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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

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

Petitioners/Plaintiffs,

v.

SAKUMA BROTHERS FARMS, INC.,

Respondent/Defendant.

**PLAINTIFFS ANA LOPEZ DEMETRIO AND FRANCISCO
EUGENIO PAZ'S REPLY BRIEF ON CERTIFIED QUESTIONS**

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ORIGINAL

TABLE OF CONTENTS

	Page No.
I. INTRODUCTION	1
II. REPLY ARGUMENT	2
A. Washington Courts Have Established that Washington Employers Must Pay Employees for Time Spent on Rest Breaks	2
1. Cases decided since WAC 296-131-020(2) was adopted have established that Washington employers must provide separately paid rest breaks	2
2. The regulatory history cited by Sakuma does not contradict the case law that has established workers' rights to separately paid rest breaks	6
B. DLI Interpretation of the Relevant Regulatory Language Supports the Requirement that Employers Must Separately Pay Piece-Rate Farm Workers for Rest Break Time	7
C. Sakuma Misstates the Washington Standards for Minimum Wage Compliance	9
1. Under the MWA, employees have a right to receive no less than the minimum hourly wage for each hour worked.....	10
2. Sakuma misstates MWA compliance standards for pieceworkers	12
D. <i>Bluford v. Safeway Stores, Inc.</i> Is Persuasive Authority Because It Is Based on Statutory and Regulatory Language Parallel to Washington Law	14

E.	Sakuma Ignores the Relevant Language of FLSA Regulations Concerning Rest Breaks and Nonproductive “Hours Worked”	15
F.	Sakuma’s Arguments Regarding the Proper Rate for Rest Break Pay Conflates Workers’ Rights Under WAC 296-131-020(2) With Their Rights Under the MWA	17
G.	Sakuma Misapprehends the Public Policy Implications of Separate Payment for Rest Breaks.....	20
H.	An Attorney Fee Award Is Appropriate.....	24
III.	CONCLUSION.....	24

TABLE OF AUTHORITIES

Page No.

STATE CASES

Abels v. Snohomish Cnty. Pub. Util. Dist. No. 1,
69 Wn. App. 542, 849 P.2d 1258 (1993)..... 24

Anfinson v. FedEx Ground Package Sys., Inc.,
174 Wn.2d 851, 281 P.3d 289 (2012)..... 14

Bluford v. Safeway Stores, Inc.
216 Cal. App. 4th 864, 157 Cal. Rptr. 3d 212
(Cal. Ct. App. 2013)..... 14, 15

Bravern Residential, II, LLC v. Dept. of Revenue,
___ Wn. App. ___, 334 P.3d 1182 (2014)..... 12

Bravo v. Dolsen Cos.,
125 Wn.2d 745, 888 P.2d 147 (1995)..... 23

Drinkwitz v. Alliant Techsystems, Inc.,
140 Wn.2d 291, 996 P.2d 582 (2000)..... 11, 15, 22

Hale v. Wellpinit Sch. Dist. No. 49,
165 Wn.2d 494, 198 P.3d 1021 (2009)..... 2, 7

Hisle v. Todd Pac. Shipyards Corp.,
151 Wn.2d 853, 93 P.3d 108 (2004)..... 16

In re Parentage of L.B.,
155 Wn.2d 679, 122 P.3d 161 (2005)..... 15

Inniss v. Tandy Corp.,
141 Wn.2d 517, 7 P.3d 807 (2000)..... 18

Macias v. Dep't of Labor & Indus.,
100 Wn.2d 263, 668 P.2d 1278 (1983)..... 23

Miller v. Farmer Bros. Co.,
136 Wn. App. 650, 150 P.3d 598 (2007)..... 11, 12

<i>Overton v. Econ. Assistance Auth.</i> , 96 Wn.2d 552, 637 P.2d 652 (1981).....	2
<i>Pellino v. Brink's Inc.</i> , 164 Wn. App. 668, 267 P.3d 383 (2011).....	1, 3, 5, 7, 16, 23
<i>Seattle Prof'l Eng'g Assn. v. Boeing Co. (SPEEA)</i> , 139 Wn.2d 824, 991 P.2d 1126 (2000).....	11
<i>Silverstreak, Inc. v. Dep't of Labor & Indus.</i> , 159 Wn.2d 868, 154 P.3d 891 (2007).....	2
<i>State v. Reier</i> , 127 Wn. App. 753, 112 P.3d 566 (2005).....	2
<i>Stevens v. Brink's Home Sec., Inc.</i> , 162 Wn.2d 42, 169 P.3d 473 (2007).....	5, 9, 12
<i>Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.</i> , 175 Wn. 2d 822, 831-32, 287 P.3d 516 (2012).....	<i>Passim</i>
<i>Whatcom Cnty. v. City of Bellingham</i> , 128 Wn.2d 537, 909 P.2d 1303 (1996).....	12
<i>Wingert v. Yellow Freight Sys., Inc.</i> , 146 Wn.2d 841, 50 P.3d 256 (2002).....	2, 3, 17, 19

FEDERAL CASES

<i>Alvarez v. IBP, Inc.</i> , 339 F.3d 894 (9th Cir. 2003)	10, 11
---	--------

STATE STATUTES

RCW 49.46.020	9, 10, 11, 12
RCW 49.46.090(1).....	17, 22, 23

FEDERAL STATUTES

29 U.S.C. § 206(a)	10
--------------------------	----

STATE RULES

RAP 10.4(c)	6
WAC 296-126-021.....	12, 13
WAC 296-131-020(2).....	5, 13
WAC 296-131-110(2).....	9

FEDERAL RULES

29 C.F.R. § 778.318	16
29 C.F.R. § 785.18	15

OTHER AUTHORITIES

DLI Admin. Policy ES.A.1 (2014)	11
DLI Admin. Policy ES.A.5 (2002)	11, 12, 18
DLI Admin. Policy ES.A.7 (2002)	11
DLI Admin. Policy ES.A.8.1 (2014)	8
DLI Admin. Policy ES.C.6 (2005).....	4, 7, 8, 14, 17
<i>Michael I. Marsh & Dorothy A. Johnson, A real heat shield for farmworkers, L.A. TIMES, Aug. 2, 2008</i>	21
<i>Washington State Farmworker Housing Trust Survey (May 2007)</i>	22

Workplace Safety & Health Topics, Heat Stress,
CTRS. FOR DISEASE CONTROL & PREVENTION 20, 21

APPENDIX

- A. DLI Fact Sheet, March 1990
- B. DLI Admin. Policy ES.C.6 (2005)
- C. DLI Poster, Publication F700-074-909, June 2013
- D. DLI Admin. Policy ES.A.1 (2014)
- E. DLI Admin. Policy ES.A.7 (2002)
- F. DLI Admin. Policy ES.A.5 (2002)

I. INTRODUCTION

Washington farm workers have two independent rights to paid rest breaks. First, they have a right to paid rest breaks under WAC 296-131-020(2) because that regulation provides that such breaks must be “on the employer’s time.” Second, they have a right under the Minimum Wage Act (“MWA”) to receive no less than the minimum hourly wage for rest break time because such time is considered “hours worked.”

Sakuma disregards workers’ rights to paid rest breaks under WAC 296-131-020(2) and misstates the law on workers’ rights under the MWA. With regard to WAC 296-131-020(2), Washington courts and the Department of Labor and Industries (“DLI”) recognize that “on the employer’s time” means “that the employer is responsible for paying the employee for the time spent on a rest period.” *Pellino v. Brink’s Inc.*, 164 Wn. App. 668, 689, 267 P.3d 383 (2011) (quoting DLI Admin. Policy ES.C.6. § 10 (2005)). With regard to the MWA, Washington courts recognize that rest breaks are “hours worked” that must be paid at no less than the minimum hourly wage and that cannot be offset by pay for other time spent working. *See Wash. State Nurses Ass’n v. Sacred Heart Med. Ctr.*, 175 Wn. 2d 822, 831-32, 287 P.3d 516 (2012).

The workers respectfully request that this Court hold that piece-rate farm workers must be separately paid for rest break time and that the

rate of pay for such time must be based on their average hourly rate from piece-rate picking work, but no less than the minimum hourly wage.

II. REPLY ARGUMENT

A. **Washington Courts Have Established that Washington Employers Must Pay Employees for Time Spent on Rest Breaks.**

Courts retain the ultimate responsibility for interpreting a statute or regulation. *See Overton v. Econ. Assistance Auth.*, 96 Wn.2d 552, 555, 637 P.2d 652 (1981). It is a “fundamental rule of statutory construction that once a statute has been construed by the highest court of the State, that construction operates as if it were originally written into it.” *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 506, 198 P.3d 1021 (2009) (quoting *Johnson v. Morris*, 87 Wn.2d 922, 927, 557 P.2d 1299 (1976)). Washington courts interpret agency regulations in the same way they interpret statutes. *See Silverstreak, Inc. v. Dep’t of Labor & Indus.*, 159 Wn.2d 868, 881-82, 154 P.3d 891 (2007); *State v. Reier*, 127 Wn. App. 753, 757, 112 P.3d 566 (2005). Thus, where Washington courts construe the meaning of language in a regulation, that construction is the law.

1. Cases decided since WAC 296-131-020(2) was adopted have established that Washington employers must provide separately paid rest breaks.

In *Wingert v. Yellow Freight Systems, Inc.*, this Court held that the non-agricultural rest break rule, WAC 296-126-092(4), requires that an employer must provide “paid rest periods” and that the employer violated

WAC 296-126-092(4) when it “failed to provide paid rest periods to employees” 146 Wn.2d 841, 848, 50 P.3d 256 (2002). In so holding, this Court construed “on the employer’s time” to require separate payment for rest break time.¹ *See id.* at 847-48. Nine years after this Court decided *Wingert*, the Court of Appeals confirmed that “on the employer’s time” in WAC 296-126-092(4) means “the employer is responsible for paying the employee for the time spent on a rest period” and that “[r]est periods are considered hours worked.” *Pellino*, 164 Wn. App. at 689 (quoting DLI Admin. Policy ES.C.6. § 10).

These two cases established that the language “on the employer’s time” in WAC 296-126-092(4)—the same language as in the agricultural rest break rule—requires separately paid rest breaks. Later, in *Sacred Heart*, this Court held that a failure to provide paid rest breaks is not only a violation of WAC 296-126-092(4) but also a violation of the MWA. 175 Wn.2d at 831-32. In so holding, this Court made clear that rest breaks are “hours worked” that must be paid at no less than the minimum hourly wage (or at the overtime rate, if applicable). *Id.*

¹ Like the non-agricultural rest break rule, the rule for agriculture provides for rest breaks “on the employer’s time.” WAC 296-131-020(2) (“Every employee shall be allowed a rest period of at least ten minutes, on the employer’s time, in each four-hour period of employment.”).

Sakuma does not cite a single case supporting its argument that compensation for farm worker rest breaks can be included in a piece rate. Indeed, this assertion is belied by this Court’s statement in *Sacred Heart* that rest break time “may not be offset” by pay received for working time. 175 Wn.2d at 832.

Sakuma suggests that none of the Washington cases concerning paid rest breaks are relevant, claiming that the cases concern only how to remedy “missed” rest breaks. Sakuma is wrong. The reason why a remedy for “missed” rest breaks is necessary is that Washington employers are obligated to provide *paid* rest breaks. *See Sacred Heart*, 175 Wn.2d at 831 (stating that “both the rest break time and additional labor time constitute [compensable] ‘hours worked’” and that “Sacred Heart may not avoid its obligation to provide 10 minutes of ‘hours worked’ for rest”); DLI Admin. Policy ES.C.6 § 10 (stating requirement under WAC 296-126-092(4) to pay for “time spent on a rest period”). The rest break claims upheld in *Wingert*, *Pellino*, and *Sacred Heart* all arose out of the employers’ obligation to provide separately paid rest breaks under WAC 296-126-092(4). Indeed, if rest breaks were not “hours worked” that an employer must compensate, there would be no claim for compensation for a “missed” rest break.

Sakuma also suggests *Sacred Heart* is inapposite because it involved overtime for missed rest breaks. But this Court's holding that rest break time constitutes compensable "hours worked" is not limited to overtime. It is a violation of the MWA to fail to pay for any "hours worked" at less than the minimum hourly wage. *Stevens v. Brink's Home Sec., Inc.*, 162 Wn.2d 42, 47, 169 P.3d 473 (2007).

Sakuma also asserts that the holding in *Pellino* that employers have a "mandatory obligation" to provide paid rest breaks should not apply here. Answering Brief at 18. Sakuma incorrectly suggests that because WAC 296-131-020(2) provides that paid rest breaks "shall be allowed," the taking of rest breaks is a "voluntary decision for the worker." *Id.* In *Pellino*, the court held that the plain language of WAC 296-126-092(4) (which states that employees "shall be allowed" rest breaks "on the employer's time") "imposes a mandatory obligation on the employer" to provide paid rest breaks. 164 Wn. App. at 688. WAC 296-131-020(2) uses the same "shall be allowed" language as WAC 296-126-092(4). Thus, agricultural employers should have the same mandatory obligation to provide paid rest breaks as non-agricultural employers.

2. The regulatory history cited by Sakuma does not contradict the case law that has established workers' rights to separately paid rest breaks.

Despite the case law that has interpreted the same “on the employer’s time” language that appears in WAC 296-131-020(2), Sakuma suggests the rule’s muddled regulatory history indicates that pay for rest breaks is included in the piece rate. The documents on which Sakuma relies do not support this theory. For example, the “Outline of Agricultural Labor Rule Proposal” from March 20, 1990 (with no listed author) merely states, “[t]here was disagreement whether rest breaks should be paid.” *See* Answering Brief, Appendix A-2. The outline does not reveal the drafters’ ultimate conclusion as to whether or how rest breaks must be paid other than that rest breaks must be “provided on the employer’s time.”² *See id.* The official DLI fact sheet for the regulation, however, states explicitly, “[t]he proposal requires a *paid* 10-minute rest break be provided for every four hours worked.”³ Appendix A (emphasis added).

Although the DLI fact sheet states the regulation requires paid rest breaks, DLI did not state how rest breaks must be paid when it

² The outline also explains that rest periods must be included in time worked for purposes of computing minimum wage on a piecework basis, but that explanation does not address the question of whether workers are entitled to separate pay for rest break time before such computations are performed.

³ The DLI administrative policies and other DLI documents cited herein are included in the Appendix. *See* RAP 10.4(c).

promulgated WAC 296-131-020 in 1990. Washington courts have since established that “on the employer’s time” means employers must pay employees for the time spent on rest breaks. *See Pellino*, 164 Wn. App. at 689 (quoting DLI Admin. Policy ES.C.6 § 10, issued in 2002, revised in 2005). This construction of “on the employer’s time” should apply to WAC 296-131-020(2) as if it “were originally written into it.” *Hale*, 165 Wn.2d at 506 (quoting *Johnson*, 87 Wn.2d at 927).

B. DLI Interpretation of the Relevant Regulatory Language Supports the Requirement that Employers Must Separately Pay Piece-Rate Farm Workers for Rest Break Time.

The only DLI administrative policy that concerns Washington rest break requirements states that “on the employer’s time” means “the employer is responsible for paying the employee for the time spent on a rest period.” DLI Admin. Policy ES.C.6 § 10.⁴ Sakuma ignores this policy and instead focuses on arguments relating to *computing the minimum wage* on a piecework basis. The certified questions do not concern how to compute minimum wage on a piecework basis.

Sakuma asserts that DLI’s literature and instructions “establish[] that there is no requirement to provide any separate and additional pay for rest breaks taken by workers employed on a piece-rate basis.” Answering

⁴ This policy interprets the language of the rest break requirement in WAC 296-126-092(4). DLI has not issued a separate administrative policy addressing the identical language of WAC 296-131-020(2).

Brief at 9. But the DLI materials on which Sakuma relies concern overtime calculations and minimum wage compliance for piecework hours. They do not address rest break requirements.

For example, DLI Administrative Policies ES.A.8.1 and ES.A.8.2 discuss how to calculate the “regular rate” for overtime pay under RCW 49.46.130. As Sakuma concedes, farm workers are not entitled to overtime. Even if “regular rate” determinations for overtime were relevant, the DLI policy relied on by Sakuma provides that for piece-rate employees the “regular rate” is computed by adding total earnings for the workweek “from piece rate *and all other earnings* . . . and any sums that may be *paid for other hours worked.*” DLI Admin. Policy ES.A.8.1 (2014) (emphasis added). “Rest periods are considered hours worked.” DLI Admin. Policy ES.C.6 § 10; *see also Sacred Heart*, 175 Wn.2d at 831-32. Thus, the DLI policy presumes that where an employer pays piece-rate wages, the employer will also pay a separate wage for rest breaks and “other hours worked.”

Furthermore, this Court should not accept Sakuma’s conclusions about rest break pay requirements based on DLI publications that do not address rest breaks. Instead, the Court should look to the DLI publications that address rest breaks. For example, the wage and hour rights poster that DLI requires *all* Washington agricultural employers to post states farm

workers are entitled to “a 10-minute paid rest break within each four-hour period of work.” Appendix C; WAC 296-131-110(2). This official DLI poster does not distinguish between agricultural workers and non-agricultural workers, nor between pieceworkers and hourly workers, in their rights to “10-minute paid rest break[s].” Appendix C.

Sakuma erroneously suggests that “workweek” MWA compliance standards for pieceworkers preclude the rule that employers must separately pay piece-rate farm workers for rest break time. In fact, piece-rate farm workers have a right to separately paid rest breaks independent of the MWA because WAC 296-131-020(2) provides that rest breaks must be “on the employer’s time.” Furthermore, as discussed below, a MWA workweek analysis does not apply to an employer’s payment obligations for “hours worked” outside of piecework activities—including rest break hours.

C. Sakuma Misstates the Washington Standards for Minimum Wage Compliance.

Under the MWA, Washington employers must pay employees at least the minimum hourly wage for all hours worked. RCW 49.46.020; *Stevens*, 162 Wn.2d at 47. This Court has held that rest breaks are “hours worked” under the MWA and must be paid. *Sacred Heart*, 175 Wn. 2d at 831-32. Furthermore, under the MWA, rest break time “may not be offset by time spent working.” *Id.* at 832. Sakuma’s practice of offsetting rest

period time with piece pay received for fruit picking time violates the MWA. *See id.*

The issue before this Court is *whether* piece-rate farm workers are entitled to *separate pay* for rest break time. The issue is not *how to compute minimum wage* for piece-rate farm workers. Nonetheless, the workers provide the following clarification of Washington minimum wage law in response to Sakuma’s arguments.

1. Under the MWA, employees have a right to receive no less than the minimum hourly wage for each hour worked.

Fair Labor Standards Act (“FLSA”) case law concerning a “workweek” measure for minimum wage compliance is inapposite because Washington’s MWA does not include the “in any workweek” language of the FLSA. *Compare* RCW 49.46.020 (requiring payment of minimum wage “per hour”), *with* 29 U.S.C. § 206(a) (providing right to minimum wage “in any workweek”). Indeed, the Ninth Circuit has recognized that the MWA, while otherwise similar to the FLSA, omits the FLSA’s reference to the obligation to pay minimum wage “in any workweek.” *Alvarez v. IBP, Inc.*, 339 F.3d 894, 912-13 (9th Cir. 2003) (holding that Washington minimum wage compliance is generally determined for *each hour worked* rather than calculated on a workweek basis).

Under the MWA, minimum wage compliance is generally measured on a “per hour” basis. *See* RCW 49.46.020; *Miller v. Farmer Bros. Co.*, 136 Wn. App. 650, 656, 150 P.3d 598 (2007) (“Under the Act, employees must be paid per hour, and must receive at least the minimum wage.”); DLI Admin. Policy ES.A.5 (2002) (stating MWA establishes minimum wage “for each hour of employment”).⁵ Although this Court has not directly addressed this issue, the Court affirmed a trial court decision in *Seattle Professional Engineering Association v. Boeing Co. (SPEEA)*, which had held that MWA compliance is measured using a per-hour standard rather than a workweek standard. *See* 139 Wn.2d 824, 834 n.4, 839-40, 991 P.2d 1126 (2000); *Alvarez*, 339 F.3d at 912 (explaining that *SPEEA* trial court “used a per-hour measure and the Washington Supreme Court refused to criticize this aspect of the trial court’s methodology”).

2. Sakuma misstates MWA compliance standards for pieceworkers.

For employees who perform some work on a piecework basis, the generally applicable per-hour approach to minimum wage compliance is still used for their non-piecework “hours worked” (including rest breaks)

⁵ This Court has noted that “the MWA and FLSA are not identical and we are not bound by such authority.” *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 298, 996 P.2d 582 (2000). The FLSA is a “floor” and not a “ceiling” on the wage and hour benefits to which employees are entitled under Washington law. *Id.* Where there are differences between the MWA and FLSA, Washington “[e]mployers must follow the laws that are more protective to the worker.” DLI Admin. Policy ES.A.1 § 2 at 2 (2014); *see also* DLI Admin. Policy ES.A.7 (2002) (same).

because Washington employers must pay employees at least the minimum hourly wage for all hours worked. *See Stevens*, 162 Wn.2d at 47. Thus, employers violate the MWA if they pay less than the minimum wage for each hour of non-piecework. *See RCW 49.46.020; Miller*, 136 Wn. App. at 656; DLI Admin. Policy ES.A.5.

There is a workweek *component* for MWA compliance for pieceworkers under WAC 296-126-021 (which, as Sakuma recognizes, does not apply to farm workers). Under that regulation, “[t]he amount earned on [a piecework] basis” is “credited as a *part* of the total wage for that period,” and “total wages” are then “computed on the hours worked in that period resulting in no less than the applicable minimum wage rate.” WAC 296-126-021 (emphasis added).

Washington courts interpret regulations like WAC 296-126-021 “in a manner that gives effect to all [the] language without rendering any part superfluous.” *Bravern Residential, II, LLC v. Dept. of Revenue*, ___ Wn. App. ___, 334 P.3d 1182, 1187 (2014); *see also Whatcom Cnty. v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) (holding that statutes must be construed so that no portion is rendered superfluous). Sakuma’s interpretation of WAC 296-126-021 renders subsection (1) of that regulation superfluous. If Sakuma were correct in its reading that employers may refuse to pay for certain “hours worked” so long as they

pay minimum wage on a workweek basis, subsection (1) of WAC 296-126-021 would have been omitted entirely. That subsection provides that the amount “earned on [a piecework] basis . . . may be credited as *a part* of the total wage for that period.” WAC 296-126-021(1) (emphasis added). Accordingly, for other “hours worked” (including rest breaks), Washington employees are entitled to separate pay that is also credited *as part* of the total wage for that period.

Here, the applicable regulation similarly requires that employers first ensure payment for rest break time, and then allows employers to perform a workweek calculation to determine minimum wage compliance for all hours worked, including both the piecework hours and rest break hours. *See* WAC 296-131-020(2). Sakuma argues that the second sentence of WAC 296-131-020(2) is inconsistent with separate payment for rest breaks. Answering Brief at 8. That sentence reads: “For purposes of computing the minimum wage on a piecework basis, the time allotted an employee for rest periods shall be included in the number of hours for which the minimum wage must be paid.” WAC 296-131-020(2). If Sakuma were correct that it need not pay for rest break time so long as it has satisfied its MWA obligations on a workweek basis, it would render the phrase “on the employer’s time” in the first sentence of WAC 296-131-020(2) superfluous. Giving meaning to the “on the employer’s

time” in the first sentence in WAC 296-131-020(2) is consistent with both the Washington requirement to pay for all “hours worked” and the rule of construction that no portion of a regulation be rendered superfluous.⁶

D. *Bluford v. Safeway Stores, Inc.* Is Persuasive Authority Because It Is Based on Statutory and Regulatory Language Parallel to Washington Law.

Sakuma incorrectly suggests that Washington does not apply the same legal principles that underlie the California Court of Appeal holding in *Bluford v. Safeway Stores, Inc.* In *Bluford*, the court held that piece-rate truck drivers must receive separate pay for rest break time under a regulation that—like Washington law—defines rest breaks as “hours worked.” 216 Cal. App. 4th 864, 870-72, 157 Cal. Rptr. 3d 212 (Cal. Ct. App. 2013); accord *Sacred Heart*, 175 Wn.2d at 831; DLI Admin. Policy ES.C.6 §§ 9-10. Sakuma suggests that this Court should follow FLSA “workweek” principles and ignore *Bluford*.⁷ But like the California law on which *Bluford* was based, WAC 296-131-020(2) is not modeled on the FLSA. Where there is no analogous federal provision, Washington courts do not rely on FLSA authority to interpret Washington law. See

⁶ This approach is also consistent with a liberal construction of the MWA’s requirement to pay at least the minimum wage for each hour worked. See *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 870, 281 P.3d 289 (2012) (holding remedial wage and hour laws must be liberally construed in favor of employees).

⁷ On issues of first impression in Washington, this Court may look at cases from other jurisdictions for guidance. *In re Parentage of L.B.*, 155 Wn.2d 679, 702, 122 P.3d 161 (2005). Because there is no authority directly on point in Washington, *Bluford* is instructive.

Drinkwitz, 140 Wn.2d at 300, 306 (refusing to follow FLSA authority where such authority had not been recognized by prior Washington case law). Because WAC 296-131-020(2) is not based on the FLSA, FLSA workweek principles are not relevant. Instead, this Court should consider the sound reasoning of *Bluford* in the interpretation of WAC 296-131-020(2).

E. Sakuma Ignores the Relevant Language of FLSA Regulations Concerning Rest Breaks and Nonproductive “Hours Worked.”

To the extent any federal authority is relevant in interpreting WAC 296-131-020(2), it is the authority relied on by this Court in *Sacred Heart*. In *Sacred Heart*, the Court relied partly on language in 29 C.F.R. § 785.18 that rest periods “must be counted as hours worked” and that “[c]ompensable time of rest periods may not be offset against other working time.” 175 Wn.2d at 831-832 (quoting 29 C.F.R. § 785.18).

Ignoring this authority, Sakuma asserts that under 29 C.F.R. § 778.318(c), a piece-rate employee “may receive an hourly rate of less than the applicable minimum wage for ‘nonproductive’ time.” Sakuma omits, however, the general rule in 29 C.F.R. § 778.318 that an agreement providing “for payment only for the hours spent in productive work,” in which “work hours spent in waiting time . . . or similar nonproductive time are not made compensable” *violates the FLSA* because “such nonproductive working hours must be counted and paid for.” 29 C.F.R.

§ 778.318(a). Instead, Sakuma refers to a narrow exception, which may permit employees and employers to enter an “agreement” that pay earned at “piece rates” is intended to cover productive as well as nonproductive work. 29 C.F.R. § 778.318(c). Under Washington law, any such agreement would be unavailing because paid rest breaks may not be waived under Washington law. *See Sacred Heart*, 175 Wn.2d at 831; *Pellino*, 164 Wn. App. at 697; DLI Admin. Policy ES.C.6 § 9 at 4. Moreover, Washington employees cannot waive or agree to alter their right to receive less than the minimum wage for each hour worked. *See Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 864-65, 93 P.3d 108 (2004) (holding that employee rights under MWA are “nonnegotiable”). Any agreement between an employee and an employer that would require the employee to work for less than the minimum wage “per hour” is “no defense” to a minimum wage claim. RCW 49.46.090(1).

F. Sakuma’s Arguments Regarding the Proper Rate for Rest Break Pay Conflates Workers’ Rights Under WAC 296-131-020(2) With Their Rights Under the MWA.

“A rest period violation can constitute both a condition of labor violation and a wage violation.” *Wingert*, 146 Wn.2d at 849. Here, the workers have two independent rights to separate pay for rest break time: one under WAC 296-131-020(2) and one under the MWA. Sakuma

improperly focuses solely on the MWA in addressing the proper rate for rest breaks.

While WAC 296-131-020(2) (like WAC 296-126-092(4)) gives workers the right to separately paid rest breaks based on the workers' regular hourly rate of pay, the MWA entitles workers only to minimum wage for rest break time. *See SPEEA*, 139 Wn.2d at 834 (holding that although employees can pursue claims for their regular pay rate under RCW 49.52 and RCW 49.48, "recovery under the WMWA is limited to the statutory minimum wage"). This is why the workers stated in their opening brief that piece-rate farm workers who do not produce enough pieces to average minimum wage earnings for all piecework time in a week should be paid for their rest break time at no less than the minimum wage. *See* Opening Brief at 25-26.

In arguing that the rate should always be based on the minimum wage, Sakuma reverts to "workweek" analysis, relying on *Inniss v. Tandy Corporation*, including the unpublished Court of Appeals decision in that case. Sakuma's argument is misguided. First, GR 14.1(a) provides that a party "may not cite as an authority an unpublished opinion of the Court of Appeals," so Sakuma's discussion of the *Inniss* Court of Appeals decision should be disregarded. Second, this Court's opinion in *Inniss* is inapposite. That case focused solely on the "regular rate" of pay under

RCW 49.46.130 for *overtime pay* calculations for *salaried employees* with a fluctuating workweek. See *Inniss v. Tandy Corp.*, 141 Wn.2d 517, 523-24, 534, 7 P.3d 807 (2000). In contrast, the workers here assert claims for failure to separately pay for rest break time, not overtime, and the workers here are not salaried employees.

Where minimum wage *straight-time* standards are at issue, Washington employees must receive no less than the minimum hourly wage for each hour of employment under RCW 49.46.020. DLI Admin. Policy ES.A.5. at 1 (“RCW 49.46.020 is a minimum guarantee . . . for each hour of employment.”). This includes rest break time because such time is considered “hours worked.” *Sacred Heart*, 175 Wn.2d at 831-32.

The MWA is not the only expression of rights to rest break pay; WAC 296-131-020(2) also provides that rest breaks must be “on the employer’s time.” In *Wingert* and *Sacred Heart*, this Court recognized the employees’ right to paid rest breaks under the parallel regulation, WAC 296-126-092(4), but those cases did not explicitly address the proper hourly *rate* for rest break time. In those cases, however, it was implicit that workers’ rest break pay would be based on their regular hourly rate of pay, as opposed to minimum wage. See *Sacred Heart*, 175 Wn.2d at 825-26 (noting employer’s concession that at least “straight time compensation” must be paid for rest break time); *Wingert*, 146 Wn.2d at

845 (noting that the workers received certain paid rest breaks without distinguishing between their regular pay rate and their rest break pay rate). This is the standard approach to rest break compensation. Thus, for example, an employee who earns \$10 per hour earns \$10 per hour for rest break time.

The same approach should apply for piece-rate farm workers. This Court should hold that, under WAC 296-131-020(2), pay for rest breaks is calculated based on the workers' regular hourly rate of pay—a rate determined by calculating the worker's average hourly earnings from piecework activities each week. Such a ruling gives full meaning to the phrase “on the employer's time” because piece-rate workers will not take a pay cut during their rest breaks.

In sum, this Court should hold that under WAC 296-131-020(2), the workers have a right to separately paid rest breaks at an hourly rate based on the worker's average hourly earnings from piecework activities each week, and that under the MWA, the workers have a right to separately paid rest breaks at no less than the minimum hourly wage.

G. Sakuma Misapprehends the Public Policy Implications of Separate Payment for Rest Breaks.

Sakuma argues that separately paying piece-rate workers for rest breaks is unnecessary and will undermine the incentives of the piece rate system. On the contrary, separate payment for rest break time can both

incentivize productivity and safeguard workers. Separately paying workers for breaks “on the employer’s time” allows faster piece-rate workers to receive higher pay. In addition, paid rest breaks are consistent with protecting employees from labor conditions that have a “pernicious effect on their health.” *Wingert*, 146 Wn.2d at 850 (quoting RCW 49.12.010); *see also Sacred Heart*, 175 Wn.2d at 832 (considering employee health in holding that rest breaks were compensable at overtime rate).

Rest breaks are particularly necessary in farm work because agriculture is a dangerous occupation. For instance, workers need breaks to protect themselves from extreme heat. *Workplace Safety & Health Topics, Heat Stress*, CTRS. FOR DISEASE CONTROL & PREVENTION, available at <http://www.cdc.gov/niosh/topics/heatstress/> (last visited January 21, 2015); *see also Michael I. Marsh & Dorothy A. Johnson, A real heat shield for farmworkers, L.A. TIMES, Aug. 2, 2008*, available at <http://articles.latimes.com/2008/aug/02/opinion/oe-marsh2> (last visited January 21, 2015). Indeed, in *Wingert* and *Sacred Heart*, this Court discussed safety concerns in holding that workers were entitled to *paid* rest breaks. *Wingert*, 146 Wn.2d at 850; *Sacred Heart*, 175 Wn.2d at 832. As Judge Pechman observed, piece-rate workers are more vulnerable to grueling work demands; a decision on whether they are entitled to paid

breaks will have implications on “both workplace conditions and fair wages.” Dkt. 42 at 4.

Sakuma argues that “enforcement of breaks” is adequate to protect worker safety, suggesting that payment for rest break time is unnecessary. Answering Brief at 26. This ignores the reality that without paid rest break time, workers will be pressured to work through breaks in order to earn badly needed wages. If workers receive separately paid rest breaks, then they will be earning wages while resting, and will not face the choice of either skipping breaks or more adequately supporting their families. In addition, rest breaks paid at workers’ average hourly rates will provide a strong incentive to work quickly because workers will earn more money during the break period if they work faster. Improved safety also promotes efficiency, a value espoused by Sakuma. *See* Answering Brief at 25. While injuries undermine productivity, rest periods promote efficiency. *See Sacred Heart*, 175 Wn.2d at 832.

Contrary to Sakuma’s suggestion, the piece-rate system is not a panacea for workers and employers. Sakuma has not offered any citation to support its assertion that workers return to its farms because it offers “high piece-rate wages.” In fact, this case challenged Sakuma’s failure to pay even the minimum wage in its compensation system. Dkt. 19 at ¶¶ 5.3, 11.2-11.5. Sakuma fails to recognize that farm workers receive

very low wages. An extensive survey found the average household income for farm workers interviewed in 2006 was approximately \$17,000, roughly \$3,300 below the poverty level. *Washington State Farmworker Housing Trust Survey* (May 2007) at 11, available at http://www.appliedsurveyresearch.org/storage/database/homelessness/farmworkers/WashingtonFarmworkers_2006.pdf (last visited January 21, 2015).

Sakuma articulates a distorted version of the “history” of piece-rate agreements. There is no historical record justifying the deprivation of rest break wages earned “on the employer’s time.” Quite the opposite, this Court has recognized Washington’s “long and proud history” of protecting employee rights. *Drinkwitz*, 140 Wn.2d 291 at 298. Washington’s strong policies do not allow waiver of any rights under the MWA. RCW 49.46.090(1). And employees’ rights to paid rest breaks “cannot be waived under Washington law.” *Pellino*, 164 Wn. App. at 697.

Farm workers have historically come from marginalized groups and must overcome prejudices and barriers. *See Washington State Farmworker Survey* at 9, 34-36 (farm workers interviewed were almost entirely Latino, were primarily immigrants, and over 77% could neither read nor write English). Yet Washington’s legislature, people, and courts have taken important steps to recognize farm workers’ rights to equal

protection in employment. In 1983, farm worker exclusion from workers' compensation was declared invalid by this Court. *Macias v. Dep't of Labor & Indus.*, 100 Wn.2d 263, 274-75, 668 P.2d 1278 (1983). In 1988, Washington voters decided to include farm workers in the minimum wage. Initiative Measure 518 (1988). In 1989, the legislature set child labor standards for agricultural employers and extended to farm workers workplace rights of unemployment compensation and paid rest breaks. Laws of 1989, ch. 380. Then in 1995, this Court recognized the right of farm workers to engage in concerted activity to improve working conditions. *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 748-49, 888 P.2d 147 (1995).

The workers ask that this Court follow in Washington's long and proud tradition of providing equal protection for farm workers by ensuring they receive paid rest breaks like other Washington workers, consistent with the public policies of protecting wage rights and worker safety.

H. An Attorney Fee Award Is Appropriate.

Sakuma incorrectly contends that "the certified question itself does not present an issue related to attorney's fees." Answering Brief at 29. The certified questions here concern whether and how Sakuma must pay wages for rest break time. Any order or opinion requiring payment of wages warrants an award of attorneys' fees and costs under RCW

49.48.030. *See Abels v. Snohomish Cnty. Pub. Util. Dist. No. 1*, 69 Wn. App. 542, 557-58, 849 P.2d 1258 (1993) (holding attorney's fees were properly awarded where employees established their right to receive future pension benefits based on compensation that included accumulated vacation time). Thus, the certified questions present issues "related to" attorneys' fees, and a fee award to the workers is appropriate.

III. CONCLUSION

The workers respectfully request that this Court conclude (1) employers have an obligation under WAC 296-131-020(2) and the MWA to separately pay piece-rate farm workers for rest break time; and (2) employers must calculate the rate of pay for rest break time based on the average hourly rate from piecework each week, but not less than minimum wage. The workers also respectfully request an award of attorneys' fees pursuant to RCW 49.48.030.

RESPECTFULLY SUBMITTED AND DATED this 29th day of
January, 2015.

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CERTIFICATE OF SERVICE

I certify that on January 29, 2015, I caused a true and correct copy of the foregoing to be served on the following via the means indicated:

Adam S. Belzberg, WSBA #41022	<input type="checkbox"/>	U.S. Mail, postage prepaid
Email: adam.belzberg@stoel.com	<input type="checkbox"/>	Hand Delivered via
STOEL RIVES LLP		Messenger Service
600 University Street, Suite 3400	<input type="checkbox"/>	Overnight Courier
Seattle, Washington 98101	<input type="checkbox"/>	Facsimile
Telephone: (206) 386-7516	<input checked="" type="checkbox"/>	Electronic Service, per
Facsimile: (206) 386-7500		parties' agreement

Attorney for Respondents

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 29th day of January, 2015.

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— APPENDIX A —



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
General Administration Building • Olympia, Washington 98504-1101

FACT SHEET

Minors in Agriculture
March 1990

Rules for minors in agriculture were proposed March 21 by the Department of Labor and Industries. Public and expert testimony will be sought at six hearings statewide April 24-30. Final rules will be adopted July 1, 1990.

The rules, developed in conjunction with the Advisory Committee on Agricultural Labor, cover hours of work and other employment standards for children under age 18 working in agricultural labor.

Meal and rest breaks

The proposal requires a paid 10-minute rest break be provided for every four hours worked. Employees working more than five hours shall receive a meal period of at least 30 minutes. Those working 11 or more hours shall receive an additional 30-minute meal period. These rules apply to adults as well as minors.

Minor work permits

Employers will be required to obtain a minor work permit from the department within three days after hiring a minor. These permits must be posted at the work site.

Parental and school authorization

Before employing minors, employers must obtain written permission from the minor's parent and from the school. School authorization is required only during the school year.

Age of employment

The minimum age to work will be age 14, except those picking berries. The minimum age for berry-pickers would be 12.

Hours of work

Minors under age 16 would be allowed to work up to three hours a day and 21 hours per week when school is in session; and up to eight hours a day and 40 hours a week when school is not in session. They may start work at 5 a.m. and finish at 8 p.m. during school weeks and start at 5 a.m. and finish at 9 p.m. when school is not in session.

Minors age 16 and 17 would be allowed up to six hours a day on school days and 38 hours a week during school weeks; and up to eight hours a day and

48 hours a week when school is not in session. They may start work at 5 a.m. and finish at 10 p.m. throughout the year.

Prohibited and hazardous employments

Minors under age 16 are prohibited from certain dangerous work as prescribed by federal standards. Federal work prohibitions include operating corn pickers, grain combines and working in a stall occupied by a stud horse.

The following restrictions apply to all minors:

- Handling, mixing, loading or applying poisonous pesticides.
- Transporting, transferring or applying anhydrous ammonia.
- Handling or using blasting agents, such as dynamite or blasting caps.
- Harvesting crops before the expiration of the pre-harvest interval. The pre-harvest interval is the time required between the last pesticide application and harvest of the crop, according to Environmental Protection Agency labeling requirements.

Lifting

Employers must instruct minors on proper weight-lifting techniques when lifting more than 20 pounds is a regular part of the job.

Penalties

The department may suspend any employer's permit to employ minors if conditions exist that may cause death or serious harm to minor employees. The minor work permit would remain suspended until the employer removes the danger.

Hearings

Public hearings will be held at:

- 2:30 p.m. April 24, Wenatchee Valley College media center.
- 3 p.m. April 25, Eisenhower High School Little Theatre in Yakima.
- 3 p.m. April 26, Columbia Basin Community College Library Building E102, Pasco.
- 2 p.m. April 27, Spokane Community College "A" Conference Room, Spokane.
- 9 a.m. April 30, Auditorium in the General Administration Building, 9th and Columbia streets, Olympia.
- 5 p.m. April 30, Skagit County Courthouse in Mount Vernon.
- 3:00 P.M., May 9, Clark College, Vancouver

For more information, or copies of the rules, please contact the Department of Labor and Industries at (206) 586-7212.

— APPENDIX B —



ADMINISTRATIVE POLICY

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
EMPLOYMENT STANDARDS

TITLE: MEAL AND REST PERIODS
FOR NONAGRICULTURAL WORKERS
AGE 18 AND OVER

NUMBER: ES.C.6

REPLACES: ES-026

CHAPTER: RCW 49.12
WAC 296-126-092

ISSUED: 1/2/2002

REVISED: 6/24/2005

ADMINISTRATIVE POLICY DISCLAIMER

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

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

1. Are meal and rest periods conditions of labor that may be regulated by the department under RCW 49.12, the Industrial Welfare Act?

Yes, the department has the specific authority to make rules governing conditions of labor, and all employees subject to the Industrial Welfare Act (IWA) are entitled to the protections of the rules on meal and rest breaks. The actual meal and rest break requirements are not in the statute but appear in WAC 296-126-092, Standards of Labor.

Note: **Minor employees** (under 18) and **agricultural workers** are not covered by these rules. The regulations for minors are found in WAC 296-125-0285 and WAC 296-125-0287. The regulations for agricultural employees are found in WAC 296-131-020.

2. Are both private and public employees covered by these meal and rest period regulations?

Yes. The IWA and related rules establish a minimum standard for working conditions for all covered employees working for both public sector and private sector businesses in the state, including non-profit organizations that employ workers.

3. Does a collective bargaining agreement (CBA) or a labor/management agreement allow public employers to give meal and rest periods different from those under WAC 296-126-092?

Yes. Effective May 20, 2003, the legislature amended RCW 49.12.005 to include "the state, any state institution, state agency, political subdivisions of the state, and any municipal corporation or quasi-municipal corporation". Thus it brought public employees under the protections of the IWA, including the meal and rest period regulations, WAC 296-126-092. See *Administrative Policy ES.C.1 Industrial Welfare Act and ES.A.6 Collective Bargaining Agreements*.

Exceptions--The meal and rest periods under WAC 296-126-092 do not apply to:

- Public employers with a local resolution, ordinance, or rule in effect prior to April 1, 2003 that has provisions for meal and rest periods different from those under WAC 296-126-092, or
- Employees of public employers who have entered into collective bargaining contracts, labor/management agreements, or other mutually agreed to employment agreements that specifically vary from or supersede, in part or in total, the rules regarding meal and rest periods, or
- Public employers with collective bargaining agreements (CBA) in effect prior to April 1, 2003 that provide for meal and rest periods different from the requirements of WAC 296-126-092. The public employer may continue to follow the CBA until its expiration. Subsequent collective bargaining agreements may provide for meal and rest periods that are specifically different, in whole or in part, from the requirements under WAC 296-126-092.

If public employers do not meet one of the above exceptions, then public employees are included in the requirements for meal and rest periods under WAC 296-126-092.

4. May a collective bargaining agreement have different provisions for meal and rest periods for employees in construction trades?

Yes. Effective May 20, 2003, RCW 49.12.187 was amended to include a provision that the rules regarding appropriate meal and rest periods (WAC 296-126-092) for employees in the construction trades, i.e., laborers, carpenters, sheet metal, ironworkers, etc., may be superseded by a CBA negotiated under the National Labor Relations Act. The terms of the CBA covering such employees must specifically require rest and meal periods and set forth the conditions for the rest and meal periods. However, the conditions for meal and rest periods can vary from the requirements of WAC 296-126-092.

Construction trades may include, but are not necessarily limited to, employees working in construction, alteration, or repair of any type of privately, commercially, or publicly-owned building, road, or parking lot, or erecting playground or school yard equipment, or other related industries where the employees are in a recognized construction trade covered by a CBA.

This exception does not apply to employees of construction companies without a CBA.

5. When is a meal period required?

Meal period requirements are triggered by more than five hours of work:

- Employees working five consecutive hours or less need not be allowed a meal period. Employees working over five hours shall be allowed a meal period. See WAC 296-126-092(1).

- The 30-minute meal period must be provided between the second and fifth working hour.
- The provision in WAC 296-126-092(4) that no employee shall be required to work more than five consecutive hours without a meal period applies to the employee's normal workday. For example, an employee who normally works a 12-hour shift shall be allowed to take a 30-minute meal period no later than at the end of each five hours worked.
- Employees working at least three hours longer than a normal workday shall be allowed a meal period before or during the overtime portion of the shift. A "normal work day" is the shift the employee is regularly scheduled to work. If the employee's scheduled shift is changed by working a double shift, or working extra hours, the additional meal period may be required. Employees working a regular 12-hour shift who work 3 hours or more after the regular shift will be entitled to a meal period and possibly to additional meal periods depending upon the number of hours to be worked. See WAC 296-126-092(3).
- The second 30-minute meal period must be given within five hours from the end of the first meal period and for each five hours worked thereafter.

6. When may meal periods be unpaid?

Meal periods are not considered hours of work and may always be unpaid as long as employees are completely relieved from duty and receive 30 minutes of uninterrupted mealtime.

It is not necessary that an employee be permitted to leave the premises if he/she is otherwise *completely* free from duties during the meal period. In such a case, payment of the meal period is not required; however, employees must be completely relieved from duty and free to spend their meal period on the premises as they please. These situations must be evaluated on a case-by-case basis to determine if the employee is on the premises in the interest of the employer. If so, the employee is "on duty" during the meal period and must be paid.

Employees who remain on the premises during their meal period on their own initiative and are completely free from duty are not required to be paid when they keep their pager, cell phone, or radio on *if* they are under no obligation to respond to the pager or cell phone or to return to work. The circumstances in determining when employees carrying cell phones, pagers, radios, etc., are subject to payment of wages must be evaluated on a case-by-case basis.

7. When must the meal period be paid?

Meal periods are considered hours of work when the employer requires employees to remain on duty on the premises or at a prescribed work site *and* requires the employee to act in the interest of the employer.

When employees are required to remain on duty on the premises or at a prescribed work site and act in the interest of the employer, the employer must make every effort to provide employees with an uninterrupted meal period. If the meal period should be interrupted due to the employee's performing a task, upon completion of the task, the meal period will be continued until the employee has received 30 minutes total of mealtime. Time spent performing

the task is not considered part of the meal period. The entire meal period must be paid without regard to the number of interruptions.

As long as the employer pays the employees during a meal period in this circumstance and otherwise complies with the provisions of WAC 296-126-092, there is no violation of this law, and payment of an extra 30-minute meal break is not required.

8. May an employee waive the meal period?

Employees may choose to waive the meal period requirements. The regulation states employees "shall be allowed," and "no employee shall be required to work more than five hours without a meal period." The department interprets this to mean that an employer may not require more than five consecutive hours of work and must allow a 30-minute meal period when employees work five hours or longer.

If an employee wishes to waive that meal period, the employer may agree to it. The employee may at any time request the meal period. While it is not required, the department recommends obtaining a written request from the employee(s) who chooses to waive the meal period.

If, at some later date, the employee(s) wishes to receive a meal period, any agreement would no longer be in effect. Employees must still receive a rest period of at least ten minutes for each four hours of work.

An employer can refuse to allow the employee to waive the meal period and require that an employee take a meal period.

9. What is the rest period requirement?

Employees shall be allowed a rest period of not less than ten minutes on the employer's time in each four hours of working time. The rest break must be allowed no later than the end of the third working hour. Employees may not waive their right to a rest period.

10. What is a rest period?

The term "rest period" means to stop work duties, exertions, or activities for personal rest and relaxation. Rest periods are considered hours worked. Nothing in this regulation prohibits an employer from requiring employees to remain on the premises during their rest periods. The term "on the employer's time" is considered to mean that the employer is responsible for paying the employee for the time spent on a rest period.

11. When must rest periods be scheduled?

The rest period of time must be scheduled as near as possible to the midpoint of the four hours of working time. No employee may be required to work more than three consecutive hours without a rest period.

12. What are intermittent rest periods?

Employees need not be given a full 10-minute rest period when the nature of the work allows intermittent rest periods equal to ten minutes during each four hours of work. Employees must be permitted to start intermittent rest breaks not later than the end of the third hour of their shift.

An "intermittent rest period" is defined as intervals of short duration in which employees are allowed to relax and rest, or for brief personal inactivities from work or exertion. A series of ten one-minute breaks is not sufficient to meet the intermittent rest break requirement. The nature of the work on a production line when employees are engaged in continuous activities, for example, does not allow for intermittent rest periods. In this circumstance, employees must be given a full ten-minute rest period.

13. How do rest periods apply when employees are required to remain on call during their rest breaks?

In certain circumstances, employers may have a business need to require employees to remain on call during their paid rest periods. This is allowable provided the underlying purpose of the rest period is not compromised. This means that employees must be allowed to rest, eat a snack or drink a beverage, make personal telephone calls, attend to personal business, close their door to indicate they are taking a break, or make other personal choices as to how they spend their time during their rest break. In this circumstance, no additional compensation for the 10-minute break is required. If they are called to duty, then it transforms the on-call time to an intermittent rest period and they must receive the remainder of the 10-minute break during that four-hour work period.

14. May an employer obtain a variance from required meal and rest periods?

Employers who need to change the meal and rest period times from those provided in WAC 296-126-092 due to the nature of the work may, for good cause, apply for a variance from the department. The variance request must be submitted on a form provided by the department, and employers must give notice to the employees or their representatives so they may also submit their written views to the department. See ES.C.9, Variances.

15. May a Collective Bargaining Agreement negotiate meal and rest periods that are different from those required by WAC 296-126-092?

No. The requirements of RCW 49.12 and WAC 296-126-092, establish a minimum standard for working conditions for covered employees. Provisions of a collective bargaining agreement (CBA) covering specific requirements for meal and rest periods must be least equal to or more favorable than the provisions of these standards, with the exception of public employees and construction employees covered by a CBA. See *Administrative Policy* ES.A.6 and/or ES.C.1.

— APPENDIX C —

It's the law!

Employers must post this notice where employees can read it.

Wage and Hour Laws

Workers must be paid the Washington minimum wage

Workers in all industries who are 16 years of age or older must be paid at least the minimum wage for all hours worked. Workers who are 14 or 15 may be paid 85% of the minimum wage.

Need to know the current minimum wage? See "Contact L&I" below.

Tips cannot be counted as part of the minimum wage.

Overtime pay is due when working more than 40 hours

You must be paid one and one-half times your regular rate of pay for all hours worked over 40 in a fixed seven-day workweek that is designated by your employer.

Agricultural workers are generally exempt from overtime.

There are a few exceptions to minimum wage and overtime laws

A few occupations are not covered by minimum wage or overtime requirements under limited circumstances. See www.WorkplaceRights.Lni.wa.gov and click on "Minimum Wage" or "Overtime & Exemptions."

Unless you are exempt, you cannot waive the right to minimum wage or overtime pay.

Workers need meal and rest breaks

Most workers are entitled to a 30-minute unpaid meal period if working more than five hours in a day. If you must remain on duty or work during your meal period, you must be paid for the 30 minutes.

Most workers are entitled to a 10-minute paid rest break no later than the end of the third hour. Your employer may schedule the break or allow "mini" breaks, such as two five-minute rest breaks. Agricultural workers must have a 10-minute paid rest break within each four-hour period of work.

If you are under 18, check out the **Teen Corner** to see break requirements.

Your employer must schedule a regular payday

You must be paid at least once a month on a regularly scheduled payday. Your employer must give you a pay statement showing the number of hours worked, rate of pay, number of piece work units (if piece work), gross pay, the pay period and all deductions taken.

You must agree to deductions from pay

Your employer may deduct from your wages when required by state or federal law and for certain other deductions under an agreement between you and your employer. For complete information, go to www.WorkplaceRights.Lni.wa.gov and click on "Pay Requirements."

Teen Corner (information for teens age 14–17)

- The minimum age for work is generally 14, with different rules for ages 16–17 and for ages 14–15.
- Employers must have a minor work permit to employ teens. This requirement applies to family members except on family farms.
- Teens don't need a work permit; however, parents must sign the parent/school permission form provided by the employer. If you work during the school year, a school official must sign too.
- Many jobs are not allowed for anyone under 18 because they are not safe.
- Work hours are limited for teens; more restrictions apply during school weeks.
- If you are injured on the job, ask your health-care provider to help you file a workers' compensation claim.

Meal and rest breaks for teens

- In agriculture, teens of any age get a meal period of 30 minutes if working more than five hours, and a 10-minute paid break for each four hours worked.
- In all other industries, teens who are 16 or 17 must have a 30-minute meal period if working more than five hours, and a 10-minute paid break for each four hours worked. They must have the rest break at least every three hours.
Teens who are 14 or 15 must have a 30-minute meal period no later than the end of the fourth hour, and a 10-minute paid break for every two hours worked.

You can learn more about teen safety, work hours and prohibited jobs:

- Online www.TeenWorkers.Lni.wa.gov.
- Call or visit any L&I office or call toll-free: 1-866-219-7321.
- Email a question to TeenSafety@Lni.wa.gov.

Leave Laws

Family care, family leave and other leave-related laws are summarized below. To learn more, go to www.WorkplaceRights.Lni.wa.gov and click on "Leave & Benefits."

Washington Family Care Act: Use of paid leave to care for sick family

If you work for an employer with a paid-leave policy (sick, vacation, certain employer-provided short-term disability plans, or other paid time off), you are allowed to use your choice of paid leave to care for sick family. Family includes:

- Children under age 18 with a health condition that requires supervision or treatment.
- Spouse, registered domestic partner, parent, parent-in-law or grandparent with a serious or emergency health condition.
- Adult son or daughter incapable of self-care due to a disability.

Federal Family and Medical Leave Act (FMLA)

The federal FMLA requires covered employers to provide up to 12 weeks of unpaid job-protected leave every 12 months to eligible employees for certain family and medical reasons. Employees are eligible if they:

- Worked for their employer for at least 1,250 hours over the previous 12 months; and
- The company has at least 50 employees within 75 miles.

For more information, contact the U.S. Department of Labor at 1-866-487-9243 or visit www.dol.gov/whd/fmla.

Washington Family Leave Act: Additional leave for pregnancy and domestic partner care

Women who qualify for leave under the *federal* FMLA (above) may be entitled to *additional* state family leave for sickness or disability due to pregnancy. Also, Washington's Family Leave Act provides up to 12 weeks leave to FMLA-eligible registered domestic partners or same-sex spouses who need to care for an ill partner/spouse.

Pregnancy-related disability protected from discrimination

A woman with a pregnancy-related disability is entitled to time off and job protection if she works for an employer with eight or more employees. Her health-care provider determines the amount of time off needed. For more information, contact the Washington State Human Rights Commission at www.hum.wa.gov or call 1-800-233-3247.

Leave for victims of domestic violence, sexual assault or stalking

Victims and their family members are allowed to take reasonable leave from work for legal or law-enforcement assistance, medical treatment, counseling, relocation, meetings with their crime victim advocate or to protect their safety.

Leave for military spouses during deployment

Spouses or registered domestic partners of military personnel who receive notice to deploy or who are on leave from deployment during times of military conflict may take a total of 15 days unpaid leave per deployment.

Your employer may not fire you or retaliate against you for using your leave for these reasons or for filing a complaint alleging a violation of these leave laws.

Contact L&I

Need more information? Questions about filing a worker rights complaint?

Online: www.WorkplaceRights.Lni.wa.gov
Call: 1-866-219-7321, toll-free
Visit: www.Offices.Lni.wa.gov
Email: ESgeneral@Lni.wa.gov

About required workplace posters

Go to www.Posters.Lni.wa.gov to learn more about workplace posters from L&I and other government agencies.

Human trafficking is against the law

For victim assistance, call the National Human Trafficking Resource Center at 1-888-3737-888, or the Washington State Office of Crime Victims Advocacy at 1-800-822-1067.

¡Es la ley!

Los empleadores deben poner este aviso donde los empleados puedan leerlo.

Leyes de salario y horas

A los trabajadores se les debe pagar el salario mínimo de Washington

A los trabajadores de 16 años de edad o más en todas las industrias se les debe pagar por lo menos el salario mínimo por todas las horas trabajadas. A los trabajadores de 14 ó 15 años se les podría pagar 85% del salario mínimo.

¿Necesita saber el salario mínimo actual? Vea "Comuníquese con L&I" en la parte de abajo.

Las propinas no pueden incluirse como parte del salario mínimo.

Se debe pagar horas extras después de más de 40 horas trabajadas

Se le tiene que pagar tiempo y medio de su tarifa regular de pago por todas las horas trabajadas adicionales a las 40 horas en una semana de trabajo de siete días establecida por el empleador.

Generalmente, a los trabajadores agrícolas no se le pagan horas extras.

Hay algunas excepciones a las leyes de salario mínimo y de horas extras

Algunas ocupaciones están exentas del requisito del pago de horas extras o salario mínimo bajo circunstancias limitadas. Vaya a www.Lni.wa.gov/Spanish/WorkplaceRights y haga clic en "Horas extras y exenciones" o "Salario Mínimo."

A menos que usted esté exento, no podrá renunciar al derecho a recibir salario mínimo o pago de horas extras.

Los trabajadores necesitan períodos de comida y de descansos

La mayoría de los trabajadores tienen derecho a un período de comida de 30 minutos no pagados si trabajan más de cinco horas en un día. Si se requiere que usted permanezca trabajando durante su período de comida, se le debe pagar por los 30 minutos.

La mayoría de los trabajadores tienen derecho a 10 minutos de descanso pagado a más tardar al final de la tercera hora de trabajo. Su empleador podría programar el período de descanso o permitir "pequeños" descansos, como por ejemplo dos períodos de descanso de cinco minutos. Los trabajadores de agricultura deben tener derecho a un descanso pagado de 10 minutos por cada período de trabajo de cuatro horas.

Si usted es menor de 18 años, revise el Rincón para adolescentes para ver los requisitos de descanso.

Su empleador debe programar un día fijo de pago

Se le tiene que pagar por lo menos una vez por mes en un día fijo en forma regular. Su empleador debe proporcionarle un comprobante de pago indicando el número de horas trabajadas, la tarifa de pago, el número de unidades por pieza (si trabaja por pieza), salario bruto, el período de pago y todas las deducciones que se le hagan.

Usted debe estar de acuerdo con las deducciones de pago

Su empleador podría deducir dinero de su salario cuando lo requieran las leyes estatales o federales y cuando haya un acuerdo entre usted y su empleador sobre ciertas otras deducciones. Para obtener información completa, vaya a www.Lni.wa.gov/Spanish/WorkplaceRights y haga clic en "Requisitos de Pago."

Rincón para adolescentes (Información para adolescentes entre 14 y 17)

- La edad mínima para trabajar es generalmente de 14 años, con reglas diferentes para las edades de 16-17 y para las edades de 14-15.
- Los empleadores deben tener un permiso de trabajo de menores para emplear adolescentes. Este requisito se aplica a los miembros de la familia excepto en las granjas de familia.
- Los adolescentes no necesitan un permiso de trabajo, sin embargo, los padres deben firmar un formulario de Autorización de los padres y la escuela proporcionado por el empleador. Si usted trabaja durante el año escolar, un oficial de la escuela debe firmarlo también.
- Muchos trabajos están prohibidos para los menores de 18 años porque no son seguros.
- Las horas de trabajo están limitadas para los adolescentes; se aplican más restricciones durante las semanas de escuela.
- Si se lesiona en el trabajo, pídale a su proveedor de cuidado de la salud que lo ayude a someter un reclamo de compensación para los trabajadores.

Períodos de comida y descanso para los adolescentes

- En la agricultura, los adolescentes de cualquier edad tienen derecho a un período de comida de 30 minutos si trabajan más de cinco horas en el día y a un período de descanso pagado de 10 minutos por cada cuatro horas trabajadas.
- En todas las otras industrias, los adolescentes que tienen 16 ó 17 años deben tener un período para comida de 30 minutos si trabajan más de cinco horas al día y un período de descanso pagado de 10 minutos por cada cuatro horas trabajadas. Ellos deben tener el período de descanso por lo menos cada tres horas.

Los adolescentes que tienen 14 ó 15 años deben tener un período de comida de 30 minutos después de cuatro horas y un período de descanso pagado de 10 minutos por cada dos horas trabajadas.

Aprenda más sobre la seguridad de los adolescentes, horas de trabajo y trabajos prohibidos:

- En línea www.Lni.wa.gov/Spanish/WorkplaceRights/TeenWorkers.
- Llame o visite cualquier oficina de L&I o llame gratis al: 1-866-219-7321.
- Envíe una pregunta por correo electrónico a TeenSafety@Lni.wa.gov.

A petición del cliente, hay otros formatos disponibles para personas con discapacidades. Llame al 1-800-547-8367. Usuarios de TDD llamen al 360-902-5797. L&I es un empleador con igualdad de oportunidad.

Leyes de permisos de ausencia

Las leyes para permiso de ausencia familiar, cuidado de la familia y otros permisos relacionados se han resumido abajo. Para aprender más, vaya a www.Lni.wa.gov/Spanish/WorkplaceRights y haga clic en "Permiso y beneficios."

Ley del cuidado de la familia de Washington: Uso del permiso de ausencia pagado para cuidar a un miembro de la familia enfermo

Si usted trabaja para un empleador que tiene un plan para permiso de ausencia pagado (enfermedad, vacaciones, ciertos planes proporcionados por el empleador para la discapacidad a corto plazo u otro permiso pagado) usted puede usar cualquier clase de permiso de ausencia pagado que usted escoja para cuidar a los miembros de su familia que estén enfermos. Los miembros de la familia incluyen:

- Los hijos menores de 18 años con una condición de salud que requiera supervisión o tratamiento.
- Cónyuge, pareja doméstica registrada, padres, suegros o abuelos con una condición de salud seria o de emergencia.
- Hijo o hija adultos que no puedan cuidarse a sí mismos por causa de una discapacidad.

La Ley Federal de Ausencia Médica y Familiar (FMLA, por su sigla en inglés)

La ley federal FMLA requiere que los empleadores registrados le proporcionen hasta 12 semanas de permiso de ausencia sin pago con protección de empleo cada 12 meses a los empleados que tienen derecho a este beneficio por algunas razones familiares y médicas. Los empleados tienen derecho a FMLA, si ellos:

- Trabajan por lo menos 1,250 horas para su empleador durante los 12 meses anteriores y
- La compañía tiene por lo menos 50 empleados dentro de 75 millas.

Para más información, comuníquese con el Departamento de Trabajo de los EE.UU. al 1-866-487-9243 o visite www.dol.gov.

Ley del Permiso Familiar de Washington: Permiso adicional por maternidad y cuidado de la pareja doméstica registrada

Las mujeres que reúnen los requisitos para permiso de ausencia bajo la ley federal de Ausencia Médica y Familiar (FMLA, descrita arriba) podrían tener derecho adicional a un permiso de ausencia familiar del estado por enfermedad o por discapacidad debido a maternidad. También, la Ley de Ausencia Familiar de Washington provee hasta 12 semanas de permiso a las parejas domésticas registradas o cónyuges del mismo sexo con derecho a FMLA que necesiten cuidar a una pareja/cónyuge enferma(o).

La discapacidad relacionada con la maternidad está protegida contra la discriminación

Una mujer con una discapacidad relacionada con la maternidad tiene derecho a permiso de ausencia y protección de empleo si trabaja para un empleador con ocho o más empleados. Su proveedor del cuidado de la salud determina la cantidad de tiempo libre necesario. Para más información, comuníquese con la Comisión de Derechos Humanos del estado de Washington en www.hum.wa.gov o llame al 1-800-233-3247.

Permiso de ausencia para víctimas de violencia doméstica, asalto sexual o acoso

Las víctimas y los miembros de su familia tienen permiso para una ausencia razonable de trabajo para obtener ayuda legal o de la policía, tratamiento médico, asesoramiento, traslado, reuniones con su defensor de víctimas de crimen o para proteger su seguridad.

Permiso de ausencia para los cónyuges durante una misión militar

Los cónyuges o parejas domésticas registradas del personal militar que reciben una notificación para partir a una misión militar o que se encuentran con permiso de ausencia de una misión militar durante tiempos de conflicto militar podrían tomar un total de 15 días de ausencia no pagada por cada misión militar.

Su empleador no lo puede despedir o tomar represalias contra usted por usar su permiso para estos propósitos o por presentar una queja alegando una violación a estas leyes de permiso de ausencia.

Comuníquese con L&I

¿Necesita más información?

¿Tiene preguntas sobre cómo presentar una queja sobre los derechos laborales de los trabajadores?

En línea: www.Lni.wa.gov/Spanish/WorkplaceRights

Llame al: 1-866-219-7321, línea gratuita

Visite: www.Offices.Lni.wa.gov (en inglés solamente)

Correo electrónico: ESgeneral@Lni.wa.gov

Información sobre los carteles requeridos en el lugar de trabajo

Vaya a www.Lni.wa.gov/IPUB/101-054-999.asp para aprender más sobre los carteles de L&I y de otras agencias gubernamentales para el lugar de trabajo.

El tráfico humano es contra la ley

Para ayuda a víctimas, llame al Centro Nacional de Recursos para Combatir la Trata de Personas al 1-888-3737-888 o a la Oficina de Defensa de Víctimas de Crímenes del estado de Washington al 1-800-822-1067.

— APPENDIX D —



ADMINISTRATIVE POLICY

STATE OF WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES EMPLOYMENT STANDARDS

TITLE:	MINIMUM WAGE ACT APPLICABILITY	NUMBER:	ES.A.1
CHAPTER:	<u>RCW 49.46</u> <u>WAC 296-128</u>	REPLACES:	ES-005
		ISSUED:	1/2/2002
		REVISED:	6/24/2005
		REVISED:	3/24/2006
		REVISED:	7/15/2014

ADMINISTRATIVE POLICY DISCLAIMER

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

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

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

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

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

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

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

2. Which employers are subject to RCW 49.46?

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

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

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

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

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

The protections of the MWA apply to all "employees." An "employee" is defined as "any individual employed by an employer" *except* those employees specifically excluded by the legislature in RCW 49.46.010(3)(a) through (n). Minimum wage is not required for employees who are excluded from the MWA. Note that there are additional exceptions to overtime, and as a result an employee can be entitled to minimum wage even if overtime pay is not required. See RCW 49.46.130 and administrative policy ES.A.8.1, related to overtime.

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

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

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

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

The following exemptions are found in RCW 49.46.010(3). Application of these exemptions depends on the facts, which must be carefully evaluated on a case-by-case basis:

- (a) **Certain agricultural employees:** An individual who is employed as a hand harvest pieceworker in the region of employment, *and* who commutes daily from his or her permanent residence to the farm upon which he or she is employed *and* who has been

employed in agriculture less than thirteen weeks during the preceding calendar year. Each of the elements listed above must be met in order for the exemption to apply.

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

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

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

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

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

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

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

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

An individual will not be considered a volunteer if he or she is otherwise employed by the same agency or organization to perform similar or identical services as those for which

the individual proposes to volunteer. Any individual providing services as a volunteer who then receives wages for services, is no longer exempt and must be paid at least minimum wage and overtime pay for hours worked in excess of 40 hours per workweek. Unpaid employment is unlawful. An employee-employer relationship is deemed to exist where there is a contemplation or expectation of payment for goods or services provided.

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

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

(e) **Individuals who are employed full time by a state or local governmental agency or nonprofit educational, charitable, or religious organization and who also do volunteer work for the agency.** Such individuals are exempt from the MWA only with respect to the voluntary services.

(f) **Newspaper vendors or carriers.** The department construes "newspaper vendors or carriers" very narrowly and does not include magazine carriers or vendors, those who distribute advertising circulars, or persons who sell or distribute literature at sporting events etc.

(g) **Employees of carriers subject to Part I of the Interstate Commerce Act (Railroads and Pipelines):** Part I of the Interstate Commerce Act is limited to railroads and pipelines only. Interstate motor carriers are covered under Part II of the Interstate Commerce Act and are not exempted from the MWA by this definition.

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

(h) **Forest protection and fire prevention.** Any persons engaged in forest protection and fire prevention activities.

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

"Charitable institution" traditionally includes churches and other organizations commonly set up under the not-for-profit corporations act if they are recognized by the United States Internal Revenue Service under the tax exemption provision, section 501(c)(3). Typical examples may include the YMCA or YWCA, Girl Scout or Boy Scout

organizations, etc. "Charged with child care responsibilities" would include reference to this activity in the organization's by-laws and incorporation documents.

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

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

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

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

(k) **Inmates and others in custody.** Residents, inmates or patients of state, county or municipal correctional, detention, treatment or rehabilitative institution would not be required to be paid minimum wage if they perform work directly for, and at, the institution's premises where they are incarcerated, and remain under the direct supervision and control of the institution. State inmates assigned by prison officials to work on prison premises for a private corporation at rates established and paid for by the state are not employees of the private corporation and would not be subject to the MWA.

(l) **Elected or appointed public officials and employees of the state legislature.** The MWA does not apply to any individual who holds a public elective or appointive office of the state, any county, city, town, municipal corporation, political subdivision, or any instrumentality thereof, or any employee of the state legislature.

(m) **Washington State ferry crews.** Vessel operating crews of the Washington State ferries, as long as the Department of Transportation operates the ferries.

(n) **Crews of non-American vessels.** The MWA applies to persons employed as seamen on an American vessel but does not apply to seamen employed on non-American vessels.

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

Assuming that the type of employees and employers involved in a particular case are covered under the MWA, the department has the authority to investigate and gather data and may enter workplaces, examine and copy records, question employees and investigate such facts conditions practices or matters deemed necessary or appropriate to determine whether there has been a violation of the MWA. RCW 49.46.040.

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

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

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

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

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

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

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

— APPENDIX E —



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
EMPLOYMENT STANDARDS

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

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When is federal law applied over state law?

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

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

— APPENDIX F —

ADMINISTRATIVE POLICY



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
EMPLOYMENT STANDARDS

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

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

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

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

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

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

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

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

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To: Bradford Kinsey
Cc: Marc Cote
Subject: RE: No. 90932-6 Ana Lopez Demetrio, et al. v. Sakuma Brothers Farms, Inc., et al.: Reply Brief on Certified Questions

Received 1-29-2015

Supreme Court Clerk's Office

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From: Bradford Kinsey [mailto:bkkinsey@tmdwlaw.com]
Sent: Thursday, January 29, 2015 2:25 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Marc Cote
Subject: No. 90932-6 Ana Lopez Demetrio, et al. v. Sakuma Brothers Farms, Inc., et al.: Reply Brief on Certified Questions

Greetings,

Attached for filing with the court is Plaintiffs Ana Lopez Demetrio and Francisco Eugenio Paz's Reply Brief on Certified Questions in the above-referenced matter.

Thank you for your attention.

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