

No. 94229-3

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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

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

Petitioners/Plaintiffs,

v.

DOVEX FRUIT COMPANY,

Respondent/Defendant.

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**PLAINTIFFS' REPLY BRIEF ON CERTIFIED QUESTIONS**

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## I. INTRODUCTION

The district court certified to this Court the question of whether Washington law requires agricultural employers to pay pieceworkers for “time spent performing activities *outside of piece-rate picking work.*” Dkt. 41 at 2 (emphasis added). Instead of addressing this specific question, Dovex asserts: “What is in contest is whether Dovex must now separately track and pay for time spent by piece rate employees on non-picking tasks that piece rate employees regularly undertake *in the course of picking the fruit that makes up each piece.*” Answering Br. at 2 (emphasis added). That is incorrect. What is in contest is whether workers are entitled to compensation for time when Dovex requires them to perform work *during which they cannot earn a piece rate*—like attending a meeting, waiting for a weather delay, or traveling to another orchard. This is unquestionably work, and it is not piecework.

In *Lopez Demetrio v. Sakuma Brothers Farms, Inc.*, this Court held that a piece rate “is earned only when the employee is actively producing”—that is, doing work for which piece-rate pay accrues. 183 Wn.2d 649, 652, 355 P.3d 258 (2015). Because no piece-rate pay accrues while workers are on rest breaks, which are considered “hours worked” under Washington law, the Court held that employers who pay by piece rate must separately pay for time spent on rest breaks. *Id.* at 656.

Here, the workers ask the Court to hold that Dovex must pay them for actual work time during which they are unable to earn a piece rate because Dovex has required them to perform non-piecework activities. This work includes time spent traveling between orchards, time spent waiting for weather to clear, time spent transporting ladders to or from a company trailer, and time spent in meetings. It does not include time in which workers are in active production (or in Dovex’s words, “in the course of picking the fruit that makes up each piece”), such as climbing ladders, moving between trees, emptying fruit into bins, or any other work time during which they can earn piece-rate pay.

Under the plain language of the Minimum Wage Act (“MWA”), cases interpreting the MWA, and this Court’s decision in *Lopez Demetrio*, workers are entitled to receive separate compensation at no less than minimum wage for all non-piecework activities performed.

## II. REPLY ARGUMENT

### A. **This Court Addressed and Resolved the Work Time a Piece Rate Covers in *Lopez Demetrio*.**

According to Dovex, the *Lopez Demetrio* decision “did not determine what defined the piece rate in the first instance.” Answering Br. at 9. Dovex is mistaken. This Court succinctly described the work that can be covered by a piece rate in *Lopez Demetrio*: “A piece rate is tied to

the employee's output (for example, per pound of fruit harvested) and *is earned only when the employee is actively producing.*" 183 Wn.2d at 652 (emphasis added). *Id.* at 652. The Court held that "employers must pay employees for rest breaks separate and apart from the piece rate" because rest breaks are "hours worked," and an "all-inclusive piece rate compensates employees for rest breaks by deducting pay from the wages the employee has accumulated that day." *Id.* at 653, 661–662.

Dovex's compensation system has suffered from the same defect. Until at least 2016, workers received no compensation for time spent performing non-piecework activities because no pay accrued unless they were actively producing "pieces" (e.g. bins of apples). Thus, when they attended a meeting, traveled to another orchard, waited during a rain delay, or transported a ladder to a trailer, they were unable to earn money. In fact, during these time periods, they *lost money* from their piece-rate pay because Dovex took some of that pay to finance the non-piecework periods under its workweek-averaging approach.

This Court emphasized in *Lopez Demetrio* that "hourly employees do not finance their own rest breaks in this way, and requiring pieceworkers to do so strips the phrase 'on the employer's time' of any practical meaning." *Id.* at 653. There, as here, the parties presented divergent views of the "hours worked" that could be covered by a piece

rate. The employer argued, as Dovex argues here, that pay for non-piecework “hours worked” is subsumed in the piece rate. *Compare* Sakuma Brothers Farms, Inc’s Responsive Brief on Certified Questions at 7 (No. 90932-6) (“Compensation for rest breaks is included in the piece rate.”), *with* Dovex’s Answering Br. at 15 (“Dovex’s piece rate employment system incorporates regular non-picking tasks within the piece rate.”). Just like the employer in *Lopez Demetrio*, however, Dovex provides no evidence that its piece rates are “calculated to include regular non-picking tasks associated with the actual picking of the piece.” Answering Br. at 15.

Even if Dovex had evidence that the company took into account non-piecework tasks when developing piece rates, such evidence would have no legal relevance. In *Lopez Demetrio*, the Court held it is never permissible to “fold payment for rest breaks” into the “piece rate consistently with the mandate that breaks be paid ‘on the employer’s time.’” 183 Wn.2d at 652–53.<sup>1</sup> Separate pay for “hours worked” in the form of rest breaks was required because “no piece rate wages accumulate during that time.” *Id.* at 654. The same principle applies here: separate pay for hours worked on non-piecework activities is required because no piece-rate wages accumulate during that time.

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<sup>1</sup> Thus, it did not matter that Sakuma said “it sets the piece rate with rest periods in mind.” *Id.* at 654.

Dovex seeks to distinguish *Lopez Demetrio* by emphasizing that the Court stated, “a pieceworker’s right to separate pay for rest breaks springs not from the MWA, but rather from WAC 296-131-020(2)’s mandate that rest breaks be paid ‘on the employer’s time.’” Answering Br. at 9 (quoting *Lopez Demetrio*, 183 Wn.2d at 661). But this statement was part of the Court’s rationale for applying workers’ higher average hourly rate, as opposed to minimum wage, to rest break time. *See Lopez Demetrio*, 183 Wn.2d at 661 (“[T]here is no basis to treat the rate paid for rest breaks ‘on the employer’s time’ differently from the rate paid for other hours worked.”). The Court did not conclude the MWA is inapplicable. To the contrary, the Court recognized the MWA sets the floor: “pay separate from the piece rate must equal *at least* the applicable minimum wage or the pieceworker’s regular rate of pay, whichever is greater.” *Id.* at 663.

**B. The Requirement to Pay Employees for Work During Which They Are Unable to Earn a Piece Rate Is Not an “Arbitrary Bifurcation.”**

By incorrectly describing the basis of the workers’ claims, Dovex asserts that the workers make an “arbitrary bifurcation” between piecework activities and non-piecework activities. Answering Br. at 13 (incorrectly suggesting the workers seek separate pay for “moving ladders” and “moving between orchard rows” during production). The

distinction is not arbitrary. It is logical. The workers seek compensation for work time *during which they are unable to earn a piece rate*.

Under Washington law, employers must pay for all hours worked. *Stevens v. Brink's Home Security, Inc.*, 162 Wn.2d 42, 47, 169 P.3d 473 (2007). Workers paid solely on a piece-rate basis earn money only when “actively producing.” *Lopez Demetrio*, 183 Wn.2d at 652. It is permissible to pay on a piece-rate basis for all time in which the employer allows employees to contribute to piece-rate pay by actively producing. *See id.* The certified questions do not concern this work time. Instead, they concern time in which an employer requires workers to perform *other tasks*—tasks that fall outside the piece-rate picking work. Dkt. 41 at 2.

The workers propose a clear line for determining when activities must be separately compensated: If an employer requires a piece-rate employee to perform work for which no piece rate can be earned because no pieces can be produced, the employer must separately pay for that work. Requiring compensation for time periods in which workers otherwise earn nothing is consistent with the plain language and remedial purpose of the MWA, is fair, and is easy to enforce. The ambiguous standard Dovex proposes, on the other hand, would lead to further abuses of vulnerable low-wage workers and more litigation.

Furthermore, Dovex’s current pay system is inconsistent with the standard it proposes. Dovex maintains that since 2016, the company has separately tracked and paid for time pieceworkers spent transporting ladders to and from company trailers, traveling between orchard blocks, attending meetings, and storing equipment. Dkt. 39 at 3–4. If this work were already covered by the piece rate, then Dovex would have no reason to separately pay for it.

To ensure compliance with the Washington legal requirement that employers pay for all hours worked and provide a workable standard for employers, this Court should hold that employers must separately pay pieceworkers for *all work time during which no piece rate can be earned because no pieces can be produced*. This includes meetings, down time mandated by the employer, wait time mandated by the employer, travel time, and equipment transport time—all during which workers do not have the ability to pick fruit. It does not include time in which workers pick fruit, climb up and down ladders, empty fruit into bins, or move from tree to tree. This distinction follows this Court’s sound logic that a piece rate is based on “output” and “productivity” and earned “only when the employee is actively producing.” *Lopez Demetrio*, 183 Wn.2d at 652–53.

**C. Workers Did Not and Could Not Waive Their Right to Minimum Wage for All Time Worked by “Agreement.”**

Without any evidentiary support, Dovex claims “its piece rate employees agree to compensate all non-picking time via the piece rate.” Answering Br. at 4. The workers never agreed to this arrangement, and Dovex’s own documents suggest this is *not* the working arrangement. Dkt. 39, Ex. 11 (“Worker Information—Terms and Conditions of Employment” document stating workers will receive a “minimum wage” separate from the listed piece rates for “general /miscellaneous work”).

Even if Dovex were able to get workers to agree they will not be paid for non-piecework time, any such agreement would be unavailing. *See Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 861, 864, 93 P.3d 108 (2004) (recognizing employees cannot waive or agree to alter their minimum wage rights because such rights are nonnegotiable). Purported agreements between employees and employers that require the employees to work for less than the minimum wage “per hour” are “no defense” to minimum wage claims. RCW 49.46.090(1).

In *Lopez Demetrio*, this Court noted that while piecework employees and employers can agree to a compensation structure for rest break time, they may only contract “within the scope of the law.” 183 Wn.2d at 663 n.5 (recognizing employer and employee can agree to

separate pay “at a rate higher than the employee’s regular rate”). The law provides that a piece rate is earned only during active production. *Id.* at 652. Thus, any agreement purporting to allow an employer to refuse to pay for time worked outside of active production is “no defense” to a minimum wage claim. *See* RCW 49.46.090(1).

**D. The MWA Does Not Allow an Employer to Use Piece-Rate Pay Earned During Active Production to Offset the Minimum Wage Due for Other Work Time.**

When interpreting a statute, the Court’s goal is “to effectuate the legislature’s intent.” *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846, 850 (2007). “If the statute’s meaning is plain, [the Court] gives effect to that plain meaning as the expression of the legislature’s intent.” *Id.* “Language is unambiguous if it has only one *reasonable* interpretation.” *Lopez Demetrio*, 183 Wn.2d at 655–56 (“While Sakuma’s suggestion that WAC 296-131-020(2) allows an all-inclusive piece rate is perhaps a conceivable interpretation . . . it is not a reasonable one.”).

Dovex asserts that RCW 49.46.020 is unambiguous. The workers agree. The statute states an employer must pay no less than minimum wage “per hour” for each hour worked. RCW 49.46.020; *see also* Wash. DLI Admin Policy ES.A.5 at 1 (2002) (recognizing employers must pay minimum wage “for each hour of employment”). The legislature could have said employers must pay no less than minimum wage “per week,” as

Dovex asserts should be the compliance measure, but the legislature chose instead to explicitly use a “per hour” measure. *See Alvarez v. IBP, Inc.*, 339 F.3d 894, 912 (9th Cir. 2003) (recognizing MWA omits phrase “in any workweek,” which “is contained in the relevant portion of the FLSA”).

Even if the MWA measure of compliance were ambiguous, statutes are “interpreted to further, not frustrate, their intended purpose.” *Bostain*, 159 Wn.2d at 712. The MWA is remedial legislation intended to protect employees; therefore, it must be liberally construed for the benefit of employees. *Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d 851, 870, 281 P.3d 289 (2012); *see also Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000) (recognizing Washington’s “long and proud history of being a pioneer in the protection of employee rights”). A liberal construction of the MWA favors the per-hour approach over the workweek approach because the per-hour approach ensures employees will be paid for all time worked, thereby increasing employee wages. Because the MWA is remedial, “its exemptions must be ‘narrowly construed and applied only to situations which are plainly and unmistakably consistent with the terms and spirit of the legislation.’” *Bostain*, 159 Wn.2d at 712 (quoting *Drinkwitz*, 140 Wn.2d at 301). Dovex’s interpretation of RCW 49.46.020 to mean

employers can refuse to pay for certain work time so long as total wages for other work time result in a *weekly average* of minimum wage is “neither plainly nor unmistakably consistent with the language” of RCW 49.46.020 “or the spirit of the MWA’s minimum wage levels for Washington employees.” *Id.* Furthermore, no Washington appellate case has approved the use of an averaging framework for a worker’s minimum wage claim based on unpaid hours worked outside of piecework.

Dovex incorrectly relies on *Inniss v. Tandy Corp.*, 141 Wn.2d 517, 7 P.3d 807 (2000), to support its assertion that an employer can choose to include any work time in its piece-rate compensation. *Inniss* concerned the “regular rate” determination for *overtime pay* calculations under RCW 49.46.130 as it relates to *salaried employees* with a fluctuating workweek. *See Inniss*, 141 Wn.2d at 523–24, 534. Here, the workers are not salaried employees, and calculations of regular rates for overtime are not at issue. Thus, *Inniss* has no relevance. Indeed, the determination of the proper “regular rate” for overtime purposes under RCW 49.46.130 presents a different question than what is required to comply with the minimum hourly wage requirement of RCW 49.46.020 in the first place.

Instead of paying workers no less than minimum wage for hours worked outside of piecework, Dovex purported to compensate this work time with per-bin piece-rate compensation paid for picking time. But

workers earned per-bin pay only while in the process of picking apples and emptying them into bins. As soon as workers ended picking work to attend a meeting, travel to another orchard, or transport ladders to a trailer, they stopped earning money. Because pay earned during active production may not be used as an offset for other unpaid time, Dovex violated the MWA. *See Lopez Demetrio*, 183 Wn.2d at 652–53.

**E. Dovex’s “Only Hour Worked” Analogy Ignores the Reality of Its Pay System and Lacks Support in Washington Law.**

In a convoluted attempt to suggest compliance with the MWA, Dovex states that if one of its workers worked only one hour and then quit, the worker would receive minimum wage for that hour. Answering Br. at 25. That may or may not be the case, but the hypothetical does not address the issue underlying the certified questions—Dovex’s practice of deducting pay from the piece-rate wages each worker has accumulated in an attempt to show it is paying for other hours in which no pay accrues.

It is unclear whether Dovex would actually pay workers if they showed up for work but were unable to pick fruit and never worked for Dovex again. Nothing in the record shows Dovex has paid workers in these circumstances, and Dovex’s own admission suggests the opposite. *See* Dkt. 39 at 3 (Dovex’s admission that it “did not pay” a “separate rate of at least minimum wage for all non-piece-rate work performed”). Thus,

the “only hour worked” analogy may be based on a false premise.<sup>2</sup>

Even if true, Dovex’s analogy ignores the specific MWA issue underlying the certified questions. The certified questions concern the obligation to pay “pieceworkers for time spent performing activities outside of piece-rate picking work.” In Dovex’s analogy, the worker is not a pieceworker because he did not perform piecework. Indeed, Dovex claims it would have paid the worker on an hourly basis for one hour of work. *Id.* Because the certified questions do not concern time periods in which Dovex pays workers on an hourly basis, the analogy is not relevant.

A more apt analogy for the certified questions would be one in which a worker in 2015 shows up to work at 8:00 a.m. but due to rain, Dovex does not permit him to pick fruit. Instead, Dovex tells the worker to stay at the worksite and wait until the rain stops. The rain stops at 9:00 a.m., and the worker begins picking fruit. The worker continues picking fruit until 10:00 a.m., earning \$19 in piece-rate wages for the hour. At that point, Dovex tells the worker to go home because the rain starts again, and the worker does not work at all the rest of the week.

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<sup>2</sup> Dovex also asserts, “[t]he parties acknowledge that Dovex tracks and records all time a piece rate employee works each day.” Answering Br. at 22. This is incorrect. The workers do not “acknowledge” this; they deny this. One of the workers’ central claims is that Dovex violated Washington and federal law by failing to accurately track and record all time worked. *See* Dkt. 39, Ex. 1 (Plaintiffs’ Class Action Complaint) at 13–14, 17–18. Instead, the workers allege the company relied on inaccurate and rounded estimates. *Id.*

Under Dovex’s compensation system, even though the worker earned \$19 in piece-rate pay for one hour of active production, Dovex would deduct \$9.47 (the 2015 minimum wage) from the worker’s piece-rate pay to cover its obligations to pay for the otherwise unpaid hour of wait time. If the worker had control of his ability to pick fruit during that first hour, he would have likely earned around \$38 for the two hours, but because Dovex did not permit him to pick fruit, the worker only received \$19 for the hour of picking and nothing for the other hour. In effect, Dovex required the worker to finance one hour of non-piecework time using pay received from the other hour of piecework.

Furthermore, *SPEEA*, *Alvarez*, and *Stevens* do not support Dovex’s hypothetical “only hour worked” test for MWA compliance. Instead, under the tests established in those cases, courts determine minimum wage compliance by looking at the allegedly unpaid hours at issue, determining whether such hours constitute “hours worked,” and asking whether the employer *actually* paid any wage for those specific hours. *Seattle Prof’l Eng’g Emps. Ass’n v. Boeing Company* (“*SPEEA*”), 139 Wn.2d 824, 827, 835 n.6, 991 P.2d 1126 (2000); *Alvarez*, 339 F.3d at 912–14; *Stevens*, 162 Wn.2d at 47–50. In *SPEEA*, the employer failed to pay any wage for time spent in orientation. 139 Wn.2d at 835 n.6. In *Alvarez*, the employer failed to pay any wage for donning and doffing time. 339 F.3d at 899–

900. And in *Stevens*, the employer failed to pay any wage for certain drive time. 162 Wn.2d at 47–50. Here, Dovex failed to pay any wage for meetings, travel between orchards, transporting ladders to and from company trailers, and wait time. No one contests that these activities—like the unpaid activities in *SPEEA*, *Alvarez*, and *Stevens*—constitute compensable work hours.

Dovex asserts that in *SPEEA*, “[b]ecause Boeing did not pay for each hour worked, this Court did not—and had no need to—consider whether or not Boeing paid its employees at an adequate rate via workweek averaging.” Answering Br. at 27. The workers agree. When an employer refuses to pay *any wage* for certain work time, it is a violation of the MWA regardless of whether the employer pays a workweek average of minimum wage when taking into account compensation received for other hours worked. Because Dovex did not pay *any wage* for travel between orchards, waiting time, transporting ladders to or from the company trailer, and meetings, this Court should reach the same result as it did in *SPEEA*. As Dovex admits, there is “no need to[] consider whether or not [it] paid its employees at an adequate rate via workweek averaging” if it did not “pay for each hour worked” in the first place. Answering Br. at 27.

Dovex also recognizes that *Stevens* comes down to this: “because

Brink's failed to pay for drive time, it failed to comply with the MWA." Answering Br. at 28. Here, Dovex similarly failed to pay for drive time when its workers traveled between orchards during the work day. As in *Stevens*, this practice fails to comply with the MWA.

The opinions in *SPEEA*, *Alvarez*, and *Stevens* did not address whether workers' other pay was sufficient to cover minimum wage on a workweek basis because that is not the standard in Washington. This Court should therefore reject Dovex's invitation to read into the case law a restrictive view of the MWA's protections that would allow an employer to refuse to pay for certain hours worked so long as pay from other hours worked resulted in a workweek average of minimum wage.

**F. WAC 296-126-021 Does Not Govern Agricultural Workers and Even if It Did, the Regulation Does Not Exempt Employers from the Obligation to Pay for All Hours Worked.**

Dovex admits that WAC 296-126-021 is inapplicable to agricultural employees and thus does not govern the company's obligations to its workers. *See* Answering Br. at 19, 37; WAC 296-126-001(2)(c) (excluding "agricultural labor" from WAC 296-126). As anticipated, however, Dovex continues to argue the regulation is "persuasive authority" for the proposition that Washington employers can refuse to compensate piece-rate employees for non-production work hours. *See* Answering Br. at 37. Dovex is wrong for several reasons.

First, the workers are pursuing their claims under the MWA, and the administrative rules that implement the MWA are set forth in WAC 296-128. *See, e.g.*, WAC 296-128-010 (establishing rules for employers of “employees who are subject to RCW 49.46.020”). WAC 296-126, by comparison, implements the Industrial Welfare Act, RCW 49.12. *See* WAC 296-126-001 (“These rules apply to employers and employees in the state as defined in RCW 49.12.005(3) and (4).”). Thus, WAC 296-126-021 has no bearing on the operation of the MWA. And notably, there are no provisions in WAC 296-128 comparable to WAC 296-126-021.

Second, even if WAC 296-126-021 were considered for purposes of administering the MWA, “an administrative rule is invalid and unenforceable if it contravenes the statute which it implements.” *Bostain*, 159 Wn.2d at 713. Under RCW 49.46.020, employers must compensate employees for each and every hour worked. *See Stevens*, 162 Wn.2d at 47–50. As this Court made clear in *Lopez Demetrio*, a piece rate “is earned only when the employee is actively producing.” 183 Wn.2d at 652. Thus, when an employer pays on a piece-rate basis for production work completed over a certain amount of time but fails to pay anything for additional hours of non-production work, no compensation is being paid for those non-production hours. To the extent WAC 296-126-021 allows this to occur, it contravenes the MWA and is thus unenforceable. *See*

*Bostain*, 159 Wn.2d at 713–16 (holding administrative rule allowing employer to avoid paying for all hours worked contravenes MWA).

Third, WAC 296-126-021 does *not* authorize employers to avoid paying piece-rate employees for non-production hours worked. Rather, the purpose of the regulation is to ensure that piece-rate pay, which by definition is tied to units other than time, is sufficient to cover piece-rate production hours. Dovex argues the regulation goes much further, exempting piecework employers from the obligation to pay for all hours worked. That interpretation, however, is inconsistent with RCW 49.46.020 and must be rejected. *See Drinkwitz*, 140 Wn.2d at 301 (noting that exemptions from MWA are narrowly construed and allowed only when “unmistakably consistent with the terms and spirit” of the statute).

Finally, WAC 296-126-021 contemplates employers will pay separately for work performed on some basis other than piecework. *See* WAC 296-126-021(1). The administrative policy on which Dovex relies underscores this point, providing that “total earnings” (or “total wages” under WAC 296-126-021) “is meant to include all compensation received for *hours worked* in the pay period . . . .” Wash. DLI Admin. Policy ES.A.3 at 3 (2014) (emphasis added). “Hours worked” means “all work requested, suffered, permitted or allowed” and includes “meeting time, wait time,” and “preparatory and concluding time.” Wash. DLI Admin.

Policy ES.C.2 at 1 (2008). Simply put, “[i]f the work is performed, it must be paid.” *Id.* The fallacy of Dovex’s argument is that the company failed to compensate employees for all work performed because piece-rate pay by definition compensates only for production work, not other hours worked. *See Lopez Demetrio* 183 Wn.2d at 653, 656, 661-62.<sup>3</sup>

**G. FLSA Workweek Averaging Authorities Are Inapposite Because They Are Based on a Different Statutory Framework, but California Law is Persuasive Because Its Statutory Language Tracks Washington Law.**

Dovex’s blanket statement that the MWA is based on the FLSA is misleading. While certain parts of the MWA are based on the FLSA, the minimum hourly wage provision in RCW 49.46.020 is not. Unlike the FLSA, RCW 49.46.020 has no reference to the “workweek.” *See Alvarez*, 339 F.3d at 912–13; RCW 49.46.020. Although *some* federal courts have found that the FLSA uses a workweek-averaging approach to minimum

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<sup>3</sup> Dovex relies on unpublished orders from two federal cases involving non-agricultural workers to support its position regarding WAC 296-126-021: *Helde v. Knight Transp., Inc.*, C12-0904-RSL, 2016 WL 1687961 (W.D. Wash. Apr. 26, 2016), and *Mendis v. Schneider Nat’l Carriers Inc.*, C15-0144-JCC, 2016 WL 6650992 (W.D. Wash. Nov. 10, 2016). Answering Br. at 42. Those decisions should be rejected for the reasons set forth above. Furthermore, the courts were wrong to conclude that because workweek averaging is used to calculate “regular rates” for purposes of overtime pay, employers may deduct from piece-rate pay to compensate for non-production hours worked. *See Helde*, 2016 WL 6650992, at \*1; *Mendis*, 2016 WL 6650992, at \*3. The obligation to pay for each hour worked is separate from (and logically antecedent to) the calculation of a “regular rate” for purposes of determining overtime compensation, and employees may not waive their basic right to be paid for each hour worked. *See Schneider v. Snyder’s Foods, Inc.*, 95 Wn. App. 399, 402, 976 P.2d 134 (1999) (holding “rights provided by the MWA may not be waived”). Lastly, “a federal district court case . . . is not controlling on this court when state substantive law is interpreted.” *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 823-24, 881 P.2d 986 (1994).

wage compliance,<sup>4</sup> Washington employs a per-hour standard. *See id.*

As this Court has recognized, “[t]he FLSA is intended to be a ‘floor’ below which employers may not drop. It is not a ‘ceiling’ on benefits or terms and conditions of employment.” *See Drinkwitz*, 140 Wn.2d at 298. Indeed, “the MWA and FLSA are not identical and [this Court is] not bound by such authority.” *Id.* Because the MWA is more protective of the worker in terms of minimum wage requirements, Washington employers must comply with the per-hour approach of the MWA. *See Wash. DLI Admin. Policy ES.A.1 at 2 (2014)* (“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.”); *Wash. DLI Admin. Policy ES.A.7 (2002) (same)*.

The decisions in *Drinkwitz* and *Anfinson* reveal that this Court relies on FLSA authority only where the FLSA statutory language matches the MWA *and* the use of FLSA authority would be consistent with Washington’s liberal construction of the MWA for the benefit of workers. *See Anfinson*, 174 Wn.2d at 868–70; *Drinkwitz*, 140 Wn.2d at 300, 305–06. Dovex incorrectly relies on *Anfinson* to support use of FLSA

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<sup>4</sup> Other federal courts have persuasively pointed out that workweek averaging is inappropriate even under the FLSA. *See, e.g., Norceide v. Cambridge Health Alliance*, 814 F. Supp. 2d 17, 22–25 (D. Mass. 2011).

workweek averaging.<sup>5</sup> In *Anfinson*, this Court looked to FLSA case law to determine the meaning of “employee” and “employ” under the MWA because the “definitions of ‘employee’ and ‘employ’ are functionally identical under the two acts.” *Anfinson*, 174 Wn.2d at 868–69. Here, there are key differences between the FLSA’s minimum wage provision (which uses “in any workweek”) and the MWA’s provision (which uses “per hour”). *See Alvarez*, 339 F.3d at 912–13; 29 U.S.C. § 206(a); RCW 49.46.020. Therefore, this Court should not rely on FLSA authority to determine Washington’s minimum hourly wage compliance measure.

Dovex also relies on a seldom-cited subsection of an FLSA interpretive guideline issued by the Department of Labor, 29 C.F.R. § 778.318, for which Washington has no parallel provision. But Dovex quotes only subsection (c) of that guideline. The overall thrust of the regulation reflects the opposite of Dovex’s argument. Subsection (a) explicitly *prohibits* “agreements” under which employers pay employees only for “productive” time and not for “unproductive” time:

Some agreements provide for payment only for the hours spent in productive work; the work hours spent in waiting time, time spent in travel on the employer’s behalf or similar nonproductive time are not made compensable and in some cases are neither counted nor compensated.

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<sup>5</sup> Dovex also relies on *Ballaris v. Wacker Siltronic Corp.*, but that case holds just the opposite of what Dovex is arguing. 370 F.3d 901, 914 (9th Cir. 2004) (“Crediting money already due an employee for some other reason against the wage he is owed is not paying that employee the compensation to which he is entitled by statute.”).

Payment pursuant to such an agreement will not comply with the Act; such nonproductive working hours must be counted *and paid for*.

29 C.F.R. § 778.318(a) (emphasis added). This is consistent with the MWA's per-hour measure. The regulation provides that even under the FLSA, employers cannot do what Dovex did: pay employees for some types of work activity but not others. Subsection (c), on which Dovex relies, suggests a narrow exception to the requirement to separately pay for nonproductive work time under the FLSA where there is "an agreement of the parties" that pay earned at piece rates is intended to compensate for all hours worked. 29 C.F.R. § 778.318(c). Even if FLSA authority were relevant here, this exception would have no application because there is no "agreement of the parties" that "work hours spent in waiting time, time spent in travel on the employer's behalf or similar nonproductive time" are covered by pay earned at piece rates. 29 C.F.R. § 778.318(a), (c).

Unlike the FLSA, California's minimum wage law is nearly verbatim to RCW 49.46.020. The California law provides: "Every employer shall pay to each employee wages not less than . . . [the minimum wage] per hour for all hours worked." *Armenta v. Osmose, Inc.*, 135 Cal. App. 4th 314, 323–24, 37 Cal. Rptr. 3d 460, 467 (Cal. Ct. App. 2005) (quoting California Wage Order No. 4). The MWA provides: "every employer shall pay to each of his or her employees . . . not less

than [the minimum hourly wage] per hour.” RCW 49.46.020. Dovex suggests the inclusion of “all hours worked” in the California law makes that law different than the MWA. Answering Br. at 41. But this Court has already held that the MWA requires payment of no less than minimum wage for all “hours worked,” which is broadly defined to mean “all hours during which the employee is authorized or required to be on duty on the employer’s premises or a prescribed work place.” *Stevens*, 162 Wn.2d at 47 (quoting WAC 296-126-002(8)). Thus, Washington law, like California law, requires payment of “not less than” minimum wage “per hour” for all “hours worked.” As a result, the California cases holding employers must separately pay workers for “nonproductive” hours worked outside of piecework are highly persuasive. *See* Opening Br. at 22–25.

**H. Dovex’s Post-Lawsuit Changes Show Employers Can Both Pay on a Piece-Rate Basis for Piecework and Pay for Non-Piecework Hours Worked.**

Dovex speculates that the workers want to “get rid of” or “dismantle” piece-rate employment for agricultural workers. Answering Br. at 46. Contrary to Dovex’s speculation, what the workers want is to be paid for all the hours they work in which they cannot earn a piece rate.

The suggestion that employers will not be able to pay piece-rate compensation if this Court rules in favor of the workers is contradicted by Dovex’s own practices. Although Dovex states it “is not possible for

employers to separately track and pay for” non-piecework time, Dovex asserted in the district court that “on or about January 12, 2016 . . . it began separately tracking and separately paying for time spent doing [non-piecework] activities.” Dkt. 39 at 4 (citing Ex. 7). Thus, it is possible.

Tracking and paying for hours worked is not a novel concept. Every Washington employer is required to track the time employees work and the pay they receive for that work time. RCW 49.46.070.

Agricultural employers are not exempt from this requirement. *See id.* Dovex states it already tracks the start and stop time of employees each day.<sup>6</sup> Since 2016, Dovex states it has separately tracked time spent in non-piecework activities at issue here. Dkt. 39 at 4–6. Thus, separately tracking this work time is administratively feasible. To ensure accuracy, an employer could ask workers to verify their work time in these activities each day. Alternatively, if an employer did not want to track the specific time in each non-piecework activity, it could calculate the estimated time of each task and pay flat rates for “travel time,” “ladder transport time,” “meeting time,” and (using its existing code) “Piece Rate Down Time.” *See* Dkt. 39, Ex. 9. So long as the employer ensures these rates equal no less than minimum wage for the amount of time spent on each respective

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<sup>6</sup> The workers allege that Dovex failed to *accurately* track this time, but it can be done.

activity, this would be entirely permissible.<sup>7</sup>

### III. CONCLUSION

The workers ask this Court to uphold the right of pieceworkers to be separately paid for work time in which they are unable to earn a piece rate. Dovex asks this Court to hold that farm workers do not have that protection under the MWA. Dovex's position is inconsistent with the plain language of RCW 49.46.020, the cases that have interpreted RCW 49.46.020, this Court's opinion in *Lopez Demetrio*, and the liberal construction principles that apply to remedial employment legislation. Accordingly, the Court should hold that Washington law requires agricultural employers to separately pay their pieceworkers for work time in which they cannot earn a piece rate. The Court should also hold that the rate for such work time must be based on either the minimum wage or the agreed hourly rate for non-piecework time, whichever is higher.

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<sup>7</sup> These are merely suggestions. The workers are confident employers can determine their own methods to track and pay for work time spent outside of piecework activities.

RESPECTFULLY SUBMITTED AND DATED this 12th day of  
June, 2017.

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**CERTIFICATE OF SERVICE**

I certify that on June 12, 2017, I caused a true and correct copy of the foregoing to be filed with the Washington Supreme Court and copies were served to the following counsel of record via email (per agreement of the parties):

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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>PAYMENT OF WAGES LESS THAN MINIMUM WAGE—EMPLOYER'S LIABILITY</b>	<b>NUMBER:</b>	<b>ES.A.5</b>
<b>CHAPTER:</b>	<b><u>RCW 49.46.090</u></b>	<b>REPLACES:</b>	<b>ES-010</b>
		<b>ISSUED:</b>	<b>1/2/2002</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.

**An employer must pay minimum wage, regardless of any employee agreements to work for less.** RCW 49.46.020 is a minimum guarantee to all employees covered by the Washington Minimum Wage Act (MWA) for each hour of employment, and RCW 49.46.130 is the guarantee of overtime pay equal to one and one-half the regular rate of pay for hours worked in excess of 40 per week.

RCW 49.46.090 prohibits agreements entered into, individually or collectively, between an employee and an employer that result in the employee being paid less than the applicable minimum wage pursuant to the MWA. If such agreements are entered into, the agreement does not relieve an employer of the legal responsibility to pay minimum wage, and the employer cannot use the agreement as a defense to legal action to recover unpaid wages.

Deductions from wages may be allowed in certain situations under RCW 49.48.010 and RCW 49.52.060. Deductions that meet the criteria of RCW 49.52.060 are permissible, even when the result is a net pay of less than the minimum hourly rate, such as when required by state or federal law, for medical insurance, or for voluntary deductions accruing to the benefit of the employee. Examples of voluntary deductions include employee agreement for repayment of loans, personal purchases, and savings accounts or bonds. Because the employee has agreed to use his or her paycheck as a mechanism for spending money that would have been spent regardless, there is no violation even if the employee's *net* pay is less than the minimum wage. Regardless of

deductions, an employee's *gross* pay must always be at least the minimum rate per hour.

**Any employee who is paid less than minimum wage, or less than the agreed wage rate, may file a complaint with the department.** RCW 49.46.090(2) states that any employee paid less "than the wages to which he [or she] is entitled under or by virtue" of the MWA, may file a wage claim with the Department of Labor and Industries pursuant to RCW 49.48.040. This means that an employee is entitled to at least the minimum wage. If a higher hourly wage has been negotiated, the employee is entitled to payment at the rate for all hours worked subject to the agreement. The authority to make such a claim is not the MWA but rather is RCW 49.52.050, unless the claim is for overtime, which falls under RCW 49.46.130.

According to the Washington State Supreme Court, in *Seattle Professional Engineering Employees Association (SPEEA) v. Boeing*, 139 Wn.2d 824 (2000), the MWA can be used only to claim unpaid wages of up to the statutory minimum hourly rate. If the agreed rate of wage is higher than the minimum wage and the employer fails to pay that rate of wage, the action to recover unpaid wages, above the minimum wage, by the employee or by the department on the employee's behalf, must be brought under RCW 49.52.050 (and RCW 49.52.070 to seek double damages and attorney fees). However, according to the Court in *SPEEA v. Boeing*, unpaid overtime, in any amount, can be claimed under the MWA.

The department is not required to take a formal assignment in order to bring an action to recover unpaid wages on behalf of the employee. A written wage claim is sufficient to initiate legal action on the employee's behalf. The authority for this can be found in *Department of Labor and Industries v. Overnite Transportation*, 67 Wn.App.23 (1992).



## 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>
		<b>REVISED:</b>	<b>7/15/2014</b>

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#### **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(3)(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(3). 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.

(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.



STATE OF WASHINGTON  
DEPARTMENT OF LABOR AND INDUSTRIES  
EMPLOYMENT STANDARDS

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<b>TITLE:</b>	<b>MORE FAVORABLE LAWS</b>	<b>NUMBER:</b>	<b>ES.A.7</b>
<b>CHAPTER:</b>	<b><u>RCW 49.46.120</u></b>	<b>REPLACES:</b>	<b>ES-012</b>
		<b>ISSUED:</b>	<b>1/2/2002</b>

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### **When is federal law applied over state law?**

If there are differences between federal and state laws or rules governing wages, hours and working conditions, the standard more favorable or more protective to the employee is applied. Individuals with questions regarding whether federal labor law provides more favorable standards must obtain clarification of the Fair Labor Standards Act (FLSA) from the United States Department of Labor.

Examples of more protective standards in federal law include compensatory time agreements and overtime for workers who reside or sleep on the employer's premises. For example, under federal law, compensatory time agreements in lieu of premium pay are not allowed in private sector businesses. Employees must be paid in wages for all overtime work. Additionally, under federal law, individuals who are required to sleep or reside at their place of business may be subject to minimum wages and overtime pay.



## 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 enroute.
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.

## 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>	<b><u>RCW 49.46.020</u></b> <b><u>WAC 296-126</u></b> <b><u>WAC 296-125</u></b> <b><u>WAC 296-131</u></b>	<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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### 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.

**FRANK FREED SUBIT & THOMAS LLP**

**June 12, 2017 - 2:20 PM**

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