 41st hour and total hours at the different rates are only recorded, the regular rate for that week is the weighted average of such rates; i.e. the earnings from all such rates are added together and this total is divided by the total number of hours worked at all jobs.

Commission Payments: Commissions are payments for hours worked and must be included in the regular rate. This is so regardless of whether the commission is the sole source of the employee's compensation or is paid in addition to a salary or hourly rate. It does not matter whether the commission earnings are computed daily, weekly or monthly.

When a commission is paid on a work week basis, it is added to the employee's other earnings for that work week and the total is divided by the total number of hours worked in the work week to obtain the employee's regular rate for the particular work week. The employee must then be paid extra compensation at one-half of that rate for each overtime hour worked.

PAYMENTS EXCLUDED FROM THE REGULAR RATE:

Overtime pay for hours in excess of a daily or weekly standard: When employees are paid overtime for hours worked over 8 per day or 40 per week the extra compensation paid for the excess hours, whether or not at time and one-half, is excluded from the regular rate and may be credited toward statutory overtime requirements.

Premium Pay for work on Saturday, Sundays, and other special days: Extra compensation provided by a premium rate of at least time and one-half which is paid for work on Saturday, Sundays, holiday, or regular days of rest, or on the sixth or seventh day of the workweek as such, may be treated as overtime pay.

Interpretive Guideline No. ES-032
Employment Standards Section

However, if the premium rate is less than time and one-half, the extra compensation paid must be included in determining the regular rate of pay and cannot be credited toward statutory overtime requirements.

Non-Overtime Premium: Lump sum payments which are paid without regard to the number of hours worked are not overtime premiums and must be included in the regular rate.

Bonuses: Nondiscretionary bonuses must be totaled in with other earnings to determine the regular rate on which overtime must be paid.

Discretionary Bonuses: A bonus need not be included in the regular rate if the employer retains discretion both that a bonus will be paid and that the amount is not determined until the end, or near the end, of the bonus period, i.e. when an employer pays a bonus without prior contract, promise, agreement and the decision as to the fact and amount of payment lay in the employer's sole discretion and the bonus is not geared to hours worked or production, the bonus would be properly excluded from the regular rate.

Gifts, Christmas and Special Occasion Bonuses: If a bonus paid at Christmas or on other special occasions is a gift, it may be excluded from the regular rate even though it is paid with regularity so that the employees are led to expect it.

Reimbursement for Expenses: When an employee incurs expenses on the employer's behalf or where the employee is required to spend sums solely for the convenience of the employer, payments to cover such expenses are not included in the employee's regular rate of pay.

Payment for Nonworking Hours: Payments which are made for periods when the employee is not at work due to vacation, holiday, illness or similar situations, may be excluded from the regular rate of pay, and such payments may not be credited toward statutory overtime requirements.

APPENDIX B



HOW TO COMPUTE OVERTIME

HOURS WORKED — Covered employees must be paid for all hours worked in a workweek. In general "hours worked" includes all time an employee must be on duty, on the employer's premises, or at any other prescribed place of work. Also included is any additional time the employee is "suffered or permitted" to work. For example, an employee may voluntarily continue to work at the end of the shift. He or she may be a clerical worker who wants to finish an assigned task or correct errors; or a piecework employee may choose to remain and finish a unit or complete a roof due to changes in weather; a bookkeeper may want to remain and post work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that the work is continuing; thus, it must be counted as working time.

COMPUTING OVERTIME PAY — The Washington State overtime law, RCW 49.46.130, requires overtime compensation to be paid at a rate of at least 1-1/2 times the employee's "regular rate" for each hour worked in a workweek in excess of 40 hours. Generally, the regular rate for other than a single hourly rate includes all payments made by the employer to or on the behalf of the employee (excluding certain exceptions), and is determined by dividing the total compensation for an employee in any workweek by the total number of hours worked in the workweek for which such compensation was paid.

HOURLY RATE — If the employee is employed solely on the basis of a single hourly rate, the hourly rate is the "regular rate". If more than 40 hours is worked in the workweek, at least 1-1/2 times the regular rate for each hour over 40 is due. The hourly rate will not be the regular rate if additional compensation or incentive pay is earned by the employee during the workweek.

EXAMPLE: An employee paid \$9.00 an hour works 44 hours in a workweek. The employee is entitled to at least 1-1/2 times \$9.00, or \$13.50, for each hour over 40. Pay for the week should be \$360.00 for the first 40 hours of work, plus \$54.00 (4 hours x \$13.50), for the four hours of overtime; a total of \$414.00.

HOURS WORKED EACH DAY							Single Hourly Rate = \$9.00				OVERTIME
Sun	Mon	Tue	Wed	Thu	Fri	Sat	Hours Worked	Hourly Rate	Unpaid OT Hrs	OT Rate (1-1/2 Hourly Rate)	
31-Jan	1-Feb	2-Feb	3-Feb	4-Feb	5-Feb	6-Feb	44	\$9.00	4	\$13.50	\$54.00
off	8	8	8	8	8	4					

EXAMPLE: An employee paid \$9.00 an hour works 44 hours in a workweek. The employer pays the employee an additional \$100.00 for the week as a bonus, representing 10% of the profits. The straight time earnings for the week is \$496.00 (44 hours x \$9.00 = \$396.00 + \$100.00 bonus). The weekly earnings (\$496.00) divided by the actual hours worked (44) reflects a \$11.27 per hour regular rate of pay for that week. Since the \$496.00 is the total straight time pay for all 44 hours, all that is owed for the overtime is the half-time rate of \$5.64 (\$11.27 divided by 2), times four hours, or \$22.56. The total wages, including overtime, owed for that particular week would therefore be \$518.56.

HOURS WORKED EACH DAY							\$9.00 Hourly Rate + \$100.00 Weekly Bonus = \$11.27 Reg Rate + 2 = \$5.64 OT Rate							OVERTIME OWED (OT Hrs x OT Rate)		
Sun	Mon	Tue	Wed	Thu	Fri	Sat	Hours Worked	Hourly Rate	Straight Time Earn	Weekly Bonus	Weekly Earn/OT	Tot Hrs Worked	Regular Rate	OT Rate (1/2 Reg Rate)	Unpaid OT	
31-Jan	1-Feb	2-Feb	3-Feb	4-Feb	5-Feb	6-Feb	44 x	\$9.00 =	\$396.00 +	\$100 =	\$496.00 +	44 =	\$11.27 ÷ 2 =	\$5.64 x	4 =	\$22.56
off	8	8	8	8	8	4										

WORKING AT TWO OR MORE HOURLY RATES — Where an employee in a single workweek works at two or more different types of work for which different rates of pay (of not less than the applicable minimum wage) have been established, the regular rate for that week is the weighted average of such rates. That is, the total earnings are computed to include the compensation during the workweek from all such rates, and are then divided by the total number of hours worked at all jobs in that workweek.

EXAMPLE: An employee works 45 hours in a workweek and is paid \$9.50 an hour for 5 hours and \$15.00 an hour for 40 hours. The straight time earnings for the week is \$647.50 (5 hours x \$9.50 = \$47.50 + \$15.00 x 40 = \$600.00; a total of \$647.50). The weekly earnings (\$647.50) divided by the actual hours worked (45) reflects a \$14.39 per hour regular rate of pay for that week. Since the \$647.50 is the total straight time pay for all 45 hours, all that is owed for the overtime is the half-time rate of \$7.20 (\$14.39 divided by 2), times five hours, or \$36.00. The total wages, including overtime, owed for that week would therefore be \$683.50.

HOURS WORKED EACH DAY							5 hours x \$9.50 = \$47.50 + 40 hours x \$15.00 = \$600.00 = Weekly Total \$647.50							OVERTIME	
Sun	Mon	Tue	Wed	Thu	Fri	Sat	Hours Worked	Hourly Rate #1	Hourly Rate #2	Weekly Earn To	Total Hrs Worked	Regular Rate	OT Rate (1/2 Hrly)	Unpaid OT	OWED (OT Hrs x OT)
31-Jan	1-Feb	2-Feb	3-Feb	4-Feb	5-Feb	6-Feb	45	\$9.50 x 5	\$15.00 x 40 =	\$647.50 +	45 =	\$14.39 + 2 =	\$7.20 x	5 =	\$36.00

AN "ACCURATE" RECORD OF DAILY HOURS WORKED MUST BE KEPT SO THAT THE REGULAR RATE CAN BE COMPUTED

In no case may the regular rate be less than the minimum wage required under the Minimum Wage Act.

SALARIES —

Note: To use the analysis for computing salaries for workweeks exceeding 40 hours and those with fluctuating hours — in order to apply a compensation of one half of the hourly rate to compensate the employee for the overtime hours worked, the following three requirements must all be met:

1. There is a clear mutual understanding between the employer and the employee that the salary is straight pay for all hours worked in the week
2. There is a clear and mutual understanding between the employer and the employee that overtime will be compensated at one-half times the regular hourly rate
3. The overtime is paid contemporaneously with straight-time pay

Contemporaneous means that the overtime pay is received in the same pay period as the regular pay.

The regular rate for an employee paid a salary for a specified number of hours per week is obtained by dividing the salary by the number of hours the salary is intended to compensate. The employee is due the full salary plus one-half the regular rate for each hour worked over 40, but if the employee works in excess of the agreed-upon hours, time and one-half the regular rate is due for the additional hours. If, under the employment agreement, an employee paid on a salary will have hours that fluctuate each week, a salary sufficient to meet the minimum wage requirement in every workweek is paid at straight time for whatever number of hours are worked in a workweek; thus, the regular rate is obtained by dividing the salary by the number of hours actually worked each week. After arriving at the figure, the employee is to receive the full salary along with one-half times the regular rate for each hour worked over 40. It is considered that the salary pays the "time", it is just the "one-half" that is due in such instances. If the employer fails to establish a specified number of hours per week for which the salary is intended to compensate the worker, it will be assumed that the salary is based upon a 40-hour workweek, and thus, 1-1/2 times the worker's regular rate will be due for all hours worked in excess of 40 in each workweek.

EXAMPLE: To illustrate such fluctuating hours for salaried employees, suppose an employee's hours of work vary each week and the agreement with the employer is that the employee will be paid \$500.00 a week for whatever number of hours of work are required. Under this pay agreement, an employee who works 50 hours during the week has a regular rate of \$10.00 per hour (\$500.00 divided by 50 hours). In addition to the salary, 1/2 the regular rate, or \$5.00, is due for each of the 10 overtime hours; a total of \$550.00 for the week. If the employee worked 54 hours, the regular rate would be \$9.26 (\$500.00 divided by 54 hours). In that case, an additional \$4.63 (\$9.26 divided by 2) is due for each of the overtime hours; a total of \$564.82 for the week (\$4.63 x 14 hours = \$64.82 + \$500.00 = \$564.82).

HOURS WORKED EACH DAY							Weekly Salary = \$500.00				OVERTIME	
Sun	Mon	Tue	Wed	Thu	Fri	Sat	Hours Worked	Hourly Rate	Unpaid OT Hrs	OT Rate (1/2 Hourly Rate)	OWED (OT Hours x OT Rate)	
31-Jan	1-Feb	2-Feb	3-Feb	4-Feb	5-Feb	6-Feb	54	\$9.26	14	\$4.63	\$64.82	

AN "ACCURATE" RECORD OF DAILY HOURS WORKED MUST BE KEPT SO THAT THE REGULAR RATE CAN BE COMPUTED

If a salary is paid on other than a weekly basis, the weekly pay must be determined in order to compute the regular rate and overtime. If the salary is for a half month, it must be multiplied by 24 and the product divided by 52 weeks for the weekly equivalent. A monthly salary should be multiplied by 12 and the product divided by 52.

PIECE RATE — Piece rate employees are usually paid a fixed amount per unit of work. The regular rate of pay for an employee paid on a piece rate basis is essentially identical to that of a commissioned employee, and is obtained by dividing the total weekly earnings by the total number of hours worked in the same week. The employee is entitled to an additional 1/2 times this regular rate for each hour worked over 40, besides the full piece rate earnings. Following is an example of a piece rate employee who earned \$500.00 in piecework, but took 50 hours to earn the wages during a workweek.

HOURS WORKED EACH DAY							Piece Rate Earned = \$500.00				OVERTIME OWED (OT Hrs x OT Rate)
Sun	Mon	Tue	Wed	Thu	Fri	Sat	Hours Worked	Hourly Rate	Unpaid OT Hrs	OT Rate (1/2 Hourly Rate)	
31-Jan	1-Feb	2-Feb	3-Feb	4-Feb	5-Feb	6-Feb	50	\$10.00	10	\$5.00	\$50.00
off	10	10	10	10	10	off					

AN "ACCURATE" RECORD OF DAILY HOURS WORKED MUST BE KEPT SO THAT THE REGULAR RATE CAN BE COMPUTED

Another way to compensate piecework for overtime, if agreed before the work is performed, is to 1-1/2 times the piece rate for each piece produced during the overtime hours. The piece rate must be the one actually paid during non-overtime hours and must be enough to yield at least the minimum wage per hour.

FLAT RATE — Flat rate (or task basis) employees are paid according to a pre-set rate for a particular task. The most obvious example of this type of pay might be a mechanic who is paid an hourly rate to repair a carburetor, a task that is "pre-set" to take 2 hours to complete. The flat rate mechanic would be paid 2 hours pay for that task whether it took 1, 2 or 3 hours to finish. The "regular rate" for a flat rate employee is calculated essentially the same way as a commissioned or piece rate employee, dividing total earnings for the week by the hours worked during the week. It is important that an accurate record of "actual" hours worked be kept, along with the flat rate hours, so that the regular rate can be computed. Here is an example of a flat rate employee who earned \$400.00 during a week, but actually worked 45 hours to earn it.

	HOURS WORKED EACH DAY							Flat Rate Earned = \$400.00				OVERTIME OWED (OT Hrs x OT Rate)
	Sun	Mon	Tue	Wed	Thu	Fri	Sat	Hours Worked	Hourly Rate	Unpaid OT Hrs	OT Rate (1/2 Hourly Rate)	
Flat Rate Hrs	off	8	8	8	8	8	off	40	\$10.00	N/A	N/A	N/A
Actual Hrs	off	9	9	9	9	9	off	45	\$8.89	5	\$4.44	\$22.22

AN "ACCURATE" RECORD OF DAILY HOURS WORKED MUST BE KEPT SO THAT THE REGULAR RATE CAN BE COMPUTED

In no case may the regular rate be less than the minimum wage required under the Minimum Wage Act.

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No. 90932-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CERTIFICATION FROM
THE UNITED STATES DISTRICT COURT
FOR
THE WESTERN DISTRICT OF WASHINGTON

ANA LOPEZ DEMETRIO and FRANCISCO EUGENIO PAZ,
individually and on behalf of all others similarly situated,

Petitioners/Plaintiffs,

v.

SAKUMA BROTHERS FARMS, INC.,

Respondent/Defendant.

DECLARATION OF SERVICE

Robert A. Battles, WSBA No. 22163
ASSOCIATION OF
WASHINGTON BUSINESS
1414 Cherry Street SE
Olympia, WA 98507
Telephone: (360) 943-1600

DECLARATION OF SERVICE

I reside in the State of Washington, am over the age of eighteen, and not a party to this action. My business address is 1414 Cherry Street SE, Olympia, WA 98507. On January 30, 2015, I served the following:

**MOTION FOR LEAVE TO FILE AMICI CURIAE MEMORANDUM OF AWB, WFB,
and WGA
BRIEF OF AMICI CURIAE OF AWB, WFB, and WGA**

by US Mail, postage pre-paid and e-mail, as follows:

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

Executed on this 30th day of January, 2015, at Olympia, Washington.

A handwritten signature in black ink, appearing to read "Connie Grande", written over a horizontal line.

Connie Grande

OFFICE RECEPTIONIST, CLERK

To: Bob A. Battles
Cc: tmarshall@tmdwlaw.com; mcote@tmdwlaw.com; dan.ford@columbialegal.org;
sarah.leyrer@columbialegal.org; adam.belzberg@stoel.com; tim.oconnell@stoel.com;
elena.bundy@stoel.com
Subject: RE: Paz et al. v. Sakuma Brothers Farms No. 90902-6

Received 1-30-2015

Supreme Court Clerk's Office

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

From: Bob A. Battles [mailto:BobB@AWB.ORG]
Sent: Friday, January 30, 2015 4:04 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: tmarshall@tmdwlaw.com; mcote@tmdwlaw.com; dan.ford@columbialegal.org; sarah.leyrer@columbialegal.org;
adam.belzberg@stoel.com; tim.oconnell@stoel.com; elena.bundy@stoel.com
Subject: Paz et al. v. Sakuma Brothers Farms No. 90902-6
Importance: High

Dear Clerk:

Please find attached for filing in the above-referenced matter, electronic copies of the following documents:

- Motion for Leave to file Memorandum of Amicus Curiae of AWB, WFB and WGA
- Memorandum of Amicus Curiae of AWB, WFB and WGA
- Declaration of Service

By copy of this e-mail, electronic service to counsel of record is made. In addition, hard copies have been sent via US mail.

Please let me know if there is any difficulty opening the .pdf files.

Yours,

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