

No. 94229-3

SUPREME COURT  
OF THE OF WASHINGTON

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

IN

MARIANO CARRANZA and ELISEO MARTINEZ, individually and on  
behalf of others similarly situated,

Petitioners,

v.

DOVEX FRUIT COMPANY,

Respondent.

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BRIEF OF AMICI CURIAE

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A. INTEREST OF AMICI CURIAE

Amici curiae Raymond Schmitten, Antonio Maldonado, Jr., Johnny Duarte, Del Feigel, Faustino Barrios, Natividad Rubio, Felipe Maldonado, Cristian Torres, Geronimo Carrillo, Refugio Carrillo, Pedro Garduño, Raymundo Garduño, Natalie Garduño, Mario Martinez, Leobardo Cardenas, Julio Moreno, Jose Dominguez, Miguel Meza, Nicanor Silva, Aaron Hernandez, and the Washington Trucking Associations (collectively “Amici”) have an interest in ensuring that the existing piece rate pay system for workers continue in existence according to decades long tradition, custom, and practice within the agricultural and trucking industries, as articulated in their motion for leave to file this amicus brief.

B. INTRODUCTION

The piece rate compensation system is vital to the interests of Washington’s agricultural and trucking communities. It has long been a part of both industries, and is valued both by workers and employers. It is recognized in Washington’s wage laws. Ultimately, the position of petitioners Carranza and Martinez (“Carranza/Martinez”) is nothing more than a frontal assault on that pay system, as such.

A piece work system is valued by workers, allowing them to better control their schedules and earnings. For agricultural and trucking

employers, it permits them to compensate workers based on the economic reality of getting crops harvested or addressing the cyclical nature of cargo demands in shipping.

As it is implemented in Washington, the piece rate compensation system fully compensates workers for their efforts preparing to harvest crops or to transport loads. It meets the requirements of Washington's Minimum Wage Act, RCW 49.46 ("MWA").

This Court should not disrupt well-settled principles of compensation in critical Washington industries. The Court should answer "yes" to the district court's first certified question and not reach the second question.

#### C. STATEMENT OF THE CASE

Amici adopt the statement of the case set out in the brief of Dovex Fruit Company ("Dovex").

#### D. ARGUMENT

As noted above, ultimately, the position advocated by Carranza/Martinez in their brief is nothing more than a direct attack on the concept of piece rate compensation. Their suggested change in the decades old industry customs and practices with regard to the piece rate system attempts to restructure Washington policy in a fashion similar to that against which Congress warned in enacting the Portal to Portal Act:

(a) The Congress finds that the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged;

...

The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this chapter be enacted.

The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

...

29 U.S.C. § 251.

Like the concerns mentioned by Congress above, this case challenges the very basis of the compensation system for agriculture and trucking in Washington. Agriculture is a vital industry in Washington.<sup>1</sup>

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<sup>1</sup> Washington is a leading producer of numerous fruit and vegetable crops, making our state a key supplier of food for domestic and export markets. Our growers feed people across the U.S. and around the world. The agriculture and food manufacturing sector is a cornerstone of Washington's economy in both rural communities and metropolitan areas.

Agriculture is woven into the fabric of Washington State's heritage and has been an important part of our culture since the earliest days of territorial settlement. Farmers and ranchers provide environmental stewardship that supports 15 million acres of the state's lands.

#### WASHINGTON STATE'S AGRICULTURE AND FOOD MANUFACTURING SECTOR

Washington's 37,249 farms power a diverse agricultural economy, led by the state's apple industry that accounts for 70 percent of U.S. production. In addition to Washington's top four commodities – apples, wheat, milk and potatoes – the Evergreen State is a major producer of hops, stone fruits, farm forest products, fish, shellfish, onions and mint oils.

Harvest is a much needed opportunity for farmworkers to make two or three times the wages that they make during the rest of the year. The piece rate compensation system as it exists today affords this opportunity to the workers and it also creates the stability of a skilled and efficient workforce for farms and orchards. These farms and orchards are often small family-run businesses that work side by side with their employees to build the success of the business. Similarly, Washington's trucking industry is vital to Washington.<sup>2</sup>

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We're also home to a large food processing industry that supports many supply and marketing services in machinery, pesticides and fertilizers, transportation, packaging, and more. The quality and safety of Washington's agricultural products continue to raise the state's reputation around the world.

- The state's \$49 billion food and agriculture industry employs approximately 140,000 people. Thirteen percent of the state's economy comes from agriculture.
- More than \$15.1 billion in food and agricultural products were exported through Washington ports in 2013, the third largest total in the U.S.
- Agriculture generates income and employment on farms in all 39 counties. The industry is an economic pillar of many rural communities.

<http://www.commerce.wa.gov/growing-the-economy/key-sectors/agriculture-food-manufacturing> (last visited July 31, 2017).

<sup>2</sup> Movement of goods in Washington relies on highways and roads for long-distance transport as well as for urban goods delivery. Trucks move an estimated \$42 million of freight on roadways in Washington State every hour of every day.

There are over 7,000 miles of highways in Washington State, and thousands of additional miles of roads, providing mobility for freight moving into, out of, within, and through the state.

Trucks move on nearly every highway and road in the state.

Carranza/Martinez's position is contrary to the interests of Washington farmworkers who rely on the piece rate compensation system to earn the money to support their families while also allowing them to control their schedule in a way that hourly pay cannot. Their position does not take into consideration the reality of how complicated the changes they are proposing will actually be to implement and how it will negatively impact farmworkers, managers, and orchard owners. The position that piece rate compensation does not pay for time spent performing activities other than "picking" ignores the realities of piece rate (otherwise known as contract) work and further defies employers and employees' rights to agree to an alternate compensation system that is beneficial to both parties. As noted in Dovex's brief, in agriculture, piece rate workers *are fully compensated for all of their time*, including their

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<http://www.wsdot.wa.gov/Freight/Trucking/default.htm>; WSDOT Trucking Freight Page (last visited July 31, 2017).

Washington's regional and state economies, workers and residents depend on an effective and efficient freight transportation system. Washington is one of the most trade-dependent states in the nation. Goods ranging from milk and medicine to Boeing plane parts ship into, out of and around the state using every part of our freightsystem: highways and roads, railroads, waterways, and marine and airports. Industry supply chains moving goods from production to distribution and processing centers, ultimately to consumers via the State's Freight Economic Corridors produced over \$129 billion in regional domestic output in 2013.

<http://www.wsdot.wa.gov/NR/rdonlyrs/FCCF96BA-8E25-4326-8DD1-9428621382D3/0/FreightMobilityPlanExecSummary.pdf> at p. 1 (last visited July 31, 2017).

time necessary to prepare for work. This is also true in the trucking industry.

The current piece rate compensation system complies with the MWA as well as all other Washington statutes and regulations. Furthermore, the current piece rate compensation system complies exactly with Department of Labor & Industries (“DOLI”) rules and guidelines regarding payment of minimum wages. If the Court were to adopt Carranza/Martinez’s strained view that Washington law requires employers pay piece rate workers for “downtime” or tasks not associated directly with picking activities, then it will not only have a devastating impact on the industry as a whole but it will affect other industries who rely on alternative incentive-based compensation systems as well. Furthermore, such a decision would likely be applied retroactively, instigating a flurry of litigation of which the key beneficiaries would be the lawyers involved in those cases.

(1) Under the Current Piece Rate Compensation System, Workers Are Already Paid for Every Hour Worked

As Dovex argued in its brief at 24-25, 29-31, 33-39, the current piece rate pay system pays workers for *all* work. Amici here request that the Court take into consideration the realities of piece rate work and that workers and employers have agreed for decades that piece rate work

includes *all* work performed associated with the task upon which the piece rate is based. For instance, if the piece rate is based upon apple bins picked, this rate also includes all other work and wait time associated with harvesting the fruit, including walking from tree to tree, walking in between rows and blocks, moving ladders from tree to tree, taking breaks to drink water (outside of required rest breaks), and waiting for removal and replacement of bins. Such tasks are instrumental in fulfilling the requirements of the contract, which is the term that piece rate is known in the industry among workers. Workers cannot pick the fruit if they do not move up and down ladders, move ladders, go between rows, and perform other essential work Carranza/Martinez label as “downtime.” What Carranza/Martinez call “downtime” is all a part of being able to fill up the bin or otherwise perform the task upon which the piece rate is based. The “contract” includes all of the downtime necessary to perform the task upon which the piece rate is based.

It is no different in the trucking industry where workers paid on a piece rate basis prepare the truck and the load for the processing of transporting the cargo from one location to another.

Orchard managers and owners set the piece rate based on the difficulty of performing the task upon which the piece rate is based. Again, taking a piece rate based upon the number of apple bins filled, the

manager will assess the difficulty of filling the bin, including the spacing of the trees, the sparsity or density of the fruit on the tree, and the time it will take for the worker to move around the orchard to harvest the fruit when setting the piece rate or contract price. Orchard managers and owners like Amici work with their employees to set an appropriate piece rate so that the workers receive a fair wage that is typically higher than the base rate for work paid on an hourly basis. This is also true for trucking carriers and drivers paid on a mileage or per load or piece basis.

The piece rate includes all associated tasks and, therefore, what Carranza/Martinez label as “down time” is already included and paid for under the piece rate. If the Court were to find that these non-picking tasks should be paid separately and hourly, it would change the manner in which employers and managers determine the piece rate pay and result in lower piece rates. Workers would not receive any additional compensation, they would just be compensated for their time in a different manner. Such an unnecessary change is not required by Washington law.

(2) Piece Rate Compensation Is Supported under Washington’s MWA

The Legislature has broadly defined “wages” in the MWA; it never restricted that concept to “dollars per hour.” RCW 49.46.010(7) defines “wages” as:

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.

DOLI recognizes that for purposes of the MWA, workers may be paid on a piece rate basis. WAC 296-126-021 (“Where employees are paid on a commission or piecework basis...”).

Similarly, RCW 49.46.130, the overtime wage component of the MWA, the Legislature has never restricted wages to “dollars per hour.” Indeed, for the trucking industry, piece rate compensation is specifically recognized by statute and regulation. RCW 49.46.130(2)(f); WAC 296-128-012 (“... an employer may, with notice to a truck driver or bus driver subject to the provisions of the Federal Motor Carrier Act, establish a rate of pay that is not on an hourly basis and that includes in the rate of pay compensation for overtime.”). This Court recognized in *Inniss v. Tandy Corp.*, 141 Wn.2d 517, 532, 7 P.3d 807 (2000) that the Legislature intended generally “to allow a broad and flexible interpretation of [regular rate of pay] so long as the purposes of the Washington Minimum Wage Act are satisfied.” Specifically in the trucking setting, Washington courts have rejected challenges to alternate compensation systems such as those based on miles driven or a per load piece rate, finding such systems to meet MWA overtime provisions. *Westberry v. Interstate Distributor Co.*,

164 Wn. App. 196, 263 P.3d 1251 (2011), *review denied*, 174 Wn.2d 113 (2012); *Mynatt v. Gordon Trucking, Inc.*, 183 Wn. App. 253, 257, 333 P.3d 442 (2014), *review denied*, 182 Wn.2d 1007 (2015) (“Since 1989, Washington state has authorized motor carriers to compensate drivers with pay that is “reasonably equivalent” to overtime (REOT) through non-hourly, piece-rate compensation plans.”).

Thus, piece rate compensation systems that include in their rate compensation for a variety of “nonproductive” tasks are acceptable in Washington. Carranza/Martinez would disrupt that historical type of compensation structure, nowhere barred by Washington law.<sup>3</sup>

As noted *supra*, agricultural employers, in fact, pay every worker minimum wage for all hours worked by keeping track of the worker’s time from the moment they start work until the time that they finish their workday. This includes time spent waiting or moving between rows and orchards, as well as safety trainings, and moving and waiting for equipment. For a piece rate worker, the employer then takes the piece rate wages earned during the pay period and divides that by the hours worked during the pay period. If the employee has not earned at least the

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<sup>3</sup> The situation of rest breaks addressed by this Court in *Demetrio v. Sakuma Bros., Inc.*, 183 Wn.2d 649, 355 P.3d 258 (2015) was different; as the Dovex brief noted, piece rate workers were not compensated at all for such statutorily-mandated breaks. Nothing in *Demetrio* even hinted at the notion that piece rate compensation *per se* violates Washington wage and hour public policy generally or the MWA specifically.

Washington minimum wage for all hours worked during the pay period, then the employer increases the employee's pay so that h/she receives additional pay equal to minimum wage for all hours worked. Dovex has referred to this process as "grossing up" the employee's wages. This process is recognized in DOLI policy and guidance documents. <http://www.lni.wa.gov/WorkplaceRights/files/policies/esa3.;pdf>; <https://web.archive.org/web/20150905185739/http://www.lni.wa.gov/IPUB/700-171-000.pdf> (last visited July 31, 2017). *See* Appendix.<sup>4</sup>

This averaging process in the trucking context for piece rate compensation has also been held by two respected federal district courts not to violate the MWA. *Helde v. Knight Transp., Inc.*, 2016 WL 1687961 (W.D. Wash. 2016); *Mendis v. Schneider Nat'l Carriers, Inc.*, 2016 WL 6650992 (W.D. Wash. 2016).

Carranza/Martinez's argument that workers are not paid minimum wage for all hours worked, despite the agricultural industry's compliance with DOLI's guidance that ensures compliance with minimum wage laws, defies reason and reality. Carranza/Martinez are essentially requesting the ability to "double dip" by getting paid separately and hourly for work that

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<sup>4</sup> This Court appropriately defers to agency interpretations of statutes, giving "great weight" to them, where the agency is statutorily charged, as is DOLI here, with interpreting and enforcing the statute, so long as the interpretation does not conflict with the Legislature's intent. *Hegwine v. Longview Fibre Co., Inc.*, 162 Wn.2d 340, 349, 172 P.3d 688 (2007). This Court should do so here as to these DOLI directives.

is already compensated at least at the Washington minimum wage and is already calculated into the piece rate compensation system.

(3) The Practical Effect of Petitioners' "Downtime" Will Negatively Impact Workers and Employers Alike

If the Court adopts Carranza/Martinez's position, many unintended consequences of the change in payment practices will ensue. Timekeeping in compliance with the law will become next to impossible if employers attempt to continue paying on a piece rate basis. Supervisors and crew bosses will be required to micromanage every minute of a piece rate worker's work day which will create room for abuses from all sides. Supervisors, orchard managers, crew bosses, dispatchers, and payroll personnel will have significantly added responsibilities for jobs that are already complicated and difficult.

Carranza/Martinez's proposed rule also leaves many unanswered questions that leaves too much room for interpretation and exposes employers to additional lawsuits. What types of activities are included in the piece rate and what must be paid hourly? Do employees get paid hourly for going up and down ladders to pick the fruit and put them into bins? Do employees get paid separately and hourly when they are walking from tree to tree? Do drivers get paid for any activities performed outside the actual operation of a truck? How can the employer possibly track such

movement? Employers need solid answers on these questions in order to ensure compliance with the law and prevent unnecessary and expensive lawsuits.

Under their proposed hybrid piece rate system, workers will not have as much control over their pay and work day as they do now under the current piece rate pay system. Switching to hourly work during harvest would cause workers to lose economic benefits of earning based on their experience and efficiency. If complications of keeping track of the “downtime” prove too difficult and employers are forced to switch to paying workers solely on an hourly basis, this would have a strong negative economic impact on employers because production would go down and workers would lose the motivation to pick the fruit while it is at the right maturity for harvest and packing. Incentive based pay is essential for time sensitive functions such as harvesting fruit within the time necessary before the fruit becomes overripe on the tree.

Dozens of lawsuits have been filed against employers since the *Demetrio* decision. The end result is that the employees have received a small amount of extra money and the lawyers who file these cases have received large payouts. This is exactly the type of conduct that Congress warned about when enacting the FLSA’s Portal to Portal Act. Because of the complexity of what is being proposed by Carranza/Martinez, not only

would it be impossible to properly calculate the back pay owed for time spent “not picking” but these back pay cases could cause smaller growers to go out of business.

If this fundamental alteration of Washington wage and hour laws is to be undertaken, as Carranza/Martinez contemplate, this is a major policy decision for the Legislature, and not this Court. As this Court noted in *Burkhart v. Harrod*, 110 Wn.2d 381, 755 P.2d 759 (1988), major changes in public policy are best left to the Legislature. There, the Court declined to establish social host liability for overserving an intoxicated guest who then harms herself/himself or a third person, stating:

The nature of the judicial role prevents us from capably deciding the relative merits of social host liability. Evaluating the overall merits of social host liability, with its wide sweeping implications, requires a balancing of the costs and benefits for society as a whole, not just the parties of any one case. Yet because judicial decisionmaking is limited to resolving only the issues before the court in any given case, judges are limited in their abilities to obtain the input necessary to make informed decisions on issues of broad societal impact like social host liability. In this regard, we fully concur in the statement that ““of the three branches of government, the judiciary is the least capable of receiving public input and resolving broad public policy questions based on a societal consensus.”” *Bankston v. Brennan*, 507 So. 2d 1385, 1387 (Fla. 1987) (quoting *Shands Teaching Hosp. & Clinics, Inc. v. Smith*, 497 So. 2d 644, 646 (Fla. 1986)). It is for this very reason that public policy usually is declared by the Legislature, and not by the courts. See *Felder v. Butler*, 292 Md. 174, 183, 438 A.2d 494 (1981).

The Legislature is uniquely able to hold hearings, gather crucial information, and learn the full extent of the competing societal interests. It can balance the relative importance of compensating the victims of drunk drivers with the burdens that liability would place on social hosts. Time can be taken to investigate a whole range of issues that are not before the court in any given case, such as the amount of damage caused by drunk drivers, the percentage of that damage for which a social host was at some point involved, the extent to which automobile insurance of all types already provides a remedy to victims, the effect that the added liability would have on homeowners' and renters' insurance rates, the possibilities of alternative remedies such as having drunk drivers contribute to a statewide fund for victims, the possibilities of limiting the host's liability, and proscribing standards of conduct for social hosts. If substantial financial liability is to be attached to the hosting of a social gathering, heretofore considered an innocuous act, it should only be done after careful consideration of all the effects on society and it should be imposed as a comprehensive measure. The Legislature can do this, we cannot.

*Id.* at 385-86. The issue of piece rate compensation similarly merits the exercise of judicial restraint. This type of policy shift, effectively eliminating piece rate compensation structures in Washington, should be made by the Legislature after appropriate public hearings in which testimony can be taken from all affected stakeholders.

#### E. CONCLUSION

The position advanced here by Carranza/Martinez is nothing more than a frontal assault on the piece rate compensation system, a compensation system that some advocacy groups do not like.

Recognizing that they cannot prevail in the Legislature in legitimately seeking the elimination of such a wage and hour policy in that forum, they seek to accomplish a repeal of piece rate compensation in Washington through judicial action. This Court should not allow such a circumvention of the appropriate process for addressing such a fundamental change in major Washington industries like agriculture and trucking.

Employers and managers in these industries comply with the law. Piece rate pay has always been understood as including all time spent on the clock to accomplish the final goal of harvesting the fruit, transporting goods, or performing the tasks upon which the piece rate is based. This has been the industry practice and standard for decades. To now change the manner in which piece rate workers are paid as Carranza/Martinez suggest would be devastating to the agricultural industry: it would harm workers and growers alike. Perhaps those that would struggle to survive this the most, however, are the small growers. Similarly, it would harm the trucking industry, particularly smaller carriers.

Employees prefer the piece rate system as it stands today over that of the hourly pay system. This type of incentive based pay system is necessary for farmers and orchardists to harvest their fruit in the short time frame required and is beneficial to the workers because it allows them to increase their pay two to three times in a short period of time. It is

similarly desirable and necessary for drivers and carriers alike.

This Court should reject the assault by Carranza/Martinez on the piece rate compensation structure in Washington. It should answer “yes” to the first question and not reach the second.

DATED this 31st day of July, 2017.

Respectfully submitted,



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# APPENDIX

## ADMINISTRATIVE POLICY



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

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<b>TITLE:</b>	<b>MINIMUM HOURLY WAGE</b>	<b>NUMBER:</b>	<b>ES.A.3</b>
<b>CHAPTER:</b>	<a href="#">RCW 49.46.020</a> <a href="#">WAC 296-126</a> <a href="#">WAC 296-125</a> <a href="#">WAC 296-131</a>	<b>REPLACES:</b>	<b>ES-008</b>
		<b>ISSUED:</b>	<b>1/2/2002</b>
		<b>ISSUED:</b>	<b>7/15/2014</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.

### Minimum Wage Adjustments

The Minimum Wage Act provides that on September 30, 2000 and on each following year on September 30<sup>th</sup>, 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 will 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 1<sup>st</sup> as calculated by the United States Department of Labor. Each adjusted minimum wage rate takes effect on the following 1<sup>st</sup> of January.

Each minimum wage adjustment will be published in the Washington State Register.

### Minimum Hourly Wage—Adults

Employers must pay each employee who is age 18 or older at least the minimum hourly wage established under [RCW 49.46.020](#). This includes agricultural workers, except as provided in [RCW 49.46.010\(3\)\(a\)](#).

## **Minimum Hourly Wage—Minors**

The department has the authority to set the minimum wage rate for minors by regulation, and did so in [WAC 296-125-043](#), [WAC 296-126-020](#), and [WAC 296-131-117](#), which state that the minimum wage for minors 16- and 17-years of age is equal to that of adults, and the minimum wage for minors under 16 years of age is 85 percent of the applicable adult minimum wage.

## **Minimum Hourly Wage—Agricultural Labor**

Agricultural workers, including minors, are covered under the state minimum wage provisions, except the minimum wage requirement doesn't apply to hand harvest laborers paid piece rate, *and* who commute daily from their permanent residence to the farm *and* who are employed fewer than thirteen weeks in agriculture in the preceding calendar year. See [RCW 49.46.010\(3\)\(a\)](#).

An example of workers within this group might include berry pickers who reside permanently in the area and work only in the berry crop.

The employer has the burden of proving that workers fall within the above exemption.

## **Determining whether an employee has been paid the minimum wage**

In order to determine whether an employee has been paid the statutory minimum hourly wage when the employee is compensated on other than an hourly basis, the following standards should be used:

- If the pay period is weekly, the employee's total weekly earnings are divided by the total weekly hours worked (including hours over 40). Earnings must equal minimum wage for each hour worked. If such earnings do not equal minimum wage, the employer must pay the difference.
- If the regular pay period is not weekly, the employee's total earnings in the pay period are divided by the total number of hours worked in that pay period. The result is the employee's hourly rate of pay. Earnings must equal minimum wage for each hour worked. If such earnings do not equal minimum wage, the employer must pay the difference.
- For employees paid on commission or piecework basis, wholly or in part, other than those employed in bona fide outside sales positions, the commission or piecework earnings earned in each workweek are credited toward the total wage for the pay period. The total wage for that period is determined by dividing the total earnings by the total hours worked; the result must be at least the applicable minimum wage for each hour worked. See [WAC 296-126-021](#).

- Meal periods are considered hours worked if the employee is required to remain on duty or on the employer's premises at the employer's direction subject to call. In such cases, the meal period counts toward total number of hours worked and must be included in the minimum wage determination.
- "Total earnings" is meant to include all compensation received for hours worked in the pay period, as well as any additional payments, i.e., split-shift bonus or stand-by pay.
- See [ES.A.8.1](#) and [ES.A.8.2](#) for overtime calculations for payment of other than a single hourly rate.

**Payments not Included in minimum wage determination:**

- Vacation pay or holiday pay is not considered when computing the minimum wage.
- Gratuities, tips, or service fees are not considered when computing the minimum wage and may not be credited as part the minimum wage. See [WAC 296-126-022](#).



## Agricultural workers:

# When paid by piece rate, are you earning minimum wage? (\$9.32 in 2014)

### Follow these steps to find out:

#### 1. Record the *hours* you work each day.

Each day, write down the actual number of hours you worked. Ask for L&I's free *Your Daily Record of Hours and Units Worked — For Agricultural Workers* (F700-169-909) or use any other method you choose.

#### 2. Record the *units* you complete each day.

A unit may be a bin, tree, pound, etc.

#### 3. Find out what your workweek is.

Your employer sets your seven-day workweek. It may begin on any day of the week and any hour of the day.

#### 4. Add up the total number of *hours* and *units* at the end of your workweek.

#### 5. *Each time you're paid, review your pay statement for total units recorded.*

Does it match the units you recorded for the workweek?

- **Check:** Were you paid for **all units**? Were you paid the promised amount per unit?

#### 6. Calculate your hourly wage.

Divide your gross pay by the total number of hours your **own** record shows you worked in the workweek.

- **Check:** Were you paid at least \$9.32 per hour?

### *José's workweek*

José picks strawberries. His employer promised to pay 50 cents for every pound (unit) of strawberries. Every day, José records how many **hours** he worked and how many **pounds** of strawberries he picks.

**Example**

	Sun. July 14	Mon. July 15	Tues. July 16	Wed. July 17	Thurs. July 18	Fri. July 19	Sat. July 20	Totals
Units (bins/trees/pounds/etc.)	92	125	175	149	183	105	98	927 Total units
Hours (subtract your meal period)	5	8	10	9	10	7	6	55 Total hours

For the workweek above, José was paid \$463.50 (gross wages) for picking 927 pounds (units) of strawberries at 50 cents per pound. His own records show that he worked 55 hours for the week.

#### Piece rate correct? Yes.

- 927 pounds (units) *multiplied* by 50 cents per pound = \$463.50. The employer **did** pay José for all the pounds (units) of strawberries he picked. José was paid the promised rate of 50 cents per pound.

#### Minimum wage paid? No.

- \$463.50 gross wages *divided* by 55 hours worked = \$8.43 per hour. José was not paid at least the minimum wage of \$9.32 per hour. His employer should have paid him \$512.60 gross wages: 55 hours of work multiplied by \$9.32 = \$512.60. José's employer owes him an additional \$49.10.

## Questions workers ask:

### 1. What is the minimum wage?

It's the wage your employer is required to pay you — *at a minimum* — for every hour you work in Washington. It usually changes each year on January 1.

### 2. Must all agricultural workers be paid minimum wage?

No. Minimum wage does not need to be paid if **ALL** the following conditions apply:

- You hand-harvest fruit or vegetables,
- Are paid by piece rate,
- Commute daily from your permanent residence to the farm, and
- Worked fewer than 13 weeks in any agricultural job last year.

### 3. Is the minimum wage different for minors?

Yes. Employers may pay 85% of the minimum wage to minors under age 16.

### 4. Is my employer required to pay me overtime?

No. Employers are not required to pay overtime to agricultural workers.

### 5. What if I work through my meal period? Should I get paid for that time?

Yes. If you are not able to take a full, 30-minute meal period, you do not need to deduct 30 minutes from your hours worked for the day.

### 6. What should I do if my calculations show I *have not* been paid correctly for the work I performed?

You may file a Worker Rights Complaint with L&I. (If you wish, you may check with your employer first to see if there's a payroll mistake.) To ask for a complaint form, call: 1-866-219-7321.

### 7. What if I'm an undocumented worker? May I still file a Worker Rights Complaint?

Yes. L&I will not ask about your immigration status. Workers must be paid at least minimum wage, regardless of immigration status.

## Need more help or information? Need an interpreter free of charge? Just ask!

Phone: 1-866-219-7321, press #1 for Spanish

Visit: Need to visit an L&I office?  
Call the number above and ask for the office location nearest you.

Email: [ESGeneral@Lni.wa.gov](mailto:ESGeneral@Lni.wa.gov)  
If your message is not in English, we will forward it to our bilingual staff.

On the Web: [www.WorkplaceRights.Lni.wa.gov](http://www.WorkplaceRights.Lni.wa.gov)

## Here are some of the publications and forms you may ask for over the phone or during your visit:

- *Worker Rights Complaint form* (F700-148-000)
- *Your Daily Record of Hours and Units Worked — For Agricultural Workers* (F700-169-909)
- *What You Need to Know if You Don't Get Paid* (F700-153-909)
- *What are Your Rights as a Worker?* (F101-061-909)
- *Young Workers in Agriculture* (F700-096-909)
- *FileFast wallet card for workers* (F242-400-000) — if you are injured at work
- *Safety and Health Discrimination Complaint* (F416-011-000) — applicable when safety and health issues are involved

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