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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DAVID COOPER and JERRY SCOTT,
individually and on behalf of all those similarly situated,

Respondents/Plaintiffs,

v.

ALSCO, INC., a foreign corporation,

Appellant/Defendant.

APPELLANT ALSCO INC.'S OPENING BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 4

III. ISSUES PRESENTED FOR REVIEW 4

IV. STATEMENT OF THE CASE 5

A. Factual Background 5

1. Alsco 5

2. RSR Job Duties and Compensation 6

3. RSR's Choose Their Compensation Method Under the CBA 7

B. Procedural Background 8

V. ARGUMENT 9

A. Standard of Review 9

B. RSRs Are Exempt Employees Under The "Retail or Service Establishment" Exemption 10

1. Alsco's Sales Are Retail Under Washington Law 10

2. Business-to-Business Sales Are Retail Sales Under The FLSA 13

3. Alsco Has Additional Characteristics Of A Retail Establishment 17

4. The Size of Alsco's Sales Are Considered "Retail" 18

5. Alsco Also Meets The Requirements Of The Exemption Because It Is A Service Establishment 19

C. The Superior Court Incorrectly Calculated The Regular Rate 20

1. The Regular Rate Is Calculated By Dividing The Employee's Total Compensation By The Total Hours Worked 20

2. There Is No Authority Supporting the Superior Court's Decision To Calculate The Regular Rate For RSRs By Dividing the Total Compensation By Only 40 Hours 23

3. The Fluctuating Workweek Test Does Not Apply When An Employee Is Paid A Commission 24

VI. CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Cases

Alvarado v. Corporate Cleaning Servs., Inc.,
719 F. Supp. 2d 935, 944 (N.D. Ill. 2010); aff'd 782
F.3d 365 (7th Cir. 2015) ..... *passim*

Amazon.com v. Szabadi,
No. 14-2-18167-1SEA, J. Ramsdell 10/20/14 Order,
Docket No. 75 (2014) 13

Anderson v. N. Roanoke Veterinary Clinic,
No. 96-0250-R, 1997 U.S. Dist. LEXIS 12690 (W.D.
Va. Aug. 1, 1997) 22

Assoc. Grocers, Inc. v. State,
114 Wn.2d 182 (1990) 13

Brittingham Leasing Corp. v. Szymanski,
53 Wn. App. 251 (1989) 13

Collins v. Horizon Training Ctrs., L.P.,
No. 3:02-CV-1310-L, 2003 U.S. Dist. LEXIS 17271
(N.D. Tx. Sep. 30, 2003) 14, 16

English v. Ecolab, Inc.,
No. 06 Civ. 5672 (PAC), 2008 U.S. Dist. LEXIS 25862
(S.D.N.Y. Mar. 31, 2008) ..... *passim*

Hisle v. Todd Pac. Shipyards,
151 Wn.2d 853, 93 P.3d 108 (2004) 14

Idaho Sheet Metal Works, Inc. v. Wirtz,
383 U.S. 190 (1966) 15

Kaiser v. At the Beach, Inc.,
No. 08-CV-586-TCK, 2011 U.S. Dist. LEXIS 149857,
2011 WL 6826577 (N.D. Okla. Dec. 28, 2011) 22

Klinedinst v. Swift Invs., Inc.,
260 F.3d 1251 (11th Cir. 2001) 22

La Parne v. Monex Deposit Co.,
714 F. Supp. 2d 1035 (C.D. Cal. 2010) 12, 17, 18

Schultz v. Crotty Bros. Texas, Inc.,
310 F.Supp. 761 (E.D. Tx. 1970).....14

Schwind v. EW & Assocs.,
371 F. Supp. 2d 560 (S.D.N.Y. 2005).....15, 17, 22

Stahl v. Delicor of Puget Sound, Inc.,
148 Wn.2d 876, 64 P.3d 10 (2003) ..... *passim*

Stevens v. Brink's Home Sec., Inc.,
162 Wn.2d 42, 169 P.3d 473 (2007).....9, 10

Wirtz v. Modern Trashmoval, Inc.,
323 F.2d 451 (4th Cir. 1963) 15

Zehring v. Brown Materials,
48 F. Supp. 740 (S.D. Cal. 1943).....13

Statutes

RCW 49.46.010(6).....11

RCW 49.46.130(1).....10, 14, 20

RCW 49.46.130(3)..... *passim*

RCW 82.08.0202 11

Regulations

29 C.F.R. § 778.118 .....3, 21, 23

WAC 296-126-021.....4, 24

WAC 296-126-021(2).....21

WAC 296-128-550..... *passim*

Rules

Civil Rule 56(c).....10

Other Authorities

Black's Law Dictionary 1509 (10th ed. 2014).....13

I. INTRODUCTION

This case concerns two fundamental issues of wage and hour law: (a) the applicability of the overtime exemption from the Washington Minimum Wage Act for employees of a "retail or service establishment" that predominantly sells or provides service to other businesses, as opposed to individual consumers or households; and (b) the legal definition of the "regular rate of pay" for a nonexempt employee who is paid on a commission basis.

Appellant/Defendant Alsco, Inc. ("Alsco") is a textile rental services company that supplies garments, uniforms, linens, floor mats, towels and other products necessary for businesses to provide a clean and safe working environment. Generally, the products, mostly textiles, are owned by Alsco and rented to the customer. Alsco also sells paper and products and janitorial supplies.

Respondents/Plaintiffs represent a class of Alsco route sales representatives ("RSR"). RSRs are employed pursuant to a collective bargaining agreement ("CBA") between Alsco and Teamsters Local Union 690. RSRs are responsible for the delivery and pickup of Alsco's service items from its customers. RSRs are also expected and encouraged to make additional sales to both existing and new Alsco customers.

Alsco, pursuant to the CBA, treated the RSRs as exempt from overtime requirements under the "retail or service establishment" exemption in the Washington Minimum Wage Act ("MWA") and paid them a salary plus commissions. Plaintiffs claim, despite the terms of the CBA, that Alsco misclassified the RSRs as exempt and failed to pay them a required overtime premium.

The Minimum Wage Act provides an exemption from its overtime requirements for employees who work for a "retail or service establishment" and are paid commissions, if their compensation meets certain requirements. RCW 49.46.130(3); *Stahl v. Delicor of Puget Sound, Inc.*, 148 Wn.2d 876, 881, 64 P.3d 10 (2003).

On May 19, 2014, the superior court ruled on cross motions for summary judgment on the issue of whether RSRs are exempt under the "retail or service establishment" exemption. The superior court held that Alsco satisfies the majority of the requirements of the exemption: none of Alsco's sales of goods or services are for resale, Alsco's services are subject to Washington's retail sales tax, Alsco's customers are at the end of the distribution stream, and Alsco is not involved in the manufacture of the products it rents or sells. However, the court erroneously concluded that the exemption did not apply because Alsco's services and sales lack what the court described as a "retail concept." This lack of "retail

concept" determination was based on the fact that Alsco's customers are businesses. That decision is contrary to this Court's precedent and 60 years of federal jurisprudence construing the same exemption under the Fair Labor Standards Act ("FLSA"), upon which the Washington MWA is modeled. Contrary to the superior court's analysis, the test is not whether the buyer consumes the product or service or uses it to make money (any consumer could do either), but whether the buyer ***resells*** the product or service. ***Alsco's customers do not resell its products or services.***

Later, on February 6, 2015, the superior court ruled on the parties' cross-motions for partial summary judgment on the issue of how to calculate the regular rate of pay for Alsco's RSRs assuming they were nonexempt. When an employee is paid on a commission basis, as were Alsco's RSRs, the regular rate of pay is calculated by dividing the total weekly compensation paid to employees by the total hours worked for such compensation. 29 C.F.R. § 778.118; L&I Admin. Policy ES.A.8.1 (see Q/A #6, p. 6). The superior court erred by making up its own formula. It divided the total weekly compensation paid to employees by 40 hours, rather than the actual total hours worked as required by law. This erroneous approach resulted in an unjust penalty to Alsco of over $1 million in compensatory damages above what the RSRs would legally be entitled to under the law and what they agreed to in their CBA.

This Court should reverse the superior court's two erroneous rulings.

II. ASSIGNMENTS OF ERROR

1. The superior court erred by denying Alsco's motion for summary judgment and granting Plaintiffs' motion for summary judgment, holding Alsco's RSRs are not exempt from the overtime requirements of the Washington Minimum Wage Act under the exemption for employees of "retail or service establishments."

2. The superior court erred by denying Alsco's motion for partial summary judgment and granting Plaintiffs' motion, holding that the "regular rate" of pay of an employee paid on a commission basis is calculated by dividing an employee's total weekly compensation by 40 instead of by the total number of hours actually worked in a week, as required by WAC 296-128-550, WAC 296-126-021, and L&I's guidance.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the overtime exemption for a "retail or service establishment" under RCW 49.46.130(3) applies to a retail business whose customers are businesses rather than individuals or households?

2. Whether the "regular rate" of pay for a worker who is compensated by commissions is calculated by dividing total weekly

compensation by the total number of hours actually worked in a week as set forth in Washington law?

IV. STATEMENT OF THE CASE

A. Factual Background

The parties do not dispute the material facts in this case. CP 801.

1. Alsco

Alsco is a textile rental services company that supplies products necessary for businesses to provide a clean and safe working environment. CP 571. It is undisputed that it does not provide products or services for resale. CP 570.

Alsco provides its customers three services: (1) the rental and servicing of linens and uniforms; (2) the rental and servicing, including repair, replacement, and refilling, of washroom and hygiene products; and (3) the direct sale of a variety of janitorial products, garments, and linens. Alsco's services include regularly providing its customers with clean textiles such as table and bed linens, napkins, towels, uniforms, and floor mats. It also sells and rents mops, automatic air fresheners, soap dispensers, paper towel and toilet paper dispensers, tampon dispensers, urinal screens, urinal mats, and alcohol wipes. CP 401-02, 421, 446-49, 492-93, 497. Alsco has a range of paper products, janitorial products, and garments available for direct sale. CP 439-40, 450-51, 524, 531-41.

Alsco delivers and collects its service items (linens, uniforms, mats, washroom supplies, etc.) directly to and from its customers. CP

398, 500-01. Alsco generally requires that its customers enter into a service contract before providing service items, and these contracts vary in duration. CP 493-95. To ensure that the expenses Alsco incurs in providing service to a customer are justified by sufficient volume, the contracts may require that the customer agree to purchase a minimum amount of services or product (referred to as a "stop minimum"). CP 453, 464-65. Alsco direct sales items (janitorial and paper products and some garments) may be delivered to its customers or purchased from Alsco's Spokane location and picked up by the customer. CP 442-45, 475-77. These items are available for purchase by the general public, including individuals and businesses regardless of whether the customer has a service contract with Alsco. CP 441-43, 475-77.

Alsco's customers include a variety of businesses such as restaurants, hotels, gyms, hospitals, doctor and dentist offices, casinos, auto dealerships, automotive shops, and coffee stands. CP 243, 421, 452, 465-67, 471. Alsco does not limit its services and products to particular businesses or even kinds of business and will provide its services to anyone who can use them. "Any company that has a bathroom is a potential customer." CP 527-28. None of these customers resell Alsco's products or services; they are the end-users. CP 570.

2. RSR Job Duties and Compensation

RSRs are customer service representatives employed by Alsco in Spokane, Washington. CP 406-07, 488, 522-23. They are responsible for

the delivery and pickup of Alsco's service items from its customers. Their duties include a mix of customer service, salesmanship, physical labor, and administrative tasks. CP 243, 396-97, 399-400, 404-05, 502-03. RSRs are expected and encouraged to make additional sales to existing and new Alsco customers. CP 396, 422-25, 454-55, 472-73, 500-01.

3. RSR's Choose Their Compensation Method Under the CBA

RSRs at Alsco's Spokane location are represented by Teamsters Local Union 690 (CP 572) and paid according to the terms of a collective bargaining agreement negotiated between Local 690 and Alsco. *Id.* Under the CBA, RSRs may choose to be compensated on either an hourly or a commission basis. RSRs who chose to be compensated on a commission basis are paid as follows:

- RSRs receive a commission on all linen invoice revenue, other than a service charge, from the RSR's customers (i.e., the RSR delivers and picks up product from the customer). The commission rate depends on the length of the RSR's route; RSRs who drive a route longer than 300 miles per week on average receive a higher commission rate.

- RSRs also receive a base salary. The amount of the base salary depends on the average weekly volume of the RSR's route during a 13-week period. If the average weekly volume of the RSR's route is more than $6,000, the RSR receives a base salary of $128.00 per week. If the average weekly volume is less than $6,000, the base salary increases to $256.00 per week.

- Route commissions and base pay combined are guaranteed to be at least the following amounts:

From July 1, 2009 to June 30, 2012	$625 per week
Effective July 1, 2012	$625.00 per week
Effective July 1, 2013	$650.00 per week

Effective July 1, 2014	$675.00 per week
Effective July 1, 2015	$700.00 per week

- RSRs earn additional commissions on new business and direct sales products. RSRs are also eligible to earn a variety of bonus payments (based on renewal of contracts, contract attainment, sales goals, etc.).

CP 591-92, 616, 618. The Plaintiffs concede that, at all times relevant to this lawsuit, they were paid according to the terms of the CBA then in place. CP 403, 426-27, 545-47, 554-56, 569-70.

B. Procedural Background

Plaintiffs filed suit in September 2012, claiming that, despite the terms of the CBA, they should have been paid overtime because they are not exempt under the MWA.

On May 19, 2014, the superior court granted partial summary judgment in favor of Plaintiffs on the exemption issue (and denied Alsco's summary judgment motion on that issue), holding that the "retail or service establishment" exemption did not apply because Alsco's customers were businesses rather than individuals. CP 800-04 (5/19/14 Order on Motions for Summary Judgment). In the same order, the court granted Alsco's motion for summary judgment that the alleged wrongful withholding of overtime was not willful and denied, without prejudice, Plaintiff's motion as to the method for calculating unpaid overtime. *Id.*

The parties subsequently filed cross-motions for summary judgment as to the proper method for calculating the amount of overtime allegedly due. The court granted Plaintiffs' motion (and denied Alsco's). The court erroneously calculated the RSRs "regular rate" of pay for overtime purposes by dividing the total weekly compensation actually paid (including all commissions) by the first 40 hours worked only, rather than all hours actually worked, as required by WAC 296-128-550 and L&I Administrative Policy ES.A.8.1 and ES.A.8.2. The superior court's method is contrary to existing law and unsupported by any authority. It results in an unjustified windfall to the RSRs and a penalty to Alsco of over $1 million above what the RSRs are legally entitled to and what is required by the CBA.

V. ARGUMENT

A. Standard of Review

On review of summary judgment, the Court "engage[s] in the same inquiry as the trial court and view[s] the facts and all reasonable inferences in the light most favorable to the nonmoving party." *Stevens v. Brink's Home Sec., Inc.*, 162 Wn.2d 42, 46-47, 169 P.3d 473, 475 (2007); citing *Fairbanks v. J.B. McLoughlin Co.*, 131 Wn.2d 96, 101, 929 P.2d 433 (1997). "Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a

matter of law." *Id.*; quoting *Cerrillo v. Esparza*, 158 Wn.2d 194, 200, 142 P.3d 155 (2006); accord CR 56(c).

B. RSRs Are Exempt Employees Under The "Retail or Service Establishment" Exemption

Washington's Minimum Wage Act, RCW 49.46.130(1) requires employers to pay overtime to employees who work over 40 hours per week unless an exemption applies. *Stahl,* 148 Wn.2d at 881. The MWA expressly exempts employees who work for a "retail or service establishment," if their regular rate of pay exceeds one and one-half times the minimum wage and more than the half of the employee's compensation represents commissions on goods or services. RCW 49.46.130(3). Here, the superior court correctly held that the RSR's "are paid more than 1.5 times the state minimum wage with more than half their pay being calculated by a commissions formula...." *See* CP 801 (5/18/14 Order). The only issue was whether Alsco is a "retail or service establishment." *Stahl*, 148 Wn.2d at 882 ("When interpreting the [retail or service establishment exemption] of the MWA, the first question to ask is whether the entity is a retail or service establishment.").

1. Alsco's Sales Are Retail Under Washington Law

A "retail or service establishment" means "an establishment seventy-five percent of whose annual dollar volume of sales or goods or

services, or both, is not for resale and is recognized as retail sales or services in the particular industry." RCW 49.46.010(6). Here, ***all*** of Alsco's revenue—100%—comes from the sale of goods and services directly to customers, none of which is for resale. CP. 571. Alsco is a "retail or service establishment" because it is undisputed that its customers use Alsco's products and services "for their own business purposes" and do not resell them. CP 802 (5/19/14 Order).

The superior court's contrary decision is inconsistent with this Court's decision in *Stahl*, 148 Wn.2d at 882. In *Stahl*, this Court held that an establishment's sales or services are "recognized as retail," and the exemption is available, when: (a) the employer is subject to Washington's retail sales tax; and (b) the transaction can be deemed an "end of the line" transaction that is not subject to resale. *See Stahl* at 148 Wn.2d at 882. Alsco's sales satisfy both of the *Stahl* requirements.

First, it is undisputed that Alsco's sales are subject to Washington's retail sales tax. RCW 82.08.0202 expressly states that "providing customers with a supply of clean linen, towels, uniforms, gowns, protective apparel, clean room apparel, mats, rugs, and similar items, whether ownership of the item is in the person operating the linen

and uniform supply service or in the customer" ***is a retail sale*** and subject to retail sales tax.[1]

Second, Alsco's sales are "end of the line" sales. ***It is undisputed that Alsco's goods and services are not re-sold.*** CP 571; CP 802 (5/19/14 Order); *see La Parne v. Monex Deposit Co.*, 714 F. Supp. 2d 1035, 1043 (C.D. Cal. 2010) ("[G]oods are at the end of the stream of distribution in that there is no set plan for resale at the time it is being sold.").

Nevertheless, the superior court incorrectly concluded that Alsco was not a retail or service establishment because its business customers used Alsco's products and services "as a means to assist their own . . . efforts to make a profit by selling their own goods or services to the general public." Order, p.4 (CP 803). Of course a business purchases products and services to be used in its business efforts. But that is not the legal test. So long as the business customer is not purchasing Alsco's products or services for resale (and it is undisputed they are not), it does not matter how the business customer uses the products or services.

The superior court's decision also conflicts with Washington appellate decisions interpreting of the term "retail" in other cases. Under

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[1] Plaintiffs ignore *Stahl's* express holding and argue, based on non-binding federal regulations, that tax treatment is not relevant. But the federal regulations do not say that tax treatment is irrelevant; they merely say it is not dispositive. Therefore, while tax treatment ***alone*** may not be sufficient, tax treatment is one of the factors that courts may rely upon to determine whether particular sales are recognized as retail. And as this Court made clear in *Stahl*, it is significant under Washington law.

Washington law, a "retail purchaser" is "the buyer who is the final user of the goods," without regard for whether the buyer is an individual or a business enterprise. *Brittingham Leasing Corp. v. Szymanski*, 53 Wn. App. 251, 256 (1989); *accord Assoc. Grocers, Inc. v. State*, 114 Wn.2d 182, 185 n.2 (1990) (differentiating between retail and wholesale sales); *Amazon.com v. Szabadi*, No. 14-2-18167-1SEA, J. Ramsdell 10/20/14 Order, Docket No. 75 (2014) (term "any retail market sector" in noncompete agreement included markets for business-to-business sales); *see also Zehring v. Brown Materials*, 48 F. Supp. 740, 743 (S.D. Cal. 1943) ("a retailer . . . sells the object or article or thing to the person who consumes or uses it"); Black's Law Dictionary 1509 (10th ed. 2014) (defining retail as "[t]he sale of goods or commodities to ultimate consumers, as opposed to the sale for further distribution or processing. *Cf.* wholesale.").

This Court's definition of "retail" activity in *Stahl* encompasses Alsco's business to business sale of goods and services, and the superior court's decision to the contrary should be reversed.

2. Business-to-Business Sales Are Retail Sales Under The FLSA

Because the MWA is based on the federal Fair Labor Standards Act ("FLSA"), *Stahl*, 148 Wn.2d at 885, Washington courts look to

federal authority interpreting the FLSA for guidance. *Hisle v. Todd Pac. Shipyards*, 151 Wn.2d 853, 862 n.6, 93 P.3d 108 (2004). The FLSA does not require that a business sell to individuals in order to qualify as a "retail or service establishment." In 1949, Congress amended the FLSA specifically to allow business-to-business sales to qualify as retail sales.[2] Retail sales, therefore, are defined broadly and include sales to customers who are businesses in addition to individuals. *Schultz v. Crotty Bros. Texas, Inc.*, 310 F.Supp. 761, 766 (E.D. Tx. 1970) ("There can be no question that [the 1949] amendments have broadened the scope of the § 13(a)(2) exemption."); *Collins v. Horizon Training Ctrs., L.P.*, No. 3:02-CV-1310-L, 2003 U.S. Dist. LEXIS 17271, *10-11, 20 (N.D. Tx. Sep. 30, 2003) (finding that the company sold to the general public where "customers are mainly businesses or commercial clients who intended to use their computer training in the workplace").

For the past 60 years, federal courts, including the United States Supreme Court, have held that the retail sales or service establishment exemption under the FLSA applies to employers engaged in business to business transactions, predominantly ***or even exclusively***. *See Idaho Sheet*

[2] Below, Plaintiffs relied heavily on regulations and federal cases that predate the 1949 amendment to the FLSA. In recent decisions, the federal courts have expressly rejected application of these DOL regulations and call into question their continued validity. *English*, 2008 WL 878456, at *16; *Alvarado*,782 F.3d at 371 (critical of "departmental regulations that attempt to define a 'retail or service establishment' by listing factors of dubious relevance").

Metal Works, Inc. v. Wirtz, 383 U.S. 190, 203 (1966) (under FLSA "sales of such goods and services can be retail 'whether made to private householders or to business users.'"); *Alvarado v. Corporate Cleaning Servs., Inc.*, 782 F.3d 365, 369 (7th Cir. 2015) (window washing company that sold 99% of its services to other businesses, building owners and managers, met the "retail or service establishment" requirement because it sold its window cleaning services to the ultimate customers); *Wirtz v. Modern Trashmoval, Inc.*, 323 F.2d 451, 465 (4th Cir. 1963) ("the 'business use' rule, that sales to other than individual consumers to satisfy their personal wants could not qualify as retail, can no longer be used for such determinations."); *English v. Ecolab, Inc.*, No. 06 Civ. 5672 (PAC), 2008 U.S. Dist. LEXIS 25862, *42 (S.D.N.Y. Mar. 31, 2008) ("The distinction between commercial and residential sheds no light on whether such sales are wholesale or retail. It is quite clear that sales to commercial entities are not necessarily wholesale."); *Schwind v. EW & Assocs.*, 371 F. Supp. 2d 560, 567 (S.D.N.Y. 2005) ("we note that although most of EWA's clients were businesses, the Supreme Court recognized that 'Congress also intended that the retail exemption extend in some measure beyond consumer goods and services to embrace certain products almost never purchased for family or noncommercial use.'") (quoting *Idaho Sheet Metal*, 383 U.S. at 203); *Collins*, 2003 U.S. Dist. LEXIS 17271, at *22-23

("Horizons can qualify as a "retail or service establishment" even if most of its consumers are businesses, if its sales are not for resale and are recognized in the industry as retail.").

The superior court's decision rejected, without any basis, six decades of federal authority. The superior court's reasoning—that Alsco's services were not retail because other businesses may use the services to make a profit—is the exact argument that the Seventh Circuit rejected as "absurd" earlier this year:

> It would be absurd to suggest that a dealer in motor vehicles, when it sells a truck to a moving company, is "wholesaling" the truck because the buyer will doubtless try to recover the cost of the purchase in the price he charges for his moving services, which utilize the truck.

Alvarado, 782 F.3d at 369.

The proper statutory inquiry is not whether a customer uses the purchased goods or services in its own business to make a profit but whether the customer resells the good or service (and it is undisputed here that Alsco's customers do not resell its products or services). Many individuals buy retail goods and use those goods to make a profit in their trade (e.g., a carpenter who buys his tools and materials at Home Depot). No federal or state case supports the superior court's interpretation of the exemption. Its holding is directly contrary to those cases that explicitly

hold that a business, such as Alsco, qualifies as a "retail or service" establishment, even where it sells its services predominantly to other businesses and in quantities larger than would be demanded by an individual consumer. *Alvarado*, 782 F.3d at 369; *English*, 2008 WL 878456, at *13; *Schwind*, 371 F. Supp. 2d at 566-67.

3. Alsco Has Additional Characteristics Of A Retail Establishment

Alsco's business has numerous additional characteristics that qualify it as a retail or service establishment under federal law. Alsco (1) sells goods to the general public; (2) serves the everyday needs of the community; and (3) is at the end of the stream of distribution and does not take part in the manufacturing process. *La Parne*, 714 F. Supp. 2d at 1043; *English v. Ecolab, Inc.*, No. 06 Civ. 5672 (PAC), 2008 U.S. Dist. LEXIS 25862, at *44 (S.D.N.Y. Mar. 31, 2008).

Alsco provides its services to the general public. It does not target particular customers and will provide its services to anyone who can use them. "Any company that has a bathroom is a potential customer." In addition, Alsco's direct sales items are available for purchase by the general public. CP 441-43, 475-77; *Alvarado v. Corporation Cleaning Servcs., Inc*, 719 F. Supp. 2d 935, 944 (expressly rejecting plaintiffs'

argument that business was not retail because less than 1% of gross sales were made to individual householders).

Alsco "serves the everyday needs of the community." The public requires and demands clean linens and uniforms, washroom services and technologies, and a supply of paper products, cleaning supplies, washroom supplies, and garments, in both home and workplace, dining room and restaurant, bedroom and hotel room. *See English*, 2008 U.S. Dist. LEXIS 25862, at *43 ("The provision of [] services to commercial entities where members of the public work, eat or sleep is no less a community service than the provision of such services to individual households.").

Finally, and most importantly, Alsco is at the end of the stream of distribution because ***its services and goods are not for resale***. *See* Section V.B.1 above; *La Parne*, 714 F. Supp. 2d at 1044 ("[G]oods are at the end of the stream of distribution in that there is no set plan for resale at the time it is being sold."). And while Alsco cleans, maintains, and repairs the service items it provides to its customers, it is undisputed that it does not manufacture them.

4. The Size of Alsco's Sales Are Considered "Retail"

Plaintiffs' argued below that Alsco's sales to businesses should not be considered "retail" because of the size of Alsco's sales. However, in

allowing sales to businesses to qualify as retail, Congress did not limit the quantity of retail sales to only those that an individual consumer would purchase. Obviously, a business customer needs and purchases quantities of services and goods larger than an individual would buy and federal courts hold that a retail establishment may sell its services in quantities larger than would be demanded by an individual homeowner. *English*, 2008 WL 878456, *3 ("retail" included sales and service pursuant to extended service agreements with commercial entities, including fast-food franchises or hotel chains); *Alvarado*, 782 F.3d at 370 (sale of window washing to entire building is "retail"). Even the superior court properly ruled on this point: "[I]t is now accepted that the term retail may be applied in some business-to-business transactions that are not necessarily small and do not necessarily involve household needs." Order at p.3 (CP 802).

5. Alsco Also Meets The Requirements Of The Exemption Because It Is A Service Establishment

There is no dispute in this case that Alsco is a service establishment. The core of its business is selling a service: the rental of linens and garments which are owned by Alsco. As a ***service establishment***, Alsco, therefore, meets the "retail *or* service establishment" requirement of RCW 49.46.130(3). *See Alvarado*, 782

F.3d at 369 ("service establishment" is "much broader" than a "retail establishment"). The superior court made no ruling to the contrary.

For the foregoing reasons, the superior court's ruling on the "retail or service establishment" exemption should be reversed.

C. The Superior Court Incorrectly Calculated The Regular Rate[3]

For all hours worked in excess of 40 in a week, the Washington Minimum Wage Act requires employers to pay an employee his or her "regular rate" plus an additional half-time premium, for a total of one and one-half times the regular rate. RCW 49.46.130(1). "Prior to computing overtime pay, it is necessary to determine the employee's regular rate." L&I Admin. Policy ES.A.8.1 (see Q/A #3, p. 2). An employees' regular rate is calculated by dividing the amount of compensation received per week by the total number of hours worked during that week. WAC 296-128-550.

1. The Regular Rate Is Calculated By Dividing The Employee's Total Compensation By The Total Hours Worked

L&I has repeatedly and unequivocally said that the regular rate for an employee paid on a commission basis is computed by dividing the employee's total compensation by the total hours he or she works:

[3] The Court need not reach this issue if it reverses the superior court's decision on the retail or service establishment exemption.

> To obtain the regular rate of pay, the total earnings for the pay period are to be divided by the ***total hours worked*** in that period.

L&I Admin. Policy ES.C.3 (Commissions, Piecework And Minimum Wage Requirements) (emphasis added); *see also*, L&I Admin. Policy ES.A.8.1 (see Q/A #6, pp. 4-6); L&I Admin. Policy ES.A.3 (see p. 2) ("For employees paid on a commission or piecework basis, wholly or in part, the total wage for that period is determined by dividing the total earnings by ***the total hours worked....***") (emphasis added). This also is the methodology required by the express unambiguous language of WAC 296-126-021(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."

L&I's guidance is consistent with federal regulations. 29 C.F.R. § 778.118 ("When the commission is paid on a weekly basis, it is added to the employee's other earnings for that workweek ... and the total is divided by the ***total number of hours worked*** in the workweek to obtain the employee's ***regular hourly rate*** for the particular workweek.") (emphasis added).

Federal courts applying this rule have also consistently held that when an employee earns a commission in addition to his or her salary the regular rate of pay is calculated by dividing the entire compensation by the

total hours worked. *Klinedinst v. Swift Invs., Inc.*, 260 F.3d 1251, 1256 (11th Cir. 2001); *Kaiser v. At the Beach, Inc.*, No. 08-CV-586-TCK, 2011 U.S. Dist. LEXIS 149857, 81, 2011 WL 6826577 (N.D. Okla. Dec. 28, 2011) ("for any semimonthly pay periods in which Plaintiffs earned a commission, bonus, or other compensation in addition to their salary, the divisor used in deriving the regular rate of pay must be total hours worked."); *Schwind v. EW & Assocs., Inc.*, 371 F. Supp. 2d 560, 568 n. 8 (S.D.N.Y. 2005) (calculating plaintiff's regular rate of pay by averaging the commissions received by plaintiff in a year and allocating the average to each week, and dividing that figure by a maximum number of hours that could have been worked); *Anderson v. N. Roanoke Veterinary Clinic*, No. 96-0250-R, 1997 U.S. Dist. LEXIS 12690, 10-11 (W.D. Va. Aug. 1, 1997) (rejecting argument that regular rate should be calculated by dividing total compensation by only the number of non-overtime hours worked).

This calculation determines the regular rate, i.e., the average hourly rate, for each hour worked, including the hours worked in excess of 40 hours. For each hour over 40, the employer must also pay an additional one-half of that rate to achieve the statutory overtime pay requirement of one and one-half times the regular rate.[4] 29 C.F.R. § 778.118; L&I

[4] To illustrate, if an employee works 50 hours in one week and receives $500 in salary and $100 in commission for that week, his total compensation is $600. His "regular rate of pay" for each of his 50 hours is $12/hour ($10 x 50 = $500; $500 + $100 = $600;

Admin. Policy ES.A.8.1 (see Q/A #6, p. 6). Again, the state guidance and federal regulations on this point are consistent and explicit. 29 C.F.R. § 778.118 ("The employee must then be paid extra compensation at one-half of that rate for each hour worked in excess of the applicable maximum hours standard."); L&I Admin. Policy ES.A.8.1 (see Q/A #6, pp. 4-6) ("The employee must then be paid extra compensation at the one-half rate for each overtime hour worked.").

Here, it is undisputed that RSRs are paid a salary plus weekly commission. Thus, by law, the "regular rate" is calculated by dividing the RSRs' total compensation by the total number of hours worked in that workweek. A court has no authority to arbitrarily exclude hours worked to skew the average or regular rate.

2. There Is No Authority Supporting the Superior Court's Decision To Calculate The Regular Rate For RSRs By Dividing the Total Compensation By Only 40 Hours

The superior court disregarded the Washington Administrative Code, Washington's L&I Administrative Policy, and similar federal

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$600/50 hours = $12/hour). If that employee is entitled to overtime, he or she would be owed a total of $660 for the week: $480 for straight time ($12/hour x 40 hours = $480) plus $180 for overtime ($12/hour x 1.5 = $18/hour; $18/hour x 10 hours = $180). Since the employee has already been paid $600 for the week (his regular rate of $12/hour for both the first 40 hours he worked ***and*** the next 10 hours ($12/hour x 50 hours = $600)), all that is left to be paid is the additional $60, which is the additional one-half of his regular rate for each of the 10 overtime hours worked ($12/2 = $6 x 10 = $60). The employee, therefore, receives the full one and one-half times his regular rate for his overtime hours when he is paid $660 for the week.

regulations and invented its own calculation method. (CP 1093). The court held the "regular rate" should be calculated by dividing the total compensation (including commissions) received by the RSRs by the first 40 hours worked (not all hours worked). *Id.* The court's calculation ignores WAC 296-128-550, WAC 296-126-021, and L&I's express direction to use the actual hours worked. There is no authority, nor does the superior court cite any, to support its calculation method.

The superior court's novel approach improperly excludes some of the hours actually worked from the regular rate calculation. Thus it does not reflect the true average or regular rate, and this results in unjustified penalties on employers, who will be required to pay far more than is required by law.

3. The Fluctuating Workweek Test Does Not Apply When An Employee Is Paid A Commission

The trial court attempted to justify its formula by citing to the so-called "fluctuating workweek" methodology.

The fluctuating workweek requirements do not apply. The question was what is the "regular rate" of pay for a non-exempt employee paid by commission. WAC 296-128-550 requires that the regular rate of pay be determined by dividing the amount of compensation received per week by the total number of hours worked during that week.

The superior court's discussion of the fluctuating workweek methodology simply makes no sense in relation to employees who are paid a commission and is counter to the plain language of the L&I policy.

VI. CONCLUSION

For these reasons, Alsco respectfully requests that this Court reverse the judgments in favor of Plaintiffs. The Court should direct the trial court to enter judgments in favor of Alsco that (a) Alsco's RSRs meet the requirements of the overtime exemption from the Washington Minimum Wage Act for employees of a "retail or service establishment," who are paid on a commission basis in whole or in part and (b) the "regular rate" of pay of an employee paid on a commission basis should be calculated by dividing the employee's total weekly compensation by the total number of hours actually worked in a week.

RESPECTFULLY SUBMITTED this 27th day of August, 2015.

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APPENDIX

The following Appendix of Statutes, Rules, and Administrative Policies is included pursuant to RAP 10.4(c):

A. RCW 49.46.010 Definitions

B. RCW 49.46.130 Minimum rate of compensation for employment in excess of forty hour work week -- Exceptions

C. RCW 82.08.0202 Retail sales of linen and uniform supply services

D. WAC 296-126-021 Minimum wages—Commissions and piecework

E. WAC 296-128-560 Regular rate of pay

F. Dept. of Labor and Industries Employment Standards Program Administrative Policy Number ES.A.3 ("Minimum Hourly Wage")

G. Dept. of Labor and Industries Employment Standards Program Administrative Policy Number ES.A.8.1 ("Overtime")

H. Dept. of Labor and Industries Employment Standards Program Administrative Policy Number ES.A.8.2 ("How to Compute Overtime")

I. Dept. of Labor and Industries Employment Standards Program Administrative Policy Number ES.C.3 ("Commissions, Piecework and Minimum Wage Requirements")

J. 29. C.F.R. § 778.118 Commission paid on a work-week basis

TAB A

RCW 49.46.010

Definitions (as amended by 2013 c 141).

*** CHANGE IN 2015 *** (SEE **5893.SL**) ***

As used in this chapter:

(1) "Director" means the director of labor and industries;

(2) "Employ" includes to permit to work;

(3) "Employee" includes any individual employed by an employer but shall not include:

(a) Any individual (i) employed as a hand harvest laborer and paid on a piece rate basis in an operation which has been, and is generally and customarily recognized as having been, paid on a piece rate basis in the region of employment; (ii) who commutes daily from his or her permanent residence to the farm on which he or she is employed; and (iii) who has been employed in agriculture less than thirteen weeks during the preceding calendar year;

(b) Any individual employed in casual labor in or about a private home, unless performed in the course of the employer's trade, business, or profession;

(c) Any individual employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesperson as those terms are defined and delimited by rules of the director. However, those terms shall be defined and delimited by the human resources director pursuant to chapter **41.06** RCW for employees employed under the director of personnel's jurisdiction;

(d) Any individual engaged in the activities of an educational, charitable, religious, state or local governmental body or agency, or nonprofit organization where the employer-employee relationship does not in fact exist or where the services are rendered to such organizations gratuitously. If the individual receives reimbursement in lieu of compensation for normally incurred out-of-pocket expenses or receives a nominal amount of compensation per unit of voluntary service rendered, an employer-employee relationship is deemed not to exist for the purpose of this section or for purposes of membership or qualification in any state, local government, or publicly supported retirement system other than that provided under chapter **41.24** RCW;

(e) Any individual employed full time by any state or local governmental body or agency who provides voluntary services but only with regard to the provision of the voluntary services. The voluntary services and any compensation therefor shall not affect or add to qualification, entitlement, or benefit rights under any state, local government, or publicly supported retirement system other than that provided under chapter **41.24** RCW;

(f) Any newspaper vendor ((~~or~~)), carrier, or delivery person selling or distributing newspapers on the street, to offices, to businesses, or from house to house and any freelance news correspondent or "stringer" who, using his or her own equipment,

chooses to submit material for publication for free or a fee when such material is published;

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

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

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

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

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

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

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

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

(4) "Employer" includes any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee;

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

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

(7) "Wage" means compensation due to an employee by reason of employment, payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value, subject to such deductions, charges, or allowances as may be permitted by rules of the director. [2013 c 141 § 1. Prior: 2011 1st sp.s. c 43 § 462; (2011 1st sp.s. c 43 § 461 expired December 31, 2011); prior: (2010 c 160 § 2 expired December 31, 2011); 2010 c 8 § 12040; 2002 c 354 § 231; 1997 c 203 § 3; 1993 c 281 § 56; 1989 c 1 § 1 (Initiative Measure No. 518, approved November 8, 1988); 1984 c 7 § 364; 1977 ex.s. c 69 § 1; 1975 1st ex.s. c 289 § 1; 1974 ex.s. c 107 § 1; 1961 ex.s. c 18 § 2; 1959 c 294 § 1.

[2013 c 141 § 1. Prior: 2011 1st sp.s. c 43 § 462; (2011 1st sp.s. c 43 § 461 expired December 31, 2011); prior: (2010 c 160 § 2 expired December 31, 2011); 2010 c 8 § 12040; 2002 c 354 § 231; 1997 c 203 § 3; 1993 c 281 § 56; 1989 c 1 § 1 (Initiative Measure No. 518, approved November 8, 1988); 1984 c 7 § 364; 1977 ex.s. c 69 § 1; 1975 1st ex.s. c 289 § 1; 1974 ex.s. c 107 § 1; 1961 ex.s. c 18 § 2; 1959 c 294 § 1.]

RCW 49.46.010

Definitions (as amended by 2014 c 131). (*Effective until December 31, 2017.*)

As used in this chapter:

(1) "Director" means the director of labor and industries;

(2) "Employ" includes to permit to work;

(3) "Employee" includes any individual employed by an employer but shall not include:

(a) Any individual (i) employed as a hand harvest laborer and paid on a piece rate basis in an operation which has been, and is generally and customarily recognized as having been, paid on a piece rate basis in the region of employment; (ii) who commutes daily from his or her permanent residence to the farm on which he or she is employed; and (iii) who has been employed in agriculture less than thirteen weeks during the preceding calendar year;

(b) Any individual employed in casual labor in or about a private home, unless performed in the course of the employer's trade, business, or profession;

(c) Any individual employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesperson as those terms are defined and delimited by rules of the director. However, those terms shall be defined and delimited by the human resources director pursuant to chapter **41.06** RCW for employees employed under the director of personnel's jurisdiction;

(d) Any individual engaged in the activities of an educational, charitable, religious, state or local governmental body or agency, or nonprofit organization where the employer-employee relationship does not in fact exist or where the services are rendered to such organizations gratuitously. If the individual receives reimbursement in lieu of compensation for normally incurred out-of-pocket expenses or receives a nominal amount of compensation per unit of voluntary service rendered, an employer-employee relationship is deemed not to exist for the purpose of this section or for purposes of membership or qualification in any state, local government, or publicly supported retirement system other than that provided under chapter **41.24** RCW;

(e) Any individual employed full time by any state or local governmental body or agency who provides voluntary services but only with regard to the provision of the voluntary services. The voluntary services and any compensation therefor shall not affect or add to qualification, entitlement, or benefit rights under any state, local government, or publicly supported retirement system other than that provided under chapter **41.24** RCW;

(f) Any newspaper vendor or carrier;

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

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

(i) Any individual employed by any charitable institution charged with child care responsibilities engaged primarily in the development of character or citizenship or promoting health or physical fitness or providing or sponsoring recreational

opportunities or facilities for young people or members of the armed forces of the United States;

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

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

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

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

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

(o) Any farm intern providing his or her services to a small farm which has a special certificate issued under RCW **49.12.470**;

(4) "Employer" includes any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee;

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

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

(7) "Wage" means compensation due to an employee by reason of employment, payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value, subject to such deductions, charges, or allowances as may be permitted by rules of the director. [2014 c 131 § 2. Prior: 2011 1st sp.s. c 43 § 462; (2011 1st sp.s. c 43 § 461 expired December 31, 2011); prior: (2010 c 160 § 2 expired December 31, 2011); 2010 c 8 § 12040; 2002 c 354 § 231; 1997 c 203 § 3; 1993 c 281 § 56; 1989 c 1 § 1 (Initiative Measure No. 518, approved November 8, 1988); 1984 c 7 § 364; 1977 ex.s. c 69 § 1; 1975 1st ex.s. c 289 § 1; 1974 ex.s. c 107 § 1; 1961 ex.s. c 18 § 2; 1959 c 294 § 1.

[2014 c 131 § 2. Prior: 2011 1st sp.s. c 43 § 462; (2011 1st sp.s. c 43 § 461 expired December 31, 2011); prior: (2010 c 160 § 2 expired December 31, 2011); 2010 c 8 § 12040; 2002 c 354 § 231; 1997 c 203 § 3; 1993 c 281 § 56; 1989 c 1 § 1 (Initiative Measure No. 518, approved November 8, 1988); 1984 c 7 § 364; 1977 ex.s. c 69 § 1; 1975 1st ex.s. c 289 § 1; 1974 ex.s. c 107 § 1; 1961 ex.s. c 18 § 2; 1959 c 294 § 1.]

NOTES:

Reviser's note: This section did not amend the most current version of the RCW. It was amended by 2014 c 131 § 2 without cognizance of its amendment by

2013 c 141 § 1.

Expiration date—2014 c 131: See note following RCW **49.12.470**.

Effective date—2011 1st sp.s. c 43 § 462: "Section 462 of this act takes effect December 31, 2011." [2011 1st sp.s. c 43 § 484.]

Expiration date—2011 1st sp.s. c 43 § 461: "Section 461 of this act expires December 31, 2011." [2011 1st sp.s. c 43 § 483.]

Effective date—Purpose—2011 1st sp.s. c 43: See notes following RCW **43.19.003**.

Expiration date—2010 c 160: "This act expires December 31, 2011." [2010 c 160 § 6.]

Short title—Headings, captions not law—Severability—Effective dates—2002 c 354: See RCW **41.80.907** through 41.80.910.

Construction—1997 c 203: See note following RCW **49.46.130**.

Effective date—1993 c 281: See note following RCW **41.06.022**.

Effective date—1989 c 1 (Initiative Measure No. 518, approved November 8, 1988): "This act shall take effect January 1, 1989." [1989 c 1 § 5.]

Severability—1984 c 7: See note following RCW **47.01.141**.

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

TAB B

49.46.120 << 49.46.130 >> **49.46.140**

RCW 49.46.130

Minimum rate of compensation for employment in excess of forty hour work week — Exceptions.

(1) Except as otherwise provided in this section, no employer shall employ any of his or her employees for a work week longer than forty hours unless such employee receives compensation for his or her employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he or she is employed.

(2) This section does not apply to:

(a) Any person exempted pursuant to RCW **49.46.010**(3). The payment of compensation or provision of compensatory time off in addition to a salary shall not be a factor in determining whether a person is exempted under RCW **49.46.010**(3)(c);

(b) Employees who request compensating time off in lieu of overtime pay;

(c) Any individual employed as a seaman whether or not the seaman is employed on a vessel other than an American vessel;

(d) Seasonal employees who are employed at concessions and recreational establishments at agricultural fairs, including those seasonal employees employed by agricultural fairs, within the state provided that the period of employment for any seasonal employee at any or all agricultural fairs does not exceed fourteen working days a year;

(e) Any individual employed as a motion picture projectionist if that employee is covered by a contract or collective bargaining agreement which regulates hours of work and overtime pay;

(f) An individual employed as a truck or bus driver who is subject to the provisions of the Federal Motor Carrier Act (49 U.S.C. Sec. 3101 et seq. and 49 U.S.C. Sec. 10101 et seq.), if the compensation system under which the truck or bus driver is paid includes overtime pay, reasonably equivalent to that required by this subsection, for working longer than forty hours per week;

(g) Any individual employed (i) on a farm, in the employ of any person, in connection with the cultivation of the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wildlife, or in the employ of the owner or tenant or other operator of a

farm in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment; or (ii) in packing, packaging, grading, storing or delivering to storage, or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; or (iii) commercial canning, commercial freezing, or any other commercial processing, or with respect to services performed in connection with the cultivation, raising, harvesting, and processing of oysters or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption;

(h) Any industry in which federal law provides for an overtime payment based on a work week other than forty hours. However, the provisions of the federal law regarding overtime payment based on a work week other than forty hours shall nevertheless apply to employees covered by this section without regard to the existence of actual federal jurisdiction over the industrial activity of the particular employer within this state. For the purposes of this subsection, "industry" means a trade, business, industry, or other activity, or branch, or group thereof, in which individuals are gainfully employed (section 3(h) of the Fair Labor Standards Act of 1938, as amended (Public Law 93-259));

(i) Any hours worked by an employee of a carrier by air subject to the provisions of subchapter II of the Railway Labor Act (45 U.S.C. Sec. 181 et seq.), when such hours are voluntarily worked by the employee pursuant to a shift-trading practice under which the employee has the opportunity in the same or in other work weeks to reduce hours worked by voluntarily offering a shift for trade or reassignment; and

(j) Any individual licensed under chapter **18.85** RCW unless the individual is providing real estate brokerage services under a written contract with a real estate firm which provides that the individual is an employee. For purposes of this subsection (2)(j), "real estate brokerage services" and "real estate firm" mean the same as defined in RCW **18.85.011**.

(3) No employer shall be deemed to have violated subsection (1) of this section by employing any employee of a retail or service establishment for a work week in excess of the applicable work week specified in subsection (1) of this section if:

(a) The regular rate of pay of the employee is in excess of one and one-half times the minimum hourly rate required under RCW **49.46.020**; and

(b) More than half of the employee's compensation for a representative period, of not less than one month, represents commissions on goods or services.

In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate is to be deemed commissions on goods or services without regard to whether the computed

commissions exceed the draw or guarantee.

(4) No employer of commissioned salespeople primarily engaged in the business of selling automobiles, trucks, recreational vessels, recreational vessel trailers, recreational vehicle trailers, recreational campers, manufactured housing, or farm implements to ultimate purchasers shall violate subsection (1) of this section with respect to such commissioned salespeople if the commissioned salespeople are paid the greater of:

(a) Compensation at the hourly rate, which may not be less than the rate required under RCW **49.46.020**, for each hour worked up to forty hours per week, and compensation of one and one-half times that hourly rate for all hours worked over forty hours in one week; or

(b) A straight commission, a salary plus commission, or a salary plus bonus applied to gross salary.

(5) No public agency shall be deemed to have violated subsection (1) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if: (a) In a work period of twenty-eight consecutive days the employee receives for tours of duty which in the aggregate exceed two hundred forty hours; or (b) in the case of such an employee to whom a work period of at least seven but less than twenty-eight days applies, in his or her work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his or her work period as two hundred forty hours bears to twenty-eight days; compensation at a rate not less than one and one-half times the regular rate at which he or she is employed.

[2013 c 207 § 1; 2010 c 8 § 12045; 1998 c 239 § 2. Prior: 1997 c 311 § 1; 1997 c 203 § 2; 1995 c 5 § 1; 1993 c 191 § 1; 1992 c 94 § 1; 1989 c 104 § 1; prior: 1977 ex.s. c 4 § 1; 1977 ex.s. c 74 § 1; 1975 1st ex.s. c 289 § 3.]

Notes:

Findings -- Intent -- 1998 c 239: "The legislature finds that employees in the airline industry have a long-standing practice and tradition of trading shifts voluntarily among themselves. The legislature also finds that federal law exempts airline employees from the provisions of federal overtime regulations. This act is intended to specify that airline industry employers are not required to pay overtime compensation to an employee agreeing to work additional hours for a coemployee." [1998 c 239 § 1.]

Intent -- Collective bargaining agreements -- 1998 c 239: "This act does not alter the terms, conditions, or practices contained in any collective bargaining agreement." [1998 c 239 § 3.]

Retroactive application -- 1998 c 239: "This act is remedial in nature and applies retroactively." [1998 c 239 § 4.]

Severability -- 1998 c 239: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1998 c 239 § 5.]

Construction -- 1997 c 203: "Nothing in this act shall be construed to alter the terms, conditions, or practices contained in any collective bargaining agreement in effect at the time of the effective date of this act [July 27, 1997] until the expiration date of such agreement." [1997 c 203 § 4.]

Intent -- Application -- 1995 c 5: "This act is intended to clarify the original intent of RCW **49.46.010**(5)(c). This act applies to all administrative and judicial actions commenced on or after February 1, 1995, and pending on March 30, 1995, and such actions commenced on or after March 30, 1995." [1995 c 5 § 2.]

Effective date -- 1995 c 5: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [March 30, 1995]." [1995 c 5 § 3.]

TAB C

82.08.0201 << 82.08.0202 >> **82.08.0203**

RCW 82.08.0202

Retail sales of linen and uniform supply services.

For purposes of this chapter, a retail sale of linen and uniform supply services is deemed to occur at the place of delivery to the customer. "Linen and uniform supply services" means the activity of providing customers with a supply of clean linen, towels, uniforms, gowns, protective apparel, clean room apparel, mats, rugs, and similar items, whether ownership of the item is in the person operating the linen and uniform supply service or in the customer. The term includes supply services operating their own cleaning establishments as well as those contracting with other laundry or dry cleaning businesses.

[2001 c 186 § 2.]

Notes:

Finding -- Purpose -- 2001 c 186: "The legislature finds that because of the mixed retailing nature of linen and uniform supply services, they have been incorrectly sited for tax purposes. As a result, some companies that perform some activities related to this activity outside the state of Washington have not been required to collect retail sales taxes upon linen and uniform supply services provided to Washington customers. The activity has aspects of both the rental of tangible personal property and retail services related to tangible personal property. This error in tax treatment provides an incentive for businesses to locate some of their functions out of state. In-state businesses cannot compete if their out-of-state competitors are not required to collect sales tax for services provided to the same customers.

The purpose of this act is to clarify the taxable situs and nature of linen and uniform supply services." [2001 c 186 § 1.]

Effective date -- 2001 c 186: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect July 1, 2001." [2001 c 186 § 4.]

TAB D

296-126-020 << 296-126-021 >> **296-126-022**

No agency filings affecting this section since 2003

WAC 296-126-021

Minimum wages—Commissions and piecework.

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.

[Order 74-9, § 296-126-021, filed 3/13/74, effective 4/15/74.]

TAB E

296-128-540 << 296-128-550 >> 296-128-560

No agency filings affecting this section since 2003

WAC 296-128-550

Regular rate of pay.

The regular rate of pay shall be the hourly rate at which the employee is being paid, but may not be less than the established minimum wage rate. Employees who are compensated on a salary, commission, piece rate or percentage basis, rather than an hourly wage rate, unless specifically exempt, are entitled to one and one-half times the regular rate of pay for all hours worked in excess of forty per week. The overtime may be paid at one and one-half times the piecework rate during the overtime period, or the regular rate of pay may be determined by dividing the amount of compensation received per week by the total number of hours worked during that week. The employee is entitled to one and one-half times the regular rate arrived at for all hours worked in excess of forty per week.

[Order 76-5, § 296-128-550, filed 2/24/76.]

TAB F

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
EMPLOYMENT STANDARDS

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

TAB G

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
EMPLOYMENT STANDARDS

TITLE:	**OVERTIME**	**NUMBER:**	**ES.A.8.1**
		REPLACES:	**ES-013**
CHAPTER:	**RCW 49.46.130**	**ISSUED:**	**1/2/2002**
	WAC 296-126 and WAC 296-128	**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 word 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 clear understanding of the number of hours to be included in the weekly salary, the department will consider the salary agreement to be based on 40 hours.

Note: To use the analysis in the following two sections about 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.

- **Salary—weekly.** When an employee is employed solely on a weekly salary basis, the regular hourly rate of pay is computed by dividing the salary by the number of hours for which the salary is intended to compensate.

- **Salary—other than weekly**. When the salary covers a period longer than a workweek, such as a month, it must be reduced to its equivalent weekly wage by multiplying by 12 (months), and dividing by 52 (weeks). A semi-monthly salary is converted to its weekly equivalent by multiplying by 24 and dividing by 52. Overtime payment for salary paid other than weekly is determined the same as for weekly payment of salary.

- **Salary—workweek exceeding 40 hours:** A fixed salary for a regular workweek longer than 40 hours does not discharge the statutory obligation for nonexempt employees. For example, an employee may be hired to work a 44-hour workweek for a weekly salary of $350. In this case, the regular rate is obtained by dividing the $350 straight-time salary by 44 hours, which results in a regular rate of pay of $7.95. The employee is due additional overtime computed by multiplying the four overtime hours by *one-half* the regular rate of pay at $3.98 per hour, and the employee is due an additional $15.92 above the $350 salary for each week, for a total of $365.92. If the employee worked more than 44 hours, the employee would be due additional pay for the hours worked over 44 computed by multiplying these additional overtime hours by *one and one-half* the regular rate of pay ($7.95), or $11.93 per hour for each hour worked in excess of 44 in any workweek.

- **Salary—fluctuating hours.** Salary for a fluctuating workweek occurs when an employee is employed on a fixed salary and it is clearly understood and agreed

upon by both employer and employee that the hours will fluctuate from week to week and that the fixed salary constitutes straight-time pay for all hours of work, whether fewer or greater than forty hours per week. The regular rate is then obtained for each week by dividing the weekly salary by the number of hours worked each week. Since it was understood that all hours would constitute straight-time, all hours worked have already been paid at straight-time compensation; however, the employee is still entitled to receive an additional one-half hour's pay for each hour over 40 in the work week.

- **Employees working at two or more rates.** Where an employee in a single workweek works at two or more different types of work for which different straight-time rates have been established, the regular rate for that week is the weighted average of such rates. That is, the earnings from all such rates are added together and this total is then divided by the total number of hours worked at all jobs. The employee is due the one-half rate for each overtime hour.
- **Commission payments (other than retail sales or service exception).** Commissions are payments for hours worked and must be included in the regular rate, regardless of whether the commission is the sole source of the employee's compensation or is paid in addition to a salary or hourly rate. It does not matter whether the commission earnings are computed daily, weekly or monthly.

  When a commission is paid on a workweek basis, it is added to the employee's other earnings for that workweek and the total is divided by the number of hours worked in the workweek to obtain the employee's regular rate for the particular work week. The employee must then be paid extra compensation at the one-half rate for each overtime hour worked. See WAC 296-126-021. Note: **See ES.A.10.1, ES.A.10.2 and ES.A.10.3** for commissioned employees in retail sales or service establishments.

Note: In all of the above examples, if the regular rate should fall below the applicable minimum wage, the employee must be compensated for regular hours at the minimum wage and for overtime based on one and one-half the minimum wage rate.

7. What is the definition of "workweek"?

A workweek is a fixed and regularly recurring period of 168 hours during seven consecutive 24-hour periods. It may begin on any day of the week and any hour of the day. For purposes of overtime payment, each workweek stands alone; there can be no averaging of two or more workweeks. Once the beginning time of an employee's workweek is established it remains fixed, but may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements. In the absence of a workweek established by the employer, the workweek automatically defaults to the calendar week, Sunday through Saturday.

8. Who is exempt from overtime?

RCW 49.46.130 includes the following exemptions from overtime law.

(a) **Employees exempted from the Minimum Wage Act (MWA).** The entitlement to overtime comes from RCW 49.46.130, which is part of the MWA. Therefore, those who are exempted from the definition of employee under the Minimum Wage Act are *not* protected by the MWA, nor is it required they be paid overtime wages. **See ES.A.1**, Minimum Wage Act Applicability, for a detailed discussion of the exemptions contained in RCW 49.46.010(5). Also **see ES.A.9.3 - 8**, Exemptions from Minimum Wage and Overtime for Executive, Administrative, Professional, Computer Professional, and Outside Sales.

If a person who is exempted from the MWA is, nonetheless, paid overtime or is given compensatory time off by the employer on a voluntary basis, the payment of such additional compensation does not mean that the employee is thereafter entitled to overtime as a matter of law. See RCW 49.46.130 (2)(a).

(b) Employees who request compensatory time off in lieu of overtime pay:

Note: Compensatory time off in lieu of overtime pay is not allowed for industries or enterprises that are subject to the federal Fair Labor Standards Act (FLSA). Employers must contact the U.S. Department of Labor to determine if their business is covered by the FLSA.

RCW 49.46.130(2)(b) and WAC 296-128-560 allow employees to request compensating time off in lieu of overtime pay. For compensatory time to substitute for a premium wage rate, however, certain criteria apply:

- The substitution of compensatory time off for premium pay must be at the employee's request and must be agreed to by the employee. Compensatory time is considered a benefit to the employee and the employer may not impose the requirement on any employee who has not made such a request.

- Compensatory time is valid only if accrued at the rate of one and a half hours off for each overtime hour worked.

- Upon termination of the employee/employer relationship, the balance of the accrued compensatory time must be paid in wages.

(c) **Persons employed as "Seamen."** "Seamen," regardless of whether they are employed on an American or other vessel. Seamen who work on American vessels are subject to the payment of minimum wage.

(d) **Seasonal employees of agricultural fairs.** Seasonal employees of agricultural fairs and seasonal employees who are employed at concessions and recreational establishments at agricultural fairs within the state of Washington as long as "the period of employment for any seasonal employee at any or all agricultural fairs does not exceed fourteen working days per year."

The department interprets "agricultural fairs" to mean any area, county, district and community fair and also including youth shows and fairs (generally having some public education component for the purpose of educating rural youth). Examples include the Puyallup Fair, King County Fair, Grant County Fair, etc. **The exception does not apply to amusement fairs such as a shopping mall carnival.**

The fourteen-day requirement is applied to individual employees. Thus, an employer could employ some workers for longer than fourteen days and would owe them overtime, or such workers could work at other fairs and would be entitled to overtime for that work, but an employer would not have to pay overtime to any individual employee who worked fourteen days or less in a year for a fair or fair concessionaire. If an employee does become entitled to overtime by working more than fourteen days in a year, the original employer is not retroactively liable for overtime. In other words, the first fourteen days of employment are not subject to the overtime requirement regardless of whether the employee works longer or at other fairs and is subject to overtime for the subsequent period.

(e) **Unionized motion picture projectionists.** Motion picture projectionists covered by a contract or collective bargaining agreement that regulates hours of work and overtime pay.

(f) **Truck or bus drivers subject to federal Motor Carrier Act.** Truck or bus drivers subject to the provisions of the federal Motor Carrier Act as long as the compensation system under which the truck or bus driver is paid includes overtime pay, reasonably equivalent to time and one half the driver's usual hourly rate. This provision does not apply to truck or bus drivers who are paid entirely by hourly wage rate or rates. See WAC 296-128-011 for special record keeping requirements applicable to employers of truck and bus drivers subject to the provisions of the Federal Motor Carriers Act, and see WAC 296-128-012 for application to the department for approval of an alternate pay system.

(g) **Agricultural workers.** Effective November 6, 2006, the previous agricultural policy in this section issued on January 2, 2002 was withdrawn pending revision to update the policy. This is necessary due to the August 31, 2006 Washington

Supreme Court decision 77283-5 on Cerrillo v Esparza. The previous policy was in conflict with the decision of the Supreme Court.

(h) **Industries that are subject to federal law requiring overtime based on a workweek other than 40 hours.** Examples in federal law include:

- Industries who lease federal land for recreational purposes, which requires payment of overtime after 56 hours per week.

- Hospitals and residential care establishments that pursuant to a prior agreement or understanding with their employees, utilize a fixed workweek period of 14 consecutive days in lieu of the workweek for the purpose of computing overtime, *if* they pay one and one-half times the regular rate for hours worked over eight in any work day, or 80 in the 14-day period, whichever is the greater number of hours.

(i) **Airline personnel who work more than 40 hours in a week if the hours are accrued as the result of a voluntary shift trade with another airline employee.** When an "employee of a carrier by air" who is subject to the provisions of subchapter II of the Railway Labor Act (45 USC Sec. 181) voluntarily works more than 40 hours in a week as a result of trading shifts with another employee or voluntarily accepting a reassignment and where the trade or reassignment gives the employee the opportunity to reduce hours in the same or in other workweeks, it is not required that the employee be paid overtime wages for the hours over 40.

9. Special exceptions exist for the following types of employees:

A. Commission employees of retail or service establishments. Employees of "retail or service establishments" need not be paid one and one-half the regular rate for hours over 40 in a week *if* the employee's regular rate of pay is greater than one and one-half times the current statutory minimum wage *and* more than half of the employee's compensation for a representative period is due to commissions on goods or services. See RCW 49.46.130(3). For a detailed discussion of application of the retail or service establishment exception to overtime, refer to administrative policies ES.A.10.1, ES.A.10.2, and ES.A.10.3.

B. Commissioned salespeople selling cars, trucks, RVs, campers, trailers, manufactured homes or farm implements to consumers. Commissioned salespeople primarily engaged in the business of selling automobiles, trucks, recreational vessels, recreational vessel trailers, recreational vehicle trailers, recreational campers, manufactured housing or farm implements to ultimate purchasers need not be paid additional overtime for hours over forty in a week *as long as they are paid the greater of:*

dc(a) At least the current minimum wage for each hour worked up to forty hours per week and at least one and one-half times the current minimum hourly rate for all hours worked over forty in one week; or

(b) A straight commission, a salary plus commission, or a salary plus bonus applied to gross salary.

Note: This exception, RCW 49.46.130(4), applies only to those workers who sell the types of vehicles listed in the statute. *It is different from the retail sales exception to overtime.* Employees other than salespersons may be subject to the retail sales exception in RCW 49.46.130(3). **See ES.A.10.1, ES.A.10.2 and ES.A.10.3** for interpretation of the retail and service establishment exception.

C. Public sector fire protection and law enforcement employees of agencies of agencies with fewer than five employees. Under RCW 49.46.130(5), employees of a public agency who are engaged in "fire protection" and "law enforcement" activities (which includes security personnel in correctional institutions) are not required to be paid additional overtime compensation for hours over 40 in a week *if* (a) in a 28-consecutive day work period the employee earns at least one and one-half his or her regular rate of pay for hours worked in excess of 240 total in that 28-consecutive day work period; or (b) In a work period of not less than seven days but not more than 28 days, the employee earns at least one and one-half his or her regular rate of pay for total hours worked in excess of the number equal to the ratio of 240 hours to 28 days. Note: Agencies with five or more employees in fire protection and law enforcement activities are covered by the federal Fair Labor Standards Act.

TAB H

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 Ttl	Ttl Hrs Worked	Regular Rate	OT Rate (1/2 Hrly Rate)	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 OWED
Sun	Mon	Tue	Wed	Thu	Fri	Sat	Hours Worked	Hourly Rate #1	Hourly Rate #2	Weekly Earn Ttl	Total Hrs Worked	Regular Rate	OT Rate (1/2 Hrly Rate)	Unpaid OT	(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 OWED
Sun	Mon	Tue	Wed	Thu	Fri	Sat	Hours Worked	Hourly Rate	Unpaid OT Hrs	OT Rate (1/2 Hourly Rate)	(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 OWED (OT Hours x OT Rate)
Sun	Mon	Tue	Wed	Thu	Fri	Sat	Hours Worked	Hourly Rate	Unpaid OT Hrs	OT Rate (1/2 Hourly Rate)	
31-Jan	1-Feb	2-Feb	3-Feb	4-Feb	5-Feb	6-Feb					
off	10	10	10	10	10	off	50	$10.00	10	$5.00	**$50.00**

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 OWED (OT Hrs x OT Rat
	Sun	Mon	Tue	Wed	Thu	Fri	Sat	Hours Worked	Hourly Rate	Unpaid OT Hrs	OT Rate (1/2 Hourly Rate)	
	31-Jan	1-Feb	2-Feb	3-Feb	4-Feb	5-Feb	6-Feb					
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.

TAB I

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
EMPLOYMENT STANDARDS

TITLE:	**COMMISSIONS, PIECEWORK AND MINIMUM WAGE REQUIREMENTS**	**NUMBER:**	**ES.C.3**
		REPLACES:	**ES-018**
CHAPTER:	**WAC 296-126-021**	**ISSUED:**	**1/2/2002**

ADMINISTRATIVE POLICY DISCLAIMER

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

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

Workers paid on a commission or piecework basis, unless otherwise exempt, i.e., outside salespersons, must receive wages at least equivalent to the applicable minimum wage. To determine whether commission or piecework employees have received minimum wage, the following rules are applied:

1. WAC 296-126-021(1): Wages earned in each workweek period may be credited as part of the total wage for the period.

2. WAC 296-126-021(2): To obtain the regular rate of pay, the total earnings for the pay period are to be divided by the total hours worked in that period.

3. If the regular rate for the pay period is less than the minimum hourly wage, the employer must pay the difference to comply with the Minimum Wage Act. **See ES.A.1** for discussion on minimum wage requirements.

TAB J

U.S. GOVERNMENT INFORMATION GPO

that week is the weighted average of such rates. That is, his total earnings (except statutory exclusions) are computed to include his compensation during the workweek from all such rates, and are then divided by the total number of hours worked at all jobs. Certain statutory exceptions permitting alternative methods of computing overtime pay in such cases are discussed in §§ 778.400 and 778.415 through 778.421.

§ 778.116 Payments other than cash.

Where payments are made to employees in the form of goods or facilities which are regarded as part of wages, the reasonable cost to the employer or the fair value of such goods or of furnishing such facilities must be included in the regular rate. (See part 531 of this chapter for a discussion as to the inclusion of goods and facilities in wages and the method of determining reasonable cost.) Where, for example, an employer furnishes lodging to his employees in addition to cash wages the reasonable cost or the fair value of the lodging (per week) must be added to the cash wages before the regular rate is determined.

[46 FR 7310, Jan. 23, 1981]

§ 778.117 Commission payments—general.

Commissions (whether based on a percentage of total sales or of sales in excess of a specified amount, or on some other formula) are payments for hours worked and must be included in the regular rate. This is true regardless of whether the commission is the sole source of the employee's compensation or is paid in addition to a guaranteed salary or hourly rate, or on some other basis, and regardless of the method, frequency, or regularity of computing, allocating and paying the commission. It does not matter whether the commission earnings are computed daily, weekly, biweekly, semimonthly, monthly, or at some other interval. The fact that the commission is paid on a basis other than weekly, and that payment is delayed for a time past the employee's normal pay day or pay period, does not excuse the employer from including this payment in the employee's regular rate.

[36 FR 4981, Mar. 16, 1971]

§ 778.118 Commission paid on a workweek basis.

When the commission is paid on a weekly basis, it is added to the employee's other earnings for that workweek (except overtime premiums and other payments excluded as provided in section 7(e) of the Act), and the total is divided by the total number of hours worked in the workweek to obtain the employee's regular hourly rate for the particular workweek. The employee must then be paid extra compensation at one-half of that rate for each hour worked in excess of the applicable maximum hours standard.

§ 778.119 Deferred commission payments—general rules.

If the calculation and payment of the commission cannot be completed until sometime after the regular pay day for the workweek, the employer may disregard the commission in computing the regular hourly rate until the amount of commission can be ascertained. Until that is done he may pay compensation for overtime at a rate not less than one and one-half times the hourly rate paid the employee, exclusive of the commission. When the commission can be computed and paid, additional overtime compensation due by reason of the inclusion of the commission in the employee's regular rate must also be paid. To compute this additional overtime compensation, it is necessary, as a general rule, that the commission be apportioned back over the workweeks of the period during which it was earned. The employee must then receive additional overtime compensation for each week during the period in which he worked in excess of the applicable maximum hours standard. The additional compensation for that workweek must be not less than one-half of the increase in the hourly rate of pay attributable to the commission for that week multipled by the number of hours worked in excess of the applicable maximum hours standard in that workweek.

CERTIFICATE OF SERVICE

The undersigned declares under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On this date, I caused to be served in the manner noted below, a copy of the APPELLANT'S OPENING BRIEF on the following:

Via Federal Express
Geoffrey D. Swindler, WSBA # 20176
Law Office of Geoffrey D. Swindler
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Via Legal Messenger
Martin S. Garfinkel, WSBA # 20787
Schroeter Goldmark & Bender
810 Third Avenue, Suite 500
Seattle, WA 98104

Executed this 27th day of August, 2015, in Seattle, Washington.

s/ Donna Alexander
Donna Alexander

CERTIFICATE OF SERVICE

The undersigned declares under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On this date, I caused to be served in the manner noted below, a copy of the APPELLANT'S OPENING BRIEF on the following:

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810 Third Avenue, Suite 500
Seattle, WA 98104

Executed this 27th day of August, 2015, in Seattle, Washington.

s/ Donna Alexander
Donna Alexander

OFFICE RECEPTIONIST, CLERK

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Subject: Alsco, Inc. v. Dave Cooper and Jerry Scott; Case No. 91801-5

Dear Clerk:

Attached for filing please find Appellant Alsco Inc.'s Opening Brief. Please advise if you are unable to open the attachment.

Thank you

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A little encouragement can spark a great accomplishment

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