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NO. 58039-6-1
Superior Court Case No. 02-2-32464-9 SEA

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

DAVID STEVENS, DONALD A. GOINES AND JEFFREY R.
PORTER, ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents,

v.

BRINK'S HOME SECURITY, INC.,

Appellant.

BRIEF OF RESPONDENTS

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FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2006 OCT 27 PM 3:42

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I. INTRODUCTION

This appeal arises from a certified class action that was tried before a jury in King County Superior Court (Judge Palmer Robinson, presiding) from January 30 through February 10, 2006. This case involves the failure of Brink's Home Security, Inc. ("Brink's" or "employer") to pay its installation and service technicians ("employees" or "class members") overtime and straight-time wages for all work performed, as required by the Washington Minimum Wage Act ("MWA"), RCW 49.46. Specifically, Brink's failed and refused, on a class-wide basis, to pay for five different types of "off-the-clock" work activities. As a consequence, the 12-person jury awarded the sixty-nine (69) members of the class a total of \$751,020 in back pay damages owed for the class period of November 19, 1999 through July 21, 2005. CP 886-889 (Verdict).

Brink's challenges two pre-trial rulings on motions for partial summary judgment, as well as the trial court's entry of the judgment and its order awarding attorneys fees and costs. The principal issue on appeal arises from the trial court's September 13, 2005 partial summary judgment order on employees' "drive time" claim. CP 613-616 (Order). The trial court found that "drive time" (*i.e.*, time spent by class members driving company trucks from their homes to the first work site of the day and from the last work site back to their homes at

the end of the day) constitutes “hours worked” and must be paid.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Whether drive time hours constitute “hours worked” under the Washington MWA, RCW 49.46 and WAC 296-126-002(8)?

B. Whether there was a sufficient basis for the trial court’s drive time ruling on a class-wide basis?

C. Whether pre-judgment interest should be awarded where the jury awarded back pay damages based on data from which it calculated hours worked?

D. Whether the pre-judgment and post-judgment interest rate is 12% per annum, as provided under RCW 4.56.110(4) and 19.52.020, because the drive time claim is not based on “tortious conduct” as used in RCW 4.56.110(3)?

E. Whether the employees are entitled to their fees and expenses in connection with this appeal pursuant to RAP 18.1, RCW 49.46.090(1), and RCW 49.48.030?

III. STATEMENT OF THE CASE

A. Factual Background.

1. The Technicians And Brink’s Home Security, Inc.

The class of employees is comprised of 69 installation and service technicians who worked for Brink’s from November 1999

through July 21, 2005. These technicians install and repair home security systems throughout Western Washington.

The employees allege that Brink's required them to perform six different categories of work without pay, including: (1) driving company trucks from their homes to their first job sites and from their last job sites back to their homes (*i.e.*, the "drive time" claim¹); (2) completing paperwork at home; (3) performing work duties prior to the weekly meeting at Brink's' Kent branch office; (4) cleaning the company trucks; (5) time spent telephoning customers during weeks as the on-call technician; and (6) arranging oil changes for the trucks. CP 10-17 (First Amended Complaint). With exception of the oil change claim, the employees prevailed on all of these off-the-clock claims. Brink's challenges only the liability finding on the drive time claim.

2. Technician Drive Time Is Not Normal Commuting.

Brink's' appeal focuses on the contention that technician drive time is ordinary commuting time and therefore not compensable. It is not. Unlike ordinary commuting, which simply delivers the employee to his place of work and during which the employee is free to engage in personal activities, the technicians' drive time is strictly controlled by the

¹ Brink's uses the term "commuting time" but the class members will instead refer herein to "drive time," which is the term used by the company in its own policies (CP 71, 72, & 73), as well as by the trial court below. *E.g.*, CP 613 (Order).

company and is necessary to transport the tools and equipment required to perform work functions.

The trucks provided by Brink's and driven by class members look like this:



Trial Ex. 6, 9; *see also* Trial Ex. 8.

Brink's policies make it absolutely clear that the trucks are not to be used for anything but Brink's business at all times. For example, technicians are instructed in writing that the trucks "are to be used for company business only," and "[o]nly employees of Brink's Home Security are authorized passengers in company vehicles." CP 74. In other words, technicians may not do what normal commuters do. They may not drive their children to school on their way to work, or stop to eat or go shopping in the truck on their way home at night. In addition, they are instructed to always "use seat belts," "not park haphazardly," to "lock the vehicle at all times," and never to carry alcohol in the vehicle. *Id.*

3. Brink's Drive Time Policies.

Brink's employed two different drive time policies during the class period. Prior to September 26, 2002 and after January 12, 2005, Brink's paid technicians who took their trucks home only for drive time that exceeded 45 minutes between their homes and the first or last customers of the day. CP 71, 73 (drive time policies). Technicians who parked their trucks at the office were paid for all drive time between the office and their first and last customers of the day. All technicians were paid for drive time between job sites during the day.

Between September 26, 2002 and January 12, 2005 (referred to herein as the "interim period"), the company significantly reduced the compensated drive time for home-dispatched technicians (*i.e.*, a technician who parked the Brink's truck at his home). CP 72. Under the interim policy, a home-based technician was paid for drive time to and from the first and last jobs of the day only to the extent that the job was more than 45 minutes from *either* the technician's home *or* the Brink's office, *whichever was closer*. *Id.* As a consequence, substantially less drive time was paid under the interim policy. It is undisputed, however, that class members were not paid for at least a portion of their drive times throughout the class period.

There also is no dispute that drive time from home to the office is not compensable, because of the difference between ordinary commuting

and work performed by driving the truck to a customer's home. When a technician reported to the office for staff meetings or to pick up equipment, he did not carry out the necessary task of transporting tools and equipment to the customer's location. Instead, he engaged in normal commuting, or merely transporting himself to his office. However, when the technician left for the customer's home, from either the office or his own residence, he engaged in the transport of essential materials, an integral part of his work function.

4. The Transport Of Company Trucks To Work Sites Is Necessary For The Performance Of The Work.

The record demonstrates that driving the trucks to customers' homes is necessary to performance of the work and therefore should be treated as compensable work. There is no rational basis for the company to compensate technicians for this work some of the time (when the drives originate at the office) and not other times (when the drives originate from technician homes). In either instance, the result accomplished is the same: the trucks with their equipment are being brought to a work site.

5. Brink's Managers Admit That The Home Dispatch Option Facilitates The Progress Of The Work.

Brink's managers and supervisors in the Kent branch acknowledge that the company benefits from having technicians take their work trucks home. While Brink's points to isolated comments

that allegedly are to the contrary, these admissions given under oath speak for themselves.

For example, Kent Branch Manager Skip Keeley testified:

Q [by class counsel]: Is there an attempt to select jobs for them [technicians] that are in their general area, geographic area?

A [by Keeley] Sure, yes.

Q And that is done, is it not, for both the convenience of the technicians, but more importantly, to make sure that more jobs are done by that technician within a geographic area?

A Sure, and safety....

A I believe if you have a technician leave his house and try to keep him near his home, it's better obviously better for everybody.

Q Including the company?

A Sure.

CP 96 (Keeley Dep. 68:22-69:25). Supervisor Paul Pringle made the same point:

Q: And so in scheduling those things, in allocating the jobs among those people [technicians], you pay some attention to where the jobs were relative to where the people live?

A: Oh, yeah.

Q: Particularly if they're starting from their home, right?

A: Yes.

Q: Was that also true when you were an installer, would you typically pull more jobs closer to where you lived?

A: ...Typically, if you've got a job in Tenino, you've got Rick who lives in Tenino. He's going to draw that job. It makes sense for us, if the guy lives next to the job, put him on that job.

Q: Then you get more productivity out of the person?

A: They you get more productivity out of the person. You don't have the drive time factored in. They're on site, they're being productive. Drive time is not productive.

CP 113 (Pringle Dep. 50:21-51:25). Supervisor Timothy Nickols, testified as follows:

Q: And you attempted, as a service supervisor, to dispatch your service technicians in the morning to a first job that was as close to the house as possible?

A: Generally, yeah, and then make the rest of the route as tight off of that as I can.

Q: And you tried to end the day with the last job being as reasonably close as possible?

A: Well, that usually worked best for everybody. It made the most sense. If you had an afternoon job that had a certain time frame that was close to their home, it made sense to try to put that person there.

Q: And it would also make sense for Brink's because you would be more productive?

A: That's the way I saw it, yeah.

Q: It also would make sense from Brink's point of view, because if you situated their first job far away, they would be more likely than not that they would have to be paid for drive time, so it would save Brink's some money to have the first job closer to their house?

A: Yeah, by that, sure.

CP 557 (Nickols Dep. 41:7-42:17).

Even Jack Cantrell, Brink's Director of National Technical Operations and former technical manager in Atlanta, admitted that distribution of trucks throughout a branch service area could make scheduling of jobs more efficient, even though he tried to claim that Brink's derives no benefit from the home dispatch practice:

Q: And when you assigned jobs, would you attempt to assign technicians to jobs nearer their homes if they were taking their company vehicles home?

A: When possible.

Q: Was that a more efficient way of getting technicians to the jobs?

A: When possible.

CP 515 (Cantrell Dep. 42:17-23).

Class members do not contend that geographic proximity between a technician and a customer's home is the sole factor in the allocation of work assignments, and recognize that it is not always possible to schedule a particular technician for a job near his home. However, as shown above, Brink's' own managers have indisputably acknowledged that the company improves productivity by having technicians spread out throughout their service areas with trucks and equipment readily available to respond to customer needs.

6. The Flexibility, Responsiveness And Efficiency Of The Company's Services Are Enhanced By Having Technicians Take The Company Trucks Home.

There are other ways in which the company benefits from having technicians take the trucks home. The home dispatch option creates, in effect, twenty or more satellite offices at employee homes that facilitate the progress of the company's work. This dispersal of the trucks expedites the supply of labor and materials to customers' homes and permits the technicians to respond more efficiently to company and customer demands.

First, while taking the truck home is generally voluntary, the technician is required to take his truck home during weeks when he acts as an “on-call” technician so that he can respond more quickly to after-hours service calls. CP 75, 76, & 241.² Without the trucks at home, the on-call technician would not be able to provide timely service to the emergency calls received from customers throughout Western Washington.

Further, if the on-call technician does not have the equipment needed to respond to an emergency call, he can obtain the equipment from the truck of another technicians who lives nearby. This is a more efficient alternative than going to the office, meeting a supervisor who can open the stockroom, and obtaining the necessary equipment there. *E.g.*, CP 272 (Evans Dep. 30:22-31:25); CP 281 (Kennedy Dep. 28:23-29:3). There also is evidence that on-call technicians occasionally swap calls with technicians who are not on-call but who live closer to the customer’s home and can respond more quickly. *E.g.*, CP 257 (Ashbaugh Dep. 20:15-21:5); 298 (Sadettanh Dep. 12:13-13:1); 306-07 (Yet Dep. 21:15-22:2); 271 (Evans Dep. 15:13-23); and 295 (Porter Dep. 162:5-9).

² The requirement that technicians must take a truck home during their weeks of on-call work was in effect throughout the class period. CP 288 (Little Dep 73:3-7).

Moreover, branch managers occasionally assign technicians traveling homeward at the end of the day to a late service call or to help finish jobs in progress in their area. See CP 273 (Evans Dep. 56:18-23); CP 281 (Kennedy Dep. 28:14-22, 29:10-30:2). The company's ability to do this is enhanced by having trucks dispersed throughout Western Washington. As one technician explained:

It helps them out if I'm on the way home and they have a service call pop up in Olympia. I mean, if I parked the truck there, then that would be a service call, an emergency service call. So that helps them that I'm going that way so I can pick it up.

CP 273 (Evans Dep. 56:18-23); CP 281 (Kennedy Dep. 29:10-17) (estimating that he receives such end-of-day assignments as many as two to three times a week).

The trucks, which are prominently emblazoned with the Brink's name and 1-800 number, act as traveling billboards for the company. CP 308 (Yet Dep. 39:25-40:20). Their distribution throughout the service area enhances Brink's' marketing exposure. When some technicians at a national meeting suggested sponsoring a NASCAR team, the vice-president replied that the trucks already served as sufficient advertisement. CP 283 (Kennedy Dep. 103:14-20).

Finally, the home dispatch option relieves the company of the cost and difficulty of providing sufficient parking space and security for the vehicles at its office complex at night and for technicians'

personal vehicles during the day. The company's lease in Kent grants it only ten unreserved parking spaces at the office park and provides that it "shall not overburden the parking facilities." CP 245. When more technicians started leaving their trucks at the office at the end of 2004, Brink's Technical Manager (the top person in Kent in charge of technicians), Howard Goakey, told them that they could not park their personal vehicles in the office park because there were insufficient spaces. CP 254 (Alvarez Dep. 46:20-47:12); CP 302 (Stevens Dep. 105:8-19). The home dispatch option relieves the company of the burden of addressing these logistical issues.

In sum, despite the generally voluntary nature of the home-based option, it is clear that having technicians take their trucks home is an integral part of the Brink's business plan. Nationwide, approximately 98% of technicians take their trucks home. CP 518 (Christopher Dep. 30:23-31:10). When Ryan Alvarez, who lived within five minutes of the Kent office, began working as a technician for Brink's, he was not even made aware that he could pick up his truck at the office. CP 251-53 (Alvarez Dep. 19:5-20:7; 37:25-38:12, 41:1-4). Moreover, when more technicians started exercising their option to park at the Kent branch, they were accused by Mr. Goakey of

being “disloyal” to the company.³ This accusation makes no sense unless the company counts on technicians taking their trucks home and derives substantial benefit from their doing so.

As Dave Stevens was told by his managers in Kent, taking the truck home is simply the Brink’s way of doing business:

Q. And what exactly did your superiors tell you?

A. It's pretty much company policy that we are dispatched out of our house. The trucks, they would rather have the trucks at our house because of the geographical areas that we live in and just by the jobs that they dole out every day, they would rather have us take the trucks home.

* * *

Q. Okay. So you don't know, you don't know of anyone other than Howard that has told, that has said, I want you to commute in the trucks, that's company policy?

A. Well, when I first started Brian Pfeifer was in Howard's position and he was the one that told me at that particular time, it's always been company policy, you're dispatched out of your house with the company truck.

CP 303 (Stevens Dep. 120:19-25, 121:14-21).

7. Brink’s Saved Money By Its Drive Time Policy.

Brink’s undeniably derived a direct financial benefit from its drive time policies, at least when the interim policy was in effect.

For nearly half the class period, from September 26, 2002 through January 12, 2005, a home-based technician was paid for drive time to and from the first and last jobs of the day only to the extent that the job was more than 45 minutes from either the technician’s home or

³ Mr. Goakey’s superiors from Brink’s corporate headquarters investigated the incident and concluded that Mr. Goakey had made this comment. CP 286-87 (Little Dep. 60:7-61:1); CP 268 (Christopher Dep. 89:1-12). Mr. Goakey was issued a warning as a result. CP 247-48 (copy of “Personnel Memo”).

the Brink's office, *whichever was closer*. CP 72. If a job was one hour from the technician's home, but only 45 minutes from the branch office, the technician received no drive time pay. CP 264 (Christopher Dep. 50:1-17). Likewise, if the job was one hour from the branch and 45 minutes from the technician's home, the technician also received no drive time pay. *Id.* at 50:18-51:6. And if the job was two hours from home but only one hour from the branch, the technician only received 15 minutes of drive time pay.

By contrast, office-based technicians received full pay for all drive time to and from the first and last jobs of the day regardless of distance from the branch. Therefore, it is a mathematical fact that Brink's paid less in drive time wages under the interim policy to technicians who took their trucks home than it would have paid had the same technicians parked their vehicles at the office. For jobs closer to the office than to the technician's home, the compensable drive time would always be the office-to-job site drive time for the office-based technician, while it would be the office-to-job site drive time *minus 45 minutes* for the home-based employee. For jobs closer to the technician's home, the compensation would still be the office-to-job site drive time for the office-based tech, but would be the *shorter* home-to-job drive *minus 45 minutes* for the home-based worker. In either scenario, Brink's paid significantly less wages by having the technician take his truck home.

8. Brink's Contention That Employees Benefit More Than The Company Is Immaterial And Unsupported.

Brink's contends, in essence, that the home dispatch option only benefits the employees and that Brink's itself derives no value whatever from the program. This contention is plainly false and is not supported by the evidence.

There is no dispute that employees derive some benefit from not having to use their own vehicles during the workday. But, as discussed herein, it is also indisputable that the company relies on the employees' drive times to carry out work functions (*i.e.*, the transport of tools and equipment), and derives other related benefits, financial and otherwise, from the widespread practice.

Brink's argues that it "was *seldom* able to schedule technicians to jobs close to their homes." Brink's Brief, at 14 (emphasis added). But the record cited does not support this contention. For example, Brink's relies on a deposition excerpt of named plaintiff Dave Stevens. *Id.* In fact, Mr. Stevens testified that he was dispatched to job sites within 45 minutes of his home much more than "seldom"; he testified that it occurred approximately 25% of the time. CP 376-77 (Stevens Dep. at 111:9-11). Likewise, Brink's' reliance on the testimony of Sharon Gilmore, who scheduled jobs for the installation technicians, is

also misplaced. Her testimony was not that such distribution of jobs was “seldom”; she testified only that “some days it worked out, and some days it didn’t...” CP 400 (Gilmore Dep., at 11:16-18).

Based on flimsy evidence, Brink’s also contends that it would have gained more productivity had it required technicians to pick up trucks at the Kent office since a slim majority of the job sites are located in the Tacoma-Seattle areas. Brink’s Brief, at 14 (citing CP 139 (Christopher Dec., ¶7)(55% of job sites)). There is nothing in the record which even attempts to show, based on real trips made by technicians from their actual home addresses, that greater productivity would have resulted from having technicians drive to the Kent office through rush hour traffic to pick up their trucks, and then drive back out into the field.⁴ As shown herein, Brink’s’ entire business model anticipates that its technicians and trucks will be dispersed throughout the “service area” of Western Washington, and its own supervisors and managers have testified that this system benefits the company in permitting a more efficient allocation of jobs. The system also has

⁴ Mr. Christopher provides some statistics for a handful of class members who live at the geographic edges of Brink’s’ service area. CP 140. These data are largely meaningless, because they involve only a small number of selected technicians and do not compare travel time between job locations and the Kent office to the time between the job locations and class member homes. However, these statistics do show that, even for these technicians living in outlying areas, a substantial number of first-job assignments are located near their homes.

undeniably saved Brink's money, at least during the more than two years of the interim policy.

In any event, it is immaterial whether the Brink's business model is more or less productive than the alternative. The fact is that the transport of equipment and tools are necessary for the job and such activity is no less compensable "work" when it originates at a technician's home than when it originates at the Brink's office.

B. Procedural Background.

On September 13, 2005, the trial court granted the class members' motion for partial summary judgment on liability with respect to several of the off-the-clock claims. CP 613-15 (Order). Of particular relevance here is the court's finding that technician drive time constitutes "work time" under Washington law and must be paid. The trial court relied upon the definition of "employ" contained in the MWA and the regulation's definition of "hours worked," as well as the "significant restrictions" placed by Brink's on the technicians' activities and use of trucks during the drive time. The amount of back wages due was left for trial. *Id.* The trial court also found for class members on their claims for vehicle washing and telephone time spent while on-call during a portion of the class period.

On January 13, 2006, the trial court granted, in part, a second partial summary judgment in which it found, *inter alia*, that class

members are entitled to pre-judgment interest on any back pay damages in the case. CP 827-830 (Order).

At trial, the jury awarded class members back pay damages for drive time in the amount of \$706,000, and also found liability on four of the remaining five off-the-clock claims. The jury did not find Brink's liable for damages on the oil change claim. On the non-drive time claims, the jury awarded total back pay damages of \$45,020. Brink's does not challenge in this appeal their liability on any of the non-drive time claims.

After the verdict, on March 13, 2006, the court entered a Judgment for Plaintiffs awarding pre-judgment interest at the rate of 12% per annum, or a total amount of \$294,115.64. CP 882-891. The Judgment also awards class members post-judgment interest at the rate of 12% per annum. *Id.*

On April 5, 2006, the trial court issued an Order Awarding Plaintiffs' Attorneys Fees and Costs under the MWA, RCW 49.46.190, in the total amount of \$653,931.07. CP 1043-46. A Supplemental Judgment for Plaintiffs' Attorneys Fees and Costs was entered on April 19, 2006. CP 1106-08.

On April 6, 2006, Brink's filed its Notice of Appeal (CP 1047-65) in which it seeks review of the trial court's finding on (a) the drive time issue, (b) pre-judgment and post-judgment interest at the rate of

12% per annum; and (c) attorneys fees and costs.

IV. ARGUMENT

A. The MWA Must Be Liberally Construed.

Washington has long been protective of employees' right to receive fair wages in a timely manner. In *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.3d 582 (2000), the Supreme Court recognized "Washington's long and proud history of being a pioneer in the protection of employee rights." Because of the MWA's broad objectives, any MWA provision that excludes or limits coverage must be "narrowly construed and applied only to situations which are plainly and unmistakably consistent with the terms and spirit of the legislation." *Drinkwitz*, 140 Wn.2d at 301.

In *International Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002), the Supreme Court reviewed the rules of liberal construction that must be applied to a remedial statute such as the MWA:

A liberal construction requires that the coverage of the statute's provisions 'be liberally construed [in favor of the employee] and that its exceptions be narrowly confined.' 'When interpreting statutory language, the goal of the court is to carry out the intent of the legislature... In ascertaining this intent, the language at issue must be evaluated in the context of the entire statute.'

We have previously recognized Washington's 'long and proud history of being a pioneer in the protection of employee rights.' The legislature 'evidenced a strong

policy in favor of payment of wages due employees by enacting a comprehensive [statutory] scheme to ensure payments of wages'...Furthermore, remedial statutes 'should be liberally construed to advance the legislature's intent to protect employee wages and assure payment.'

(Citations omitted.).

For the reasons discussed below, Brink's' position here – that it has no obligation to pay for drive time – ignores this command to liberally interpret the MWA.

B. Drive Time Must Be Paid Under Washington Law.

1. The Term “Employ” In The MWA Supports The Trial Court's Conclusion.

The MWA broadly covers all activities that are performed at the direction and for the benefit of the employer. While there is no definition in the statute for “hours worked,” there is a definition of the term “employ,” which is defined as “to permit to work.” RCW 49.46.010(3) (App. A). Under WAC 296-126-010(3), “employ” is defined as “to engage, suffer, or permit.” App. B. These terms have been broadly construed under both state and federal law. Even if the work is not requested, but rather is “suffered or permitted,” the worker must be compensated.

The Washington Department of Labor & Industries (“L&I”) interprets this language to mean:

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, 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.

...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.

CP 78-79 (emphasis added) (L&I Administrative Policy ES.C.2) (App. C).

This definition of "hours worked" is consistent with that used under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq*; *see also Drinkwitz.*, 140 Wn.2d at 298 (federal authority under the FLSA may provide helpful guidance if based on analogous statutory language).

There are three pertinent federal regulations:

29 C.F.R. 785.11 General

Work not requested but suffered or permitted is work time. ... The employer knows or has reason to believe that he is continuing to work and the time is working time.

29 C.F.R. 785.12 Work performed away from the premises or job site.

The rule is also applicable to work performed away from the premises or the job site, or even at home. If

the employer knows or has reason to believe the work is being performed, he must count the time as hours worked.

29 C.F.R. 785.13 Duty of management

In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. **It cannot sit back and accept the benefits without compensating for them....**

(Emphasis added) (App. D). Thus, any work performed at the employer's request with its knowledge and for its benefit constitutes work time and must be paid.

The drive time here is plainly not normal commuting time because the technicians not only bring themselves but also necessary equipment and tools to the work sites. Brink's pays for this work when it occurs at other times, namely, when technicians drive the trucks from the office (after their weekly meetings or when a truck is picked up at the branch) and from job site to job site. There is no lawful basis for Brink's' refusal to pay for this time when the travel occurs to and from the technician homes.

Brink's mistakenly relies upon *Anderson v. State*, 115 Wn. App. 452, 63 P.3d 134, *rev. denied*, 149 Wn.2d 1036 (2003), where Division Two rejected a claim brought by corrections officers who were transported by ferry to McNeil Island Correction Center. There, the transportation involved did not involve any exertion (the plaintiffs

were passengers), and plaintiffs could engage in a range of personal activities. Most significant, only the employees themselves were being transported to the work site (as in all normal commuting), and not any equipment or tools.

In contrast, here the trucks (with their equipment and tools) have to be transported to the work sites. The technicians do not have the option of traveling to job sites in their personal vehicles because without the trucks, the work cannot be performed. If they did drive their own cars to the work sites, they would have no claim for compensation. But because they do drive the Brink's trucks, transporting Brink's equipment, they are on duty from the time they step into the vehicles and should be paid for that time.

It also is significant that Brink's strictly controls the conduct of technicians when they are in the trucks. According to company policy, the trucks cannot be used for personal reasons or in any way treated as personal vehicles. CP 74. The policy provides that "[v]ehicles are to be used for company business only" and "[o]nly employees of Brink's Home Security are authorized passengers in company vehicles." *Id.* Thus, technicians are under the control of the employer in the truck and, unlike a "commute," are not free to engage in personal activities. When technicians are in the truck, they are not on their own time.

Brink's also contends that the compensability of drive time is "analogous" to whether an employee who is "on call" should be paid for his time, citing *Chelan County Deputy Sheriff's Ass'n v. County of Chelan*, 109 Wn.2d 282, 292, 745 P.2d 1 (1987). Brink's claims that the test of whether "on call" time is compensable is whether the employee's time "is spent *predominantly* for the benefit of the employer." Brink's Brief, at 20 (emphasis in original). This statement is only partly true. In fact, the Supreme Court in *Chelan* explained that there is a multi-part test for determining whether on-call time should be paid, and all of the following elements must be considered:

the parties' agreement, whether the employees are required to remain on the premises or at any particular place during the on-call time, the degree to which the employees are permitted to engage in their own activities during on-call time, and if the employee's availability during on-call time is predominantly for the employer's or the employee's benefit.

109 Wn.2d. at 292.

Drive time is not "on-call" time and therefore this test is inapplicable here. But even if this test were applied, the drive time would be compensable. Technicians are "required to remain on the premises" in that they must remain with the truck, and they are not permitted to engage in any personal activity with the truck. Further, driving the truck is necessary and "predominantly for the employer's benefit" in that the tools and equipment must be transported directly to

and from the work sites. In fact, the appellate decision arising out of the one federal case that Brink's cites for application of the "predominance" test to drive time draws a critical distinction between cases where employees are transporting necessary tools and equipment, and thus engaged in compensable work, and those where the travel is "solely for the transportation of employees." *Smith v. Aztec Well Servicing Co.*, 462 F.3d 1274, 2006 U.S. App. LEXIS 23189 *34 (10th Cir. 2006) (citation omitted). Thus, even under the *Chelan County* test for compensability of "on call" time, the drive time here must be treated as hours worked and paid.

2. WAC 296-126-002(8) Also Supports The Drive Time Claim.

WAC 296-126-002(8) defines the term "hours worked" as "all hours during which the employee is authorized or required by the employer to be on duty on the employer's premises or at a prescribed work place." App. B. Thus, the regulation requires both that the employee be "on duty" and that he or she is working "on the employer's premises or at a prescribed work place." The class members easily satisfy these requirements.

First, the technicians are "on duty" at all times when they are driving the trucks. The company's own written policy makes it clear that during drive time, they are driving a company vehicle and are

subject to strict company controls. They also are subject to redirection by supervisors to assist with other jobs or answer service calls while en route to and from their homes.

In addition, given the necessity of the travel and Brink's control over employees during the drive time, the Brink's truck itself is a "premises" of Brink's or, alternatively, "a prescribed workplace." Brink's denies this conclusion. Brink's Brief, at 19. Under the company's interpretation, however, it would be under no obligation to pay for any time in the trucks even when the technician drives from the office to a job site, or from job site to job site. Plainly, this is an absurd result, and is contrary to what the regulation provides.

In sum, the trial court's conclusion should be affirmed on the statute and regulation alone.

3. L&I's Interpretation Of The Term "Hours Worked" Is Consistent With The Statute And The Regulation And Lends Further Support To The Trial Court's Finding.

In a written policy on "hours worked," L&I describes the circumstances under which travel time counts as work time:

Time spent driving from home to the job site, from job site to job site, and from job site to home is considered work time when a vehicle is supplied by an employer for the mutual benefit of the employer and the worker to facilitate progress of the work. All travel that is an integral and indispensable function without which the employee could not perform his/her principal activity, is considered hours worked. Employment begins when the worker enters the

vehicle and ends when the worker leaves it on the termination of that worker's labor for that shift.

CP 79 (App. C).

The Policy's section on "preparatory and concluding activities" also requires compensation

[for] those activities which are 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.

CP 83.

Thus, the Policy requires that employee be paid for travel time where a vehicle is supplied by the employer "for the mutual benefit of the employer and the worker to facilitate progress of the work." Such time also is compensable if it is "preparatory and concluding" activity that is performed "in readiness and/or completion of the job." These activities are deemed "an integral and indispensable function without which the employee could not perform his/her principal activity."

Here, the home alarm installation and repair work cannot be completed unless the drivers bring the tools and equipment (stored on the trucks) to and the from the job locations. Thus, the drive time "facilitates the progress of the work" and constitutes "an integral and indispensable function." Further, since class members were dispatched

to jobs that must be performed at certain times of the day, they “do not have control over when and where such activities can be made.” *Id.*

a. Brink’s Misapprehends The Policy’s “Mutual Benefit” Language.

Brink’s oversimplifies the language of this L&I Policy, and class members’ argument, by claiming that it is “constructed out of whole cloth” and is “unguided by any established aspect of Washington law under the WMWA.” Brink’s Brief, at 31. Brink’s also argues at great length that it is the employees, not Brink’s, who primarily benefit from the home dispatch option. Brink’s Brief, at 8-14. These arguments are misplaced.

There never has been a dispute here that employees derive some benefit from using the trucks to drive to and from work sites. Likewise, there is no genuine dispute that Brink’s enjoys financial and operational advantages in having trucks go home with technicians. If it did not, surely Brink’s would not have permitted approximately 98% of its technicians nationwide to take the trucks home.

The Policy’s use of the term “mutual benefit” must be read in conjunction with the phrase “to facilitate the progress of the work,” as well as with the sentence that follows, requiring the travel to be “an integral and indispensable function without which the employee could not perform his/her principal activity.” In other words, the MWA requires pay for activities, like transport of tools and equipment in a

company vehicle, that constitute a necessary part of the work functions for which the employee is hired. This common sense interpretation follows from the intent and meaning of the MWA and the regulation.

The fact that employees derive some benefit from the home dispatch option has absolutely no bearing on whether the drive time activity must be compensated. There are, after all, many compensable work activities that are beneficial to employees. For example, an employer may permit an employee to work from home (which the employee strongly prefers) but the employer must still pay for such work activity. An employer also may provide an employee with tools, saving the employee the expense of providing his own gear, but that does not entitle the employer to an offset against compensation for hours worked. The fact that work practices are designed to benefit both employee and the employer has no bearing on whether the employer must pay for work performed.

In sum, neither the law nor the policy calls upon the courts to weigh the relative benefits derived by employee and employer from a specific work activity, as Brink's contends. This subjective standard is unsupported by the law and would, in any event, needlessly complicate the analysis. So long as the activity benefits the employer and is integral and indispensable to completion of the job, it is work and must be paid.

b. L&I's Policy Is Entitled To Weight Because It Is Consistent With The Law.

Brink's also erroneously contends that L&I's policies are entitled to no deference and no weight. It is established, however, that Washington courts defer to the interpretation of the administrative agency charged with responsibility to enforce a statute as long as that interpretation is consistent with the law.

For example, this Court held in *Salvation Army v. White*, 118 Wn. App. 272, 277, 75 P.3d 990 (2003), with respect to L&I's policy on rest and meal breaks, as follows:

An agency's interpretation of law may be entitled to deference "to the extent that it falls within the agency's expertise in a special area of the law," which generally means that the statute pertains to the agency's authority and how it bases its policy decisions on that statute. [Citations omitted.] The weight given an administrative policy depends upon the thoroughness evidenced in its consideration, the validity of its reasoning, and all those factors that give it power to persuade, if lacking power to control. [Citations omitted] No deference is to be accorded a policy that is wrong. Moreover, it is and always has been for the courts, not administrative agencies, to declare the law and interpret statutes

Further, agency interpretations are entitled to "*great weight*, absent a compelling indication that its interpretation conflicts with the legislative intent." *Bostain v. Food Express*, 127 Wn. App. 499, 507 111 P.3d 906, 911 (2005), *rev. granted*, 156 Wn.2d 1010, 132 P.3d 145 (2006) (emphasis added) (citing *Washington Water Power Co. v. Washington State Human Rights Comm'n*, 91 Wn.2d 62, 68-69, 586

P.2d 1149 (1978)); *see also Stahl v. Delicor of Puget Sound, Inc.*, 148 Wn.2d 876, 886, 64 P.3d 10 (2003) (relying on L&I interpretative guidelines);

Class members rely on this policy not as a statement of law or as the basis for a cause of action, but rather as a well-reasoned interpretation of the MWA and WAC 296-126-002(8) by an administrative agency with expertise in this wage-and-hour area. For this reason, Brink's' reliance upon *Washington Education Ass'n v. Washington State Public Disclosure Comm'n*, 150 Wn.2d 612, 80 P.3d 608 (2003) is misplaced. Brink's Brief, at 27-28. There the Supreme Court observed that all agency interpretations are "advisory only" and do not have the force and effect of law or regulation. Class members do not allege otherwise. Their action arises under the MWA and the WAC. The policy is useful only as an explanation of that law.

Brink's' reliance upon footnote 1 in *Wingert v. Yellow Freight*, 146 Wn.2d 841, 50 P.3d 256 (2002) is similarly misplaced. There the Court refused to defer to an L&I administrative guideline, not because of any legal insufficiency in the guideline, but because the parties had not submitted it to the trial court and therefore the Supreme Court could not take judicial notice of it.⁵

⁵ Brink's also argues that L&I's Administrative Policy ES.C.2 may not be relied upon because the Department never published notice of the policy in the Washington Register as allegedly required by the Administrative Procedures Act. Brink's Brief, at 29-30. Brink's is wrong. Notice of ES.C.2 was properly published by L&I on March 11, 2002 at W.S.R. 02-07-022, although the full text of the policy was not set

c. L&I's Policies Support The Drive Time Claim Throughout the Class Period.

Brink's contends that Administrative Policy ES.C.2 was not adopted until January 1, 2002 and therefore there is no valid drive time claim prior to that date. Brink's Brief, at 33. In fact, the prior policy (the "1992 Policy") just as strongly supports class member's drive time claim. CP 738-45 (1992 Policy) (App. E).

Brink's misinterprets the 1992 Administrative Policy to provide that employees can only claim drive time pay if they were required to take the trucks home. While the 1992 Policy does not explicitly address pay for voluntary home dispatch options, its language nonetheless explains that activities such as drive time should be paid as hours worked. For example, the 1992 Policy states that pay is required once the "regular work day" begins until it ends:

The principles which apply in determining whether or not time spent in travel is working time *depend upon the kind of travel involved*. An employee who travels from home *before the regular work day and returns home at the end of work day* is engaged in ordinary home to work travel. This is true whether the employee works at a fixed location or at different job sites. Normal travel from home to work is not work time and does not require compensation.

Emphasis added. Thus, the question under the 1992 Policy (as with the 2002 Policy) is when the "regular work day" begins and ends, and

forth. CP 596 (Washington State Register). In any event, the alleged failure to publish is immaterial here since Brink's is adversely affected by the application of

the kind of travel involved. Here, the “work day” should include all drive time because the technicians were on company business at all times while driving the trucks. Stated otherwise, the drive times are compensable because they occurred after the start of the technicians’ “regular work day.”

In fact, in most instances, class members began their work at home filling out paperwork and routing their trips for the day before ever climbing into their trucks and ended their workday by completing paperwork at home. CP 1114 (Kennedy Dec. ¶6); 1118 (Corey Dec. ¶ 6); 1125 (Evans Dec. ¶ 7); 1130 (Kirk Dec. ¶ 7); and 1138 (Dupuy Dec. ¶ 3). The jury found that this time constituted work and the company unlawfully failed to pay for such paperwork. CP 887 (Verdict). Brink’s has not challenged this aspect of the verdict, and it therefore is a verity on appeal. *Malarkey Asphalt Co. v. Wyborney*, 62 Wn. App. 495, 513, 814 P.2d 1219 (1991). There is no legal question that once the work day begins, all actions engaged at the request of the employer constitute compensable work activities. *IBP, Inc. v. Alvarez*, ___ U.S. ___, 126 S.Ct. 514, 163 L.Ed.2d 288 (2005) (holding that walking time occurring after the first work activity must be paid); *Dooley v. Liberty Mutual Ins. Co.*, 307 F. Supp.2d 234, 239, 242-43 (D. Mass. 2004) (drive time must be paid when it occurs after commencement or

the statute and regulation, not by the terms of the policy.

before completion of the work day by such at-home tasks as checking messages, reviewing assignments, and mapping routes).

Finally, the 1992 Policy's section on "preparatory and concluding activities" - which requires compensation "[for] those activities which are integral or necessary to the performance of the job" - is identical to that contained in the 2002 Policy, and just as fully supports compensability of drive time.

d. L&I Has Not Been Inconsistent In Its Treatment Of Home Dispatch Programs.

Brink's points to two letters written by an L&I manager, Richard Ervin, to two other employers to suggest that L&I's enforcement policy on drive time has been inconsistent. Brink's Brief, at 31-32. The record does not contain any information whatsoever about the nature of the drive time policies at issue, and certainly does not lend support to Brink's arguments in this case. Moreover, these letters were not submitted to the trial court until after it granted summary judgment on the drive time claim, and therefore should not be considered by this Court on appeal of that order. *See Colwell v. Holy Family Hospital*, 104 Wn. App. 606, 614, 15 P.3d 210 (2001).

In one letter, Brink's emphasizes a phrase about the need "to provide clear guidelines." CP 770. This statement does not show, as Brink's contends, that the L&I Policy is "unguided by ... Washington law." Brink's Brief, at 31. As the letter itself states, L&I is merely

concerned to ensure that “all employers fully understand their responsibilities under the law.” The second letter is even less helpful to Brink’s’ position. There Mr. Ervin states emphatically that the “Department has not changed its position that travel time by employee driving company vehicles from home to the designated worksite is compensable travel time.” CP 773. This letter notes only that if the travel time is treated as a benefit under IRS regulations, it may pass L&I scrutiny.

C. Analogous Federal Law Supports Payment For Drive Time.

Without legal citation,⁶ Brink’s contends that if this Court affirms the trial court’s ruling below, it would make “Washington the only state in the Country in which this is the law.” Brink’s Brief, at 16. In fact, Brink’s has not shown that any state has ruled one way or the other on this issue. Its argument about Washington being unique is not only irrelevant but unsupported, and should be given no weight.

As to federal law, Brink’s neglects to mention that current federal law is not analogous to Washington state law on the compensability of drive time. There have been two significant amendments to the FLSA on the drive time issue. First, the statute

⁶ Brink’s also refers to an alleged fact that does not appear in the record, namely, that the company “found it necessary to discontinue its home dispatch program in state after the Trial Court’s summary judgment ruling finding that this commuting time had to be paid as hours worked.” This self-serving statement violates RAP 10.3(a)(4)’s requirement that there must be a “[r]eference to the record ... for each factual statement.”

was amended in 1947 by the Portal-to-Portal Act, 29 U.S.C. § 254 (“Portal Act”), which restricted pay for activities occurring prior to and after the normal work shift. It was amended again in 1996 with passage of the Employee Commuting Flexibility Act (“ECFA”), § 2102 of Pub. L. 104-188, 110 Stat. 1755, 1928 (1996), (*see* 29 U.S.C. § 254(a)). The ECFA, which Brink’s does not even mention in its brief, substantially limited the circumstances in which pay is required under federal law for travel time in a company-issued vehicle.

The Washington legislature never adopted either of these amendments to the FLSA, and therefore the outcome of this case is not determined by these provisions. Nonetheless, every one of the federal cases on which Brink’s relies were decided under either the Portal Act or the more restrictive ECFA. *See Singh v. City of New York*, 418 F. Supp. 2d 390 (S.D.N.Y. 2005); *Adams v. United States*, 65 Fed. Cl. 217, 10 Wage & Hours Cas. 2d (BNA) 1000 (2005); *Smith v. Aztec Well Servicing Co.*, 321 F. Supp. 2d 1234 (D.N.M. 2004), *aff’d*, 462 F.3d 1274 (10th Cir. 2006); *Dooley*, 307 F. Supp.2d at 234; *Bobo v. United States*, 37 Fed. Cl. 690, 3 Wage & Hour Cas. 2d (BNA) 1587 (1997), *aff’d*, 136 F.3d 1465 (Fed. Cir. 1998).

Accordingly, if federal law is to be used at all, it can only be analyzed in accordance with federal law as it existed before 1947. As recognized by Division Two in *Anderson, supra*, the U.S. Supreme Court in the pre-1947 era established that an employer should pay for

travel if three elements were present: (1) the activity involved “[p]hysical or mental exertion (whether burdensome or not)”; ... (2) the “[e]xertion [was] controlled or required by the employer”; ... [and] (3) the “[e]xertion [was] pursued necessarily and primarily for the benefit of the employer and his business.” *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 161, 164-166, 65 S. Ct. 1063, 89 L.Ed. 1534 (1945), *relying on Tennessee Coal, Iron & R. Co. v. Muscado Local No. 123*, 321 U.S. 590, 64 S. Ct. 698, 88 L.Ed. 969 (1944).

Technician drive time easily satisfies all of these elements. First, unlike the corrections officers who rode the ferry in *Anderson*, driving to the job sites involves physical and mental exertion. Second, the exertion is controlled and required by the employer in that the employer directs the technicians to the job sites and strictly controls their behavior while operating the company vehicle. Finally, the driving is necessary and is done primarily for the benefit of the employer; the trucks and equipment have to get to and from the customers’ houses, and the technicians are the ones who accomplish this necessary task. They do not do this “for their own pleasure or convenience. It occurs only because it is a necessary prerequisite” to the installation and repair of the home security systems. *Jewell Ridge*, 325 U.S. at 166.

But even under the Portal Act, there is substantial authority that the technicians' drive time would be considered work. In the leading case of *Steiner v. Mitchell*, 350 U.S. 247, 256, 76 S. Ct. 330, 100 L.Ed. 267 (1956), the Supreme Court described the Portal Act's effect on the FLSA:

[Congress] did not intend to deprive employees of the benefits of the [FLSA] where ...[activities performed before or after regular hours of work] ...are an integral part of and indispensable to their principal activities... We, therefore, conclude that activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the [FLSA] if those activities are *an integral and indispensable part of the principal activities for which covered workmen are employed* and which are not specifically excluded by Section 4(a)(1).

(Emphasis added). Thus, *Steiner* requires employers to pay for work that is necessary to carry out principal work functions.

In a case involving nearly identical facts, *Baker v. GTE North, Inc.*, 927 F. Supp. 1104 (N.D. Ind. 1996), *rev'd on other grounds*, 110 F.3d 28 (7th Cir. 1997),⁷ a group of facility maintainers for a telephone company brought suit under the FLSA for wages for unpaid drive time in company vehicles. The facts there are nearly indistinguishable from this case:

In driving their GTE vehicles to their first work sites, and home from their last work sites, the plaintiffs are

⁷ This decision was reversed by the Seventh Circuit due to the intervening passage of the ECFA, a statute intended specifically to overrule the district court opinion and to exclude drive time under most home dispatch programs from compensation under the FLSA. See H.R. Rep. 104-585, at 4 (1996).

performing the necessary task of transporting the tools and equipment ... between the first and last work sites.... The job could not be done without these tools and equipment, and the tools and equipment must be transported because facility maintainers work at one or more work sites per day. GTE receives significant economic benefits as a result of the HDP [*i.e.*, the Home Dispatch Program] because each facility maintainer's workday contains a greater proportion of time installing and maintaining telephone and transmission equipment at the same cost to GTE, which in turn increases GTE's responsiveness to customer demands. Further, GTE's non-HDP facility maintainers [*i.e.*, those who pick up trucks at the office] are compensated for the time they spend driving GTE vehicles to and from the first and last work sites and for transporting the necessary tools and equipment, as were the plaintiffs before beginning the HDP. The plaintiffs are thus performing the same task (including the restrictions placed on them while driving) as the non-HDP facility maintainers, but are not being paid based on the location of their parking spots and the collapsing of their commutes into their drive to and from their first and last work sites.

927 F. Supp. at 1113. Citing similar federal cases, the court found the drive time to be compensable, even under the more restrictive language of the Portal Act, because transporting the vehicles, tools and equipment was controlled by the employer and was necessary to accomplish the work:

[P]arking the vehicles at home or other alternatives to the facility is for the employees' convenience, but *getting the vehicle and its contents to and from the first and last work sites is not for the employees' convenience; it is an integral and indispensable part of their jobs.* See *Crenshaw v. Quarles Drilling Corp.*, 798 F.2d 1345, 1350 (10th Cir. 1986) (oil rig mechanics' driving of specially-equipped trucks containing tools and equipment necessary to servicing

oil rigs found compensable); *Secretary of Labor v. E. R. Field, Inc.*, 495 F.2d 749, 751 (1st Cir. 1974) (same; electrician driving back to shop in truck containing tools and supplies necessary for job); *D A & S Oil Well Servicing, Inc. v. Mitchell*, 262 F.2d 552, 555 (10th Cir. 1958) (same; employees transporting equipment for oil well servicing). And, as in *Dunlop[v. City Elec., Inc.]*, 527 F.2d 394 (5th Cir. 1976) the activities are those "for which the employees would ordinarily have been paid had such work been performed during the normal workday." *Dunlop*, 527 F.2d at 401.

Id. at 1114 (Emphasis added.)

Subsequent to the district court decision in *Baker*, Congress adopted the ECFA specifically to overrule that decision and to exclude drive time under home dispatch programs from the definition of compensable work under the FLSA. That Congressional action was prompted by judicial recognition that under the FLSA, even as amended by the Portal Act, drive time in employer vehicles was compensable where it involved an integral and indispensable part of the work, like transport of needed tools and equipment. *E.g.*, *Baker*, 927 F. Supp. at 1104; *Dunlop*, 527 F.2d at 394; *Field*, 495 F.2d at 751. Thus, Brink's contention that requiring compensation for such drive time would be an unprecedented result is simply false, as demonstrated by *Baker* and the pre-ECFA cases on which it relies.

In sum, under both Washington and pre-ECFA federal law (*i.e.*, prior to 1996), work that is necessary to Brink's functions (whether it occurs at the beginning and end, or during, each work day)

must be compensated. There can be no serious dispute that Brink's must have its trucks and equipment transported to and from work sites. This can be accomplished either by having all technicians come to the office to pick up the trucks or by having the technicians take the trucks home. They should be paid whenever their work involves transportation of tools and equipment, and not just when they come to the office first. Accordingly, compensation must begin when "the worker enters the vehicle and ends when the worker leaves it on the termination of that worker's labor for that shift," regardless of whether that occurs at home or office. CP 79 (L&I Policy ES.C.2) (App. C).

D. The Entry Of Summary Judgment For The Class Was Appropriate.

By misstating the legal issues, Brink's attempts to show that there was a "triable question" precluding summary judgment on the compensability of drive time. Brink's Brief, at 33.

Brink's claims that there are individual questions regarding (a) how much Brink's benefited from the drive time, and (b) whether the company's provision of the trucks was "motivated" to facilitate the progress of the work. For the reasons previously stated, neither of these questions are material to the outcome here.

The drive time issue was well suited to class-wide resolution, as reflected by the fact that both parties moved for summary judgment.

Beyond that, Brink's never raised this issue below. *See* CP 309-325 (Opposition to Plaintiffs' Motion for Partial Summary Judgment). As a result, this Court should not consider this new issue at this stage of the proceedings. *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995).⁸

Even if this new argument were considered, it is plainly wrong. The company's policies, both as to payment of drive time and use of vehicles, were in writing and applied to all class members across-the-board. There are no material individual issues that would preclude a summary judgment finding. While the home dispatch option may have benefited some employees more than others, such differences are irrelevant.

E. Class Members Are Entitled To Pre-judgment Interest On The Back Wages Awarded.

On January 13, 2006, the trial court awarded partial summary judgment finding, *inter alia*, that pre-judgment interest must be paid to class members on any back pay awarded by the jury for uncompensated drive time. CP 827-829. The trial court then included such interest in the Judgment entered on March 7, 2006. CP 827-29. Brink's contests this award of pre-judgment interest on the ground that the calculation of

⁸ The same principal applies to Brink's suggestion, never raised in the trial court, that the morning and evening drive times should be analyzed differently. Brink's Brief, at 12.

back pay owed for drive time was based on estimated drive times. Specifically, it points to an excerpt of the trial testimony by Dr. Robert Abbott in which he explained how he calculated the drive time damages based on the travel times required between class member homes and their first and last job sites as computed by a standard mapping and routing program. Brink's Brief, at 35-37. Brink's argument fails.

Shortly after the trial court's decision, the Court of Appeals for Division II rejected this same argument (presented by Brink's counsel, Littler Mendelson) in another wage and hour class action, *McConnell v. Mothers Work, Inc.*, 131 Wn. App. 525, 535, 128 P.3d 128 (2006). There, pre-judgment interest was awarded to a group of employees whom the jury found had been misclassified as exempt under MWA. The company argued, just as in this case, that the "jury's computation of unpaid overtime hours was inexact and required the exercise of discretion" because the precise number of unpaid hours was "impossible" to recreate. Division II properly rejected this argument:

Here, the jury had to evaluate disputed evidence as to the number of unpaid hours worked. But the necessary data to make this factual determination was set out in the evidence. The claim was, therefore, liquidated. The dispute was, moreover, about money owed under employment agreements, i.e., contracts for the payment of money with the amounts due determinable by computation with reference to the fixed standard of the number of hours and hourly rate fixed in the contract. No element of opinion or discretion was required to enable

Mothers Work to figure out what it owed the employees as wages.

Id. Likewise, there was “no element of opinion or discretion” in the decision by the jury in this case. Dr. Abbott provided drive times (based on data generated by the software program, “Mappoint”) for each work day for each class member.⁹ He calculated back pay damages based on these drive times and each class member’s actual wage rates. The jury found that these damage calculations were accurate and incorporated his calculation into their verdict. Accordingly, the jury did not have to use “opinion or discretion.”

Washington law on this subject supports the result in *Mothers Work*. Pre-judgment interest is awardable for any liquidated claim. *Prier v. Refrigeration Eng. Co.*, 74 Wn.2d 25, 32, 442 P.2d 621 (1968). A claim is liquidated “where the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion.” *Id.* at 32 (citing C. McCormick, *Damages* (Hornbook Series) §54, at 213 (1935) (“*McCormick*”). A claim is only unliquidated “where the exact amount of the sum to be allowed cannot be definitely fixed from the facts proved, disputed or undisputed, but must in the last analysis depend upon the opinion or discretion of the judge or jury as to whether a larger or a smaller amount should be allowed.” *Id.* at 33 (quoting *McCormick* §54, at 213).

⁹ It is worth noting that Brink’s own interim drive time policy used a similar program, Mapquest, to determine how much drive time would be paid. CP 72.

Here, the evidence (in the form of testimony by Dr. Abbott, as supported by class members' testimony regarding their usual driving speeds, *e.g.*, Porter Testimony [RP 33:15-36:14]; Yet Testimony [RP 11:16-15:18]; Goines Testimony [RP 5:21-7:9]; Depuy Testimony [RP 8:22-10:5]) provided the "data [from] which ... [the jury was able].... to compute the amount with exactness...." *Prier*, 74 Wn.2d at 32. The fact that Brink's disputes these amounts does not make the claim unliquidated. It is the "character of the claim and not of the defense that is determinative of the question whether an amount of money sued for is a 'liquidated sum.'" *Id.* at 33 (quoting *McCormick* §54, at 213). In other words, the jury's decision to accept the class members' version of the hours worked, and to reject Brink's arguments, is not the type of "discretion" or "opinion" that makes pre-judgment interest inappropriate. *See Edgerer v. CSR West, LLC*, 116 Wn. App. 645, 654, 67 P.3d 1128 (2003) (the fact that judgment was used to determine the "appropriate market price" does not mean the damages are unliquidated). The jury was not asked how much back pay was *reasonable*, but rather how much was *owed*.

Besides *Mothers Work*, Washington courts have typically regarded judgments for back wages as liquidated for purposes of pre-judgment interest. *E.g.*, *Dautel v. Heritage Home Center, Inc.*, 89 Wn. App. 148, 948 P.2d 397 (1997), *rev. denied*, 135 Wn.2d 1003, 959 P.2d 126 (1998) (commission pay rate dispute); *Curtis v. Security*

Bank of Washington, 69 Wn. App. 12, 847 P.2d 507, *rev. denied*, 121 Wn.2d 1031, 856 P.2d 383 (1993) (dispute over cutoff date for back wages and interim earnings).

Finally, Washington courts have held that an award of pre-judgment interest is based on a “sense of justice” which demands that a defendant “who retains money which he ought to pay to another should be charged interest upon it.” *Hansen v. Rothaus*, 107 Wn.2d 468, 473, 730 P.2d 662 (1986) (*quoting Prier*, 74 Wn.2d at 34). This principle applies when a defendant “can ascertain how much he ought to pay with reasonable exactness...” *Prier*, 74 Wn.2d at 34 (*quoting* 5A Corbin, *Contracts*, § 1046 n.69 (1964)). The only reason there was a need for the jury to make findings on the number of hours worked was due to Brink’s own violation of law through its failure to keep track of class member hours. Washington law requires that all employers maintain payroll records showing, among other things, the hours worked by each employee. WAC 296-128-010.¹⁰ Brink’s never kept track of the off-the-clock hours and thus violated the regulation. By awarding pre-judgment interest, the trial court prevented Brink’s

¹⁰ WAC 296-128-010 (emphasis added) provides in pertinent part:

For all employees ..., employer shall be *required* to keep and preserve payroll or other records containing the following information and data [for]...each and every employee to whom ... said act applies:

(6) *Hours worked each workday and total hours worked each workweek* (for purposes of this section, a “workday” shall be any consecutive 24 hours)....

from profiting from its violation. Stated another way, Brink's cannot complain about pre-judgment interest because it surely was in a position to "ascertain how much [it] ought to pay with reasonable exactness" at the time the pay was due. *Prier*, 74 Wn.2d at 34.

F. The Required Rate Of Interest Is 12% Per Annum.

Brink's mistakenly contends the trial court should have set the interest rate (for both pre- and post-judgment interest) at two percent above the six-month Treasury Bill rate, as set forth in RCW 4.56.110(3), instead of the 12% rate provided in RCW 19.52.020. RCW 4.56.110(3) was added by the legislature in 2004 to reduce the rate on judgments "founded on tortious conduct." Significantly, the legislature did not reduce the interest rate on all judgments, but only on those sounding in tort. Thus, the lower rate has no application here.

In *SPEEA v. Boeing Co.*, 139 Wn.2d 824, 991 P.2d 1126 (2000), the Supreme Court unambiguously held that actions under the MWA, like the present case, do not sound in tort, but are contractual or quasi-contractual in nature. Although the Court's analysis occurred in the context of determining the proper statute of limitations for such claims, its reasoning and conclusions are fully controlling here:

RCW 4.16.080(2), the statute the employees contend applies, has generally been applied to torts and tort-like claims, not labor and employment claims. We decline to adopt the employees' suggestion that a claim under

the WMWA is akin to a civil rights action or tort action because this approach essentially eviscerates *RCW 4.16.130*. Any action in court upholds a right of some sort.

But we note that Washington case law has applied a three-year statute of limitations to claims involving unjust enrichment. *RCW 4.16.080(3)*.... *The employees' WMWA claims are more analogous to claims for unjust enrichment than to tort claims...*

Thus, in instituting this action, the employees are in essence seeking recovery under an obligation imposed by law, and the WMWA, for Boeing's unjust enrichment (i.e., receiving the benefit of the employees' work without paying for the work.) As such, *the employees' claims are subject to the three-year statute of limitations applicable to implied contracts*, as provided under *RCW 4.16.080(3)*.

139 Wn.2d at 837-838 (emphasis added, cites omitted).

Brink's tries to dismiss *SPEEA* by arguing that the Court merely wanted to avoid having the "invasion of personal rights" language of *RCW 4.16.080(2)* swallow up the catch-all limitations period of *RCW 4.16.130*. Brink's Brief, at 40-41. However, the Court specifically rejected the contention that *RCW 4.16.080(2)* is applicable to MWA claims because that subsection applies to "tort and tort-like claims, not labor and employment claims." 139 Wn.2d at 837. Moreover, the Court determined that MWA claims *are* subject to the limitations period of *RCW 4.16.080(3)*, which governs implied contracts, rather than the catch-all of *RCW 4.16.130*. If MWA claims are not tort-like but rather contractual for limitations purposes, then

they cannot logically be considered tort claims for purposes of pre- and post-judgment interest.

In addition, *SPEEA* rebuts Brink's' two other principal arguments on this issue. First, just as "any action in court upholds a right of some sort," 139 Wn.2d at 837, any cause of action also asserts a "legal wrong," Brink's Brief, at 39. The fact that an MWA claim remedies a "legal wrong" does not dictate that it is a tort claim any more than the fact that it "upholds" an employee's right to wages. Rather, an MWA claim is based on a statutory violation, not a tort or tortious misconduct.

Second, *SPEEA* specifically distinguished discrimination cases from MWA actions. 139 Wn.2d at 837. Thus, Brink's' reference to *Blair v. Washington State University*, 108 Wn.2d 558, 740 P. 2d 1379 (1987), is inapposite. In fact, *Blair* and its predecessors support the conclusion that MWA claims are not tort-like in nature. In concluding that Washington Law Against Discrimination claims are torts, *Blair* cited *Anderson v. Pantages Theater Co.*, 114 Wash. 24 (1921). *Anderson*, in turn, held that damages for discrimination are not limited to pecuniary loss (*i.e.*, the measure of damages for breach of contract claims) but include general tort damages for personal indignity and mental suffering. *Id.* at 30-31. By contrast, MWA damages are strictly limited to the pecuniary loss of wages owed, with no general

damages, further supporting the conclusion that such actions do not sound in tort.

In sum, the correct rate for interest awarded in this case is 12% per annum as provided in RCW 19.52.020.

G. Respondents Should Be Awarded Attorneys Fees And Expenses Pursuant to RAP 18.1, RCW 49.46.090(1) and RCW 49.48.030.

Pursuant to RAP 18.1, RCW 49.46.090(1) and RCW 49.48.030, the class members are entitled to their fees and expenses in connection with the instant appeal, and seek an award of such fees and expenses.

V. CONCLUSION

This Court should affirm the trial court's orders in all respects and award class members their fees and expenses expended in connection with this appeal.

RESPECTFULLY SUBMITTED this 27th day of October, 2006.


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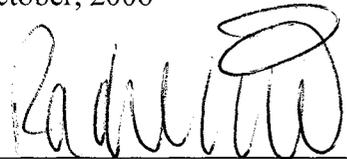
CERTIFICATE OF SERVICE

I, RACHEL M. WHITE, the undersigned, hereby certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct:

1. I am over the age of 18 years and am not a party to the within cause;
2. I am employed by the law firm of Schroeter Goldmark & Bender. My business/mailling address is 810 Third Avenue, Suite 500, Seattle, WA 98104.
3. On October 27th, 2006, I served true and correct copies of BRIEF OF RESPONDENTS via ABC Legal Messengers on counsel of record as follows:

Daniel L. Thieme
Littler Mendelson
Columbia Center
701 Fifth Avenue, Suite 6500
Seattle, WA 98104-7097

DATED this 27th day of October, 2006

By 
Rachel M. White, Paralegal

FILED
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STATE OF WASHINGTON
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APPENDIX A

LEXSTAT RCW 49.46.010

ANNOTATED REVISED CODE OF WASHINGTON
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*** STATUTES CURRENT THROUGH 2005 GENERAL ELECTION (2006 c 2) ***
*** ANNOTATIONS CURRENT THROUGH JUNE 20, 2006 ***

TITLE 49. LABOR REGULATIONS
CHAPTER 49.46. MINIMUM WAGE ACT

GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 49.46.010 (2006)

§ 49.46.010. Definitions

As used in this chapter:

- (1) "Director" means the director of labor and industries;
- (2) "Wage" means compensation due to an employee by reason of employment, payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value, subject to such deductions, charges, or allowances as may be permitted by rules of the director;
- (3) "Employ" includes to permit to work;
- (4) "Employer" includes any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee;
- (5) "Employee" includes any individual employed by an employer but shall not include:
 - (a) Any individual (i) employed as a hand harvest laborer and paid on a piece rate basis in an operation which has been, and is generally and customarily recognized as having been, paid on a piece rate basis in the region of employment; (ii) who commutes daily from his or her permanent residence to the farm on which he or she is employed; and (iii) who has been employed in agriculture less than thirteen weeks during the preceding calendar year;
 - (b) Any individual employed in casual labor in or about a private home, unless performed in the course of the employer's trade, business, or profession;
 - (c) Any individual employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesman as those terms are defined and delimited by rules of the director. However, those terms shall be defined and delimited by the director of personnel pursuant to chapter 41.06 RCW for employees employed under the director of personnel's jurisdiction;
 - (d) Any individual engaged in the activities of an educational, charitable, religious, state or local governmental body or agency, or nonprofit organization where the employer-employee relationship does not in fact exist or where the services are rendered to such organizations gratuitously. If the individual receives reimbursement in lieu of compensation for normally incurred out-of-pocket expenses or receives a nominal amount of compensation per unit of voluntary service rendered, an employer-employee relationship is deemed not to exist for the purpose of this section or for purposes of membership or qualification in any state, local government or publicly supported retirement system other than that provided under chapter 41.24 RCW;
 - (e) Any individual employed full time by any state or local governmental body or agency who provides voluntary services but only with regard to the provision of the voluntary services. The voluntary services and any compensa-

tion therefor shall not affect or add to qualification, entitlement or benefit rights under any state, local government, or publicly supported retirement system other than that provided under chapter 41.24 RCW;

(f) Any newspaper vendor or carrier;

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

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

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

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

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

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

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

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

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

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

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

NOTES:

SHORT TITLE -- HEADINGS, CAPTIONS NOT LAW -- SEVERABILITY -- EFFECTIVE DATES -- 2002 C 354: See *RCW 41.80.907* through *41.80.910*.

CONSTRUCTION -- 1997 C 203: See note following *RCW 49.46.130*.

EFFECTIVE DATE -- 1993 C 281: See note following *RCW 41.06.022*.

EFFECTIVE DATE -- 1989 C 1 (INITIATIVE MEASURE NO. 518, APPROVED NOVEMBER 8, 1988): "This act shall take effect January 1, 1989." [1989 c 1 § 5.]

SEVERABILITY -- 1984 C 7: See note following *RCW 47.01.141*.

CROSS REFERENCES.

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

UNITED STATES CODE REFERENCES.

The Interstate Commerce Act, referenced in paragraph (5)(g), is codified at *49 U.S.C.S. § 10101* et seq.

EFFECT OF AMENDMENTS.

APPENDIX B

LEXSTAT WAC 296-126-002

Washington Administrative Code
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*** THIS SECTION IS CURRENT THROUGH April 5, 2006. ***

TITLE 296. LABOR AND INDUSTRIES, DEPARTMENT OF
CHAPTER 126. STANDARDS OF LABOR FOR THE PROTECTION OF THE SAFETY, HEALTH AND
WELFARE OF EMPLOYEES FOR ALL OCCUPATIONS SUBJECT TO CHAPTER 49.12 RCW

WAC § 296-126-002 (2006)

WAC 296-126-002. Definitions.

(1) "Employer" means any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees, unless exempted by chapter 49.12 RCW or these rules.

(2) "Employee" means an employee who is employed in the business of his employer whether by way of manual labor or otherwise. This definition is not intended, for purposes of these regulations, to include: Any individual registered as a volunteer with a state or federal volunteer program or any person who performs any assigned or authorized duties for an educational, religious, governmental or nonprofit charitable corporation by choice and receives no payment other than reimbursement for actual expenses necessarily incurred in order to perform such volunteer services; any individual employed in a bona fide executive, administrative or professional capacity or in the capacity of commissioned outside salesperson; nor is it intended to include independent contractors where said individuals control the manner of doing the work and the means by which the result is to be accomplished.

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

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

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

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

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

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

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

WAC § 296-126-002

(10) "Committee" shall mean the industrial welfare committee as provided by law. The committee's secretary is the supervisor of employment standards in care of the Department of Labor and Industries, General Administration Building, Olympia, Washington 98504.

Order 76-15, § 296-126-002, filed 5/17/76; Order 74-9, § 296-126-002, filed 3/13/74, effective 4/15/74.

APPENDIX C

ADMINISTRATIVE POLICY



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
EMPLOYMENT STANDARDS

TITLE:	HOURS WORKED	NUMBER:	ES.C.2
CHAPTER:	RCW 49.12 WAC 296-126	REPLACES:	ES-016
		ISSUED:	1/2/2002

ADMINISTRATIVE POLICY DISCLAIMER

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

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

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). Also see ES.C.1 on the Industrial Welfare Act.

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.

What is travel time and when it is considered hours worked?

Travel time, other than normal commute time, is that time that it takes to travel to and from the place where the work actually begins and ends and is considered "hours worked".

The principles that apply in determining whether or not time spent in travel is working time, depend upon the kind of travel involved. An employee who travels from home before the regular workday and returns home at the end of the workday is engaged in ordinary home-to-work travel. This is true whether the employee works at a fixed location or at different job sites. Normal travel from home to work is not work time and does not require compensation.

Time spent in travel when employees are required by their employer to drive a vehicle to transport tools (other than personal tools), equipment, or other employees from the employer's place of business to the job site is considered work time. It makes no difference whether the vehicle is the employee's own vehicle, a company vehicle or a rented vehicle; however, there is no obligation to pay employees who are merely riding on or in the vehicle, unless required to do so by the employer. It is not hours worked when employees report to the employer's location to obtain a ride to the job site merely for the employees' convenience.

Time spent driving from home to the job site, from job site to job site, and from job site to home, is considered work time when the employer requires the employee to take the employer's vehicle home.

Time spent driving from home to the job site, from job site to job site, and from job site to home is considered work time when a vehicle is supplied by an employer for the mutual benefit of the employer and the worker to facilitate progress of the work. All travel that is an integral and indispensable function without which the employee could not perform his/her principal activity, is considered hours worked. Employment begins when the worker enters the vehicle and ends when the worker leaves it on the termination of that worker's labor for that shift.

Time spent driving or riding as a passenger from job site to job site (if the job site is not at the employer's main business location), regardless of ownership of the vehicle, is considered time worked.

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:

1. Attendance is voluntary; and
2. The employee performs no productive work during the meeting or lecture; and
3. The meeting takes place outside of regular working hours; and
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.

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:

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
2. The training is for the benefit of the trainee; and
3. The trainees do not displace regular employees, but work under their close observation; and
4. The business that provides the training derives no immediate advantage from the activities of the trainees, and may in fact be impeded; and
5. The trainees are not necessarily entitled to a job at the conclusion of the training period; and
6. The trainees understand they are not entitled to wages for the time spent in the training.

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.

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

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
3. The school has a designated district person as an agent/instructor for the worksite activity and monitors the program; and
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 time for 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. The student is not entitled to a job at the completion of the learning experience; 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 not subject to the Industrial Welfare Act or the state minor work regulations. Public agencies are, however, subject to payment of the applicable state minimum wage.

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 waiting to be engaged, 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.

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.

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.

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:

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.
2. Counting money in the till before and after shift, and other related paperwork.
3. Preparation of equipment for the day's operation, i.e., greasing, fueling, warming up vehicles; cleaning vehicles or equipment; loading, and similar activities.

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.

APPENDIX D

LEXSTAT 29 C.F.R. 785.11

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*** THIS SECTION IS CURRENT THROUGH THE OCTOBER 18, 2006 ISSUE OF ***
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TITLE 29 -- LABOR
SUBTITLE B -- REGULATIONS RELATING TO LABOR
CHAPTER V -- WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR
SUBCHAPTER B -- STATEMENTS OF GENERAL POLICY OR INTERPRETATION NOT DIRECTLY
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SUBPART C -- APPLICATION OF PRINCIPLES
EMPLOYEES "SUFFERED OR PERMITTED" TO WORK

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29 CFR 785.11

§ 785.11 General.

Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time. (*Handler v. Thrasher*, 191, F. 2d 120 (C.A. 10, 1951); *Republican Publishing Co. v. American Newspaper Guild*, 172 F. 2d 943 (C.A. 1, 1949); *Kappler v. Republic Pictures Corp.*, 59 F. Supp. 112 (S.D. Iowa 1945), aff'd 151 F. 2d 543 (C.A. 8, 1945); 327 U.S. 757 (1946); *Hogue v. National Automotive Parts Ass'n.* 87 F. Supp. 816 (E.D. Mich. 1949); *Barker v. Georgia Power & Light Co.*, 2 W.H. Cases 486; 5 CCH Labor Cases, para. 61,095 (M.D. Ga. 1942); *Steger v. Beard & Stone Electric Co., Inc.*, 1 W.H. Cases 593; 4 Labor Cases 60,643 (N.D. Texas, 1941))

HISTORY: [26 FR 190, Jan. 11, 1961]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
52 Stat. 1060; 29 U.S.C. 201-219.

NOTES: NOTES APPLICABLE TO ENTIRE SUBTITLE:

CROSS REFERENCES: Railroad Retirement Board: See Employees' Benefits, 20 CFR chapter II.

Social Security Administration: See Employees' Benefits, 20 CFR chapter III.

EDITORIAL NOTE: Other regulations issued by the Department of Labor appear in 20 CFR chapters I, IV, V, VI, VII; 30 CFR chapter I; 41 CFR chapters 50, 60, and 61; and 48 CFR chapter 29.

225 words

LEXSTAT 29 C.F.R. 785.12

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EMPLOYEES "SUFFERED OR PERMITTED" TO WORK

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29 CFR 785.12

§ 785.12 Work performed away from the premises or job site.

The rule is also applicable to work performed away from the premises or the job site, or even at home. If the employer knows or has reason to believe that the work is being performed, he must count the time as hours worked.

HISTORY: [26 FR 190, Jan. 11, 1961]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
52 Stat. 1060; 29 U.S.C. 201-219.

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EDITORIAL NOTE: Other regulations issued by the Department of Labor appear in 20 CFR chapters I, IV, V, VI, VII; 30 CFR chapter I; 41 CFR chapters 50, 60, and 61; and 48 CFR chapter 29.

39 words

LEXSTAT 29 C.F.R. 785.13

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29 CFR 785.13

§ 785.13 Duty of management.

In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

HISTORY: [26 FR 190, Jan. 11, 1961]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
52 Stat. 1060; 29 U.S.C. 201-219.

NOTES: NOTES APPLICABLE TO ENTIRE SUBTITLE:

CROSS REFERENCES: Railroad Retirement Board: See Employees' Benefits, 20 CFR chapter II.

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EDITORIAL NOTE: Other regulations issued by the Department of Labor appear in 20 CFR chapters I, IV, V, VI, VII; 30 CFR chapter I; 41 CFR chapters 50, 60, and 61; and 48 CFR chapter 29.

64 words

APPENDIX E

INTERPRETIVE GUIDELINE

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

SECTION: Employment Standards	NUMBER: ES-016
STATUTE AUTHORITY: Chapter 49.12 RCW	ISSUED: April 1992
REGULATION: WAC 296-126-002	REPLACES:
TITLE: Definitions	SEE ALSO: ES-004,005 and 006

WAC 296-126-002 DEFINITIONS.

(1) "Employer" means any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees, unless exempted by chapter 49.12 RCW or these rules.

(2) "Employee" means an employee who is employed in the business of his employer whether by way of manual labor or otherwise. This definition is not intended, for purposes of these regulations, to include: Any individual registered as a volunteer with a state or federal volunteer program or any person who performs any assigned or authorized duties for an educational, religious, governmental or nonprofit charitable corporation by choice and receives no payment other than reimbursement for actual expenses necessarily incurred in order to perform such volunteer services; any individual employed in a bona fide executive, administrative or professional capacity or in the capacity of commissioned outside salesperson; nor is it intended to include independent contractors where said individuals control the manner of doing the work and the means by which the result is to be accomplished.

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

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

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

(6) "Student learner" means a person enrolled in a bona fide vocational training program accredited by a national or regional accrediting agency recognized by the

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Employment Standards Section

United States Office of Education, or authorized and approved by the Washington state commission for vocational education, who may be employed part time in a definitely organized plan of instruction.

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

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

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

(10) "Committee" shall mean the industrial welfare committee as provided by law. The committee's secretary is the supervisor of employment standards in care of the Department of Labor and Industries, General Administration Building, Olympia, Washington 98504.

WAC 296-126-002 INTERPRETIVE GUIDELINES

WAC 296-126-002(1) No Interpretive Guideline.

WAC 296-126-002(2) "Employee" means any employee who is employed in the business of the employer whether by way of manual labor or otherwise.

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 who receive 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. Any individual providing services as a volunteer

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and who then receives wages for their services is no longer exempt and must be paid at least minimum wage and overtime payments for hours worked in excess of 40 hours per work week. Unpaid employment is unlawful.

Volunteers are not allowed in a "for-profit" business.

An employee-employer relationship is deemed to exist where there is a contemplation or expectation of pay for goods or services provided.

An employer cannot avoid conforming with the Employment Standards by merely referring to someone as an "independent contractor". In general an employee, as distinguished from an independent contractor who is engaged in a business of their own, is one who follows the usual path of an employee and is dependent on the business which the employee services. Significant factors (no single factor is controlling) shall include, but not be limited to, the following:

1. Sources of income--normally independent contractors will have a number of sources of income while a single source of income implies an employer/employee relationship.
2. Investment in tools and/or equipment--investment in tools and/or equipment are significant to the performance of the assignment. Independent contractors normally supply the items while employees are provided tools and/or equipment by their employer. Repairs to tools and/or equipment are usually paid for by the independent contractor.
3. Opportunity for loss--if a worker has no chance to lose money, there is little chance that worker is a true independent contractor. Normally, people in their own business pay their own business expenses and expenses may exceed income.
4. Termination of the relationship--the right to terminate at will and without liability is typical in an employer/employee relationship, while termination only for cause is typical of an independent contractor relationship.

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5. Control--if the employer controls the hours of work and controls the means to accomplish the results desired, an employer/employee relationship exists. Controlling only the goal to be accomplished and not the means is normal when working with an independent contractor.
6. Distinct occupation or business--independent contractors may have their own business cards, may advertise their service, may be incorporated, and may operate under a business name. Employees will do none of these things.
7. Training--if previous training or experience is required, the chances of being considered an independent contractor are greater than if little skill or training is necessary.
8. Method of payment--independent contractors are paid by the job while employees are paid by unit of time, piece rate or commission.
9. Fringe benefits--employees are eligible for fringe benefits while independent contractors are ineligible.
10. Length of service--employees are hired indefinitely, while independent contractors are hired for a definite duration.
11. Personal performance of services--employees perform duties under the general direction of the employer while independent contractors can assign a job to assistants they hire.

Regulations concerning bona fide executive, administrative, professional and outside commissioned salespersons are defined in WAC 296-128-510 through 540. See also Interpretive Guidelines No. ES-005 and ES-006.

WAC 296-126-002(3) "Engage, suffer or permit to work" shall be construed to mean all work requested, suffered, permitted or allowed. For example, 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.

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WAC 296-126-002(4) No Interpretive Guideline.

WAC 296-126-002(5) No Interpretive Guideline.

WAC 296-126-002(6) Refer to WAC 296-128-175 Student Learners.

WAC 296-126-002(7) Refer to WAC 296-128-100 Employment of Learners.

WAC 296-126-002(8) "Hours worked" shall include but not be limited to travel time, training time, meeting time, waiting time, and preparatory and concluding activities. "Authorized" shall include "engage, suffer or permit to work" as set forth in WAC 296-126-002(3):

Travel Time

Travel time other than normal commute time is that time which it takes to travel to and from the place where the work actually begins and ends.

The principles which apply in determining whether or not time spent in travel is working time depend upon the kind of travel involved. An employee who travels from home before the regular work day and returns home at the end of the work day is engaged in ordinary home to work travel. This is true whether the employee works at a fixed location or at different job sites. Normal travel from home to work is not work time and does not require compensation.

Time spent in travel when employees are required by their employer to drive a vehicle to transport tools (other than personal tools), equipment, or other employees from the employer's place of business to the job site is considered work time. It makes no difference whether the vehicle is the employee's own vehicle, a company vehicle or a rented vehicle; however, there is no obligation to pay employees who are merely riding on or in the vehicle.

Time spent driving from home to the job site, from job site to job site, and from job site to home if the employer requires the employee to take the employer's vehicle home is considered work time.

Time spent driving from job site to job site regardless of ownership of the vehicle is considered time worked.

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When employees are required by the employer to take a trip by automobile, plane, train, bus or any other mode of transportation, which requires they be away from home or designated work site, only time spent in such travel during hours which correspond to the employee's normal work hours are counted as time worked. Hours spent in travel on Saturdays, Sundays and holidays which correspond to the employee's normal working hours on other days of the week must also be counted as time worked.

Training/Meeting Time

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. Those circumstances under which attendance at training programs and similar activity need not be counted as working time if all of the following tests are met:

1. attendance is voluntary;
2. the employee performs no productive work during the meeting or lecture;
3. the meeting takes place outside of regular working hours; and
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.

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 nonattendance, time spent shall be considered hours worked.

Time spent in training programs mandated by state or federal regulation, not by the employer, may not be considered hours of work if all but criteria No. 4 above have been met.

For example, 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.

Although the training course may be directly related to the employee's job, the training is 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. 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, criterion No. 4 would not have to be met.

As for criteria No. 1 above, in each situation the reason why attendance by an employee is not voluntary must be examined. Where an employer (or someone acting on its 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, shall not be considered hours worked. The cost of maintaining the certificate or license shall be borne by the employee.

Waiting Time

- Waiting time is generally interpreted to mean all time that an employee is required or authorized to report at a designated time and remain on the premises or at a designated work site. During this time, the employees are considered to be waiting and all hours shall be considered hours worked. If employees are not completely relieved from duty and cannot use the time effectively for their own purposes, such time shall be considered hours worked. If employees are definitely told in advance they may leave the job and they will not have to commence work until a definitely specified time, such time shall not be considered hours worked.

Preparatory/Concluding Activity Time

Preparatory and concluding activities are generally interpreted to mean those activities which 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:

1. If employees in a chemical plant cannot perform their principle activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the work day would be an integral part of the employee's principle activity.
2. Counting money in the till before and after shift and other related paperwork.
3. Preparation of equipment for the day's operation, i.e., greasing, lubing, warming up vehicles; cleaning, fueling vehicles; washing vehicles or equipment; loading and/or unloading vehicles and similar activities.

WAC 296-126-002(9) No Interpretive Guideline.

WAC 296-126-002(10) Refer to WAC 296-126-001(2) Applicability. "Industrial welfare committee" shall mean the director of the Department of Labor and Industries as here and elsewhere mentioned in these Employment Standards Interpretive Guidelines.