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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 ANSWER TO
AMICUS BRIEFS FILED IN SUPPORT OF PETITIONERS**

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I. INTRODUCTION

The fundamental flaw in the arguments of amici curiae supporting Petitioners¹ (which are essentially the same as the Petitioners' arguments) is that they fail to recognize that piece-rate pay covers *all* of the activities and functions that go into hand-harvesting crops and, therefore, *does* compensate farmworkers for rest breaks taken throughout the workday. The phrase “on the employer’s time” in the agricultural rest break rule, WAC 296-131-020(2), requires only that rest breaks be paid, *not* that such breaks be paid separately from and in addition to farmworkers’ regular mode of compensation. Nothing in the cases applying the non-agricultural rest break rule, WAC 296-126-092(4), to missed rest breaks compels separate payments for rest breaks taken, and such a requirement would be contrary to the interpretive guidance provided by DLI. An exclusive piece-rate compensation system satisfies the requirements of the agricultural rest-break rule and the WMWA. Accordingly, the Court should answer the first certified question in the negative.

¹ In this brief, Sakuma answers the arguments of the five amici curiae – the Washington Employment Lawyers Association and Washington State Labor Council, AFL-CIO (together, “*WELA*”), the United Farm Workers (“*UFW*”), the Office of the Attorney General of Washington (“*Attorney General*”), the Department of Labor and Industries (“*DLP*”), and Farmworker Justice, National Employment Law Project, Migrant Clinicians Network, and Sea Mar Community Health Centers (together, “*Farmworker Justice*”) – that have filed briefs either supporting Petitioners’ position or, in the case of DLI, opposing certain arguments of Sakuma. As explained *infra*, many of these amici advance the same argument. In those instances, Sakuma refers to them collectively as “amici,” with citations to portions of specific amicus briefs.

II. ARGUMENT

A. The Agricultural Rest Break Rule Does Not Require Separate Payment For Rest Breaks.

1. Amici's Suggestions Notwithstanding, Sakuma Does Not Contend That Rest Breaks Are Optional.

Before addressing amici's different interpretive and policy arguments, it is necessary to clarify one aspect of Sakuma's responsive briefing. On page 18 of its Response Brief, Sakuma explained that "[t]he 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." According to amici, this statement reflects Sakuma's view that rest breaks are optional or may be waived by agricultural workers. *See* AG Br. 6-7; DLI Br. 12; WELA Br. 5-6. These arguments misunderstand Sakuma's position.

Sakuma does not argue that rest breaks are optional or waivable. As previously explained, Sakuma strictly requires its workers to take a 10-minute rest break for every four hours of work. Sakuma Resp. Br. 3. To the extent that other employers do not coordinate rest breaks, the timing of a rest break would be left to an employee's voluntary decision-making. That is all Sakuma meant.

Any argument to the contrary is based on a misstatement of Sakuma's position. The rest break rule mandates that employers give their

employees a paid 10-minute break for each four hours of work. How such payment is to be made is, of course, in dispute, and it is that dispute to which we now turn.

2. Contrary to Amici's Arguments, The Phrase "On The Employer's Time" Means Only That Rest Breaks Must Be Paid, Not That They Must Paid Separately.

Amici argue that under the *in pari materia* canon of construction, the phrase "on the employer's time" in the agricultural rest break rule should be read to require separate payment for rest breaks *taken* by piece-rate workers because the same language in the *non-agricultural* rest break rule, WAC 296-126-092(4), has been interpreted to require additional compensation for *missed* rest breaks. *See* AG Br. 5-10; WELA Br. 2-7; UFW Br. 5-7. If agricultural piece-rate workers are not paid separately for rest breaks, amici argue, the phrase "on the employer's time" would be rendered meaningless. This argument echoes Petitioners' main argument. *See* Pet. Br. 7, 10-12; Pet. Reply Br. 3, 5, 17. It is incorrect for several reasons.

To begin with, no court, when interpreting and applying the non-agricultural rest-break rule to hourly or piece-rate workers, has ever held, expressly or implicitly, that an employer must pay an employee for rest breaks separate from and in addition to the employee's usual compensation scheme. The cases applying the non-agricultural rest break rule on which amici rely stand only for the propositions that rest breaks "on the employer's

time” constitute work for which employees must be paid, and that the time for *missed* rest breaks, therefore, must be included in the time/pay calculation. See *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 849, 50 P.3d 256 (2002); *Wash. State Nurses Ass’n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 831, 832, 287 P.3d 516 (2012); *Pellino v. Brink’s, Inc.*, 164 Wn. App. 668, 691-92, 267 P.3d 383 (2011). Amici’s arguments that these remedial decisions require separate pay for rest breaks *taken* by agricultural workers employed on a piece-rate basis stretch the holdings in these cases beyond their limit.

Turning to the Attorney General’s argument (*see* AG Br. 7) that rest breaks must be paid separately because otherwise they would be functionally the same as unpaid meal breaks under subsection 1 of the agricultural rest-break rule, WAC 296-131-020(1), this argument ignores the plain language of subsection 2 of the agricultural rest break rule that treats rest breaks differently from meal breaks. Subsection 2 of the rule provides 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.” WAC 296-131-020(2). Under this provision, the time devoted to rest breaks, unlike the time spent on “unpaid” meal breaks, must be, and is, factored into the determination of whether piece-rate workers are paid at least minimum

wage.² As such, the Attorney General is incorrect that a piece-rate worker receives the same payment “when taking a rest break as when taking a meal break, i.e., no payment at all.” AG Br. 7-8.

An example illustrates this flaw in the Attorney General’s argument. Assume that a piece-rate worker’s equivalent hourly rate without accounting for rest breaks is just above minimum wage but falls below minimum wage when rest breaks are counted (*i.e.*, pay for total number of units produced ÷ hours worked, not including rest breaks, *compared to* pay for total number of units produced ÷ hours worked, including rest breaks). In the latter situation, the employer would be required to make additional payment to the employee to satisfy minimum wage requirements. Thus, it cannot be said that piece-rate pay fails to compensate employees for rest breaks.

The outcome is no different in the hypothetical example of *missed* rest breaks presented by the Attorney General. *See* AG Br. 8-9. That example supposes that a worker’s piece-rate pay for 8 hours of work with no rest breaks is equivalent to the hourly minimum wage, but that when 20 minutes are added for the two missed 10-minute rest breaks, thus increasing the overall number of hours worked to 8 hours and 20 minutes, the hourly equivalent falls below the minimum wage. This situation is analogous to the

² As explained in previously filed briefing, agricultural workers are exempt from overtime rules. *See* Sakuma Response Br. 6.

missed rest breaks underlying the claims in *Wingert*, *Sacred Heart*, and *Pellino*. Application of subsection 2 of the agricultural rest-break rule, WAC 296-131-020(2), would reveal the underpayment and trigger the employer's duty to make an additional payment. Regardless, missed rest breaks are not at issue.

WELA makes a similar argument about *missed* rest breaks. In its hypothetical example, two individuals are paid the same piece rate and pick the same amount of berries, but they do so at different speeds (one takes 8 hours, the other 10), and only the faster employee takes rest breaks, meaning that the slower employee works without rest for 10 hour straight. *See* WELA Br. 8. Contrary to WELA's argument, neither of these examples establishes that piece-rate workers are not paid for rest breaks. Under WAC 296-131-020(2), the time period for rest breaks, both breaks that are taken and breaks that are missed, must be included in the calculation to determine whether compensation comports with minimum wage requirements. If either employee's compensation falls below the minimum wage and if rest breaks were missed, the employer would have a duty to make additional payment. But, again, *missed* rest breaks are not at issue.

WELA's argument is also flawed because it rests on two false assumptions. The first is that the two piece-rate workers' equivalent hourly wage rate must be the same. Neither WELA nor any other amicus (or

Petitioner) has identified, or can identify, any statute, rule, or legal principle requiring such equivalence. As explained above, “on the employer’s time” means only that rest breaks must be paid. Other than minimum wage requirements, there is no requirement that piece-rate workers be paid any particular amount or that piece-rate workers employed on the same farm must earn the same effective hourly rate equivalent. So long as the piece-rate paid by an employer satisfies the minimum wage requirement taking into account the time required for rest breaks, the employer complies with the rest break rule and the WMWA.

The second false assumption (which also underlies the arguments of Petitioners and their other supporting amici) is that piece-rate pay does not compensate workers for the time spent on rest breaks because, in their view, breaks do not contribute to production. *See* WELA Br. 8-9; AG Br. 7-9. According to this reasoning, piece-rate workers earn wages only when they are performing certain tasks that go into the production of a piece on which wages are based. In the situation underlying this lawsuit, the argument goes, farmworkers earn pay only when they are picking berries and placing them into containers. Under this argument, because no berries are being picked during rest breaks, rest breaks are unpaid. This view ignores the defining characteristic of piece-rate pay, namely that it covers *all* work that goes into

producing the units on which compensation is based. As explained below, this mode of compensation satisfies the rest break rule.

3. Piece Rate Compensation Satisfies The Paid Rest Break Requirement Because Piece-Rate Pay Covers All Of The Work That Goes Into Harvesting A Unit Or Piece Of Production, Including Rest Breaks.

Piece work is a form of employment in which employees are paid for each unit produced or task completed, regardless of time. In Sakuma's case, farmworkers are paid for each pound of berries they pick. The rate paid for each piece is compensation for *all* of the functions necessary to produce a given piece.

Contrary to the assumptions of amici, which follow those of Petitioners, Sakuma's farmworkers are earning piece-rate wages only when they are picking berries off of a plant. However, numerous activities comprise the work that yields a harvest. Employees must move between plants after berries are picked. They must be idle as they wait for coworkers to provide empty containers after filling other vessels with berries. When they finish harvesting one row of plants, they have to relocate to another row to resume picking. Even though workers are not picking berries while engaged in these activities, these activities are necessary tasks for each unit of production.

Breaks taken under the agricultural rest-break rule are also necessary, and they are just as integral to the production as these other aspects of the work. They are so, in part, because Washington law requires that workers take rest breaks. In this regard, the rest breaks mandated under the rule are no different from any other function that must be performed under law as part of completing a task or fabricating a unit of production on which compensation is based. Breaks are also an instrumental necessity, in addition to being a legal requirement, because they facilitate safe and otherwise efficient harvesting.

To be clear, Sakuma is not suggesting that moving from one row to another is the same degree of activity as taking a rest break. The former obviously involves physical exertion, while the latter involves rest. But there is no principled difference in kind between these two activities as they relate to production of the units (*i.e.*, containers of berries) on which compensation is based. In neither of these activities is a worker picking berries. But each is a necessary and indispensable part of the job that a worker performs to harvest Sakuma's crops. Workers have to move between rows of plants in order to access berries ripe for picking, and they need to take rest breaks both because the law requires and because rest is needed for efficient production. Each activity is a necessary aspect of the

work that goes into harvesting Sakuma's crops. The piece-rate covers these activities and all other work that goes into the harvest.

In arguing that piece-rate farmworkers are not being paid for their rest breaks because they are not picking crops or performing similar functions during their breaks (*e.g.*, pruning or tying), amici, like Petitioners, fail to recognize the role that rest breaks play in the overall work of piece-rate employees. With neither reference to any legal authority nor any explanation as to why rest breaks are not part and parcel of the work needed to complete a unit of production, they assert that the time spent taking rest breaks can be compensated only on a separate hourly basis. But no legal principle or economic reality of piece work compels that conclusion.

As explained above, the terms of the agricultural rest break rule require that rest breaks be paid. Piece-rate compensation necessarily covers rest break time and activity, just as it covers all other functions that go into production. So long as the wages paid under a piece-rate plan comply with minimum wage requirements, such payment complies with the agricultural rest break rule.

4. Notwithstanding DLI's Arguments To The Contrary, Its Interpretation Of The Agricultural Rest Break Rule Confirms That Payment Exclusively By Piece Rate Is Sufficient.

The thrust of DLI's amicus argument is that it has not interpreted the agricultural rest-break rule to require one thing or another in terms of

exclusive piece-rate pay or separate and additional pay for rest breaks taken by piece-rate workers. *See* DLI Br. 2-8. Sakuma recognizes that DLI has not promulgated an Administrative Policy addressing this issue. But that does not mean DLI has not interpreted the rule.

Washington's APA encourages DLI to "advise the public of its current opinions, approaches, and likely course of action by means of interpretive or policy statements." RCW 34.05.230. As Sakuma explained at length in its responsive briefing, in providing public guidance to agricultural employers and employees alike on issues such as calculating wages and hours worked and determining compliance with minimum wage requirements, DLI has never suggested that separate pay for rest breaks is required. *See* Sakuma Resp. Br. 9-16. If separate pay were required, this guidance would be incorrect. *See id.* DLI does not dispute this latter point, nor does it suggest that its interpretive guidance must be reconsidered to account for a separate pay requirement.

What is more, DLI has indicated that piece-rate pay, by itself, is sufficient. On DLI's website discussing rules and regulations about paying by piece rate, DLI currently provides the following answer to the frequently asked question,

May workers be paid by commission or piece rate only, and must those payments equal minimum wage for the hours worked in each pay period?

Yes. In general commissions and piece rate must equal minimum wage for the hours worked. However, there is an exception for those who sell products or services from the employer's place of business and are paid commission. This is commonly known as "outside sales."

Wash. St. Dep't of Labor & Indus., "Commissions, Piece Rat & Bonuses,"

[http://www.lni.wa.gov/WorkplaceRights/Wages/PayReq/CommBonus/default](http://www.lni.wa.gov/WorkplaceRights/Wages/PayReq/CommBonus/default.asp)
[.asp](#) (last visited Mar. 5, 2015) (emphases added) (appended hereto at

App'x 2). There are no non-exempt employees paid by piece-rate who are not entitled to take rest periods. Logically, then, exclusive piece-rate pay satisfies the requirement agricultural rest-break rule that farmworkers be allowed rest periods "on the employer's time." DLI's existing guidance and lack of any revision are persuasive and cannot be ignored.

Further, even though DLI and other amici seek to downplay the drafting history of the agricultural rest-break rule and DLI's refusal to include a separate pay provision in the agricultural rest-break rule (*see* DLI Br. 6-7; AG Br. 9-10), it is an inescapable fact that the rule *does not* express such a requirement. The absence of such an express requirement is particularly significant because (a) DLI was presented with this issue at the time it promulgated the rule but did not include it, and (b) the principal argument of amici supporting Petitioners is that the *language* of the rest break rule requires separate payment. When a statute or rule does not expressly require some action and history shows that the legislature or

agency declined to adopt language that would plainly impose such a requirement, the legislature or agency is presumed *not* to have intended to silently enact the omitted provision. *See State v. Clark*, 129 Wn.2d 805, 812-13, 920 P.2d 187 (1996); *Buchanan v. Simplot Feeders, Ltd. P'Ship*, 134 Wn.2d 673, 687-88, 952 P.2d 610 (1998). Yet Petitioners and their supporting amici ask the Court to read a provision into the agricultural rest break rule that DLI declined to include. The principle of separation of powers forbids their request for judicial revision of the rule.

The effort to deemphasize DLI's interpretive guidance and the drafting history also fails because DLI has not contradicted its existing guidance or Sakuma's position on the merits. Under the doctrine of legislative acquiescence, an agency's longstanding interpretation of a statute or rule it enforces is owed deference when such interpretation is reasonable and has not been rejected or changed despite an opportunity to do so. *See, e.g., In re Sehome Park Care Ctr. Inc.*, 127 Wn.2d 774, 780-81, 903 P.2d 443 (1995) (declining to disturb agency interpretation of 30 years). It makes sense to apply the principles underlying the acquiescence doctrine and defer to an agency's longstanding interpretation where, as here, an agency declined to draft a rule requiring certain action, offered interpretive guidance for more than two decades consistent with its decision to omit such a

requirement, and declined to modify a rule or revise its interpretation when faced with a countervailing argument.³

That the Office of the Attorney General has sided with Petitioners is of no moment. Where, as here, its view does not reflect that of the enforcing agency, its position is *not* entitled to special weight. *See, e.g., Skagit Cnty. Pub. Hosp. Dist. No. 304 v. Skagit Cnty. Pub. Hosp. Dist. No. 1*, 177 Wn.2d 718, 725 n.1, 305 P.3d 1079 (2013) (declining to extend acquiescence doctrine to attorney general opinion that did not include the enforcing/implementing agency's interpretation). The critical point is that DLI has *not* embraced Petitioners' view. DLI's silence speaks loudly.

5. Amici Incorrectly Argue That Separate Pay Is Necessary To Ensure That Workers Take Rest Breaks.

Amici repeat Petitioners' incentives argument that separate pay for rest breaks is the only way to encourage farmworkers to take rest breaks and to protect them from physically demanding working conditions. *See* WELA Br. 8, 9-10; UFW Br. 13-16; AG Br. 11; FJ Br. *passim*. According to this argument, farmworkers will not take rest breaks unless rest breaks are paid separately and at an hourly rate equivalent to the piece rate because rest

³ To the extent DLI has abandoned its longstanding interpretation, DLI's new position is not owed any deference. *Cf. Dot Foods, Inc. v. Wash. Dep't of Revenue*, 166 Wn.2d 912, 921, 215 P.3d 185 (2009) (no deference when revised agency contradicted longstanding interpretation); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (no deference to new agency interpretation announced in amicus brief creating surprise liability).

breaks do not involve productive activity, *i.e.*, activity that increases harvest yield. Without separate pay, the argument continues, workers will forgo rest breaks leading to inefficient production (which hurts the employer's business) and an increased risk of injury. This argument fails legally, factually, and logically.

Legally, separate pay is not the proper means to ensure that workers take rest breaks and avoid harmful effects of sustained labor without rest. As DLI explains in its brief, it utilizes a comprehensive enforcement procedure with stiff fines to ensure that employers comply with the rest-break requirement. *See* DLI Br. 8-9. When there is an existing enforcement mechanism to uphold a public policy, such a mechanism is the appropriate primary means to further the policy at issue. *See Weiss v. Lonnquist*, 173 Wn. App. 344, 357-58, 293 P.3d 1264 (2013). Amici argue that the breach of public policy is the failure of employees to take rest breaks to which they are entitled under the law. In this situation, DLI's enforcement procedure, not a separate pay scheme, is the proper way to ensure that workers take rest breaks.

Factually, this argument fails because no record evidence shows that piece-rate compensation discouraged Sakuma farmworkers from taking rest breaks. Neither Petitioners nor their supporting amici has cited any portion of the record to the contrary. Moreover, as noted above and in Sakuma's

Response Brief (p. 3), Sakuma enforces a strict policy that requires its employees to take rest breaks. Regardless of the accuracy or reliability of the copious secondary sources cited by amici and Farmworker Justice in particular, those sources do not establish that piece-rate pay discourage farmworkers from taking breaks under the applicable rule. There simply is no evidentiary support in this case or under the scheme for enforcing Washington's rest-break rule for the argument that piece-rate compensation without separate pay for rest breaks thwarts the objective of providing rest breaks for agricultural workers.

Logically, the disincentive argument fails because of an internal inconsistency. The argument rests on the assumption that agricultural workers will skip rest breaks in order to continue active picking because their compensation is based on the amount of berries picked, not on the amount of time spent resting during which they are not actively picking. As a result, workers are being deprived of rest that would make them healthier and safer and ultimately more efficient and productive. But this argument ignores this last critical point: rest breaks benefit workers financially because breaks increase productivity. Accordingly, there is a strong financial incentive to take rest breaks without separate pay.

True, some workers might be shortsighted and fail to see the long-term benefit of taking rest breaks. But Sakuma's policies and DLI's

enforcement scheme mitigate the effects of such bounded rationality. Thus, it cannot be said that piece-rate compensation discourages rest.

B. Even If The Court Concludes That Separate Pay For Rest Breaks Is Required, No Statute Or Regulation Requires Payment In Excess Of The Minimum Wage.

Many of the amici also echo Petitioners' argument that, in the event the Court concludes separate pay for rest breaks taken by piece-rate workers is required, separate rest period payments should not be the applicable minimum wage but, rather, equivalent to an employee's regular hourly rate for piece work. *See* WELA Br. 11-12; UFW Br. 24-27. This argument rests on a premise similar to the assumption underlying amici and Petitioners' incentives argument: *that workers will not take rest breaks unless the time spent resting is as remunerative as the time spent picking berries and filling containers*. This argument is without merit, both legally and factually.

Legally, as Sakuma explained in its Response Brief (pp. 26-28), no statute or rule requires an employee be paid his or her "regular" wage or any amount other than minimum wage for any particular tasks. To the contrary, this Court explained in *Seattle Professional Engineering Employees Ass'n v. Boeing Co. (SPEEA)*, 139 Wn.2d 824, 834, 991 P.2d 1126 (2000), 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." The WMWA guarantees that

employees receive a minimum wage, but nothing mandates that they be paid some other amount.

As a rejoinder to this argument, WELA asserts that, applying the holdings of *SPEEA* and *Wingert*, rest breaks should be separately paid at their piece-rate hourly equivalent. *See* WELA Br. 11-12. This argument misunderstands the second certified question and it misreads *SPEEA* and *Wingert*. The second certified question before the Court is, in the event the Court concludes rest breaks must be paid separately, “how must Washington agricultural employers calculate the rate of pay for the rest break time to which piece-rate workers are entitled?” Dkt. 44. By its terms, this question concerns the appropriate rate of separate compensation that an employer must pay. The question before the Court is not “what is the proper measure of damages upon a finding of liability for unpaid wages or missed rest breaks?” The Court addressed those issues in *SPEEA* and *Wingert*, but it did not hold in those cases that rest breaks must be paid at an employee’s regular rate.

As Sakuma explained in its Response Brief (p. 2), the Court is limited to answering the certified question before it and should not make broad pronouncements outside the certified question’s scope. Moreover, WELA has not pointed to any authority requiring that rest breaks must be

paid at an employee's regular rate. Accordingly, the Court should reject WELA's argument.

Factually, amici's incentive-based regular rate argument fails for the same reasons discussed above. The benefits of rest breaks favor taking them regardless of the rate. Thus, even if the Court concluded that separate pay for rest breaks is required (which it should not), there is no basis to require payments that are higher than minimum wage.

III. CONCLUSION

For all of the foregoing reasons and the reasons set forth in Sakuma's Response Brief, the Court should answer the first certified question in the negative and, if necessary, answer the second certified question in the negative.

RESPECTFULLY SUBMITTED this 5th day of March 2015.

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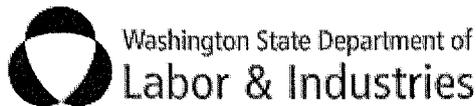
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Dated this 5th day of March 2015, at Seattle, Washington.

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Commissions, Piece Rate & Bonuses

Rules and regulations about paying by commissions, piece rate, and bonuses

[+ Expand All](#)

What does it mean to be paid by:

[+ Commission?](#)

A commission is a form of payment that is usually a percent of the business' profit. For example, in a retail store the worker might receive 10 percent of each sale made or may be paid an hourly rate plus 5 percent commission for every sale made.

- Workers may be paid on a commission basis only, or an hourly/salary plus commission. If paid on a commission basis only, it must equal the current minimum wage for all hours worked in the pay period.
For example: A beautician in a beauty salon paid by commission only for each haircut, permanent, etc., worked 80 hours with no overtime hours in the pay period, and earned a total of \$400 in commissions. The total earned in the pay period (\$400) divided by the total hours worked in the pay period (80) is equal to \$5.00 per hour. This is below the minimum wage and should be equal to or greater than the latest minimum wage rate multiplied by the number of hours worked. If it is not, the employer must make up the difference.
- Workers that sell the business' products or services outside of the business, where they typically go from business to business or customer to customer are known as "outside salespersons" and are not required to receive minimum wage or overtime payments. If the worker worked 110 hours in the pay period and made \$200 in commissions, the business is not required to make up the difference to meet the minimum wage law or to pay overtime.

[+ Piece Rate?](#)

Piece rate payment is usually a price paid per unit of work. For example, in a manufacturing plant, workers are paid 10 cents per widget they make on the production line. The worker is entitled to minimum wage, however. So if the pay per piece does not equal minimum wage for the

time it took to create those pieces, the business must make up the difference so the worker gets at least minimum wage for the time worked.

⊕ Bonuses?

Bonus payments are in addition to hourly, salary, commission, or piece rate payments. A bonus is normally given by a business to workers for excellent work or for outstanding production. For example, workers in a manufacturing plant were given a \$300 bonus at the end of the year because they made few errors on the production line, and the business made a lot more money than it had expected to make. It is typically a reward for good work but there is no agreement between the employer and workers that they will receive a bonus. This type of bonus is not considered to be part of the worker's wages and is not required to be included in the overtime calculation.

Certain bonus payments are paid under an agreement between the employer and workers. These bonuses are typically paid to the workers every pay day, every quarter, semi-yearly, or yearly, or if the workers have an agreement for bonus payments or if the business led them to believe they would receive a bonus. These types of bonus payments are considered part of the worker's wages. These bonus payments must be included in the overtime calculation.

Questions and answers

⊖ May workers be paid by commission or piece rate only, and must those payments equal minimum wage for the hours worked in each pay period?

Yes. In general commissions and piece rate must equal minimum wage for the hours worked. However, there is an exception for those who sell products or services away from the employer's place of business and are paid commission. This is commonly known as "outside sales."

⊕ Is overtime pay required for those paid on a commission or piece rate basis?

Yes. In general commissions and piece rate must be included in the overtime calculation for the hours worked in each workweek. There is an exception for those who sell products or services away from the employer's place of business and are paid commission. This is commonly known as "outside sales." For more information on how these calculations must be made, contact the nearest L&I office.

⊕ If a commission or piece rate has not been paid as agreed between the worker and business, what can the worker do?

If a worker is owed commission or piece rate wages and the employer refuses to pay, the worker may be able to:

- File a Wage Claim through L&I, OR
- File a claim in small claims court if the amount is less than \$5000, OR
- File legal action through a private attorney.

For more detail, see these L&I Administrative Policies:

 [Commissions and Minimum Wage \(ES.C.3\)](#) (11 KB PDF)

 [How to Calculate Overtime \(ES.A.8.2\)](#) (57 KB PDF)

 [Get Help Downloading Files](#) (files open in a new window).



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Attached for filing in *Demetrio et al. v. Sakuma Brothers Farms, Inc.*, Supreme Ct. Case No. 90932-6, please find Sakuma Brothers Farms, Inc.'s Answer to Amicus Briefs Filed in Support of Petitioners (with appendix attached).

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