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Supreme Court No. 90932-6

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

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

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

Petitioners/Plaintiffs,

v.

SAKUMA BROTHERS FARMS, INC.,

Respondent/Defendant.

**SAKUMA BROTHERS FARMS, INC.'S RESPONSIVE BRIEF ON
CERTIFIED QUESTIONS**

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I. INTRODUCTION

A quarter century ago, Washington farmers and labor representatives partnered with the Department of Labor and Industries (“DLI”) to form an Advisory Committee on Agricultural Labor for the purpose of developing rules governing the provision of meal and rest breaks for Washington agricultural workers. The resultant agricultural rest break rule adopted by DLI was codified at WAC 296-131-020(2) in 1990. RCW 49.30.030, Laws of 1989, ch. 380, § 85. Since that time, agricultural workers have been allowed rest break rights that are similar to other Washington workers, with recognized differences to account for the different nature of agricultural work. *Id.*

The agricultural rest break regulation (like the non-agricultural rest break regulation) does not expressly provide for a separate and additional payment for rest breaks taken by farm workers employed on a piece-rate basis. WAC 296-131-020(2). Nor does it do so by implication. To the contrary, the agricultural rest break regulation explains that “[*ff*]or purposes of computing 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) (emphasis added). Recognizing the prevalence of piece-rate compensation systems in agriculture, and the fact that compensation for rest breaks is

already included in the piece rate, DLI has also displayed no intent to disrupt those systems. Accordingly, this Court should hold that Washington employers do not have an obligation under WAC 296-131-020(2) or the Washington Minimum Wage Act (“WMWA”) to provide any separate and additional pay for rest breaks taken by agricultural workers employed on a piece-rate basis.

II. CERTIFIED QUESTIONS

The following questions were certified to this Court:

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

Dkt. 44.

III. STANDARD OF REVIEW

Certified questions of law are reviewed de novo, and must be considered “in light of the record certified by the federal court.” *Carlsen v. Global Client Solutions, LLC*, 171 Wn.2d 486, 493 (2011). In answering a certified question of law, this Court must “not seek to make broad statements outside of the narrow questions and record before [it].” *Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wn.2d 670, 676 (2000).

IV. STATEMENT OF THE CASE

A. Factual Background

Sakuma Brothers Farms, Inc. (“Sakuma”) is a third- and fourth-generation family-owned berry farm located in Burlington, Washington. Dkt. 19 at ¶ 3.17. During the brief June through October harvest season, Sakuma employs highly skilled workers to hand-harvest strawberries, blueberries, blackberries, and raspberries on a piece-rate basis at a set amount per box or pound. *Id.* at ¶¶ 3.1, 3.9, 3.18, 3.21, 3.22. In addition to strictly requiring workers to take a ten-minute rest break for every four hours of work, Sakuma ensures that its piece-rate workers are always paid the higher of Washington’s minimum wage or the worker’s weekly piece-rate earnings. Dkt. 27 at 8:12-13, 39:20-22; Dkt. 33 at 7:16-22.

B. Procedural History

In October 2013, Petitioners filed a Class Action Complaint in the U.S. District Court for the Western District of Washington (“district court”), alleging that Sakuma had violated Washington wage laws and the Federal Migrant and Seasonal Agricultural Worker Protection Act. Dkt. 19 at ¶¶ 1.1, 6.2-13.5. While there was no admission of any wrongdoing, and Sakuma specifically denied any liability, in an effort to avoid the time and expense of protracted litigation, the parties reached an agreement to settle the class claims. Dkt. 27 at 6:1-17, 20:15-17. As part of the

settlement, Sakuma also agreed to ensure that its piece-rate workers receive a full ten-minute rest break during every four hours of work. *Id.* at 8:12-13, 39:20-22.

However, hoping to have this Court adopt the California Court of Appeal's recent holding in *Bluford v. Safeway Stores, Inc.*, 216 Cal. App. 4th 864 (2013), Petitioners refused to settle the issue of whether WAC 296-131-020(2) and/or the WMWA requires Sakuma to separately pay its piece-rate farm workers an additional amount for rest breaks taken "*from 2014 going forward.*" Dkt. 27 at 17:20-26 (emphasis added). In October 2014, the district court certified the following legal questions to this Court: (1) Does a Washington agricultural employer have an obligation under WAC 296-131-020(2) and/or the WMWA to separately pay piece-rate workers for the rest breaks to which they are entitled? (2) If the answer is "yes," how must Washington agricultural employers calculate the rate of pay for the rest break time to which piece-rate workers are entitled? Dkts. 42, 44.

V. ARGUMENT

A. Summary of Argument

Since the enactment of WAC 296-131-020(2) in 1990, Washington has strictly protected the health and safety of agricultural workers by ensuring the right to take a paid ten-minute rest break during every four

hours of work. Contrary to Petitioners' misrepresentation of Washington case law, the agricultural rest break regulation (like the non-agricultural rest break regulation) does not require Sakuma or any other employer to provide a separate and additional payment for rest breaks *taken* by workers who are employed on a piece-rate basis. Compensation for rest breaks is included in the piece-rate.

For the reasons set out in detail below, this Court should answer the certified questions in the negative. A holding that WAC 296-131-020(2) and the WMWA do not require employers to provide any separate and additional pay for rest breaks taken by workers who are employed on a piece-rate basis is consistent with Washington case law, DLI interpretation and guidance, the WMWA, the Fair Labor Standards Act ("FLSA"), case law from other jurisdictions, and sound public policy.

B. WAC 296-131-020(2) and the WMWA Do Not Require A Separate and Additional Payment for the Ten-Minute Rest Breaks Taken by Workers Employed on a Piece-Rate Basis

1. The statutory and regulatory schemes governing the provision of rest breaks are not the same for agricultural and non-agricultural workers.

Washington's rest break requirements for non-agricultural workers are set out in WAC 296-126-092, a regulation adopted under the Industrial Welfare Act ("IWA") in 1976. The non-agricultural rest break regulation provides:

(4) Employees shall be allowed a rest period of not less than ten minutes, on the employer's time, for each four hours of working time. Rest periods shall be scheduled as near as possible to the midpoint of the work period. No employee shall be required to work more than three hours without a rest period.

(5) Where the nature of the work allows employees to take intermittent rest periods equivalent to ten minutes for each 4 hours worked, scheduled rest periods are not required.

WAC 296-126-092.

Agricultural workers are excluded from the IWA's coverage, are exempt from receiving overtime, and are not covered by WAC 296-126-092. RCW 49.12.185. Instead, the provision of rest breaks for agricultural workers was codified at WAC 296-131-020(2) in 1990.

Unlike the non-agricultural rest break regulation (WAC 296-126-092(4), (5)), the agricultural rest break regulation (WAC 296-131-020(2)) does not permit employers to offer intermittent rest breaks equivalent to ten minutes for each four hours worked, does not require rest breaks to be scheduled by the employer as near as possible to the midpoint of the work period, and does not restrict agricultural workers from being required to work for more than three hours without a rest period. WAC 296-131-020(2); WAC 296-126-092.

The greatest distinction between the agricultural and non-agricultural rest break standards is the inclusion of a provision addressing

agricultural workers employed on a piece-rate basis. WAC 296-131-020(2). Recognizing that a piece-rate system is the prevailing standard of pay in agriculture, WAC 296-131-020(2) includes explicit instructions (which are not included in the non-agricultural rule) on how piece-rate workers should be compensated for their rest breaks. Washington's agricultural rest break regulation provides in its entirety:

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. *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.*

Id. (emphasis added).

On its face, the agricultural rest break regulation does not expressly provide for any separate and additional pay for rest breaks taken by workers employed on a piece-rate basis. *Id.* Instead, the regulation makes it clear that, unlike meal periods, rest breaks must be included as hours worked for purposes of calculating and ensuring minimum wage compliance for workers employed on a piece-rate basis. *Id.* Compensation for rest breaks is included in the piece rate.

2. The plain language of WAC 296-131-020(2) indicates that there is no separate and additional pay required for the rest breaks taken by piece-rate workers.

The plain language of WAC 296-131-020(2) provides that employers are not required to provide any separate and additional pay for the ten-minute rest breaks taken by piece-rate workers. The regulation states that “[e]very employee shall be allowed a rest period of at least ten minutes on the employer’s time in each four-hour period of employment,” and that 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). For hourly employees, this means they must remain on the clock during their rest breaks. *Id.* For piece-rate workers, this means that the ten-minute rest breaks must be included as hours worked for purposes of calculating and ensuring the payment of minimum wage. However, WAC 296-131-020(2) does not mention a separate and additional pay requirement, let alone explain how such compensation would be included in the minimum wage calculation.

Not only is it not required by the plain language of the regulation, we know the issue of separate and additional pay for rest breaks was raised during the rule-making process, and that DLI consciously chose not to impose any such requirement. DLI Outline of Agricultural Labor Rule

Proposal.¹ According to DLI, the “Advisory Committee agreed that employees should receive meal and rest breaks,” but “[t]here was disagreement whether rest breaks should be paid.” *Id.* While the growers accepted the proposed requirement that for “workers paid at a piece rate, the rest period is included in the time worked for purposes for ensuring that compensation is at least the minimum hourly wage,” the labor representatives unsuccessfully petitioned for “rest breaks for piece workers to be paid at the average rate for that category of piecework.” *Id.* Compensation for rest breaks is properly included in the piece rate.

3. DLI interpretation and guidance confirm that no separate and additional pay is required for the rest breaks taken by piece-rate workers, as is consistent with the FLSA.

(a) DLI guidance.

DLI is expressly charged by statute to supervise the administration and enforcement of all laws relating to employment, including hours of labor and wages of employees. RCW 43.22.270. In administering the State’s policy, DLI has provided extensive literature and instruction establishing that there is *no* requirement to provide any separate and additional pay for rest breaks taken by workers employed on a piece-rate basis. While this Court is not bound by DLI’s interpretation and guidance,

¹ In accordance with RAP 10.3(e), Sakuma respectfully asks this Court’s permission to add to the record this relevant document from DLI’s rule-making file and contained in the appendix.

“the opinions of administrative agencies charged with administering a statute are entitled to considerable weight in determining legislative intent.” *Seattle Prof’l Eng’g Emps. Ass’n v. Boeing Co.*, 92 Wn. App. 214, 223 (1998) (citing *Pasco Police Officers Ass’n v. City of Pasco*, 132 Wn.2d 450, 470 (1997)).

Here, DLI’s interpretation and guidance confirm that rest breaks are included in the piece rate and that WAC 296-131-020(2) and the WMWA do not require any separate and additional pay for rest breaks taken by workers employed on a piece-rate basis. As an initial matter, DLI Admin. Policy ES.A.8.1 explains that “[w]hen an employee is paid on a piece-rate basis, the regular rate of pay is computed by adding together the *total earnings for the workweek from piece rate and all other earnings (such as bonuses)*, and any sums that may be paid for other hours worked” on an hourly basis. DLI Admin. Policy ES.A.8.1 at p. 4 (emphasis added). *See also* Opening Brief at n. 2. After explaining that the regular rate of pay calculation must take into account “the total earnings for the workweek from piece rate and all other earnings ... and any sums that may be paid for other hours worked” on an hourly basis, DLI Admin. Policy ES.A.8.1 goes on to instruct that “this sum is divided by the total number of hours worked in that week to yield the pieceworker’s ‘regular rate’ for that week.” *Id.*

DLI Admin. Policy ES.A.8.2 further provides that “[p]iece rate employees are usually paid a fixed amount per unit of work,” and that the “regular rate of pay for an employee paid on a piece rate basis is essentially identical to that of a commissioned employee, and is obtained by dividing the total weekly earnings by the total number of hours worked in the same week.” This Administrative Policy even provides an example of how to calculate the regular rate of pay for piece-rate workers that does not include any allocation for separately paid rest breaks. DLI Admin. Policy ES.A.8.2. If separate and additional pay for rest breaks taken by piece-rate workers really was a regulated policy, it would have to be included in DLI’s Administrative Policies and regular rate of pay computation, but it is not.

A very recent DLI publication from January 2014, F700-171-000, titled “When Paid By Piece Rate Are You Earning Minimum Wage?,” instructs piece-rate farm workers on how to make sure they are properly paid as follows:

1. “Record the hours you work each day.”²
2. “Record the units you complete each day.”³

² DLI says to “write down the actual number of hours you worked [using] L&I’s free *Your Daily Record of Hours and Units Worked — For Agricultural Workers* (F700-169-909) or use any other method you choose.”

³ DLI explains that a “unit may be a bin, tree, pound, etc.”

3. "Find out what your workweek is."⁴
4. "Add up the total number of hours and units at the end of the workweek."
5. "Each time you're paid, review your pay statement for total units recorded. Does it match the units you recorded for the workweek?"
6. "Calculate your hourly wage. Divide your gross pay by the total number of hours your own record shows you worked in the workweek."⁵

(Emphasis added.)

Significantly, DLI's six steps for confirming proper payment of hours worked also do *not* include any instruction or discussion regarding a separate and additional payment for rest breaks taken by piece-rate workers. DLI publication F700-171-000. Step 6 instructs piece-rate workers to "[c]alculate your hourly wage" by "[d]ivid[ing] your gross pay by the total number of hours your own record shows you worked in the workweek." *Id.* If separate and additional pay were required, step 5 and or 6 would instruct piece-rate workers to make sure their pay statements include a separate and additional amount for all taken rest breaks, but they do not. *Id.*

⁴ DLI explains to workers that "[y]our employer sets your seven-day workweek. It may begin on any day of the week and any hour of the day."

⁵ DLI reminds piece-rate workers to "Check: Were you paid at least \$9.32 per hour [for 2014]?"

DLI publication F700-171-000 also includes the following “example” of how to compute and ensure proper piece-rate payment:

Jose picks strawberries. His employer promises to pay 50 cents for every pound (unit) of strawberries. Every day, Jose records how many *hours* he worked [not including his unpaid 30-minute meal periods] and how many *pounds* of strawberries he picks.

(Emphasis in original.)

The example goes on to explain that during the week of July 14 to July 20, Jose picked a total of 927 units, worked a total of 55 hours (after subtracting his unpaid meal periods), and was paid \$463.50 in gross wages for picking 927 pounds of strawberries at 50 cents per pound. *Id.*

According to DLI, Jose was improperly paid less than Washington’s 2014 minimum wage (of \$9.32 per hour) for the workweek, *not* because Jose was denied separate and additional pay for his rest breaks, but simply because \$463.50 in gross wages divided by 55 hours of work equals \$8.43 per hour (\$0.89 below the 2014 minimum wage of \$9.32). *Id.* DLI’s example does not include any allocation for separate and additional compensation for rest breaks. *Id.* Had Jose worked for Sakuma, he would have been required to take rest breaks and *paid* for them. Jose would have been paid for 55 hours worked. Included in those hours, Jose would have been paid for 20 minutes each day on the

employer's time for his rest breaks. Dkt. 27 at 8:12-13; Dkt. 33 at 6:22-7:9. Compensation for rest breaks is included in the piece rate. *Id.*

DLI's guidance for agricultural employers also makes it clear that there is no separate and additional pay requirement for rest breaks taken by workers employed on a piece-rate basis. DLI publication F700-125-000 (titled "Agricultural Employer Worksheet") states that it is intended "to help you [*Washington agricultural employers*] know whether you are following state Agricultural Employment Standards and the Minimum Wage Act when you employ workers." (Emphasis added.) Just like DLI's publication F700-171-000 for piece-rate agricultural workers, DLI's "Agricultural Employer Worksheet" does not include any discussion or instruction on how to separately pay an additional amount for rest breaks taken by piece-rate workers. DLI publication F700-125-000. Instead the Worksheet explains that "[e]mployees must be *allowed* at least a 10-minute paid rest period in each 4-hour work period," and that "[i]f paid on a piece work basis, the rest period time must be included in the number of hours for which the minimum wage must be paid." *Id.* (emphasis added).

WAC 296-131-015, the regulation governing agricultural worker pay stubs, provides – and DLI Admin. Policy ES.D.2 confirms – that the pay statement for a piece-rate agricultural worker does not even have to include any separate and additional pay for rest breaks taken by worker.

Finally, the Small Business Economic Impact Statement that was prepared during the rule-making process explicitly states that DLI “*assume[d] that most employees currently take rest breaks during the work day,*” and that “*the proposed rules essentially establish in a rule a practice that currently exists*”; that is, the practice of piece-rate workers taking breaks without any separate and additional pay. Washington State Register 90-09-078 at p. 176 (emphasis added). Discussing the cost of employer compliance with the agricultural rest break regulation, DLI’s Small Business Economic Impact Statement goes on to explain that even if it “were assumed that an employee did not currently take rest breaks and that an additional twenty minutes must be worked each day by an employee to accomplish the same amount of work, the additional labor cost to the employer (based on a minimum wage of \$4.25 an hour) would be \$1.42 per employee for every eight hours worked.” Once again, there was *no* consideration or recognition of any requirement to provide separate and additional pay for rest breaks taken by workers employed on a piece-rate basis. *Id.* DLI correctly assumed, and the regulation reflects, that the piece rate includes compensation for rest breaks taken throughout the day. *Id.*

- (b) DLI's guidance is consistent with the U.S. Department of Labor's interpretation of the FLSA.

Under the FLSA, an employee who is employed on a piece-rate basis may receive an hourly rate of less than the applicable minimum wage for “nonproductive” time. 29 C.F.R. § 778.318(c). In fact, it is “permissible for the parties to agree that the pay the employees will earn at piece rates is intended to compensate them for all hours worked, the productive as well as the nonproductive hours.” *Id.* The FLSA does not require any separate and additional pay for rest breaks taken by workers employed on a piece-rate basis.

Interpreting “on the employer’s time” in WAC 296-131-020(2) to mean that the rest break time must be included in the hours worked and that piece-rate pay includes the compensation for the mandated ten-minute rest breaks is the only result consistent with the plain language of WAC 296-131-020(2) and the meaning adopted by DLI.

4. Washington case law does not require a separate and additional payment for rest breaks taken by workers employed on a piece-rate basis.

In *Wingert v. Yellow Freight Systems, Inc.*, this Court held that non-agricultural workers (covered by WAC 296-126-092) are entitled to recover an additional ten minutes of pay for *missed* rest breaks. 146 Wn.2d 841, 848-51 (2002). *Wingert*'s holding has never been expanded to

require any separate and additional pay for rest breaks *taken* by workers who are employed on a piece-rate basis. Nevertheless, Petitioners rely on *Wingert* for the erroneous proposition that “*Washington courts have already construed WAC 296-126-092(4) to require separate payment for rest breaks*” *taken by workers who are employed on a piece-rate basis*. Opening Brief at p. 15 (emphasis added). The two certified questions before this Court relate to separate and additional pay for rest breaks *taken* by agricultural workers who are employed on a piece-rate basis. The question of how to remedy a piece-rate worker’s *missed* rest breaks is not before this Court, and Petitioners’ reliance on *Wingert* is misplaced. *See also Broad*, 141 Wn.2d at 676 (in answering a certified question, the Washington State Supreme Court should “not seek to make broad statements outside of the narrow questions and record before [it]”).

Petitioners’ reliance on this Court’s holding in *Washington State Nurses Ass’n v. Sacred Heart Medical Center*, 175 Wn.2d 822 (2012), is also misplaced. In *Sacred Heart*, this Court expanded on *Wingert* by holding that a non-agricultural worker’s *missed* opportunity to take a rest break constitutes “hours worked” for which overtime is due. *Id.* at 831-32. *Sacred Heart*’s analysis concerning “hours worked” is in the context of hourly pay, and the case answered the narrow question of whether *missed* rest breaks should be considered “hours worked” for purposes of

computing overtime. *Id.* In addition to the fact that Washington has specific regulations covering the calculation of minimum wage and overtime for piece-rate work, *Sacred Heart* is inapposite because agricultural workers are exempt from overtime pay. RCW 49.46.130(2)(g); WAC 296-126-021; WAC 296-128-550.

Petitioners' reliance on the Washington Court of Appeals' holding in *Pellino v. Brinks*, 164 Wn. App. 668 (2011), is also improper. In *Pellino*, the Court of Appeals held that the non-agricultural rest break regulation (WAC 296-126-092) imposes a "mandatory obligation" on employers to ensure that covered workers are provided meal and rest breaks. *Id.* at 689. While Sakuma strictly enforces breaks to ensure that they are always taken and never missed (and the question in *Pellino* is not before this Court), there is *no* Washington authority interpreting WAC 296-131-020(2) to impose such a "mandatory obligation" on agricultural employers to make sure breaks are taken. Dkt. 27 at 8:12-13. The plain language of WAC 296-131-020(2) provides that paid rest breaks "shall be allowed," and that the actual taking of rest breaks is a voluntary decision for the worker. Regardless, the remedial decisions interpreting the non-agricultural rest break regulation in *Wingert*, *Sacred Heart*, and *Pellino* are irrelevant where, as here, the taking of rest breaks is strictly enforced by the employer.

C. The California Authority Relied on by the Petitioners Is Inapposite and Cannot Be Followed Under Washington Law

Recognizing the lack of authority in support of their position, Petitioners rely on a single out-of-state decision that cannot be used to fabricate Washington law. Specifically, Petitioners cite *Bluford*, 216 Cal. App. 4th 864, for the proposition that piece-rate workers must receive separate compensation for their rest break time.

1. *Bluford* is based on California’s minimum wage law.

California’s wage law is an inappropriate model for interpreting the WMWA. The “genesis of California’s minimum wage laws is distinct from the FLSA.” *Anfinson v. FedEx Ground Package Sys., Inc.*, 159 Wn. App. 35, 43-44 (2010). California “adopted its minimum wage laws in 1913, several decades before the FLSA was enacted,” and continues to “*distinguish* [its] state wage law from its federal analogue, the FLSA.” *Id.* (emphasis in original). In contrast, the WMWA is modeled on the FLSA, and Washington courts look to the FLSA when analyzing Washington law. *Id.* at 49; *Stahl v. Delicor of Puget Sound, Inc.*, 148 Wn.2d 876, 886 (2003).

Bluford is a decision based on California’s distinct minimum wage law, and it addressed the question of whether a non-agricultural employer who pays piece-rate wages at least equal to the hourly wage multiplied by

total hours of work is required to pay additional “separate” hourly wages for rest breaks taken by California piece-rate workers. In order to reach its conclusion that California employers using a piece-rate compensation system must provide separate compensation for rest breaks, *Bluford* relied on the interpretation of California’s minimum wage law in *Armenta v. Osmose, Inc.*, 135 Cal. App. 4th 314 (2005).

Armenta is another California Court of Appeal decision that analyzed whether California’s minimum wage requirement for hourly employees applies to “each” individual hour worked, or to overall wages for the particular workweek. *Id.* at 325. Focusing on California’s distinct minimum wage law, the *Armenta* court rejected the FLSA rule that calculates minimum wage compliance by dividing all compensation during a pay period by the total hours worked to determine an average rate of pay, *id.* at 323-24, the method of computing compensation that DLI has expressly adopted for Washington employers. DLI Admin. Policy ES.A.8.2. Instead, *Armenta* held that California’s unique minimum wage law requires employers to pay minimum wage for “each” hour worked per day. 135 Cal. App. 4th at 325-27.

Armenta was a class action by hourly employees seeking unpaid minimum wages. *Id.* at 317-18. The employees maintained utility poles for major utility companies. *Id.* at 316-17. Under the terms of their

collective bargaining agreement, the employees were paid an hourly wage, but only for “productive” time spent actively maintaining the utility poles. *Id.* at 317. The employees were not compensated for travel time in company vehicles, time spent loading equipment and supplies, time spent preparing paperwork, or time spent maintaining company vehicles. *Id.*

Relying on the workweek method used under the FLSA (and the WMWA), which allows the averaging of wages over the course of a workweek to satisfy the minimum wage requirement, the employer in *Armenta* argued that despite the lack of pay for certain work tasks, the *average hourly rate for the workweek* still exceeded the California minimum wage. *Id.* at 319-20. The California Court of Appeal disagreed. Interpreting California’s minimum wage law to require minimum wage “for *each* hour worked,” the *Armenta* court held that the federal workweek method does not comply with California’s distinct minimum wage law requirement to pay minimum wage “for *each* hour worked.” *Id.* at 323-24 (emphasis added).

Based on this holding, *Bluford* reflexively extended the “*Armenta* rule” to rest breaks for California workers employed under a piece-rate compensation system. *Bluford*, 216 Cal. App. 4th at 872. The *Bluford* court concluded that California employees earning piece-rate wages are entitled to separate hourly wages for rest breaks because (unlike

Washington and federal law) *Armenta* requires that hourly and piece-rate employees earn a wage for “each” hour worked without averaging. *Id.*

As stated by the *Bluford* court:

Under the California minimum wage law, employees must be compensated *for each hour worked* at either the legal minimum wage or the contractual hourly rate, and compliance cannot be determined by averaging hourly compensation. [citations omitted]

Thus, contrary to Safeway’s argument, a piece-rate compensation formula that does not compensate separately for rest periods does not comply with California minimum wage law [under Armenta].

Id. (emphasis added).

2. The *Armenta/Bluford* framework is inapplicable because Washington uses the FLSA’s workweek measure for piece-rate work.

In addition to this Court’s reliance on FLSA interpretations for guidance in interpreting the WMWA, the WMWA’s definitions are patterned on the FLSA, and the legislature even amended the WMWA’s overtime provisions to conform to the FLSA. *Stahl*, 148 Wn.2d at 885; *Inniss v. Tandy Corp.*, 141 Wn.2d 517, 523-34 (2000); Laws of 1975, ch. 289 (conforming state minimum wage laws to federal laws).

The general rule under the FLSA is that no violation occurs “so long as the total weekly wage paid by an employer meets the minimum weekly requirements of the statute, such minimum weekly requirement

being equal to the number of hours actually worked that week multiplied by the minimum hourly statutory requirement.” *Hensley v. MacMillian Bloedel Containers, Inc.*, 786 F.2d 353, 357 (8th Cir. 1986); *see also Cooper v. Thomason*, 2007 WL 306311, at *2-3 (D. Or. Jan. 26, 2007) (dismissing wage claim because wages were high enough each week to ensure minimum wage was paid even with the inclusion of plaintiff’s claimed uncompensated hours).

Unlike California, Washington has also codified the standard for piece-rate work as it relates to satisfying the minimum wage. WAC 296-126-021; WAC 296-128-550; WAC 296-131-020(2). Adopting the FLSA’s workweek (or “averaging”) method, WAC 296-126-021 provides:

Where employees are paid on a commission or piecework basis, wholly or partially,

(1) The amount earned on such basis in each work-week period may be credited as a part of the total wage for that period; and

(2) The total wages paid for such period shall be computed on the hours worked in that period resulting in no less than the applicable minimum wage rate.

Although WAC 296-126-021 does not apply to agricultural workers, it sets out the policy of Washington as it pertains to using the workweek method for piece-rate work to comply with the minimum wage requirement. *See In re Kim*, 139 Wn.2d 581, 592 (1999) (regulations in

pari materia “must be construed together,” and “all aspects relating to the same subject matter or having the same purpose should be read in connection therewith as together constituting one law” (quoting *State v. Houck*, 32 Wn.2d 681, 684-85 (1949))). Regardless, WAC 296-131-020(2)’s provision that “[f]or 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” also mirrors Washington’s generally applicable piece-rate policy that does not require separate compensation for rest breaks. WAC 296-131-020(2).

In addition to the DLI Administrative Policies and guidance discussed above, DLI Admin. Policy ES.A.3 provides the following explanation of how to determine minimum wage compliance for workers employed on a piece-rate, commission, or “other than an hourly basis”:

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

If the pay period is weekly, the employee’s *total weekly earnings are divided by the total weekly hours worked* (including hours over 40). Earnings must equal minimum wage for each hour worked. If such earnings do not equal minimum wage, the employer must pay the difference.

If the regular pay period is not weekly, the employee’s total earnings in the pay period are divided by the total number

of hours worked in that pay period. The result is the employee's hourly rate of pay. Earnings must equal minimum wage for each hour worked. If such earnings do not equal minimum wage, the employer must pay the difference.

DLI Admin. Policy ES.A.3 at p. 2 (emphasis added).

Because Washington allows the averaging of piece-rate compensation over the course of a workweek to satisfy the minimum wage requirement, Washington does not require minimum wage for "each" hour of work, and thus *Bluford* cannot apply. Under Washington law, minimum wage compliance is based on the federal workweek method (instead of "each" hour), and rest breaks do not need to be separately paid to agricultural workers who are employed on a piece-rate basis.

D. Petitioners' Interpretation of WAC 296-131-020 Contradicts Public Policy

Not only is the workweek method regulated policy and well-established practice throughout Washington, it recognizes that payment under a piece rate is accumulated based on units of production rather than on the number of hours worked. Farm workers return to Sakuma year after year because of high piece-rate wages that can far exceed minimum wage. The agricultural rest break regulation and the WMWA should be properly interpreted to encourage these opportunities for workers to financially benefit through efficiency and hard work. Sakuma's piece-rate

system incentivizes employees by awarding harder-working and more productive workers with greater earnings, which is why this system is so popular in industries (like agriculture) where output is easily measured.

The efforts of Petitioners' counsel to require extra pay for rest breaks taken by piece-rate farm workers will interfere with the historical right of employers and employees to enter into non-hourly compensation arrangements. If accepted, such a requirement will effectively discourage employers throughout agriculture (and every other industry that uses commission, piece-rate, salary, and many other non-hourly compensation systems) from making incentive-based compensation systems available to their workers. The health and safety of workers is properly protected through the enforcement of breaks.

E. The Separate Rate of Pay, if Any, for Rest Breaks Must Be Based on Washington's Minimum Wage

Petitioners assert that, if the Court were to find Sakuma owed a separate and additional payment for rest breaks, such payment should be at a rate equivalent to the generous average hourly rate earned from piece work performed – not the state minimum wage rate. Petitioners rely on supposed policy-related reasons, contending that such a rate “provides a logical, efficient, and fair process for employers and employees” and is “easily accomplished.” Opening Brief at p. 23. But Petitioners' argument

ignores applicable law. In fact, this Court has repeatedly rejected the idea that the WMWA requires anything more than the base minimum calculations under the statute.

Notably, in *Seattle Professional Engineering Employees Ass'n v. Boeing Co.*, 139 Wn.2d 824, 835 (2000), this Court held that “[n]owhere does [the WMWA] guarantee an employee be paid his or her *regular* wage, nor does it provide any remedy for an employer’s failure to pay an employee for all time worked.” (Emphasis in original.) Instead, the WMWA establishes minimum compensation that is “calculated by multiplying the 40 hours in a normal workweek by the minimum hourly wage under RCW 49.46.020.” *Inniss*, 141 Wn.2d at 532. In *Inniss*:

The parties agree that the minimum wage was \$4.90 at all times relevant to this action. Inniss conceded below and during oral argument before us that he agrees with Tandy’s contention that, when all forms of compensation i.e., commissions, SPIFFs, and bonuses are considered in calculating the regular rate, that rate never fell below the statutory minimum.

Inniss v. Tandy Corp., 95 Wn. App. 1049 (table), 1999 WL 325439, at *1 (1999) (unpublished).

The *Inniss* court held that “because the managers’ wages never fell below the statutory minimum, Tandy complied with the WMWA” and “[s]o long as wages remain greater than the statutory minimum, there is no violation.” *Id.* at *1, *4. Similarly, in *Weeks v. Washington State Patrol*,

96 Wn.2d 893, 901 (1982), this Court found that “the lunchtime of the plaintiffs must be designated as work,” but rejected their minimum wage claim because the time “was compensated for by the salaries paid” to the plaintiffs. *See also Champagne v. Thurston Cnty.*, 134 Wn. App. 515, 520 n.5 (2006) (“monetary damages under the Minimum Wage Act are limited to circumstances in which an employer fails to pay statutory minimum wages”), *aff’d*, 163 Wn.2d 69, 88 (2008).

To the extent Petitioners rely on *Sacred Heart* for the proposition that separate and additional compensation for a rest break taken by a piece-rate worker should be paid at a rate equivalent to the average hourly rate earned from piece work performed, Petitioners’ reliance is misplaced. In *Sacred Heart*, this Court held that “both the *missed* opportunity to rest and the additional labor nurses provide constitute ‘hours worked.’” 175 Wn.2d at 826 (emphasis added). In other words, this Court’s holding in *Sacred Heart* is limited to missed breaks, not – as is the case here – rest breaks that are actually taken. Petitioner's baseless wage deduction argument fails for the same reason. Put simply, Petitioners’ contention that taken rest breaks should require separate pay in any additional amount, let alone an additional amount at an average hourly rate of piece work performed, requires a rewriting of the law – a job reserved for the legislature.

F. Petitioners Are Not Entitled to an Award of Attorney's Fees

Petitioners cite a handful of cases for the proposition that they are entitled to an award of attorney's fees under RCW 49.48.030. Notably, however, Petitioners do not cite a single case in which this Court has answered a question about the entitlement to an award of attorney's fees, much less awarded attorney's fees, where, as is the case here, the certified question itself does not present an issue related to attorney's fees. The reason for Petitioners' failure to cite such a case is simple: "[The] Supreme Court does not have jurisdiction to go beyond [a] specific question presented by [a] certification order when [the] question has been certified from federal court." *La.-Pac. Corp. v. Asarco Inc.*, 131 Wn.2d 587, 693-94 (1997) (finding the issue of whether defendant was the prevailing party on review and, as a result, entitled to an award of reasonable attorney's fees and costs, was beyond the scope of the certified question).

The Federal Court Local Law Certificate Procedure Act, RCW 2.60.010, *et seq.*, provides that "[t]he supreme court shall forward to the federal court utilizing certificate procedure its opinion *answering the local law question submitted.*" RCW 2.60.030(6) (emphasis added). And Washington law explicitly limits this Court's determination to a certified question, leaving all remaining issues within the province of the federal

court: “In providing an answer to the question we recognize that when a federal court certifies a question to this court, this court answers only the discrete question that is certified and lacks jurisdiction to go beyond the question presented.” *Kitsap Cnty. v. Allstate Ins. Co.*, 136 Wn.2d 567, 577 (1998); *Broad*, 141 Wn.2d at 676. Moreover, in answering a certified question, this Court should “not seek to make broad statements outside of the narrow questions and record before [it].” *Ruiz-Guzman v. Amvac Chem. Corp.*, 141 Wn.2d 493, 508 (2000).

Here, the district court certified two discrete questions of state law to this Court. Neither certified question raises an issue related to attorney’s fees. This Court therefore lacks jurisdiction to determine whether Petitioners are entitled to an award of attorney’s fees pursuant to RCW 49.48.030. *Kitsap Cnty.*, 136 Wn.2d at 577. Petitioners’ request for an award of attorney’s fees should therefore be denied.

VI. CONCLUSION

Contrary to Petitioners’ misrepresentation of Washington law, agricultural workers have rest break rights that are similar to other Washington workers, with recognized differences to account for the different nature of agricultural work. Washington’s agricultural rest break regulation (like the non-agricultural rest break regulation) does not provide for any separate and additional payment for rest breaks taken by

workers employed on a piece-rate basis. Compensation for rest breaks is included in the piece rate, and this Court should answer the certified questions in the negative. A holding that WAC 296-131-020(2) and the WMWA do not require employers to provide any separate and additional pay for rest breaks taken by workers who are employed on a piece-rate basis is consistent with Washington case law, DLI interpretation and guidance, the WMWA, the FLSA, case law from other jurisdictions, and sound public policy. Petitioners also have no entitlement to an award of attorney's fees.

RESPECTFULLY SUBMITTED this 9th day of January, 2015

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CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury under the laws of the State of Washington, that I caused the foregoing **Responsive Brief on Certified Questions** to be served on the persons listed below in the manner shown:

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Dated this 9th day of January 2015, at Seattle, Washington.

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Appendix

However, by requiring an economic impact statement the legislature intends that rules "affecting the business community not place disproportionately higher burdens on small businesses.", RCW 19.85.010. Since over 93 percent of agricultural businesses within the state are small businesses with fewer than fifty employees, the proposed rules impact small businesses almost exclusively. Employment data on Washington agricultural businesses compiled by the Department of Employment Security indicates that of over 1500 agricultural businesses, all but 108 were small businesses. The percentage of agricultural business that is small business would be even greater if data were available for the cash grains, livestock, and general farms industries, almost all of which are small businesses. The discussion that follows also will indicate that where the proposed rules impact business the impacts are proportionate to the size of business and that the impacts are minor.

The proposed rules implement RCW 49.30.030, directing the Department of Labor and Industries to adopt rules regarding employment of minors in agriculture and providing for rest and meal periods for agricultural employees. The proposed rules are based on the recommendations of an advisory committee on agricultural labor which met from October 1989 to January 1990 discussing employment standards for agricultural workers and soliciting public comment at six meetings across the state.

SECTION ONE

Description of the reporting, recordkeeping, and other compliance requirements of the rules: WAC 296-131-020, the proposed rule establishes requirements for meal and rest periods for agricultural employees; WAC 296-131-100, the proposed rule requires employers to obtain an annual permit to employ minors; WAC 296-131-105, the proposed rule requires parental authorization for employment of each minor and school authorization for employment of each minor during the school year. After obtaining the authorization the employer must keep it on file for one year; WAC 296-131-120, the proposed rule establishes times of day during which minors may work in agriculture and limits the number of hours per day and per week that minors may work. By placing limits on work hours, employers may be required to keep time records for minor employees not kept at present; WAC 296-131-125, the proposed rule restricts minors under 16 years of age from working in a variety of agricultural occupations and restricts all minors from working in three areas considered particularly hazardous. Because the restrictions on minors under 16 years of age already exist in federal law, there is no impact on business. The additional restrictions extend to minors 16 and 17 years of age the existing federal restrictions prohibiting minors under 16 years of age from using pesticides, blasting equipment and anhydrous ammonia. The proposed rule also prohibits minor employees from riding in or working near a vehicle being driven by someone under 16 or who does not possess a valid driver's license;

WAC 296-131-130, the proposed rule requires that employers maintain records of minor employees. As discussed above, authorization to work from the minor's parents and from the minor's school must be kept for one year. Proof of age also is required to be maintained in the employer's records; and WAC 296-131-140, the proposed rule sets forth a procedure by which an agricultural business can request a variance from the hours of work limitations in WAC 296-131-120. By requiring an employer to seek permission to employ minors during certain hours or in excess of daily or weekly limitations, some additional paperwork is created for those businesses which seek a variance.

SECTION TWO

The kinds of professional services needed by a small business in order to comply with the proposed rules: A typical small agricultural business would not, in the department's best judgment, require any outside professional services in order to comply with the proposed rules.

SECTION THREE

Analysis of the costs of compliance, including costs of equipment, supplies, labor, and increased administrative costs: WAC 296-131-020, the proposed rule establishes requirements for meal and rest periods for agricultural employees. Because employers already must maintain records of employee hours, no additional recordkeeping is required. Compliance costs for this proposed rule are limited to the additional labor costs to an employer of this requirement, if any. Although precise cost estimates cannot be calculated since labor costs vary due to a variety of factors (harvest quality and quantity, weather, workforce availability), it is assumed that variations in labor costs are not linked to the size of an employer. In determining the cost of compliance, the department assumes that most employees currently take rest breaks during the work day. If this assumption is correct, the proposed rules essentially establish in rule a practice that currently exists. If it were assumed that an employee did not currently take rest breaks and that an additional twenty minutes must be worked each day by an employee to accomplish the same amount of work, the additional labor cost to the employer (based on a minimum wage of \$4.25 an hour) would be \$1.42 per employee for every eight hours worked. This additional cost of compliance is a cost to the business on a per employee basis; WAC 296-131-100, the proposed rule requires employers to obtain an annual permit to employ minors. Although one permit will serve a business whether it has one minor employee or one hundred, the department estimates the permit form should take an employer less than 15 minutes to complete. This rule has a negligible impact on business operations; WAC 296-131-105, the proposed rule requires parental authorization for employment of each minor and school authorization for employment of each minor during the school year. The employer need only obtain the signed authorization(s) from each minor prior to employment and keep them on

file for one year. Maintaining a file of the required authorizations requires minimal labor and has a negligible impact on business operations; WAC 296-131-120, the proposed rule establishes times of day during which minors may work in agriculture and limitations on the number of hours per day and per week that minors may work. By placing limits on work hours, employers may be required to keep time records for minor employees not kept at present. Since minors will no longer be allowed to work an unlimited number of hours per day or per week, employers may also find it necessary to hire additional workers. No data is available to determine the costs of this rule. However, the costs will be proportionately spread across large and small businesses by nature of the larger businesses losing more hours by the limitations on minor work hours and needing to hire more additional workers than a small business with less current minor work hours; WAC 296-131-125, the proposed rule restricts minors under 16 years of age from working in a variety of agricultural occupations and restricts all minors from working in three areas considered extremely hazardous. Because the restrictions on minors under 16 years of age already exist in federal law, there is no impact on business. The additional restrictions extend to minors 16 and 17 years of age the existing federal restrictions prohibiting minors under 16 years of age from using pesticides, blasting equipment and anhydrous ammonia. Since minors will no longer be allowed to work in a limited number of extremely hazardous occupations, employers may also find it necessary to hire additional workers who are allowed to work in those occupations. No data is available to determine the additional labor costs, if any, which may result from these restrictions. However, the costs will be proportionately spread across large and small businesses by nature of the larger businesses losing more hours by the restrictions and needing to hire more additional workers than a small business with less current minor work hours; WAC 296-131-130, the proposed rule requires employers maintain records of minor employees. As discussed above, the requirement that parental and school authorization to work be kept for one year has a negligible impact on all agricultural businesses. The proof of age required to be kept already is required by the Fair Labor Standards Act and therefore has no economic impact; and WAC 296-131-140, the proposed rule sets forth a procedure by which an agricultural business can request a variance from the hours of work limitations in WAC 296-131-120. Although those businesses which seek a variance will have to prepare and submit a request for the variance, this rule does not require any additional activities by agricultural businesses.

SECTION FOUR

Comparison of the cost of compliance for small business and the cost of compliance with the ten percent of the businesses which comprise the largest businesses required to comply with the proposed rules: As indicated in the discussion above, the increased costs associated with these rule changes are dependent on the number of

employees each employer has; therefore, the smaller business with fewer employees will sustain proportionately less of an economic impact than the larger business with more employees. Although there are initial costs associated with understanding or adjusting to new regulations such as those proposed, the department has taken several measures to mitigate those impacts. First, the proposals are based on recommendations of a fourteen member Advisory Committee on Agricultural Labor which included four representatives from agriculture and a representative from Department of Agriculture. The recommendations, and the proposals based on those recommendations, were developed in such a way as to minimize impacts on the agricultural industry, especially small farmers unaccustomed to government regulation. Second, the department has conducted an internal review to minimize the impact of the proposed rules on small business. For instance, the department proposes that the records required under WAC 296-131-130 be kept for only one year, instead of three as other employee records. Third, the department has agreed to broadly educate agricultural industry about the rules on an on-going basis. The rules provide that the department annually publicize the requirements through departmental publications and other means designed to assist employers in complying. In addition, the department plans to conduct informational seminars on the rules after their adoption in June.

CONCLUSION

In drafting rules as directed by RCW 49.30.030, the department has eliminated "disproportionately higher burdens" on small businesses, limited the impact of most rules to an impact that is minor or negligible, and has mitigated the impacts on small agricultural business in many ways.

Hearing Location: Wenatchee Valley College Media Center, Wenatchee, on April 24, at 2:00 p.m.; and at the Eisenhower High School Little Theatre, Yakima, on April 25, at 3:00 p.m.; and at the Columbia Basin Community College Library Building, L102, Pasco, on April 26, at 3:00 p.m.; and at Spokane Community College, Conference Room A, Spokane, on April 27, at 2:00 p.m.; and at the General Administration Building Auditorium, Olympia, on April 30, at 9:00 a.m.; and at the Skagit County Courthouse, Mt. Vernon, on April 30, at 5:00 p.m.

Submit Written Comments to: Mark M. McDermott, Assistant Director, 406 Legion Way, HC-710, Olympia, WA 98501, by May 15, 1990.

Date of Intended Adoption: May 31, 1990.

March 21, 1990
Joseph A. Dear
Director

AMENDATORY SECTION (Amending Order 89-15, filed 10/24/89, effective 11/24/89)

WAC 296-131-001 APPLICABILITY. These standards, adopted pursuant to sections 83 through 86, chapter 380, Laws of 1989, shall apply to persons employed in agricultural labor as defined in RCW 50.04.150. The standards in this chapter beginning at WAC 296-131-100 shall apply only to minors employed in agricultural labor.

OUTLINE OF AGRICULTURAL LABOR RULE PROPOSAL
March 20, 1990

WAC 296-131-001 Applicability. Amending an existing WAC to limit application of certain rules to employment of minors.

This is a technical amendment.

WAC 296-131-005 Definitions. Defining terms used in the proposed rules.

The definitions are drawn from the statute. No comment is expected.

WAC 296-131-020 Meals and Rest Periods. Requiring meal and rest periods for agricultural employees.

The proposals are patterned after the current child labor rules (see WAC 296-126-092). The Advisory Committee agreed that employees should receive rest and meal breaks. There was disagreement whether rest breaks should be paid.

The proposal requires that rest breaks be provided on the employer's time. For workers paid at a piece rate, the rest period is included in time worked for purposes for ensuring that compensation is at least the minimum hourly wage.

Expected stakeholder response -

Grower: General acceptance.

Labor: Wanted rest periods for piece workers to be paid at the average rate for that category of piecework.

WAC 296-131-100 Permits to Employ Minors. Requiring employers to obtain a permit to employ minors.

The Advisory Committee reached consensus that minor work permits be required. Farmers are allowed increased flexibility in being allowed to hire minors before obtaining a permit. The department will monitor this approach due to concerns whether employers will follow the regulations prior to obtaining a permit.

ADMINISTRATIVE POLICY



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
EMPLOYMENT STANDARDS

TITLE:	MINIMUM HOURLY WAGE	NUMBER:	ES.A.3
CHAPTER:	<u>RCW 49.46.020</u> <u>WAC 296-126</u> <u>WAC 296-125</u> <u>WAC 296-131</u>	REPLACES:	ES-008
		ISSUED:	1/2/2002
		ISSUED:	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.

Minimum Wage Adjustments

The Minimum Wage Act provides that on September 30, 2000 and on each following year on September 30th, the Department of Labor and Industries shall calculate an adjusted minimum wage rate to maintain employee purchasing power by increasing the current year's minimum wage rate by the rate of inflation. The adjusted minimum wage rate will be calculated to the nearest cent using the consumer price index for urban wage earners and clerical workers, CPI-W, or a successor index, for the twelve months prior to each September 1st as calculated by the United States Department of Labor. Each adjusted minimum wage rate takes effect on the following 1st of January.

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

Minimum Hourly Wage—Adults

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

Minimum Hourly Wage—Minors

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

Minimum Hourly Wage—Agricultural Labor

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

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

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

Determining whether an employee has been paid the minimum wage

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

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

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

Payments not Included in minimum wage determination:

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



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
EMPLOYMENT STANDARDS

TITLE:	OVERTIME	NUMBER:	ES.A.8.1
CHAPTER:	<u>RCW 49.46.130</u> <u>WAC 296-126</u> and <u>WAC 296-128</u>	REPLACES:	ES-013
		ISSUED:	1/2/2002
		REVISED:	11/6/2006
		REVISED:	7/15/2014

ADMINISTRATIVE POLICY DISCLAIMER

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1. Employees are generally entitled to overtime compensation for hours worked in excess of forty per week. Unless an employee is exempt from the Minimum Wage Act or from overtime requirements (see page 6 of this policy), he or she must be compensated at an overtime rate of at least at one and one-half times his or her regular rate of pay for all hours in excess of forty in a seven-day workweek. See RCW 49.46.130(1). Overtime pay is required regardless of whether the employee is paid hourly or in some other manner, (commission, piecework, salary, non-discretionary bonus, etc., combinations thereof, or an alternative pay structure combined with an hourly rate) or whether payment is made on a daily, weekly bi-weekly, semi-monthly, monthly or other basis.

There is no limitation on the number of hours an employee may work in a workweek. An employer can require mandatory overtime but must compensate the employee accordingly. Overtime compensation is due when an employee works more than 40 hours in a workweek, regardless of whether the hours are worked on a Saturday, Sunday or holiday.

The overtime requirement may not be waived by agreement between an employee and employer. A declaration by an employer that no overtime work will be permitted, or that overtime work will not be paid unless authorized in advance, is not a defense to an employee's right to compensation for any overtime hours actually worked. The right to overtime compensation cannot be waived by individual employee agreement or by collective bargaining agreement.

2. If an employee must be paid overtime, how is the amount due calculated?

If an employee is due overtime compensation for hours over 40 in a workweek, it must be paid at a rate "not less than one and one-half times the regular rate at which he [or she] is employed." See RCW 49.46.130 (1).

- **Employees paid a single hourly rate.** Employees who are paid a single, hourly rate must be paid at least one and one-half their regular hourly rate of pay for each hour worked in excess of 40 in a seven-day workweek.
- **Employees paid other than at a single hourly rate.** For example, non-exempt salaried employees, piece rate, commission, non-discretionary bonus, and combinations of the above, including one or more of the above combined with an hourly rate, are also entitled to overtime pay at a rate of at least one and one-half the "regular rate" at which they are employed. See RCW 49.46.130(1) and WAC 296-128-550.

3. How is "regular rate" determined?

Prior to computing overtime pay, it is necessary to determine the employee's regular rate. The regular rate may exceed the minimum wage pursuant to RCW 49.46.020, but may not be less. Regular rate of pay for other than strictly hourly pay plans or practices is determined by dividing the total weekly compensation received by the total number of hours the employee worked during the workweek, including the hours over forty. See WAC 296-128-550. See ES.A.8.2, "How to Compute Overtime."

4. Payments Included When Determining Regular Rate. Certain payments other than hourly, commission, piece rate, or salary nonexempt payments must be included in the regular rate.

- **Bonuses:** Non-discretionary bonuses must be totaled in with other earnings to determine the regular rate on which overtime must be paid.
- **Non-Overtime Premium:** Lump sum payments that are paid without regard to the number of hours worked are not overtime premiums and must be included in the regular rate.
- **"On Call" Pay:** If employees who are on call and are not confined to their homes or to any particular place, but are required only to leave work where they may be reached or required to wear a beeper, the hours spent on-call are not considered "hours worked." However, any payment for such on-call time, while not attributable to any particular hours of work, is paid for performing a duty connected with the job, and must be included in calculating the employee's regular rate.

5. Certain payments may be excluded when determining regular rate. The regular rate includes total compensation earned in the pay period, except certain payments. The following payments are not considered in determining regular rate provided all the conditions in each are met:

- **Overtime pay for hours in excess of a daily or weekly standard:** Extra compensation provided by a premium rate of at least *one and one-half* the usual hourly rate, which is paid for certain hours worked by the employee in any day or workweek because the hours are hours worked in excess of eight in a day or in excess of 40 in a workweek. Such extra compensation may be credited toward statutory overtime payments.
- **Premium pay for work on Saturdays, Sundays and other special days.** Extra compensation provided by a premium rate of at least *one and one-half* which is paid for work on Saturdays, Sundays, holidays or regular days of rest, or on the sixth or seventh day of the workweek as such, may be treated as overtime pay. However, if the premium rate is less than one and one-half, the extra compensation paid must be included in determining the regular rate of pay and cannot be credited toward statutory overtime requirements.
- **Discretionary bonuses.** A discretionary bonus or gift or payment in the nature of gifts given on special occasions need not be included in the regular rate if the employer retains discretion both that a bonus will be paid and that the amount will not be determined until the end, or near the end, of the bonus period, i.e., when an employer pays a bonus without prior contract, promise, or agreement and the decision as to the fact and amount of payment lay in the employer's sole discretion and the bonus is not geared to hours worked or production, the bonus would be properly excluded from the regular rate. If the employer announces a bonus in advance, discretion regarding the fact of payment has been abandoned and the bonus would not be excluded from the regular rate.
- **Gifts, Christmas and special occasion bonuses.** If a bonus paid at Christmas or on other special occasions is a gift, it may be excluded from the regular rate even though it is paid with regularity so that the employees are led to expect it. If the bonus is geared to hours worked or production, it is not considered as a gift and must be included in the regular rate.
- **Reimbursement for expenses.** When an employee incurs expenses on the employer's behalf, or where the employee is required to spend sums solely for the convenience of the employer, payments to cover such expenses are not included in the employee's regular rate of pay.
- **Payment for non-working hours.** Payments that are made for periods when the employee is not at work due to vacation, holiday, illness or similar situations,

may be excluded from the regular rate of pay. Such payments may not be credited toward statutory overtime requirements.

- **Show-up and call-back pay.** An employment agreement may provide for a stated number of hours pay if the employee is not provided with the expected amount of work. If the employee works only part of the hours but is paid for the entire number of hours in the agreement, the pay for the hours not worked is not regarded as compensation and may be excluded from the regular rate. Such pay cannot be credited toward overtime pay due.

Because the regular rate is determined by actual hours of work performed by an employee, employers are required to record all actual hours of work regardless of whether an employee is paid on hourly, salary, piece rate, commission or other basis. See ES.D.1, Recordkeeping.

6. Examples of Regular Rate In Various Situations:

- **Hourly rate.** When an employee is paid solely on the basis of a single hourly rate, the hourly rate is the "regular rate." For overtime hours, the employee must be paid one and one-half times the hourly rate for each hour over 40 in the workweek.
- **Piece rate.** When an employee is paid on a piece rate basis, the regular rate of pay is computed by adding together the total earnings for the workweek from piece rate and all other earnings (such as bonuses), and any sums that may be paid for other hours worked. This sum is divided by the total number of hours worked in that week to yield the pieceworker's "regular rate" for that week. For the overtime work, the employee is owed, in addition to the total straight-time weekly earnings, one-half the regular rate for each hour over 40 in the workweek. The employee has already received straight-time compensation for all hours worked and only additional half-time pay is required.
- **Day rates/job rates.** An employee may be paid a flat sum for a day's work, or for doing a particular job, without regard to the number of hours worked in the day or at the job, and receive no other form of compensation. In such a case, the employee's "regular rate" is found by totaling all the sums received at such day rates or job rates in the work week and divided by the total hours actually worked. The employee must be paid an additional one-half pay at this rate for each hour over 40 in the workweek. The employee has already received straight-time compensation for all hours worked and only the additional half-time pay is required.
- **Payment of salary.** Salary payment arrangements must include a mutually understood agreement between employer and employee specifying the number of hours per week for which the salary is intended to cover. In the absence of a



HOW TO COMPUTE OVERTIME

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

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

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

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

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

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

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

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

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

HOURS WORKED EACH DAY							5 hours x \$9.50 = \$47.50 + 40 hours x \$15.00 = \$600.00 = Weekly Total \$647.50							OVERTIME	
Sun	Mon	Tue	Wed	Thu	Fri	Sat	Hours Worked	Hourly Rate #1	Hourly Rate #2	Weekly Earn Till	Total Hrs Worked	Regular Rate	OT Rate (1/2 Hrly)	Unpaid OT	OWED (OT Hrs x OT Rate)
31-Jan	1-Feb	2-Feb	3-Feb	4-Feb	5-Feb	6-Feb									
off	10	5	12	10	8	off	45	\$9.50 x 5	\$15.00 x 40 =	\$647.50 +	45 =	\$14.39 ÷ 2 =	\$7.20 x	5 =	\$36.00

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

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

SALARIES —

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

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

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

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

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

HOURS WORKED EACH DAY							Weekly Salary = \$500.00				OVERTIME	
Sun	Mon	Tue	Wed	Thu	Fri	Sat	Hours Worked	Hourly Rate	Unpaid OT Hrs	OT Rate (1/2 Hourly Rate)	OWED (OT Hours x OT Rate)	
31-Jan	1-Feb	2-Feb	3-Feb	4-Feb	5-Feb	6-Feb						
off	10	10	10	10	10	4	54	\$9.26	14	\$4.63	\$64.82	

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

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

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

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

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

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

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

	HOURS WORKED EACH DAY							Flat Rate Earned = \$400.00				OVERTIME
	Sun	Mon	Tue	Wed	Thu	Fri	Sat	Hours Worked	Hourly Rate	Unpaid OT Hrs	OT Rate (1/2 Hourly Rate)	OWED (OT Hrs x OT Rate)
31-Jan	1-Feb	2-Feb	3-Feb	4-Feb	5-Feb	6-Feb	40	\$10.00	N/A	N/A	N/A	
Flat Rate Hrs	off	8	8	8	8	8	off	40	\$10.00	N/A	N/A	N/A
Actual Hrs	off	9	9	9	9	9	off	45	\$8.89	5	\$4.44	\$22.22

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

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

ADMINISTRATIVE POLICY



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
EMPLOYMENT STANDARDS

TITLE:	RECORDKEEPING AND ACCESS TO PAYROLL RECORDS (AGRICULTURAL EMPLOYMENT)	NUMBER:	ES.D.2
		REPLACES:	ES-029
CHAPTER:	<u>RCW 49.30</u> <u>WAC 296-131</u>	ISSUED:	1/2/2002
		REVISED:	5/7/2004

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1. Record keeping requirements for agricultural employment. Agricultural employers must keep records of employee name, address, occupation, dates of employment, rate or rates of pay, the amount paid to each employee during each pay period, and the hours worked. See WAC 296-131-017.

Records must be made available to the department, upon request.

2. Records must also be made available to employees. An agricultural employee who requests "his or her work record" may inspect the records that his or her employer is required to keep "at any reasonable time".

a. "Employee work record" means the original records required by WAC 296-131-015 and -017 and are to include the name, address, and occupation of each employee; dates of employment; rate or rates of pay including regular and overtime rates; amount paid each pay period to each employee; all deductions from or additions to wages; and the hours and dates worked including regular and overtime hours.

Such records shall be open upon request to inspection, review, transcription and/or photocopying by the employee and must be available at the employee's usual place of employment.

b. **"Upon request"** shall mean an oral or written request by the employee.

c. **"At any reasonable time"** shall mean within 10 business days from date of request by employee.

3. Records must be kept for three years. Agricultural employers must keep all records required for at least three years. See WAC 296-131-017.

a. **The term "all records required"** shall include the original time records, including dates and hours worked, recorded on time sheets, time clocks, time cards, computer-generated time records, video camera (if used as a means of record keeping by the employer), or any other method of recording hours worked. Records transferred from such original records to a computer or other record keeping device do not satisfy the requirements of the Agricultural Employment Standards rules, WAC 296-131.

4. Agricultural employees are entitled to itemized pay statements. At the time wages are paid, RCW 49.30.020 requires that each agricultural employee receive an itemized statement showing:

- Pay basis in hours or days worked.
- Rate or rates of pay.
- Gross pay.
- All deductions from the pay for the respective pay period.

5. Payment by direct deposit. Employers may pay employees by direct deposit as long as there is no cost to the worker to withdraw their wages from the financial institution.

6. Pay statements when paying by direct deposit. When paying by direct deposit, employers must provide the pay statement on the established payday. The pay statement may be transmitted electronically, e.g., by e-mail, as long as each employee has access to receive the information and to copy it. If the employees do not have the means to receive an electronic pay statement, or to copy it, the employer shall provide a separate pay statement to employees with the pertinent information on the regular payday.

7. "An itemized statement" generally means a separate statement issued to employees on each payday. Pay periods shall be identified by month, day, year, and payment date. If employers provide all of the information required on the pay statement on the face of the check, and there is access to a copier where the paycheck is received for the employees to make a copy of their paycheck, a separate pay statement is not necessary. An employee shall not be required to go to an outside vendor to copy the paycheck that contains the information required on the pay statement.

a. Additional requirements on pay statement. WAC 296-131-015 requires that the pay statement must also:

- Identify the employee.
- Show the number of hours worked or the number of days worked based on an eight-hour day.
- Show the number of piece work units earned if paid on a piece work basis.
- Identify the pay period.
- Identify the purpose of each deduction.
- State the employer's name, address and telephone number.

8. Employment of minors (under age 18). Additional record keeping requirements for minors working in agriculture are required under WAC 296-131-130, specifically, proof of age and parent and school authorization.

9. Employer's failure to comply with record keeping requirements. The department may issue a Notice of Infraction to agricultural employers for failure to comply with agricultural employment record keeping requirements, per RCW 49.30.040. In the event of an investigation by the department, an employer's failure to keep and produce the required records may result in the department's acceptance of records kept by employees to determine back wages owed.

10. Recordkeeping requirements of the Minimum Wage Act, RCW 49.46. The initial record keeping requirements of the Minimum Wage Act (MWA) are similar to those under WAC 296-131. Employers subject to the MWA must keep a record of each employee's name, address, occupation, rate of pay, amount paid in each pay period and hours worked each day and each workweek. See RCW 49.46.070.

Additionally, under the provisions of the MWA, employers must keep the following records:

- Employee's date of birth, if under the age of 18.
- Time of day and day of the week that each employee's workweek begins.
- Total daily or weekly earnings at straight time rate.
- Total overtime earnings for weeks in which overtime was worked.
- Date of the wage payment and the dates of pay period covered.
- Total wages paid for each pay period.
- All additions or deductions to or from the wages for each pay period and a record of the additions or deductions from pay.

11. Time Clocks and Rounding Practices. Employers may use time clocks, sign-in/out sheets, electronic swipe cards, time cards, or other method of keeping track of employee's dates and hours worked. Employees must be paid for all time worked, which includes all preparatory and concluding activities. Employers may pay for all minutes on the time card, or may use the rounding practices described below.

a. **Differences between clock records and actual hours worked when rounding is not used:** Time clocks are not required. When employer's use the time clock method, minor differences between the clock records and actual hours worked cannot ordinarily be avoided, but major discrepancies should be discouraged since they raise a doubt as to the accuracy of the records of the hours actually worked. The employer controls the workplace and to avoid potential pay issues surrounding time clock punches, should not allow employees to arrive and clock in early for their own convenience. Should employees arrive before their scheduled starting time and begin their work, or continue to work after their closing time, they must be paid for that time unless as described in the following paragraphs.

When a time clock is used, an employee must be allowed to punch in at the time they are required to report for work and must be allowed to punch out only when they are finished performing tasks at the end of their shift. If a written time card is used, an employee or their supervisor must be allowed to record the actual time they are required to report for work and the time when they are finished performing tasks at the end of their shift.

b. **Rounding practices:** It has been found that in some industries, particularly where time clocks are used, there has been the practice for many years of recording the employees' starting time and stopping time by rounding the time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Employers may not utilize recordkeeping systems in which 15-minute segments of work time are not recorded or paid. When rounding to the nearest quarter-hour, employers must round based on the 7-minute rule, i.e., when employees are 1 to 7 minutes late, they must be paid for the entire quarter-hour; if they are 8 to 14 minutes late, payment may begin at the nearest quarter-hour. If they clock out 7 minutes before the end of their shift, they must be paid to the end of that shift; if they clock out 8 minutes prior to the end of their shift, their payment may stop at the nearest quarter-hour.

A system where it is always rounded down is not appropriate. The rounding practice must work both ways so that sometimes it is rounded up and sometimes it is rounded down. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes, this practice of computing working time will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.

Rounding practices may be used only with a time clock record keeping system or when a written record keeping system accurately reflects the actual time the employee signed in before and after the scheduled shift.

c. **Examples of time clock rounding:**

The following chart is provided as an example of rounding practices based on the 7-minute rule.

CLOCK IN TIME =	7:52 a.m. / PAY AS	7:45 a.m.
	7:55 a.m. / PAY AS	8:00 a.m.
	8:07 a.m. / PAY AS	8:00 a.m.
	8:09 a.m. / PAY AS	8:15 a.m.
	8:21 a.m. / PAY AS	8:15 a.m.
	8:23 a.m. / PAY AS	8:30 a.m.

CLOCK OUT TIME =	4:51 p.m. / PAY AS	4:45 p.m.
	4:54 p.m. / PAY AS	5:00 p.m.
	5:07 p.m. / PAY AS	5:00 p.m.
	5:09 p.m. / PAY AS	5:15 p.m.
	5:22 p.m. / PAY AS	5:15 p.m.
	5:24 p.m. / PAY AS	5:30 p.m.

d. Rounding is not permitted for meal and rest periods.

The meal and rest period requirements found in WAC 296-131-020 require a 30-minute meal period no later than the end of the 5th working hour, and a 10-minute rest period in each four-hour period of employment. Employees working eleven or more hours in a day must be allowed at least one additional 30-minute meal period. Employers cannot round, deduct, or average any time from a meal or rest period. When computing minimum wage for workers paid on a piece rate basis, the employees rest periods must be included in the number of hours worked.



AGRICULTURAL EMPLOYER WORKSHEET

This worksheet is designed to help you know whether you are following state Agricultural Employment Standards and the Minimum Wage Act when you employ workers. Filling out this worksheet is not required, but answering the checklist in the affirmative will help prepare you to be successful when your employment practices are reviewed by a state or federal inspector.

Employer Information:

Business Name: _____

Address: _____

Number of employees (approx): _____ Number of acres: _____

Farm Labor Contractor:

I use a Farm Labor Contractor (FLC) to recruit, solicit, employ, supply, or transport workers Yes No

If yes, name of FLC: _____

I have verified with L&I that this FLC holds a valid FLC license and bond Yes No

FLC License #: _____ I have a written and signed contract with the FLC Yes No

I am keeping track of the workers of the FLC or I have verified that the FLC is keeping such records. The FLC law requires that either the FLC or user of his/her services keeps records of names of workers, rate or rates of pay, number of piece work units if paid by piece work, number of hours worked, total pay period earnings, deductions identified and listed separately, and net pay.

I am keeping the records: Yes No I have verified the FLC is keeping required records Yes No

To verify the status of the FLC, check L&I website: www.lni.wa.gov/WorkplaceRights/. In "Agricultural" section, click on "Farm Labor Contractors".

I have checked that the farm labor contractor is current with industrial insurance premiums Yes No

To verify industrial insurance premiums, check L&I website: www.lni.wa.gov/ClaimsIns. See middle box to right of the screen.

Payment of Wages/Record Keeping:

I pay based on one or more of the following types of pay: Hourly Piecework Salary
Per pound Per can Per box Per bin
Per sack Per flat Other (specify): _____

Hours are recorded by: Time clock/time cards Written time cards Sign-in sheet

Daily record book Attendance roster if used as time sheet

Calendar with employee names and hours per day Other _____

I understand I am required to keep these records for a period of at least three years Yes No

Paydays and Pay Statements: Paydays must be scheduled at no longer than monthly intervals.

I pay my employees Daily Weekly Twice per month Semi-monthly Monthly

I provide pay statements to each worker on payday Yes No Each pay statement contains the required information:

Employee name Yes No Total hours worked Yes No

Rate or rates of pay Yes No Piece rate if paid by piece rate Yes No

Number of piece work units earned if paid on piece work basis Yes No

Gross pay Yes No Dates of pay period Yes No

Purpose of each deduction shown on pay statement Yes No

Employer business name Yes No Employer address Yes No

Business telephone number Yes No

Meal and Rest Periods: I understand the requirements for meal and rest periods for my employees Yes No

Meal breaks: If working more than 5 hours, employees must receive at least a 30-minute unpaid meal period; if they work more than 11 hours in a day, they must be allowed at least one additional 30-minute meal period. Rest breaks: Employees must be allowed at least a 10-minute paid rest period in each 4-hour work period. If paid on a piece work basis, the rest period time must be included in the number of hours for which the minimum wage must be paid.

My practice on meal periods is (describe): _____

My practice on rest periods is (describe): _____

Employment of Minors:

I employ minors (under age 18) Yes No I have a valid Minor Work Permit Yes No

I have my valid Minor Work Permit posted on my premises Yes No

I have completed and signed Parent/School Authorization forms on file for each of my minor workers Yes No
(I understand I do not need the school signature if minors work only during non-school weeks.)

Number of minors employed (approx) _____

If yes, I schedule my minor workers for the hours permitted in each age group:

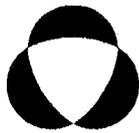
_____ **12/13** may be employed in the hand harvest of berries, bulbs, and cucumbers, and hand cultivation of spinach during weeks when school is not in session. They may work the same hours as for 14/15 yr-old workers

_____ **14/15** may work up to 8 hrs per day and up to 40 hrs per week during non-school weeks. During school weeks they may work up to 3 hrs on school days and up to 8 hrs on non-school days for a total of 21 hrs per week.

_____ **16/17** may work up to 10 hrs per day and 50 hrs per week during non-school weeks. During school weeks they may work up to 4 hours per day on school days and up to 8 hrs per day on non-school days, for a total of 28 hrs per wk

I understand the prohibited occupations for minors and do not assign or allow them to work in any of those jobs Yes No

For more specific information and forms, check L&I's publication 'Young Workers in Agriculture' (form #F700-096-909, the L&I website at www.lni.wa.gov/WorkplaceRights (in Agricultural section, click on 'Agricultural Jobs for Teens'), or contact an L&I office.



Agricultural workers:

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

Follow these steps to find out:

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

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

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

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

3. Find out what your workweek is.

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

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

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

Does it match the units you recorded for the workweek?

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

6. Calculate your hourly wage.

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

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

Example								
José's workweek								
José picks strawberries. His employer promised to pay 50 cents for every pound (unit) of strawberries. Every day, José records how many hours he worked and how many pounds of strawberries he picks.								
	Sun. July 14	Mon. July 15	Tues. July 16	Wed. July 17	Thurs. July 18	Fri. July 19	Sat. July 20	Totals
Units (bins/trees/pounds/etc.)	92	125	175	149	183	105	98	927 Total units
Hours (subtract your meal period)	5	8	10	9	10	7	6	55 Total hours

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

Piece rate correct? Yes.

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

Minimum wage paid? No.

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

Questions workers ask:

1. What is the minimum wage?

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

2. Must all agricultural workers be paid minimum wage?

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

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

3. Is the minimum wage different for minors?

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

4. Is my employer required to pay me overtime?

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

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

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

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

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

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

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

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

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

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

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

On the Web: www.WorkplaceRights.Lni.wa.gov

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

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

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Attached for filing in *Demetrio, et al. v. Sakuma Brothers Farms, Inc.*, Supreme Ct. Case No. 90932-6, please find Defendant Sakuma Brothers Farms, Inc.'s Responsive Brief on Certified Questions.

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