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NO. 91801-5

SUPREME COURT OF THE STATE OF WASHINGTON

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

Respondents/Plaintiffs,

v.

ALSCO, INC., a foreign corporation,

Appellant/Defendant.

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RESPONDENTS/PLAINTIFFS' RESPONSE  
TO APPELLANT ALSICO, INC.'S  
OPENING BRIEF

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## I. INTRODUCTION

In late 2009, AlSCO, Inc. stopped paying overtime to the class of commissioned Route Sales Representatives (“RSRs”) in this case. When challenged in court, AlSCO claimed that the RSRs were exempt from overtime under the “retail or service establishment” exception (the “RSE”) to the Washington Minimum Wage Act (“MWA”), RCW 49.46.130(3). Judge William Downing of the King County Superior Court properly concluded that AlSCO failed to carry its heavy burden of establishing that it was a retail establishment within the meaning of the RSE where AlSCO’s business consists almost entirely of long-term, large-volume rental contracts to other businesses, is not open to the general public, and is not viewed by anyone, including AlSCO’s own managers, as “retail” in nature.

Judge Downing also properly concluded that in calculating back pay damages for the misclassified workers, AlSCO could not take advantage of the employer-friendly fluctuating workweek methodology (the “FWW”). Following on-point precedent from the Court Appeals and the federal district court, Judge Downing concluded that damages must be calculated according to the standard, or statutory, time and a half method, because of AlSCO’s failure to pay contemporaneous overtime and the absence of any lawful agreement to waive the employer’s overtime obligations.

Judge Downing’s conclusions are supported by the need to liberally interpret the MWA to benefit and protect Washington’s workers

and by the narrow construction that must be given to any exemption from the MWA's requirements. Because Alscó's business operations do not fall within the scope of the RSE, and because it had no legitimate basis for its failure to pay overtime to the RSRs, this Court should affirm the Superior Court's Judgment as providing just and necessary compensation to the injured workers.

## **II. ISSUES PRESENTED FOR REVIEW**

1. Whether the overtime exemption for a "retail or service establishment" under RCW 49.46.130(3) (the "RSE") applies to an employer that is not open to the general public and that limits its business to long-term, large volume contracts with other businesses?

2. Whether an employer that misclassifies its employees and does not contemporaneously pay overtime may retroactively take advantage of the employer-friendly fluctuating workweek methodology (the "FWW") in determining damages for overtime back pay?

## **III. STATEMENT OF THE CASE**

### **A. Route Sales Representatives And Alscó's Business.**

Appellant Alscó, Inc. admits that its business is to supply linens, uniforms, floor mats, and similar products to other businesses in the industrial, hospitality, health care and other fields. CP 30; CP 193-94. The Route Sales Representatives ("RSRs") who comprise the certified class in this case work for Alscó's Service (not Sales) Department and are

responsible for delivering clean linens and retrieving dirty linens from these customers.

AlSCO's Service Department focuses exclusively on commercial rental customers who sign long term agreements for regular service. CP 95-96; *see also* CP 33-34. The standard service agreement is for five years, with a \$25 weekly minimum, because AlSCO makes a "large investment" in servicing each customer. CP 96-100.

Each RSR is assigned to a route that includes 20 to 44 stops each day and 150 to 220 customers on any one route. CP 112. At each stop, the RSR carries in the clean rental items, carries out the dirty linens, and, in some cases, collects cash payments from the customer. CP 115-18. The dirty linens are transported back to AlSCO's "production plant" in Spokane, which contains a huge laundry including 14 industrial washing machines and 8 large dryers. CP 146-48, 156-59. RSRs visit most customers once or more each week. CP 110-11. Management decides which customers are assigned to each route and the frequency of the RSR visits to each customer. CP 191-92; CP 105-08. Management also designates a start time for each route. CP 103-04.

RSRs do not have "a responsibility to sell." CP 208-09. They do have some limited sales goals, but few RSRs achieve the goals and there are no adverse consequences when they fail to do so. CP 213; CP 93-94; CP 165. There are no minimum requirements for time that RSRs must

spend selling nor for number of sales contacts, and the time actually spent by RSRs on sales is minimal. CP 210; CP 111; CP 134-36; CP 180-81. Also acknowledges that RSRs' core service duties (delivery and pick-up) are not time spent "making a sale." CP 211-12.<sup>1</sup>

Also's competitors are the other "industrial companies" that launder and rent similar products. CP 160; CP 205. Also does not compete with retail outlets that rent or sell linens to the general public for their personal needs, such as weddings or similar events. CP 161-64; *see also* CP 66-67 (distinct Yellow Page categories for industrial companies like Also versus retail linen and uniform rental suppliers); CP 69-77 (websites for linen and uniform suppliers open to the general public). As Also's managers acknowledge, "We don't rent to the man off the street," and most requests for one-time rentals are refused. CP 98-99; CP 197.<sup>2</sup> Managers and workers alike agree that they have never heard anyone refer to Also's business as "retail." CP 206-07; CP 242-43.

Also also has a small Direct Sales Department, which sells (rather than rents) paper, cleaning, and similar products primarily to existing rental customers. CP 151-54; CP 169. Sales from catalogs distributed by this department are by large volume, *i.e.*, by the case; it is unusual for

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<sup>1</sup> Also assertions about the sales duties and expectations for RSRs are not actually supported by its cites to the record. *See* App. Br. at 7. Its assertions regarding sales to the general public similarly overstate the undisputed facts in the record. *Id.* at 6.

<sup>2</sup> Any one-time rentals or sales that do occur are usually to individuals associated with commercial accounts and constitute a trivial portion of Also's business. CP 195-204; CP 151-54; CP 169.

there to be sales of individual products. CP 171. The catalog quotes “wholesale” rates, and AlSCO does not even refer to catalog sales as “retail.” CP 170, 172. In any event, revenue from direct sales comprises only 7%-10% of total revenues for the Spokane branch. CP 169.

Prior to 2009, most RSRs were paid on an hourly basis and received overtime pay. However, in or around 2009, the collective bargaining agreement was changed to pay RSRs on a base salary plus commission structure. CP 128-29. The RSRs were given a one-time opportunity to opt out of the commission structure and remain on hourly pay. CP 593. Managers pressured RSRs to move to the commission system by cutting back on the number of customer stops and therefore work hours of those who refused. CP 129-33; CP 175-77; CP 121-25. The commissioned RSRs, who make up the class here, did not receive overtime for time worked over 40 hours in a workweek.

In its brief, AlSCO repeatedly states that it treats these RSRs as exempt from overtime “pursuant to the CBA” and that plaintiffs asserted their claims “despite the terms of the CBA.” App. Br. at 2, 8. This is a red herring. First, the overtime protections of the Minimum Wage Act (“MWA”) are non-waivable, and neither an individual employee nor a union can agree to the misclassification of workers. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 864-65, 93 P.3d 108 (2004). Second, the CBAs here do not mention the retail sales exemption; indeed, they do not

state that the RSRs are exempt workers at all. CP 572-620. Third, confronted with the non-waivable nature of the rights in this case, AlSCO did not oppose dismissal of its CBA defenses. Resp. App. (CP) 1143-44.

**B. Procedural Background.**

Respondents generally agree with AlSCO's statement of procedural background with two prominent exceptions. First, the Superior Court did not hold that the RSE did not apply to AlSCO solely "because AlSCO's customers were businesses rather than individuals." App. Br. at 8. Rather, the court recognized that some business to business sales could be retail, but considered all the circumstances of AlSCO's business in determining that it was not a retail establishment. CP 800-04. Second, the court's ruling on the proper method for calculating compensatory damages was not unprecedented, but was supported by on-point authority from the Court of Appeals and federal district court. CP 1095-96. It did not result in an "unjustified windfall" to the RSRs but instead provided the correct compensation for AlSCO's misclassification and failure to pay these workers the overtime required by Washington law.

**IV. ARGUMENT**

**A. Standard of Review.**

This Court reviews the Superior Court's rulings on summary judgment *de novo*. Summary judgment should be granted if, from all the evidence, reasonable persons could reach but one conclusion. *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990). AlSCO does not

contend that there are any disputed material facts that made summary judgment inappropriate.

Also bears the burden of proving that the retail sales exemption applies to the RSRs. See *Stahl v. Delicor of Puget Sound, Inc.*, 148 Wn.2d 876, 881, 64 P.3d 10 (2003). This burden is a high one. As this Court has explained, “[a]s remedial legislation, the MWA is given a liberal construction; exemptions from its coverage ‘are narrowly construed and applied only to situations which are plainly and unmistakably consistent with the terms and spirit of the legislation.’” *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 870, 281 P.3d 289 (2012)(quoting *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 301, 996 P.3d 582 (2000)). Narrow construction of the RSE is required to ensure proper payment of employees and to avoid undermining one of the primary purposes of the MWA, which is to promote full employment by encouraging employers to hire more workers rather than pay the overtime rates. See *Inniss v. Tandy Corp.*, 141 Wn.2d 517, 538, 7 P.3d 807 (2000)(Talmadge, J., dissenting)(discussing job spreading goal of MWA).

**B. The RSRs Are Not Exempt Under The Retail Or Service Establishment Exemption.**

The MWA exempts from its overtime pay requirements employees of “a retail or service establishment” if the employee’s regular rate of pay is more than one and a half times the minimum wage and more than half the employee’s compensation is from commissions on goods or services.

See RCW 49.46.130(3). The exemption is identical to its federal counterpart under the Fair Labor Standards Act (“FLSA”); hence, the Department of Labor and Industries (“L&I”) has adopted the federal Department of Labor (“DOL”) regulations interpreting that provision. See CP 46. As the courts have recognized, “[t]he Department of Labor’s regulations consistently emphasize that the exemption is meant to apply to ‘traditional’ local retail establishments.” *Parker v. ABC Debt Relief, Ltd. Co.*, 2013 WL 371573, \*9 (N.D. Tex. Jan. 28, 2013)(citing 29 C.F.R. §§ 779.314, 779.315, 779.317)(debt settlement company “did not serve the general public by providing a retail product or service in the general sense” even though it marketed to the public by telemarketing calls).

**1. Also Is Not A Retail Establishment.**

For the many reasons described below, the RSE does not apply because AlSCO is not a retail establishment and there is no “retail concept” in the industry in which it operates, *i.e.*, industrial linen and supply companies.<sup>3</sup> In order to qualify under the exemption, an employer must establish both that it is part of an industry in which there is a “retail concept” *and* that *its* sales or services are recognized as retail in that

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<sup>3</sup> Although the RSE uses the disjunctive conjunction “or” (“retail or service establishment”), the structure of the exemption, regulations, and case law make clear that the term “service” is limited to “retail service.” See 29 C.F.R. § 779.314. See also *Roland Elec. Co. v. Walling*, 326 U.S. 657, 675 (1946). Moreover, AlSCO supplies linens and other tangible goods to its customers in addition to industrial laundry services. Thus, AlSCO’s suggestion that the retail test does not apply to its operations because it is a “service” establishment is clearly wrong. See App. Br. at 19.

industry. *See Kelly v. AI Technology*, 2010 WL 1541585, \*11 (S.D.N.Y. Apr. 10, 2010). Also fails on both counts.

**a.       AlSCO's Industry Lacks A Retail Concept.**

Both L&I and DOL have recognized that there are certain industries that lack a "retail sales or service concept" and to which the RSE does not apply. *See* CP 56 (L&I Admin. Policy ES.A.10.3); CP 47 (L&I Admin. Policy ES.A.10.1); 29 C.F.R. § 779.316. The most conclusive proof that AlSCO falls into this category is its own identification of its relevant market and competitors. AlSCO identifies other industrial linen and uniform supply companies as its competitors and does not view itself in competition with companies that rent, sell, or clean linens, uniforms, or other products directly to the public for their personal needs. CP 160, 163-64; CP 205. *See also* CP 242-43 (Plaintiff Cooper attesting that there is no retail concept in the linen and uniform supply services industry and that he has never heard the term "retail" used during three decades in the industry); CP 66-77 (Yellow Page listings and retail establishment websites).

Also relevant is the fact that both L&I and the DOL have identified "laundries" as an industry lacking a retail concept. CP 47; CP 56; 29 C.F.R. § 779.317. Although this statement is too broad when applied to local cleaners, it supports the conclusion that large, industrial purveyors of uniform and linen laundry services, like AlSCO, lack a retail concept.

This is not a novel distinction. As far back as 1945, the DOL noted the same difference between laundries serving private individuals and linen supply companies like AlSCO in terms of "retail establishments":

Another example of an establishment which would not be a service establishment for the same reason is an industrial laundry or linen supply company which cleans or supplies coats, covers, towels, sheets, etc., for railroads, hotels, restaurants, beauty parlors, barber shops, stores, hospitals, and other industrial or business customers. Such an industrial laundry or linen supply company, unlike the home laundry which serves private individuals, does not stand in a position similar to that occupied by the retailer. It possesses attributes similar to those of the ordinary wholesaler (e.g., with respect to price, quantity, and type of customer) and may not be considered as a service establishment for purposes of the exemption.

CP 79-81 (DOL Wage and Hour Manual (ed. 1944-45)).

Moreover, AlSCO's operations fail to meet the typical characteristics of a retail or service establishment as described in the later DOL regulations that have been adopted by L&I:

Typically a retail or service establishment is one which sells goods or services to the general public. It serves the everyday needs of the community in which it is located. The retail or service establishment performs a function in the business organization of the Nation which is at the very end of the stream of distribution, disposing in small quantities of the products and skills of such organization and does not take part in the manufacturing process.... Such an establishment sells to the general public its food and drink. It sells to such public its clothing and its furniture, its automobiles, its radios and refrigerators, its coal and its lumber, and other goods, and performs incidental services on such goods when necessary. It provides the general public its repair services and other services for the comfort and convenience of such public in

the course of its daily living. Illustrative of such establishments are: Grocery stores, hardware stores, clothing stores, coal dealers, furniture stores, restaurants, hotels, watch repair establishments, barber shops, and other such local establishments.

29 C.F.R. § 779.318 (emphasis added). *See also* 29 C.F.R. § 779.319 (“[A]n establishment, wherever located, will not be considered a retail or service establishment within the meaning of the Act, if it is not ordinarily available to the general consuming public.”); 29 C.F.R. § 779.328(a) (“Wholesale establishments usually exclude the general consuming public as a matter of established business policy and confine their sales to other wholesalers, retailers, and industrial or business purchasers in quantities greater than are normally sold to the general consuming public at retail.”)<sup>4</sup>

Here, with the possible exception of the small Direct Sales Department, AlSCO does not rent or sell to the general public. *See* CP 98-99. Its predominant business is renting and cleaning goods for other businesses on a volume basis pursuant to long-term contracts. CP 95-96; CP 243. These are not retail sales and do not qualify AlSCO for the exemption. *See* 29 C.F.R. § 779.328(c)(when the total quantity of goods or

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<sup>4</sup> The regulations recognize that the RSE can extend “in some measure beyond consumer goods and services to embrace certain products almost never purchased for family or noncommercial use,” like small trucks and farm implements. 29 C.F.R. § 779.318(b). Here, however, items like table linens, towels, and work coveralls may be purchased for private use, but they are not purchased for such use from AlSCO. Moreover, the regulation explains that the “strictly commercial items” that might qualify for the exemption share certain characteristics that are absent here. For example, “they are often distributed in stores and showrooms by means not dissimilar to those used for consumer goods; and they are frequently used in commercial activities of limited scope.” *Id.* Finally, the regulation cautions, “The list of strictly commercial items whose sale can be deemed retail is very small....” *Id.*

services delivered to a purchaser over the life of a contract “is materially in excess of the total quantity of goods or services which might reasonably be purchased by a member of the general consuming public during the same period, it will be treated as a wholesale quantity for purposes of the statutory definition of the term “retail or service establishment, in the absence of clear evidence that under such circumstances such a quantity is recognized as a retail quantity in the particular industry,” even if the goods are delivered in smaller quantities from time to time as the occasion requires); *see also Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 204, 86 S.Ct. 737 (1966) (“common parlance certainly suggest that the term retail becomes less apt as the quantity and the price discount increase in a particular transaction”). Moreover, it is clear that AlSCO’s service “is not ordinarily available to the general consuming public,” 29 C.F.R. § 779.319, as demonstrated by the Service Manager’s testimony that he turned away two-thirds of the requests for one-time rentals that he has received, a practice that would be incompatible with a truly retail operation. CP 197.

**b. AlSCO’s Retail Sales Volume, If Any, Is Too Low To Qualify For The Exemption.**

Even if AlSCO’s industry does have a retail concept, AlSCO fails to qualify as a retail establishment because its retail sales are too small a component of its overall business. RCW 49.46.010(6) defines a “retail or service establishment” as “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.” Here, Alisco admits that only a small portion of its income comes from non-commercial, direct sales. CP 169.

This is not to say that sales to other businesses can never qualify as retail. However, the critical fact is that Alisco limits its operations to long-term volume rentals to commercial customers, unlike establishments like party rental or uniform supply stores that sell linens or coveralls to the general public in one-time transactions. This difference highlights the distinction between retail and commercial sales in the industry and Alisco’s lack of retail activity. *E.g.*, *Idaho Sheet Metal Works*, 383 U.S. at 207-09 (RSE did not apply to seller of truck tires, majority of whose revenue derived from sales to large fleets); *Acme Car & Truck Rentals, Inc. v. Hooper*, 331 F.2d 442, 447-48 (5th Cir. 1964) (leases of five or more vehicles to one customer were not “retail sales” for purposes of exemption); *Schultz v. Instant Handling, Inc.*, 418 F.2d 1019 (5th Cir. 1969) (waste removal services rendered to industrial customers did not qualify as retail where containers for such customers were 40 times larger than used for private households in order to accommodate bulk and type of industrial waste); *Martino v. Michigan Window Cleaning Co.*, 327 U.S. 173 (1946) (company which primarily cleaned windows of industrial customers was not a “retail or service establishment” within the meaning

of the FLSA). In other words, even if the relevant “industry” is defined broadly to include linen supply businesses in which a retail concept does exist, Alasco’s sales do not qualify as “retail” within that industry.<sup>5</sup>

**2. Application Of The RSE To Alasco Would Contravene The Purposes Of The MWA.**

It is clear that classification of the RSRs as exempt is directly contrary to the MWA’s purposes of ensuring proper compensation for longer hours of work and encouraging the spread of employment opportunities. Alasco’s managers admit that RSRs who resisted switching from the old hourly pay system to the new commission system had their routes reduced in order to avoid paying them overtime, and their customers were given to the RSRs who agreed to go on commission with no overtime pay. Thus, rather than paying for overtime work or hiring more RSRs to avoid the need to pay overtime, Alasco took advantage of its misclassification of the commissioned RSRs to increase their workloads without any increase in compensation. *See Drinkwitz*, 140 Wn.2d at 301 (overtime exemptions should be “narrowly construed and applied only to situations which are plainly and unmistakably consistent with the terms and spirit” of the MWA).

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<sup>5</sup> Alasco’s assertion (App. Br. at 18-19) that the size of its sales does not matter is directly refuted by these cases and the DOL regulations. *See* 29 C.F.R. §§779.318 & .328.

**3. *Stahl v. Delicor* Does Not Support Application Of The RSE To AlSCO.**

Virtually ignoring the U.S. Supreme Court precedent and expert agency interpretation of the RSE discussed above, AlSCO argues that application of the exemption to its operations is supported by *Stahl v. Delicor*. App. Br. at 11.<sup>6</sup> However, AlSCO's reduction of *Stahl* to a two-part test (retail sales taxation and no resale) is overly simplistic and ignores the fundamental differences between the business models of the defendants in that case and this.

In *Stahl*, 95 percent of Delicor's revenue came from direct sales of snacks to the general public. 148 Wn.2d at 882. These sales were one-time transactions, in small quantities (e.g., one candy bar at a time), without any long-term contract or commitment between Delicor and the purchasing consumer. Thus, this Court had no problem determining that the sales from the vending machines were "consumer transaction[s]," *id.*, and it is hard to imagine any ordinary, common sense or legal definition of "retail sale" that would not include a person buying a bag of chips or a cup of noodles from a machine for fifty cents or a dollar. The location of Delicor's vending machines on commercial properties does not change the fact that it was marketing its goods to the public at large.

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<sup>6</sup> AlSCO argues that the DOL regulations should be disregarded as no longer valid. App. Br. at 14 n.2. However, numerous federal courts continue to give deference to the regulations, and L&I expressly adopted them in 2002 when Washington added the RSE to the Minimum Wage Act. *See Parker, supra*, \*9; *Gieg v. DDR, Inc.*, 407 F.3d 1038, 1048-49 (9th Cir. 2005); CP 46 (L&I Admin. Policy ES.A.10.1).

AlSCO's business model is fundamentally different. It services almost exclusively other businesses, on long-term contracts, with volumes of rented linens, uniforms, and other supplies far beyond what an ordinary consumer would use. When members of the general public seek to purchase or rent from AlSCO, it rejects most of those overtures. Its business cannot be fairly described as "consumer transactions" nor "retail sales."

AlSCO attempts to avoid this conclusion by asserting that it "provides its services to the general public ... and will provide its services to anyone who can use them." App. Br. at 17. However, this contention is refuted by the testimony of its own managers. AlSCO's General Manager agreed that one-time sales to members of the general public was a "once in a blue moon situation." CP 140, 154. Its Service Manager testified that he had rejected about two-thirds of all requests for one-time rentals, and that about one-half of the approximately ten one-time rentals he did approve were for clients affiliated with AlSCO's established business customers. CP 197-98. One of its District Managers explained, "We don't rent to the man off the street," and that long term, volume contracts are required because of the "large investment" in servicing each customer. CP 98-100 This is not the conduct of a company that retails "its services to the general public ... and will provide its service to anyone who can use them." App. Br. at 17. There simply is no genuine dispute that AlSCO, unlike Delicor, neither markets nor provides its services to the general public on a retail basis.

**4. The Treatment Of AlSCO's Sales As Retail For Tax Purposes Does Not Support Such Treatment For Purposes Of The Minimum Wage Act.**

AlSCO relies heavily on the fact that retail sales tax is paid on its leased goods and services under RCW 82.08.0202. *Cf. Stahl*, 148 Wn.2d at 882 (mentioning payment of retail sales tax as a factor in that case). However, both federal and state authorities confirm this is not dispositive.

First, 29 C.F.R. § 779.327 specifically recognizes “that what is a retail sale for purposes of a sales tax law is not necessarily a retail sale for purposes of the statutory definition of the term ‘retail or service establishment.’” Indeed, in *Idaho Sheet Metal Works*, the sales tax treatment of defendant’s bulk tire sales did not stop the U.S. Supreme Court from holding that the sales were not retail and the defendant was not a retail establishment in light of the bulk volume and other characteristics of the transactions. 383 U.S. at 195, 208-09.

Second, it is a well-established rule of statutory construction that “the same word can mean different things in different statutes.” *State v. A.M.R.*, 147 Wn. 2d 91, 97, 51 P.3d 790, 793 (2002) (citing *International Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 39-40, 42 P.3d 1265 (2002)). “Where two statutes concern wholly different subject matters, serve entirely different purposes and operate independently of each other, they should not be construed together.” *Klassen v. Skamania County*, 66 Wn. App. 127, 131-32, 831 P.2d 763 (1992) (quoting *Washington Utilities and Trans. Comm'n. v. United*

*Cartage*, 28 Wn. App. 90, 97, 621 P.2d 217 (1981)) (holding that property could be “forest land” for purposes of land preservation but not taxation).

Where the same word or phrase is used in two different statutes, the purposes of the statutes must be considered in construing the term in each. *Tembruell v. City of Seattle*, 64 Wn.2d 503, 508, 392 P.2d 453, 456 (1964). Thus, in *International Association of Fire Fighters*, this Court broadly construed the term “person” in RCW 49.48.030, the fee recovery provision of the Minimum Wage Act, in light of the remedial purposes to of the Act. 146 Wn.2d at 46 (including “unions” within the definition of “person” because allowing unions to recover their fees furthers the statutory purpose of vindicating employee wage rights). Similarly, in *University of Washington v. Marengo*, the court gave a narrower construction to the term “parking area” under an exemption clause in the Washington Industrial Insurance Act than in other laws, because the narrower interpretation would effectuate the Act’s remedial purpose to provide benefits to injured workers. 122 Wn. App. 798, 802-04, 95 P.3d 787 (2004).

Here, the MWA and the sales tax laws have fundamentally different purposes that support different usages of the term “retail.” The purpose of the sales tax, generally, is to raise revenue for the government. Consistent with that purpose, RCW 82.08.010 defines “retail sale” broadly to mean “any sale, lease, or rental for any purpose other than for resale,

sublease, or subrent.” (Emphases added).<sup>7</sup> Moreover, the specific purpose of RCW 82.08.0202 is not to characterize the provision of linen supply services as a retail industry for all purposes, but to define the situs of the industry’s transactions for taxing purposes. *Id.* (“defining the situs as “the place of delivery to the customer”) The concern, as expressed in the law’s statement of findings and purpose, was that out-of-state businesses providing services to Washington customers were gaining a competitive advantage over Washington firms by avoiding the sales tax on their transactions. *See* 2001 Wash. Laws c 186 § 1.<sup>8</sup>

By contrast, the Minimum Wage Act is to be liberally construed in favor of workers and “exemptions from its coverage ‘are narrowly construed.’” *Anfinson*, 174 Wn.2d at 870 (quoting *Drinkwitz*, 140 Wn.2d at 301). Moreover, while the tax statute defines “retail sales” as “any sale ... other than for resale,” RCW 82.08.010, the RSE includes the additional requirement that the sales be “recognized as retail sales or services in the

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<sup>7</sup> Consistent with this broad definition, some of the goods explicitly subject to the retail sales tax clearly would not be considered retail for purposes of the RSE, such as “charges for materials used by public road contractors and other government contractors while constructing or repairing highways and roads” and charges by “credit bureau businesses, including tenant screening services.” CP 83-84; *see also* RCW 82.04.050 (definition of “retail sale” for taxing purposes). The definition of “consumer” for purposes of the retail sales tax is equally broad, and includes, for example, “[a]ny person engaged in the business of cleaning up for the United States, or its instrumentalities, radioactive waste and other by-products of weapons production and nuclear research and development.” RCW 82.04.190(8).

<sup>8</sup> The legislature emphasized its revenue raising function in enacting this law: “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 Wash. Laws c 186 § 4.

particular industry.” See RCW 49.46.010(6).<sup>9</sup> Thus, while the fact that a transfer of goods is not for resale is sufficient by itself to qualify a sale as “retail” under the tax statute, the MWA exemption requires substantially more.<sup>10</sup>

Finally, the purpose of the legislature in adopting the RSE was to harmonize the MWA with the FLSA, with specific reference to the conditions of traditional retail commissioned salespersons and the importance of avoiding impediments to their ability to work more hours during high sales seasons. See CP 63 (House Bill Rep. SSB 5569 (Apr. 16, 1997)) (“[T]he Legislature finds retail commissioned salespersons can maximize their incomes by maximizing their work hours during periods when their sales per hour ratio are high. Employment policies that penalize employers for working retail commissioned sales persons more than 40 hours per week are detrimental to the well-being of retail commissioned salespersons.”); CP 60 (Senate Bill Rep. SSB 5569) (same). This focus of legislative consideration supports the conclusion that the exemption is to be narrowly construed and the scope of the exemption was not intended to be coextensive with the definition of retail sales under the tax statutes.

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<sup>9</sup> As the Supreme Court explained in *Idaho Sheet Metal Works*, this does not mean that the defendant, or its industry, gets to self-define what is “retail”; that determination is for the courts. 383 U.S. at 204-05.

<sup>10</sup> For the same reasons, the cases cited by AlSCO (App. Br. at 13) regarding the definition of “retail” in other contexts are inapposite and provide no basis for disregarding the detailed definition of “retail establishment” contained in the RSE regulations.

**5. AlSCO's Services Were Not Retail, Even If Not For Resale.**

AlSCO also relies heavily (and mistakenly) on the fact that its products and services are not for resale. This fact is not dispositive. *See* 29 C.F.R. § 779.327 (“a showing that sales of goods or services are not wholesale or are made to the ultimate consumer and are not for resale does not necessarily prove that such sales or services are recognized in the particular industry as retail”) (citing *Wirtz v. Steepleton General Tire Co.*, 383 U.S. 190).

The statute requires both that an employers' sales not be for resale *and* that they be “recognized as retail sales or services in the particular industry.” *See* RCW 49.46.010(6) (definition of “retail or service establishment”). Disregarding the latter requirement through undue focus on the former ignores legislative intent and violates basic rules of statutory construction. *See, e.g., Veit, ex rel. Nelson v. Burlington Northern Santa Fe Corp.*, 171 Wn.2d 88, 113, 249 P.3d 607 (2011) (applying “the rule against surplusage, which requires this court to avoid interpretations of a statute that would render superfluous a provision of the statute”).

Moreover, the case law does not support this approach. The sale of potato processing machinery was not for resale in *Idaho Sheet Metal Works, Inc.*, 383 U.S. at 190. Nor were the sale of tires to truck fleets by Steepleton General Tire Co., *id.* at 195, the industrial trash removal services in *Schultz*, 418 F.2d at 1019, or the industrial window cleaning

services in *Martino*, 327 U.S. at 173. However, because they were not “retail” sales, none of these employers qualified for the RSE.

**6. The Federal Cases Cited By AlSCO Are Inapposite.**

AlSCO also relies on a few federal court cases holding the retail sales exemption applicable to companies that provide services to other businesses. In *Alvarado v. Corporate Cleaning Service, Inc.*, 782 F.3d 365 (7th Cir. 2015), the court affirmed a district court decision holding the RSE applicable to a window washing business (“CCS”) that services principally high-rise buildings. The court focused on the fact that the window washers are compelled to work highly variable hours, due to weather, seasons, and other concerns. *Id.* at 371 (“Nowhere does the [DOL] engage with the primary reason for treating CCS's window washers as commission workers—their irregular work hours.”) This rationale is absent here, where the RSRs work regular, year-round hours set by management. Moreover, as found by the district court in *Alvarado*, more than 30% of CCS’s gross sales were to residential apartment buildings, albeit not directly to individual tenants, with comparable levels of sales to commercial office buildings. *Alvarado v. Corporate Cleaning Serv., Inc.*, 719 F. Supp. 2d 935, 938 (N.D. Ill. 2010). Thus, unlike AlSCO, CCS’s services were available to both residential and business customers. And nothing in the opinions suggest that CCS provided its services only pursuant to long-term contracts, in quantities greater than the average

consumer would purchase, or turned away potential retail customers as is the case with AlSCO. Thus, because CCS apparently provides the same services on identical bases to both business and residential customers, its case is distinguishable from the facts presented here.

Similarly, in *English v. Ecolab, Inc.*, 2008 WL 878456 (S.D.N.Y. 2008), the district court was significantly motivated by “practical considerations” absent from this case. The exterminators in that case were free to set their own schedules, which would allow them to “game” the overtime system by overloading hours in one week; also they were “skilled” workers, so the company could not simply hire more workers to avoid overtime. *Id.* at \*15-16. Here, the AlSCO RSRs are unspecialized blue collar workers whose schedules are controlled by the company, and who have no ability to manipulate their customer assignments or schedules. If anything, the moral hazard runs the other way in this case, where AlSCO cut the route assignments and work hours of RSRs who did not agree to a new commission system that would allow them to be worked more than 40 hours in a week without any overtime pay.<sup>11</sup>

Also like *Alvarado*, the *English* court largely discounts the requirement that the employer be a retail establishment and wrongly concludes that the primary focus of the exemption is on the compensation

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<sup>11</sup> The *English* court argues that overtime eligibility (and indeed hourly pay in general) promotes inefficiency. *Id.*, \*16 & n.26. Of course, employers have a variety of disciplinary tools at their disposal to deal with unproductive or inefficient workers. Misclassifying workers and denying statutory overtime pay is not, and should not be, one of those tools.

scheme. *Id.* at \*14. This is contrary to both general principles of statutory construction (*e.g.*, the need to give force and effect to all the words of a statute) and to principles specifically applicable to the FLSA and the MWA (that exemptions from the law should be narrowly construed).

Indeed, the court's near-exclusive emphasis on the manner of compensation disregards the legislature's deliberate choice to condition the RSE not just on the commission basis of pay, but on the retail nature of the employer's business. If the legislature's primary concern was with the manner of compensation, inclusion of the retail criterion would not only have been unnecessary, but counterproductive. A commissioned salesperson for a wholesaler or distributor would face the same week-to-week vagaries in sales volume and hours worked, and the same effort and reward incentives, as a salesperson for a car dealership or department store. It may even be good policy to drop the retail requirement and make the exemption dependent solely on the basis of pay. However, that is not what either Congress or the Washington legislature did, and the courts must enforce the policy choices that the legislature has made.

In addition, *English*, like *Alvarado*, improperly fails to give any deference to the DOL's expert interpretation of the RSE and dismisses almost the entirety of the DOL regulations out of hand. *Id.* at \*5-8.<sup>12</sup> As a

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<sup>12</sup> The court's rationale for disregarding the regulations is itself defective. The court reasoned that the regulations could be discounted because they were based on the repealed exemption at § 13(a)(2) of the FLSA (former 29 U.S.C. § 213(a)(2)), rather than the current § 7(i) exemption, which is the model for the MWA retail sales exemption. *See English, supra* at \*4, 14. However, while the two exemptions did vary in important ways,

direct result of this disregard, the *English* court is able to engage in a form of analytical “cherry-picking” of certain characteristics of Ecolab’s business to support its conclusions. For example, the court highlights the fact that the sales are “at the end of the stream of commerce” (*i.e.*, are not for resale), and “serve the everyday needs of the community” for clean restaurants, supermarkets, and hotels. *English, supra*, \*15. However, the court disregards other aspects of Ecolab’s business, like the provision of high-volume services almost exclusively to business customers under long-term contracts, that are not characteristic of retail establishments as understood both in common usage and the DOL regulations. *E.g.*, 29 C.F.R. § 779.318 (“Typically a retail or service establishment is one which sells goods or services to the general public..., disposing in small quantities of the products and skills of such organization....”).

Moreover, even the court’s assertion that Ecolab serves the needs of the community by keeping its restaurants and hotels pest-free proves too much. On the one hand, in a complex consumer society, virtually every economic service – retail or wholesale, private or commercial – can

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nothing in the history of the FLSA supports the conclusion that the meaning of “retail or service establishment” differed between the two provisions or should be applied any less stringently to the latter than the former. Indeed, when Congress added the § 7(i) exemption in 1961, it intended the definition from the § 13(a)(2) exemption would apply. *Gieg v. DDR, Inc.*, 407 F.3d 1038, 1047 (9th Cir. 2005) (citing 29 C.F.R. § 779.411). Thus, to the extent that case law or regulations under § 13(a)(2) address the question of whether a business is a retail or service establishment, those still apply with full force under § 7(i). Moreover, the *English* court’s reasoning is particularly inapposite with respect to interpretation of the Washington MWA, because the Washington legislature adopted the RSE, complete with the retail establishment requirement, in 1997 and L&I adopted the supporting DOL regulations in 2002, both long after the repeal of FLSA § 13(a)(2).

be said to “serve the everyday needs of the community.” On the other hand, maintaining a pest-free restaurant or hotel really serves primarily the interest of their proprietors. Undeniably, the public wants to eat and sleep at establishments free of vermin. But if a particular eatery or motel gets infested because they have not hired Ecolab, its customers will simply move on to the next restaurant or motel. The loss will fall on the business, not the consumer. This (in addition to the considerations of volume and contractual term) distinguishes Ecolab’s services from the pest company serving private homeowners on an as-needed basis; *i.e.*, a member of the general public whose home is overrun with vermin has nowhere else to go to eat or sleep.

Similarly here, members of the general public may derive some benefit from Alscó’s provision of clean mats, linens, and uniforms to its hospitality industry and other customers, although the public benefits from Alscó’s rentals to automotive service and industrial sector customers are less clear. But it is ultimately the businesses that get the primary benefit, by avoiding the loss of customers that would be prompted by a dirty premises or staff.

It also is worth noting that the *English* case was settled while on appeal. See *Clark v. Ecolab, Inc.*, 2010 WL 1948198 (S.D.N.Y. 2010) (approving \$6 million settlement of *English* and two other class actions against Ecolab). Other cases against Ecolab show that the applicability of

the RSE to its business model is still very much unsettled. *See Cancilla v. Ecolab, Inc.*, 2013 WL 1365939 (N.D. Cal. Apr. 3, 2013) (denying Ecolab's summary judgment motion asserting the RSE).<sup>13</sup> The district court's opinion in *English* is based on flawed and inapposite legal reasoning and does not provide a sound basis for disregarding either the DOL regulations expressly adopted by L&I in 2002 or the established Supreme Court and Court of Appeals precedents in *Idaho Sheet Metal, Martino, Acme Car*, and *Instant Handling* cited above.

AlSCO also cites briefly to a few other federal court cases, all of which are factually distinguishable and none of which support the characterization of AlSCO as a retail establishment. *Collins v. Horizon Training Centers, L.P.*, held that a company providing computer training to private persons and employees of other businesses was a retail establishment for purposes of the FLSA. 2003 WL 22388448 (N.D. Tex. Sept. 30, 2003). The court concluded that sales of computer training to other companies' employees could be considered retail when it was "undisputed" the company provided the same training "to the general public," and where plaintiffs did not dispute the testimony of the company's president "that the sale of Horizons' services is considered retail in its industry." *Id.*, at 6, 8.

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<sup>13</sup> *Cancilla* also settled following certification of an FLSA collective action, resulting in a \$7.5 million common fund for distribution among approximately 1,075 class members. *Cancilla v. Ecolab, Inc.*, 2015 WL 4760318 (N.D. Cal. Aug. 12, 2015).

Similarly, in *Wirtz v. Modern Transmoval, Inc.*, the court found that a trash removal firm was a retail establishment where:

Its sales are numerous and relatively small amounts of service are rendered at each stop. The service is offered to the general public in a limited geographical area at uniform rates with no discounts of the wholesale type. There is no requirement that customers utilize Modern's service regularly or in any minimum quantity and there is no requirement that the customer have status as a manufacturer, retailer or other commercial entity.

323 F.2d 451, 466 (4th Cir. 1963). In addition, several third party witnesses testified that Modern's sales were considered retail within the industry. *Id.* at 467. Here, by contrast, AlSCO does not make its services available to the general public as well as its business customers, has substantial, threshold contract terms and service requirements, and none of its managers (or any other witness) claimed that any of its sales are "considered retail in its industry." *See* CP 571-72; CP 170; CP 206-07.

Finally, *La Parne v. Monex Deposit Co.*, involved a company that sold precious metals to the public, and is readily distinguishable on its facts. 714 F. Supp. 2d 1035 (C.D. Cal. 2010). Unlike AlSCO, "Monex clearly sells goods to the general public, as it advertises on television and a public website," and registered its account representatives as telemarketers. *Id.* at 1043, 1037. The main question in that case, not present here, was whether its sales were for resale, where many customers bought the metals for investment purposes. *Id.* at 1040-42.

**7. The RSRs' Income Is Not From A Bona Fide Commission Rate.**

In addition to not qualifying as a retail establishment, AlSCO does not pay the RSRs a bona fide commission rate. Plaintiffs agree that the RSRs are paid more than one and a half times the minimum wage and that nominally more than half their compensation is from commissions. However, RCW 49.46.130(3) requires that the commission payments be derived from a "bona fide" commission rate. Here, because the RSRs do not control their customer lists or schedules and do not have the ability to increase the vast majority of their pay by working longer, harder, or more effectively, the pay system is not a bona fide commission plan that entitles AlSCO to avoid paying overtime.<sup>14</sup> See *Cancilla*, 2013 WL 1365939, \*2 (commission plan might not be bona fide for purposes of RSE where employees did not have the "ability to increase their compensation" because the "vast majority" of [their] 'commission' earnings" came from long-term monthly service contracts over which they had no control). For this reason as well, AlSCO fails to meet the requirements for the RSE.

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<sup>14</sup> There is no dispute about the RSRs' inability to increase the bulk of their 'commission' compensation. RSR payroll data for the period October 2009 through March 2013 reflects that commissioned RSRs were paid over \$2.6 million in "route commissions," which are based on the rental invoice volume of their routes, but less than \$87,000 in sales commissions and other bonuses. CP 19-20.

**C. The Superior Court Correctly Held That Also Cannot Retroactively Take Advantage Of The Employer-Friendly Fluctuating Work Week Method For Calculating Damages Where It Misclassified The RSRs And Did Not Pay Them Any Contemporaneous Overtime.**

The trial court correctly concluded that an employer that has misclassified its employees and not paid them overtime may not take advantage of the employer-friendly “fluctuating workweek” (“FWW”) method of calculating overtime for back pay damages. Under the FWW method, the employee’s actual earnings are spread out over all hours worked, and the employee receives only a half-time premium for hours over 40. Instead, the trial court correctly held that the standard, or statutory, method should be used, under which employees receive time and half pay for every hour over 40. *See* RCW 49.46.130(1); WAC 296-128-550 (“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 trial court’s decision and method of calculation follow *Fiore v. PPG Industries, Inc.*, 169 Wn. App. 325, 344-47, 279 P.3d 972 (2012), and *Monahan v. Emerald Performance Materials, LLC*, 705 F. Supp. 2d 1206, 1217 (W.D.Wash. 2010), in which the courts held that employers cannot retroactively use the FWW method to reduce their back pay liability in misclassification cases because the two prerequisites for use of that method have not been met: 1) there was no contemporaneous payment

of overtime; and 2) there was no lawful agreement that the actual pay would cover all hours worked.

A plethora of federal court decisions under the FLSA have reached the same result, including in cases, like this one, that involved base-plus-commission pay.<sup>15</sup> These courts have recognized that retroactive application of the FWW would provide an incentive for employers to misclassify employees by reducing the potential liability for doing so, contradict the liberal application of the wage laws to protect workers, and undermine the purpose of the overtime provision, which is to encourage employers to hire more workers rather than paying the time and a half overtime premium. The trial court did not err in following these cases.

The effect of the FWW approach would be to greatly reduce the overtime pay owed to the misclassified employee for two reasons. First, the FWW approach spreads the compensation received by an employee across all hours worked in that week to determine the employee's regular rate of pay, so the employee's regular rate of pay actually decreases as he works more hours. Second, the overtime premium is set at one-half that regular rate for any hours worked over 40, rather than time-and-a-half.

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<sup>15</sup> E.g., *Wallace v. Countrywide Home Loans, Inc.*, 2013 WL 1944458 (C.D. Cal. Apr. 29, 2013) (base plus bonus/commission compensation); *Klein v. Torrey Point Group*, 979 F. Supp. 2d 417, 422 (S.D.N.Y. 2013) (base plus commission basis); *Blotzer v. L-3 Communications Corp.*, 2012 WL 6086931, at \*11 (D. Ariz. Dec. 6, 2012); *McCoy v. North Slope Borough*, 2013 WL 4510780 (D. Alaska Aug. 26, 2013); *Zulewski v. Hershey Co.*, 2013 WL 633402 (N.D. Cal. Feb. 20, 2013); *Hasan v. GPM Investments, LLC*, 896 F. Supp. 2d 145 (D. Conn. 2012); *Costello v. Home Depot USA, Inc.*, 944 F. Supp. 2d 199 (D. Conn. 2013); *Stultz v. J.B. Hunt Transport, Inc.*, 2014 WL 3708807 (E.D. Mich. July 28, 2014).

Thus, use of the FWW method can reduce overtime compensation by more than 70% over the standard method. *See Blotzer*, 2012 WL 6086931, at \*11 (citing cases).<sup>16</sup>

**1. The Trial Court's Decision Is Supported by *Fiore* And *Monahan*.**

As here, the defendant in *Fiore* argued that the FWW should be used to calculate overtime owed to a worker who had been misclassified as exempt. The Court of Appeals rejected defendant's argument. The court held that there are two prerequisites to application of the fluctuating workweek method under the MWA. First, it must be "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." *Id.* at 344 (quoting L&I Admin. Policy ES.A.8.1, at 5). Second, the employer must contemporaneously pay the overtime wages owed. *Id.* at 345-47. Where either prerequisite is not met, the regular rate of pay and overtime premium must be calculated by the statutory method, under which the regular rate of pay is calculated by dividing compensation for the week by 40 and the overtime premium is one and half times the regular rate of pay for each hour over 40.

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<sup>16</sup> For example, under the fluctuating workweek method, if an employee is paid \$900 for a week in which he worked 45 hours, his regular rate of pay would be \$20/hour (\$900/45 hours) and his overtime premium would be \$10/hour. If he instead worked 50 hours in that week, his regular rate of pay would be only \$18/hour and his overtime premium rate would be \$9/hour. By contrast, under the standard method, his regular rate of pay would be \$22.50 (\$900/40 hours) and his overtime rate would be \$33.75, regardless of the number of hours worked.

Put another way, the *Fiore* court held that the fluctuating workweek method cannot be applied retroactively to reduce the amount of overtime pay owed to an employee when the employee was misclassified as exempt and there was no contemporaneous payment of overtime. *Id.* at 347. The “flexible work week method *cannot be used to calculate overtime retroactively* (where it had not been paid contemporaneously with the overtime work) for the purposes of determining damages under Washington State law” *Id.* at 346 (emphasis added)(quoting *Monahan*, 705 F. Supp. 2d at 1217).

In this case, there is no dispute that the RSRs were not paid any overtime wages contemporaneously with the overtime work. Therefore, the trial court properly calculated the overtime wages due to the class members using the statutory method.

*Fiore* followed *Monahan*, which in turn cites other federal cases to the same effect. There, the court also held that the fluctuating workweek method cannot be applied retroactively, stating:

Here, because Emerald did not pay plaintiffs any more for overtime hours (hours worked in excess of 40 hours each week) the flexible work week method of payment for overtime hours at half the regular rate would give way to the predominant rate of compensation at time-and-a-half. This approach has been adopted by District Courts around the country.... The Court's review of these cases, to include *Overnight Motor Transport Co. v. Missel*, 316 U.S. 572, 62 S.Ct. 1216, 86 L.Ed. 1682 (1942), and its consideration of the background and policy of the FLSA, convinces it that the flexible work week method cannot be used to calculate overtime retroactively (where it has not been paid

contemporaneously with the overtime work) for the purposes of determining damages under Washington State law. The plaintiffs are entitled to pay at the rate of time-and-a-half for every hour of overtime time worked during the period of time covered by plaintiffs' claims.

705 F. Supp. 2d at 1216-1217 (citations omitted). *Monahan* went on to explain that the fluctuating workweek can be used only when “all the legal prerequisites” for its application have been met, that one prerequisite is “payment of the mandatory 50% overtime premium contemporaneously with payment of the employee’s regular straight time pay,” and that when this contemporaneous payment has not occurred, the “‘statutory’ method of multiplying the employee’s regular hourly rate by 1.5 and then by the number of hours worked over 40 in each work week is the applicable overtime pay computation method.” *Id.* See also *Stultz, supra*.

**2. Recent Federal Case Law Interpreting The FLSA Supports Use Of The Standard, Rather Than FWW, Method In Misclassification Cases.**

Numerous other federal court decisions have rejected retroactive use of the fluctuating workweek methodology in misclassification cases for similar reasons as *Fiore* and *Monahan*. See fn.15, *supra*; see also *McCoy v. North Slope Borough*, 2013 WL 4510780 (D. Alaska Aug. 26, 2013); *Brown v. Nipper Auto Parts & Supplies, Inc.*, 2009 WL 1437836 (W.D. Va. May 21, 2009); *In re Texas EZPawn Fair Labor Standards Act Litigation*, 633 F. Supp. 2d 395 (W.D. Tex. 2008).<sup>17</sup> Although these cases

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<sup>17</sup> The federal courts have not all agreed on this issue. However, as the district court in *Wallace* noted, “[m]ore recent opinions” have criticized retroactive application of the FWW method in misclassification cases.” 2013 WL 1944458, at \*5. AlSCO’s assertion that the federal courts have “consistently” upheld use of the FWW for calculating

arise under the FLSA, they are particularly relevant here, because this Court relied upon federal law in approving use of the FWW under the MWA in the first place. *See Inmiss*, 141 Wn.2d at 525-32 (relying upon 29 C.F.R. § 778.114 and recognizing that L&I followed the federal approach in promulgating WAC 296-128-550).<sup>18</sup>

These cases have recognized that retroactive application of the FWW is inconsistent with the core policies of the FLSA, which are shared by the MWA, and have identified at least four principles, equally applicable to this case, for rejecting use of the FWW methodology.

First, when an employee has been misclassified, the misclassification negates any possibility of a legitimate agreement to accept the reduced regular rate of pay and lower overtime premium that occur under the fluctuating workweek approach. As one court explains:

The significance of the employee's lack of knowledge of nonexempt status cannot be overstated. The fundamental assumption underpinning the FWW is that it is fair to use it to calculate overtime pay because the employee consented to the payment scheme. But in the context of an FLSA misclassification suit when consent is inferred from the employee's conduct, that conduct will always, by definition, have been based on the false assumption that he was not entitled to overtime compensation.

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damages in commissioned misclassification cases is not only wrong, but contrary to the weight of authority. App. Br. at 21.

<sup>18</sup> In *Inmiss*, 141 Wn.2d at 517, this Court held that the fluctuating workweek method could be used to determine the regular rate of pay and overtime premium where the employer paid contemporaneous overtime to its salaried employees. *Inmiss* did not address retroactive use of the FWW. Moreover, four Justices dissented in *Inmiss* and would have held that the FWW method was not permissible under the MWA and would undermine the Act's policy of promoting full employment. 141 Wn.2d at 538. This split vote confirms the controversial nature of the method under Washington law and the narrow extent to which it should be applied.

*Ransom v. M. Patel Enter., Inc.*, 825 F. Supp. 2d 799, 810 n.11 (W.D.Tex. 2011).

Other courts have similarly pointed out that any such agreement, even if proven, would be unlawful and unenforceable because an employee cannot legally waive his right to overtime pay under the law. *E.g.*, *Costello*, 944 F. Supp. 2d at 207 (citing cases). Such an agreement to waive statutorily required overtime pay is as unenforceable under the MWA as it is under the FLSA. *See* RCW 49.46.090(1).

Second, the case law and regulations that permit use of the FWW method require contemporaneous payment of the half-time overtime premium, and therefore can operate only prospectively. Where there was no contemporaneous payment of overtime, a fundamental element for application of the FWW is missing. *E.g.*, *Scott v. OTS, Inc.*, 2006 WL 870369, \*13 (N.D. Ga. Mar. 31, 2006) (declining to apply FWW retroactively because of failure to pay contemporaneous overtime, despite finding that parties agreed salary would cover all hours worked).

Third, the FWW approach provides an incentive for employers to misclassify employees by reducing the potential liability for doing so, contrary to the principle that the wage laws should be interpreted liberally to protect workers. “[A]ssessing damages using the fluctuating workweek method provides a perverse incentive to employers to misclassify workers as exempt, and a windfall in damages to an employer who has been found

liable for misclassifying employees under the FLSA.” *Perkins v. Southern New England Telephone Co.*, 2011 WL 4460248, at \*4 n.5 (D. Conn. Sept. 27, 2011) (quoted in *Costello*, 944 F. Supp. 2d at 208). As the court explained in *Russell v. Wells Fargo*:

If Defendants’ position were adopted, an employer, after being held liable for FLSA violations, would be able unilaterally to choose to pay employees their unpaid overtime premium under the more employer-friendly of the two calculation methods. Given the remedial purpose of the FLSA, it would be incongruous to allow employees, who have been illegally deprived of overtime pay, to be shortchanged further by an employer who opts for the discount accommodation intended for a different situation.

672 F. Supp. 2d 1008, 1014 (N.D. Cal. 2009). *See also Zulewski*, 2013 WL 633402, at \*5; *Blotzer*, 2012 WL 6086931, at \*12. It is well-established that application of the MWA is informed by the same liberal construction and remedial purpose as the FLSA. *See Anfinson*, 174 Wn.2d at 870.

Finally, retroactive application of the FWW undermines the employment spreading purpose of the overtime pay requirement. *See Zulewski*, 2013 WL 633402, at \*5; *Blotzer*, 2012 WL 6086931, at \*11. Because the overtime premium is reduced under the fluctuating workweek the more hours employees work, the required incentive to hire more workers is actually *reduced* as employees work more hours. *Cf. Demetrio v. Sakuma Bros. Farms, Inc.*, 183 Wn.2d 649, 659, 355 P.3d 258 (2015) (rejecting piece rate pay scheme that would encourage workers to skip rest

breaks in part because “it incentivizes [the employer] to employ fewer employees” and thus frustrates the purpose of the wage laws and regulations ).

**3. This Case Is Not Substantively Distinguishable From *Fiore, Monahan, And The Other Federal Case Law.***

Also completely disregards *Fiore, Monahan*, and the other cases cited above in its opening brief. On reply, Plaintiffs expect that AlSCO will argue that these cases are inapposite for several overlapping reasons, none of which are correct or persuasive.

First, AlSCO may argue these cases apply to only salaried employees, rather than workers paid, as here, on a salary plus commission basis. This is flatly incorrect. The employees in *Wallace*, like the RSRs here, were paid on a base plus bonus/commission basis. 2013 WL 1944458, at \*7 n.3 & n.4. *See also Klein v. Torrey Point Group*, 979 F. Supp. 2d 417, 422 (S.D.N.Y. 2013) (analyzing applicability of FWW methodology to misclassified employees paid on base plus commission basis). *Wallace* expressly rejected the employer’s argument that the overtime premium on the commission portion of the class members’ pay should be calculated at one half the regular rate of pay, even if the fluctuating workweek approach did not retroactively apply to the base salary portion of the compensation. “Having just discussed why the FWW method should not apply here, the Court finds it imprudent to, as Plaintiffs

state, 'allow a back door application of the FWW method.'" 2013 WL 1944458, at \*7 (quoting plaintiffs' brief). The court held that retroactive application of 29 C.F.R. § 778.118, which allows for a half-time overtime premium on commission pay, was improper for the same reasons it identified with respect to salaried compensation:

For the reasons discussed above, the Court finds this regulation should not apply retrospectively where the parties have no agreement regarding overtime compensation and did not concurrently receive overtime compensation.

*Id.*, at \*7 n.4.

Moreover, the line that Alsco seeks to draw between straight salaried and base salary plus commissioned employees is a distinction without a difference, particularly where, as here, there is a hybrid salary/commission compensation structure. The MWA itself does not recognize any difference between salaried and commissioned employees for purposes of determining the regular rate of pay or the overtime premium. See RCW 49.46.130. Nor do the WACs implementing the MWA. See WAC 296-128-550 ("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."). Thus, there is no reason to treat them differently for purposes of determining the proper method for calculation of damages.

AlSCO's reliance on WAC 296-126-021, and L&I Administrative Policies ES.A.3 and ES.C.3 is equally misplaced. In the first place, these sources say nothing about how to calculate the overtime premium, either as a matter of course or for purposes of calculating damages in a misclassification case. Rather, they deal with ensuring that commissioned and piece-rate workers are paid at least the minimum wage. In addition, although these provisions make specific mention of commission and piece-rate workers, the computational formulas set forth for these workers are no different mathematically than those they apply to salaried or other non-hourly employees. For example, Administrative Policy ES.A.3 sets forth the same general rule for determining whether a non-hourly employee has been paid the minimum wage ("the employee's total weekly earnings are divided by the total weekly hours worked") as the specific rule for commissioned employees ("[t]he total wage for [the pay] period is determined by dividing the total earnings by the total hours worked"). Thus, this rule and policies provide no support for treating commissioned employees less favorably than salaried workers when determining back pay compensation in cases of misclassification.

Finally, the same principles cited above for rejecting the fluctuating workweek methodology in the context of misclassified salaried employees apply with equal force to misclassified employees paid on a base plus commission basis, including the impossibility of a lawful

agreement to waive overtime pay, the failure to pay overtime contemporaneously when due; the “perverse incentive” created by retroactive application of the FWW method, and the undermining of the job-spreading purpose of the overtime requirement. This is particularly true where, as here, the RSRs have little control over their work schedules or the amount of commission they earn because they do not control their customer lists, routes, or schedules and do not have the ability to affect their pay by working longer, harder, or more effectively. Thus, the underlying justification for application of an FWW methodology – that the employee enjoys the benefit of balancing ‘good’ and ‘bad’ weeks in terms of hours and compensation – is missing in this instance. *Cf. Hasan*, 896 F. Supp. 2d at 150 (“For a fluctuating work week arrangement to make sense to both parties, employees should offset their relative loss from a grueling work week far above forty hours with the benefit of full pay for weeks that clock-in at less than forty hours. Otherwise, employees have not bargained for anything but decreasing marginal pay as they work longer and longer hours at work.”).

Second, AlSCO also likely will argue that *Fiore*, *Monahan*, and the federal cases discussed above do not apply because they turn on the specific requirements of the federal FWW regulation, 29 C.F.R. § 778.114, which does not apply to commissioned employees. This argument fails for much the same reasons stated above.

The cited opinions do not just reject retroactive application of 29 C.F.R. § 778.114. Rather they hold that the whole concept of the fluctuating workweek cannot be applied retrospectively to reduce the overtime damages owed in a misclassification case. In doing so, they specifically discuss and distinguish the U.S. Supreme Court opinion in *Overnight Motor Transport Co. v. Missel*, 316 U.S. 572, 578, 62 S.Ct. 1216, 86 L.Ed. 1682 (1942), the case that first recognized the potential availability of the FWW method under federal law and whose holding was embodied in the federal rule.<sup>19</sup> For the reasons discussed above, they conclude that *Missel*'s recognition of the FWW cannot and should not be given retroactive application in a misclassification case. *E.g.*, *Hasan* 896 F. Supp. 2d at 147-150; *Costello*, 944 F. Supp. 2d at 206-208; *Wallace*, 2013 WL 1944458, at \*7; *Russell*, 672 F. Supp. 2d at 1016; *Zulewski*, 2013 WL 633402, at \*6. Thus, Also cannot credibly interpret these opinions as hinging on narrow grounds limited to the particular provisions of § 778.114. Rather, these cases reject retroactive application of the FWW on the basis of broad principles equally applicable to misclassified salary plus commissioned employees as to employees paid a fixed salary.<sup>20</sup>

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<sup>19</sup> Notably, *Missel* in fact rejected the employer's attempt to use the FWW method in that case because "there was no contractual limit upon the hours which petitioner could have required respondent to work for the agreed wage, had he seen fit to do so, and no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed wage." 316 U.S. at 581.

<sup>20</sup> Indeed, the focus of the federal FWW regulation on salaried employees is a matter of historical happenstance, not application of fundamental principles. The regulation was

Finally, Alscó has asserted the principles and case law relating to the FWW are irrelevant here because it is not asking for application of the fluctuating workweek methodology. This contention is not credible.

It is true that L&I Administrative Policies ES.A.8.1 and ES.A.8.2 use the word "fluctuating" only when discussing overtime computation for salaried employees. CP 1039-48; CP 1050-52. However, semantics aside, the actual mathematical application of the FWW method and the approach advocated by Alscó are identical. Both involve dividing the employees' compensation by the total hours worked in the week and calculating an overtime premium of one half the derived rate. The fact that L&I's Administrative Policies use the term "fluctuating" workweek for salaried employees but not for commissioned employees makes no difference in practical or legal application.

Moreover, as noted above, WAC 296-128-550, on which the administrative policies are based, draws no distinction between salaried and commissioned employees. Because the rule does not treat commissioned employees any different from salaried employees, the same bases for rejecting application of the FWW and requiring application of

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adopted to conform to and reflect the Supreme Court holding in *Missel*, which happened to be a salaried employee case. *See Hasan*, 896 F.Supp. 2d at 148. But nothing in the reasoning of *Missel* limits its conclusions to purely salaried employees, as opposed to employees compensated on other types of non-hourly bases. The fact that few non-salary cases have come along (and none at the Supreme Court level) to prompt DOL to explicitly expand the FWW regulation to non-salary situations is not particularly telling.

the statutory method for calculating damages exist in this case as in *Fiore* and *Monahan*.

Similarly, at the time *Fiore* was decided, the L&I policy provided virtually identical guidance regarding calculation of overtime premiums for salaried and commissioned employees.<sup>21</sup> For “Salary-fluctuating hours,” the policy provided, “The regular rate is [] obtained for each week by dividing the weekly salary by the number of hours worked each week” and “the employee is still entitled to receive an additional one-half hour’s pay for each hour over 40 in the work week.” CP 1044 (L&I Admin. Policy ES.A.8.1). For commissioned employees, the policy stated:

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.

*Id.* Thus, there is no distinction in the policy that would support treating misclassified commissioned employees less favorably (through application of the FWW) than misclassified salaried employees. Indeed, both provisions state a requirement for contemporaneous payment of overtime, demonstrating that neither they nor the WAC were designed or intended to

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<sup>21</sup> L&I amended the policies in July 2014 to add notes “to our advice on computing overtime compensation for those non-exempt workers who are paid salaries and work more than 40 hours in a work week or work fluctuating work weeks.” CP 1035-37; CP 1039-52. The policies were otherwise unchanged.

be applied retroactively in cases of misclassification, where no overtime pay has been provided.

Moreover, since *Fiore*, L&I has added provisions to both Administrative Policies ES.A.8.1 and 8.2 noting that there are three essential requirements for application of the FWW to salaried employees:

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

CP 1043, 1051. These changes follow and confirm the holding of *Fiore*, that retroactive application of the FWW method in a misclassification case is not permissible. The textual limitation of these changes to pure salaried employees is a reflection of the facts of *Fiore*, much like the federal FWW rule adopted by the DOL following *Missel*. But the principles embodied in the amendments do not logically permit the retroactive application of the FWW method, or its functional equivalent, to any misclassified employee. And here, it is beyond dispute that, at a minimum, the latter two criteria were not met; the RSRs did not receive contemporaneous payment of overtime, and there was no agreement to compensate overtime at one-half their regular hourly rate.

**4. The Cases Cited By Alsco Are Inapposite.**

The cases cited by Alsco do not provide persuasive authority for its position that the overtime damages in this case should be calculated using the “employer-friendly flexible work week method” rather than the standard method. *Monahan*, 705 F. Supp. 2d at 1215.

To begin, neither *Schwind v. EW & Assocs., Inc.*, 371 F. Supp. 2d 560 (S.D.N.Y. 2005), nor *Klinedinst v. Swift Investments, Inc.*, 260 F.3d 1251 (11<sup>th</sup> Cir. 2001), addressed the proper method for calculating damages when an employee has been misclassified as exempt. In *Schwind*, the court found that the employee was exempt under the RSE; the court calculated the employee’s regular rate of pay using total work hours as a divisor only to confirm that the rate was more than one-and-a-half times the minimum wage as required by the RSE. 371 F. Supp. 2d at 568. Similarly, in *Klinedinst*, the court held that an automobile painter paid on a “flag hour” basis was a commissioned employee for purposes of the RSE, but remanded for determination of whether his regular rate of pay exceeded the one-and-a-half times minimum rate threshold when calculated on the basis of all hours worked, rather than the flag hours paid. 260 F.3d at 1256-57. Because neither case involved retroactive calculation of damages for misclassified employees, they are inapplicable here.

The third case cited by Alsco, *Anderson v. N. Roanoke Veterinary Clinic*, also did not involve misclassified employees, but workers whose overtime pay had been improperly calculated. 1997 U.S. Dist. LEXIS

12690 (W.D. Va. Aug. 1, 1997). It was undisputed that the employees did receive contemporaneous overtime payments; the question for the court was determining damages where the employer understated the overtime rate: 1) by failing to include incentive pay in the employee's regular rate of pay; and 2) by using failed "Belo" contracts that did not adequately cover all hours worked.<sup>22</sup> The court stated that the FWW method could not be used to calculate damages, but it effectively did just that for the time period before the failed Belo contracts were implemented. *Id.*, at \*5, 9-11, (calculating regular rate of pay by dividing total compensation by total hours and awarding half-time overtime premium). After the Belo contracts were signed, the court spread the employees' incentive pay only across the 42 hours contemplated by the contracts, not across all hours worked. *Id.* at \*14. This inconsistency in the court's reasoning further undermines its relevance and persuasiveness here.

Finally, *Kaiser v. At the Beach, Inc.*, is also, by the court's own recognition, "somewhat unique" and not a "straight-forward 'misclassification case.'" 2011 WL 6826577, \*9 (N.D. Ok. Dec. 28, 2011). The employer in that case presented evidence that the salary paid to class members was only intended to cover a 5-shift, 40-hour workweek, and that it did pay the class members "certain 'overtime' payments for any

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<sup>22</sup> A Belo contract allows an employer to pay a fixed salary to a non-exempt employee for varying hours of work if sufficient time-and-a-half overtime pay is built into the salary to cover all overtime hours worked. *See* 29 U.S.C. § 207(f); 29 C.F.R. § 778.403.

extra shifts.” *Id.*, at \*10, 26. Therefore, while the employer also apparently asserted the employees were exempt, the case has more elements of a “miscalculation” case than a “misclassification” case.

In addition, *Kaiser* suffers from similar inconsistencies in analysis to those described for *Anderson* above, by first rejecting the applicability of the FWW method, but then applying the mathematically identical formula in determining damages, at least for some workweeks. *Id.*, at \*26-28. These inconsistencies are highlighted by its disparate treatment of workweeks in which employees were paid only salary versus those where they also received some bonus or commission payments. For the former weeks, the court employed the standard method to calculate overtime owed, dividing the salary by 40 hours and awarding time-and-a-half overtime for all hours worked over 40. *Id.* at 29. However, for weeks when the employees received some bonus or commission in addition to their salaries, the court employed the FWW method. *Id.* This effectively negated the court’s earlier conclusion that the FWW was not applicable. It also had the illogical impact of spreading a salary that was intended, by the employer’s own admission, to cover only 40 hours of work across a longer workweek simply because the employee also received a separate component of pay. *Id.* Indeed, the court itself recognized that “it seems incorrect and unfair to change the divisor from 40 to total hours worked in

instances where the additional compensation is only a small portion ... of the total remuneration for employment.” *Id.* at \*27.

The court’s rationale for reaching this apparently “incorrect and unfair” result is unpersuasive. Looking only at the federal regulations and a single miscalculation (not misclassification) case from the Tenth Circuit, the court concluded it could find “no authority” for using a 40 hour divisor when bonuses or commissions were part of the compensation mix. *Id.* at \*28-29. With only limited exceptions, the court did not acknowledge, much less address, other case law finding the regulations inapplicable in a misclassification context. The court therefore failed to recognize that the same principles that have led myriad courts to reject retroactive application of the FWW for misclassified salaried employees apply with full force and effect to employees paid on a salary plus commission basis. Had the *Kaiser* court applied these principles, it could have avoided its “unfair” result and recognized, as did the court in *Wallace*, that the mere presence of a commission or bonus payment does not require a “back door application of the FWW method.” 2013 WL 1944458, at \* 7.

**D. Respondents Should Be Awarded Their Fees And Costs On Appeal.**

Respondents should be awarded their reasonable attorneys’ fees and costs on appeal pursuant to RCW 49.46.090 and 49.48.030.

**V. CONCLUSION**

For the foregoing reasons, the Court should affirm the Judgment of the Superior Court.

RESPECTFULLY SUBMITTED this 28<sup>th</sup> day of October, 2015.

SCHROETER GOLDMARK & BENDER



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**DECLARATION OF SERVICE**

I, Sheila Cronan, a resident of the County of Kitsap, declare under penalty of perjury under the laws of the State of Washington that on October 28, 2015, I caused to be delivered in the manner indicated below true and correct copies of this document on the following counsel of record:

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DATED at Seattle, Washington this 28<sup>th</sup> day of October, 2015.



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Dear Supreme Court Clerk:

I attach for filing the following documents:

1. Respondents/Plaintiffs' Response to Appellant AlSCO, Inc.'s Opening Brief;
2. Respondents/Plaintiffs' Appendix (totaling 5 pages); and
3. Respondents/Plaintiffs' Appendix of Statutes, Rules, and Administrative Policies (totaling 15 pages).

Regards,

Sheila Cronan, Paralegal to  
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SUPREME COURT OF THE STATE OF WASHINGTON

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

Respondents/Plaintiffs,

v.

ALSCO, INC., a foreign corporation,

Appellant/Defendant.

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RESPONDENTS/PLAINTIFFS' APPENDIX OF STATUTES, RULES,  
AND ADMINISTRATIVE POLICIES

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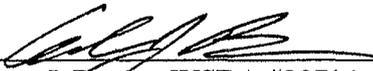
The following Appendix of Statutes, Rules, and Administrative Policies is included pursuant to RAP 10.4(c):

29 C.F.R. § 779.314	RESPAPP_STA 000001
29 C.F.R. § 779.316 through 779.319	RESPAPP_STA 000002-006
29 C.F.R. § 779.327 through 328(b)	RESPAPP_STA 000007
29 C.F.R. § 779.411	RESPAPP_STA 000008
2001 Wash. Laws c 186 §§ 1, 4	RESPAPP_STA 000009-012

DATED this 28<sup>th</sup> day of October, 2015.

Respectfully submitted,

SCHROETER GOLDMARK & BENDER

  
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**DECLARATION OF SERVICE**

I, Sheila Cronan, a resident of the County of Kitsap, declare under penalty of perjury under the laws of the State of Washington that on October 28, 2015, I caused to be delivered in the manner indicated below true and correct copies of this document on the following counsel of record:

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DATED at Seattle, Washington this 28<sup>th</sup> day of October, 2015.



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SHEILA CRONAN  
Paralegal

**ELECTRONIC CODE OF FEDERAL REGULATIONS****e-CFR data is current as of October 23, 2015**

Title 29 → Subtitle B → Chapter V → Subchapter B → Part 779 → Subpart D → §779.314

Title 29: Labor

PART 779—THE FAIR LABOR STANDARDS ACT AS APPLIED TO RETAILERS OF GOODS OR SERVICES

Subpart D—Exemptions for Certain Retail or Service Establishments

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**§779.314 "Goods" and "services" defined.**

The term "goods" is defined in section 3(l) of the Act and has been discussed above in §779.14. The Act, however, does not define the term "services." The term "services," therefore, must be given a meaning consistent with its usage in ordinary speech, with the context in which it appears and with the legislative history of the exemption as it explains the scope, the purposes and the objectives of the exemption. Although in a very general sense every business might be said to perform a service it is clear from the context and the legislative history that all business establishments are not making sales of "services" of the type contemplated in the Act; that is, services rendered by establishments which are traditionally regarded as local retail service establishments such as the restaurants, hotels, barber shops, repair shops, etc. (See §§779.315 through 779.320.) It is to these latter services only that the term "service" refers.

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Need assistance?

§ 779.312

STATUTORY MEANING OF RETAIL OR  
SERVICE ESTABLISHMENT

§ 779.312 "Retail or service establish-  
ment", defined in section 13(a)(2).

The 1949 amendments to the Act defined the term "retail or service establishment" in section 13(a)(2). That definition was retained in section 13(a)(2) as amended in 1961 and 1966 and is as follows:

A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry.

It is clear from the legislative history of the 1961 amendments to the Act that no different meaning was intended by the term "retail or service establishment" from that already established by the Act's definition, wherever used in the new provisions, whether relating to coverage or to exemption. (See S. Rept. 145, 87th Cong., first session p. 27; H.R. 75, 87th Cong., first session p. 9.) The legislative history of the 1949 amendments and existing judicial pronouncements regarding section 13(a)(2) of the Act, therefore, will offer guidance to the application of this definition.

§ 779.313 Requirements summarized.

The statutory definition of the term "retail or service establishment" found in section 13(a)(2), clearly provides that an establishment to be a "retail or service establishment": (a) Must engage in the making of sales of goods or services; and (b) 75 percent of its sales of goods or services, or of both, must be recognized as retail in the particular industry; and (c) not over 25 percent of its sales of goods or services, or of both, may be sales for resale. These requirements are discussed below in §§ 779.314 through 779.341.

MAKING SALES OF GOODS AND SERVICES  
"RECOGNIZED AS RETAIL"

§ 779.314 "Goods" and "services" de-  
fined.

The term "goods" is defined in section 3(1) of the Act and has been discussed above in § 779.14. The Act, however, does not define the term "serv-

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ices." The term "services," therefore, must be given a meaning consistent with its usage in ordinary speech, with the context in which it appears and with the legislative history of the exemption as it explains the scope, the purposes and the objectives of the exemption. Although in a very general sense every business might be said to perform a service it is clear from the context and the legislative history that all business establishments are not making sales of "services" of the type contemplated in the Act; that is, services rendered by establishments which are traditionally regarded as local retail service establishments such as the restaurants, hotels, barber shops, repair shops, etc. (See §§ 779.315 through 779.320.) It is to these latter services only that the term "service" refers.

§ 779.315 Traditional local retail or  
service establishments.

The term "retail" whether it refers to establishments or to the sale of goods or services is susceptible of various interpretations. When used in a specific law it can be defined properly only in terms of the purposes and objectives and scope of that law. In enacting the section 13(a)(2) exemption, Congress had before it the specific object of exempting from the minimum wage and overtime requirements of the Act employees employed by the traditional local retail or service establishment, subject to the conditions specified in the exemption. (See statements of Rep. Lucas, 95 Cong. Rec. pp. 11004 and 11116, and of Sen. Holland, 95 Cong. Rec. pp. 12502 and 12506.) Thus, the term "retail or service establishment" as used in the Act denotes the traditional local retail or service establishment whether pertaining to the coverage or exemption provisions.

§ 779.316 Establishments outside "re-  
tail concept" not within statutory  
definition; lack first requirement.

The term "retail" is alien to some businesses or operations. For example, transactions of an insurance company are not ordinarily thought of as retail transactions. The same is true of an electric power company selling electrical energy to private consumers. As to establishments of such businesses,

**Wage and Hour Division, Labor**

**§ 779.317**

therefore, a concept of retail selling or servicing does not exist. That it was the intent of Congress to exclude such businesses from the term "retail or service establishment" is clearly demonstrated by the legislative history of the 1949 amendments and by the judicial construction given said term both before and after the 1949 amendments. It also should be noted from the judicial pronouncements that a "retail concept" cannot be artificially created in an industry in which there is no traditional concept of retail selling or servicing. (95 Cong. Rec. pp. 1115, 1116, 12502, 12506, 21510, 14877, and 14889; *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290; *Phillips Co. v. Walling*, 324 U.S. 490; *Kirschbaum Co. v. Walling*, 316 U.S. 517; *Durkin v. Joyce Agency, Inc.*, 110 F. Supp. 918 (N.D. Ill.) affirmed sub nom *Mitchell v. Joyce Agency, Inc.*, 348 U.S. 945; *Goldberg v. Roberts* 291 F. 2d 532 (CA-9); *Wirtz v. Idaho Sheet Metal Works*, 335 F. 2d 952 (CA-9), affirmed in 383 U.S. 190; *Telephone Answering Service v. Goldberg*, 290 F. 2d 529 (CA-1.) It is plain, therefore, that the term "retail or service establishment" as used in the Act does not encompass establishments in industries lacking a "retail concept". Such establishments not having been traditionally regarded as retail or service establishments cannot under any circumstances qualify as a "retail or service establishment" within the statutory definition of the Act, since they fail to meet the first requirement of the statutory definition. Industry usage of the term "retail" is not in itself controlling in determining when business transactions are retail sales under the Act. Judicial authority is quite clear that there are certain goods and services which can never be sold at retail. (*Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 202, rehearing denied 383 U.S. 963; *Wirtz v. Steepleton General Tire Company, Inc.*, 383 U.S. 190, 202, rehearing denied 383 U.S. 963.)

**§ 779.317 Partial list of establishments lacking "retail concept."**

There are types of establishments in industries where it is not readily apparent whether a retail concept exists and whether or not the exemption can apply. It, therefore, is not possible to give a complete list of the types of es-

tablishments that have no retail concept. It is possible, however, to give a partial list of establishments to which the retail concept does not apply. This list is as follows:

- Accounting firms.
- Adjustment and credit bureaus and collection agencies (*Mitchell v. Rogers d.b.a. Commercial Credit Bureau*, 138 F. Supp. 214 (D. Hawaii); *Mill v. United States Credit Bureau*, 1 WH Cases 878, 5 Labor Cases par. 60,992 (S.D. Calif.).
- Advertising agencies including billboard advertising.
- Air-conditioning and heating systems contractors.
- Aircraft and aeronautical equipment; establishments engaged in the business of dealing in.
- Airplane crop dusting, spraying and seeding firms.
- Airports, airport servicing firms and fixed base operators.
- Ambulance service companies.
- Apartment houses.
- Armored car companies.
- Art; commercial art firms.
- Auction houses (*Fleming v. Kenton Whse.*, 41 F. Supp. 255).
- Auto-wreckers' and junk dealers' establishments (*Bracy v. Luray*, 138 F. 2d 8 (CA-4); *Edwards v. South Side Auto Parts (Mo. App.)* 180 SW 2d 1015. (These typically sell for resale.)
- Automatic vending machinery; establishments engaged in the business of dealing in.
- Banks (both commercial and savings).
- Barber and beauty parlor equipment; establishments engaged in the business of dealing in.
- Blacksmiths; industrial.
- Blue printing and photostating establishments.
- Booking agencies for actors and concert artists.
- Bottling and bottling equipment and canning machinery; establishments engaged in the business of dealing in.
- Broadcasting companies.
- Brokers, custom house; freight brokers; insurance brokers, stock or commodity brokers.
- Building and loan associations.
- Building contractors.
- Burglar alarms; establishments engaged in furnishing, installing and repairing for commercial establishments (*Walling v. Thompson*, 65 F. Supp. 666 (S.D. Calif.)).
- Burial associations (*Gilbreath v. Daniel (C.A. 8)*, 19 WH Cases 370).
- Butchers' equipment; establishments engaged in the business of dealing in.
- Chambers of Commerce.
- Chemical equipment; establishments engaged in the business of dealing in.

- Clubs and fraternal organizations with a select or restricted membership.
- Common and contract carriers; establishments engaged in providing services, fuel, equipment, or other goods or facilities for the operation of such carriers (*Idaho Sheet Metal Works v. Wirtz*, 383 U.S. 190, rehearing denied 383 U.S. 903; *Wirtz v. Steepleton General Tira Co., Inc.* 383 U.S. 190, rehearing denied 383 U.S. 903; *Boutell v. Whaling*).
- Common carrier stations and terminals.
- Construction contractors.
- Contract Post Offices.
- Credit companies, including small loan and personal loan companies (*Mitchell v. Kentucky Finance Co.*, 359 U.S. 290).
- Credit rating agencies.
- Dentists' offices.
- Dentists supply and equipment establishments.
- Detective agencies.
- Doctors' offices.
- Dry cleaners (see 95 Cong. Rec., p. 12503 and §779.337 (b) of this part).
- Drydock companies.
- Drydock
- Dye houses, commercial (*Walling v. Kerr*, 47 F. Supp. 852 (E.D. Pa)).
- Duplicating, addressing, mailing, mail listings, and letter stuffing establishments (*Goldberg v. Roberts d.b.a. Typing and Mailing Unlimited*, 15 WH Cases 100, 42 L.C. par. 31,128 (CA-9; *Durkin v. Shone*, 112 F. Supp. 375 (E.D. Tenn.); *Hanzley v. Hooven Letters*, 44 N.Y.S. 2d 398 (City Ct. N.Y. 1943).
- Educational institutions (for express exclusion see §779.337(b)).
- Electric and gas utilities (*Mesker Cooperative Light & Power Assn. v. Phillips*, 158 F. 2d 698 (CA-8); *New Mexico Public Service Co. v. Engel*, 145 F. 2d 636 (CA-10); *Brown v. Minngas Co.*, 51 F. Supp. 363 (D. Minn.)).
- Electric signs; establishments engaged in making, installing and servicing.
- Elevators; establishments engaged in repairing (cf. *Muldowney v. Seaberg Elevator Co.*, 39 F. Supp. 275 (E.D.N.Y.)).
- Employment Agencies (*Yunker v. Abbye Employment Agency, Inc.*, 32 N.Y.S. 2d 715 (N.Y.C. Munic. Ct. 1942)).
- Engineering firms.
- Factors.
- Filling station equipment; establishments engaged in the business of dealing in.
- Finance companies (*Mitchell v. Kentucky Finance Co.*, 359 U.S. 290).
- Flying schools.
- Gambling establishments.
- Geological surveys; firms engaged in making.
- Heating and air conditioning systems contractors.
- Hospital equipment (such as operating instruments, X-ray machines, operating tables, etc.); establishments engaged in the business of dealing in.
- Insurance; mutual, stock and fraternal benefit, including insurance brokers, agents, and claims adjustment offices.
- Income tax return preparers.
- Investment counseling firms.
- Jewelers' equipment; establishments engaged in the business of dealing in.
- Job efficiency checking and rating; establishments engaged in the business of supplying.
- Labor unions.
- Laboratory equipment; establishments engaged in the business of dealing in.
- Landscaping contractors.
- Laundries (see 95 Cong. Rec. p. 12503 and §779.337 (b) of this part).
- Laundry; establishments engaged in the business of dealing in commercial laundry equipment.
- Lawyers' offices.
- Legal concerns engaged in compiling and distributing information regarding legal developments.
- License and legal document service firms.
- Loan offices (see credit companies).
- Loft buildings or office buildings, concerns engaged in renting and maintenance of (*Kirschbaum v. Walling*, 318 U.S. 517; Statement of Senator Holland, 95 Cong. Rec., p. 12505).
- Machinery and equipment, including tools—establishments engaged in selling or servicing of construction, mining, manufacturing and industrial machinery, equipment and tools (*Roland Electric Co. v. Walling*, 328 U.S. 657; *Guess v. Montague*, 140 F. 2d 500 (CA-4); cf. *Walling v. Thompson*, 65 F. Supp. 686 (S.D. Calif.)).
- Magazine subscription agencies (*Wirtz v. Keystone Serv.* (C.A. 5), 418 F. 2d 249).
- Medical and dental clinics.
- Medical and dental laboratories.
- Medical and dental laboratory supplies; establishments engaged in the business of dealing in.
- Messenger; firms engaged in furnishing commercial messenger service (*Walling v. Allied Messenger Service*, 47 F. Supp. 773 (S.D.N.Y.)).
- Newspaper and magazine publishers.
- Oil well drilling; companies engaged in contract oil well drilling.
- Oil well surveying firms (*Straughn v. Schlumberger Well Surveying Corp.*, 72 F. Supp. 511 (S.D. Tex.)).
- Packing companies engaged in slaughtering livestock (*Walling v. Peoples Packing Co.*, 132 F. 2d 236 (CA-10)).
- Painting contractors.
- Pharmacists' supplies; establishments engaged in the business of dealing in.
- Photography, commercial, establishments engaged in.
- Plumbers' equipment; establishments engaged in the business of dealing in.
- Plumbing contractors.
- Press clipping bureaus.

## Wage and Hour Division, Labor

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Printers' and lithographers' supplies; establishments engaged in the business of dealing in.

Printing and binding establishments (*Casa Baldrige, Inc. v. Mitchell*, 214 F. 2d 703 (CA-1)).

Protection and Shopping services for industry; establishments engaged in supplying (*Durkin v. Joyce Agency, Inc.*, 110 F. Supp. 918 (N.D. Ill.) affirmed sub nom. *Mitchell v. Joyce Agency, Inc.*, 348 U.S. 945).

Quarries (*Walling v. Parlee*, 3 WH Cases 543, 7 Labor Cases, par. 61,721 (M.D. Tenn.)).

Radio and television broadcasting stations and studios.

Ready-mix concrete suppliers.

Real estate companies.

Roofing contractors.

Schools (except schools for mentally or physically handicapped or gifted children): (All now excluded, see § 779.337(b)).

School supply distributors.

Security dealers.

Sheet metal contractors.

Ship equipment, commercial; establishments engaged in the business of dealing in.

Shopping analysts services.

Siding and insulation contractors.

Sign-painting shops.

Special trade contractors (construction industry).

Stamp and coupon redemption stores.

Statistical reporting, business and financial data; establishments engaged in furnishing.

Store equipment; establishments engaged in the business of dealing in.

Tax services.

Telegraph and cable companies.

Telephone companies; (*Schmidt v. Peoples Telephone Union of Maryville, Mo.*, 138 F. 2d 13 (CA-8)).

Telephone answer service; establishments engaged in furnishing. (*Telephone Answering Service v. Goldberg*, 15 WH Cases 67, 4 L.C. par. 31,104 (CA-1)).

Title and abstract companies.

Tobacco auction warehouses (*Fleming v. Kenton Loose Leaf Tobacco Warehouse Co.*, 41 F. Supp. 255 (E.D. Ky.); *Walling v. Lincoln Loose Leaf Warehouse Co.*, 59 F. Supp. 601 (E.D. Tenn.)).

Toll bridge companies.

Trade associations.

Transportation equipment, commercial; establishments engaged in the business of dealing in.

Transportation companies.

Travel agencies.

Tree removal firms.

Truck stop establishments (*Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, rehearing denied 383 U.S. 963; *Wirtz v. Staepleton General Tire Co., Inc.*, 383 U.S. 190, rehearing denied 383 U.S. 963).

Trust companies.

Undertakers' supplies; establishments engaged in the business of dealing in.

Wagers, establishments accepting, as business in which they are engaged.

Warehouse companies; commercial or industrial (*Walling v. Public Quick Freezing and Cold Storage Co.*, 62 F. Supp. 924 (S.D. Fla.)).

Warehouses equipment and supplies; establishments engaged in the business of dealing in.

Waste removal contractors.

Watchmen, guards and detectives for industries; establishments engaged in supplying (*Walling v. Sondock*, 132 F. 2d 77 (CA-5); *Walling v. Wattam*, 3 WH Cases 728, 8 Labor Cases, par. 62,023 (W.D. Tenn., 1943); *Walling v. Lum*, 4 WH Cases 465, 8 Labor Cases, par. 62,185 (S.D. Miss., 1944); *Walling v. New Orleans Private Patrol Service* 57 F. Supp. 143 (E.D. La., 1944); *Haley v. Central Watch Service*, 4 WH Cases 168, 8 Labor Cases, par. 62,002 (N.D. Ill., 1944)).

Water supply companies (*Reynolds v. Salt River Valley Water Users Assn.*, 143 F. 2d (863 (CA-9)).

Water well drilling contractors.

Window displays; establishments engaged in the business of dealing in.

Wrecking contractors.

### § 779.318 Characteristics and examples of retail or service establishments.

(a) Typically a retail or service establishment is one which sells goods or services to the general public. It serves the everyday needs of the community in which it is located. The retail or service establishment performs a function in the business organization of the Nation which is at the very end of the stream of distribution, disposing in small quantities of the products and skills of such organization and does not take part in the manufacturing process. (See, however, the discussion of section 13(a)(4) in §§ 779.346 to 779.350.) Such an establishment sells to the general public its food and drink. It sells to such public its clothing and its furniture, its automobiles, its radios and refrigerators, its coal and its lumber, and other goods, and performs incidental services on such goods when necessary. It provides the general public its repair services and other services for the comfort and convenience of such public in the course of its daily living. Illustrative of such establishments are: Grocery stores, hardware stores, clothing stores, coal dealers, furniture stores, restaurants, hotels, watch repair establishments, barber

**§ 779.319**

shops, and other such local establishments.

(b) The legislative history of the section 13(a)(2) exemption for certain retail or service establishments shows 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. A precise line between such articles and those which can never be sold at retail cannot be drawn. But a few characteristics of items like small trucks and farm implements may offer some guidance; their use is very widespread as is that of consumer goods; they are often distributed in stores or showrooms by means not dissimilar to those used for consumer goods; and they are frequently used in commercial activities of limited scope. The list of strictly commercial items whose sale can be deemed retail is very small and a determination as to the application of the retail exemption in specific cases would depend upon the consideration of all the circumstances relevant to the situation. (*Idaho Sheet Metal Works, Inc. v. Wirtz* and *Wirtz v. Steepleton General Tire Company, Inc.*, 383 U.S. 190, 202, rehearing denied 383 U.S. 963.)

[36 FR 5856, Apr. 9, 1970, as amended at 36 FR 14466, Aug. 6, 1971]

**§ 779.319 A retail or service establishment must be open to general public.**

The location of the retail or service establishment, whether in an industrial plant, an office building, a railroad depot, or a government park, etc., will make no difference in the application of the exemption and such an establishment will be exempt if it meets the tests of the exemption. Generally, however, an establishment, wherever located, will not be considered a retail or service establishment within the meaning of the Act, if it is not ordinarily available to the general consuming public. An establishment, however, does not have to be actually frequented by the general public in the sense that the public must actually visit it and make purchases of goods or services on the premises in order to be considered as available and open to the

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general public. A refrigerator repair service shop, for example, is available and open to the general public even if it receives all its orders on the telephone and performs all of its repair services on the premises of its customers.

**§ 779.320 Partial list of establishments whose sales or service may be recognized as retail.**

Antique shops.  
Auto courts.  
Automobile dealers' establishments.  
Automobile laundries.  
Automobile repair shops.  
Barber shops.  
Beauty shops.  
Bicycle shops.  
Billiard parlors.  
Book stores.  
Bowling alleys.  
Butcher shops.  
Cafeterias.  
Cemeteries.  
China, glassware stores.  
Cigar stores.  
Clothing stores.  
Coal yards.  
Confectionery stores.  
Crematories.  
Dance halls.  
Delicatessen stores.  
Department stores.  
Drapery stores.  
Dress-suit rental establishments.  
Drug stores.  
Dry goods stores.  
Embalming establishments.  
Farm implement dealers.  
Filling stations.  
Floor covering stores.  
Florists.  
Funeral homes.  
Fur repair and storage shops.  
Fur shops.  
Furniture stores.  
Gift, novelty and souvenir shops.  
Grocery stores.  
Hardware stores.  
Hosiery shops.  
Hotels.  
Household appliance stores.  
Household furniture storage and moving establishments.  
Household refrigerator service and repair shops.  
Infants' wear shops.  
Jewelry stores.  
Liquor stores.  
Luggage stores.  
Lumber yards.  
Masseur establishments.  
Millinery shops.  
Musical instrument stores and repair shops.

**§ 779.327**

1938 and the legislative history of the 1949, 1961, and 1966 amendments to the Act pertaining to those sections in which the term "retail or service establishment" is found, particularly in the section 13(a)(2) exemption; (b) the decisions of the courts during the intervening years; and (c) the Secretary's experience in the intervening years in interpreting and administering the Act. These sources of information enable the Secretary to lay down certain standards and criteria, as discussed in this subpart, for determining generally and in some cases specifically what sales or services are recognized as retail sales or services in particular industries.

**§ 779.327 Wholesale sales.**

A wholesale sale, of course, is not recognized as a retail sale. If an establishment derives more than 25 percent of its annual dollar volume from sales made at wholesale, it clearly cannot qualify as a retail and service establishment. It must be remembered, however, that what is a retail sale for purposes of a sales tax law is not necessarily a retail sale for purposes of the statutory definition of the term "retail or service establishment". Similarly, a showing that sales of goods or services are not wholesale or are made to the ultimate consumer and are not for resale does not necessarily prove that such sales or services are recognized in the particular industry as retail. (*Wirtz v. Steepleton General Tire Co.*, 388 U.S. 190.)

**§ 779.328 Retail and wholesale distinguished.**

(a) The distinction between a retail sale and a wholesale sale is one of fact. Typically, retail sales are made to the general consuming public. The sales are numerous and involve small quantities of goods or services. Wholesale establishments usually exclude the general consuming public as a matter of established business policy and confine their sales to other wholesalers, retailers, and industrial or business purchasers in quantities greater than are normally sold to the general consuming public at retail. What constitutes a small quantity of goods depends, of course, upon the facts in the

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particular case and the quantity will vary with different commodities and in different trades and industries. Thus, a different quantity would be characteristic of retail sales of canned tomato juice, bed sheets, furniture, coal, etc. The quantity test is a well-recognized business concept. There are reasonably definite limits as to the quantity of a particular commodity which the general consuming public regularly purchases at any given time at retail and businessmen are aware of these buying habits. These buying habits set the standard for the quantity of goods which is recognized in an industry as the subject of a retail sale. Quantities which are materially in excess of such a standard are generally regarded as wholesale and not retail quantities.

(b) The sale of goods or services in a quantity approximating the quantity involved in a normal wholesale transaction and as to which a special discount from the normal retail price is given is generally regarded as a wholesale sale in most industries. Whether the sale of such a quantity must always involve a discount in order to be considered a wholesale sale depends upon industry practice. If the practice in a particular industry is such that a discount from the normal retail price is not regarded in the industry as significant in determining whether the sale of a certain quantity is a wholesale sale, then the question of whether the sale of such a quantity will be considered a wholesale sale would be determined without reference to the price. In some industries, the sale of a small quantity at a discount may also be regarded as a wholesale sale, in which case it will be so treated for purposes of the exemption. Generally, as the Supreme Court has recognized (*Wirtz v. Steepleton General Tire Co.*, 383 U.S. 1900), both the legislative history and common parlance suggest that "the term retail becomes less apt as the quantity and the price discount increases in a particular transaction."

(c) In some cases, a purchaser contracts for the purchase of a large quantity of goods or services to be delivered or performed in smaller quantities or jobs from time to time as the occasion requires. In other cases, the purchaser

### § 779.411

one and one-half times the minimum hourly rate applicable to him under section 6, and (2) more than half his compensation for a representative period (not less than 1 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 shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

There are briefly set forth in §§ 779.411 to 779.421 some guiding principles for determining whether an employee's employment and compensation meet the conditions set forth in section 7(i).

#### § 779.411 Employee of a "retail or service establishment".

In order for an employee to come within the exemption from the overtime pay requirement provided by section 7(i) for certain employees receiving commissions, the employee must be employed by a retail or service establishment. The term "retail or service establishment" is defined in section 13(a)(2) of the Act. The definition is set forth in § 779.24; its application is considered at length in subpart D of this part. As used in section 7(i), as in other provisions of the Act, the term "retail or service establishment" means an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry.

#### § 779.412 Compensation requirements for overtime pay exemption under section 7(i).

An employee of a "retail or service establishment" who is paid on a commission basis or whose pay includes compensation representing commissions need not be paid the premium compensation prescribed by section 7(a) for overtime hours worked in a workweek, provided the following conditions are met:

(a) The "regular rate" of pay of such employee must be more than one and one-half times the minimum hourly rate applicable to him under section 6, and

(b) More than half his compensation for a "representative period" (not less

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than one month) must represent commissions on goods or services.

#### § 779.413 Methods of compensation of retail store employees.

(a) Retail or service establishment employees are generally compensated (apart from any extra payments for overtime or other additional payments) by one of the following methods:

(1) Straight salary or hourly rate: Under this method of compensation the employee receives a stipulated sum paid weekly, biweekly, semimonthly, or monthly or a fixed amount for each hour of work.

(2) Salary plus commission: Under this method of compensation the employee receives a commission on all sales in addition to a base salary (see paragraph (a)(1) of this section).

(3) Quota bonus: This method of compensation is similar to paragraph (a)(2) of this section except that the commission payment is paid on sales over and above a predetermined sales quota.

(4) Straight commission without advances: Under this method of compensation the employee is paid a flat percentage on each dollar of sales he makes.

(5) Straight commission with "advances," "guarantees," or "draws." This method of compensation is similar to paragraph (a)(4) of this section except that the employee is paid a fixed weekly, biweekly, semimonthly, or monthly "advance," "guarantee," or "draw." At periodic intervals a settlement is made at which time the payments already made are supplemented by any additional amount by which his commission earnings exceed the amounts previously paid.

(b) The above listing in paragraph (a) of this section which reflects the typical methods of compensation is not, of course, exhaustive of the pay practices which may exist in retail or service establishments. Although typically in retail or service establishments commission payments are keyed to sales, the requirement of the exemption is that more than half the employee's compensation represent commissions "on goods or services," which would include all types of commissions customarily based on the goods or services

CERTIFICATION OF ENROLLMENT

HOUSE BILL 1385

Chapter 186, Laws of 2001

57th Legislature  
2001 Regular Legislative Session

TAXATION--LINEN AND UNIFORM SUPPLY SERVICES

EFFECTIVE DATE: 7/1/01

Passed by the House March 12, 2001  
Yeas 98 Nays 0

FRANK CHOPP  
Speaker of the House of  
Representatives

CLYDE BALLARD  
Speaker of the House of  
Representatives

Passed by the Senate April 10, 2001  
Yeas 43 Nays 4

BRAD OWEN  
President of the Senate

Approved May 7, 2001

GARY LOCKE  
Governor of the State of Washington

CERTIFICATE

We, Timothy A. Martin and Cynthia Zehnder, Co-Chief Clerks of the House of Representatives of the State of Washington, do hereby certify that the attached is HOUSE BILL 1385 as passed by the House of Representatives and the Senate on the dates hereon set forth.

TIMOTHY A. MARTIN  
Chief Clerk

CYNTHIA ZEHNDER  
Chief Clerk

FILED

May 7, 2001 - 1:28 p.m.

Secretary of State  
State of Washington

RESPAPP-STA 000009

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HOUSE BILL 1385

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Passed Legislature - 2001 Regular Session

State of Washington            57th Legislature            2001 Regular Session

By Representatives Reardon and Pennington; by request of Department of Revenue

Read first time 01/24/2001. Referred to Committee on Finance.

1            AN ACT Relating to excise tax treatment of linen and uniform supply  
2 services; amending RCW 82.14.020; adding a new section to chapter 82.08  
3 RCW; creating a new section; providing an effective date; and declaring  
4 an emergency.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6            NEW SECTION.    **Sec. 1.** The legislature finds that because of the  
7 mixed retailing nature of linen and uniform supply services, they have  
8 been incorrectly sited for tax purposes. As a result, some companies  
9 that perform some activities related to this activity outside the state  
10 of Washington have not been required to collect retail sales taxes upon  
11 linen and uniform supply services provided to Washington customers.  
12 The activity has aspects of both the rental of tangible personal  
13 property and retail services related to tangible personal property.  
14 This error in tax treatment provides an incentive for businesses to  
15 locate some of their functions out of state. In-state businesses  
16 cannot compete if their out-of-state competitors are not required to  
17 collect sales tax for services provided to the same customers.

18            The purpose of this act is to clarify the taxable situs and nature  
19 of linen and uniform supply services.

1        NEW SECTION.    **Sec. 2.** A new section is added to chapter 82.08 RCW  
2 to read as follows:

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

12        **Sec. 3.** RCW 82.14.020 and 1997 c 201 s 1 are each amended to read  
13 as follows:

14        For purposes of this chapter:

15        (1) A retail sale consisting solely of the sale of tangible  
16 personal property shall be deemed to have occurred at the retail outlet  
17 at or from which delivery is made to the consumer;

18        (2) A retail sale consisting essentially of the performance of  
19 personal business or professional services shall be deemed to have  
20 occurred at the place at which such services were primarily performed,  
21 except that for the performance of a tow truck service, as defined in  
22 RCW 46.55.010, the retail sale shall be deemed to have occurred at the  
23 place of business of the operator of the tow truck service;

24        (3) A retail sale consisting of the rental of tangible personal  
25 property shall be deemed to have occurred (a) in the case of a rental  
26 involving periodic rental payments, at the primary place of use by the  
27 lessee during the period covered by each payment, or (b) in all other  
28 cases, at the place of first use by the lessee;

29        (4) A retail sale within the scope of (~~the second paragraph of~~)  
30 RCW 82.04.050(2), and a retail sale of taxable personal property to be  
31 installed by the seller shall be deemed to have occurred at the place  
32 where the labor and services involved were primarily performed;

33        (5) A retail sale consisting of the providing to a consumer of  
34 telephone service, as defined in RCW 82.04.065, other than a sale of  
35 tangible personal property under subsection (1) of this section or a  
36 rental of tangible personal property under subsection (3) of this  
37 section, shall be deemed to have occurred at the situs of the telephone  
38 or other instrument through which the telephone service is rendered;

1       (6) A retail sale of linen and uniform supply services is deemed to  
2 occur as provided in section 2 of this act.

3       (7) "City" means a city or town;

4       (~~(7)~~) (8) The meaning ascribed to words and phrases in chapters  
5 82.04, 82.08 and 82.12 RCW, as now or hereafter amended, insofar as  
6 applicable, shall have full force and effect with respect to taxes  
7 imposed under authority of this chapter;

8       (~~(8)~~) (9) "Taxable event" shall mean any retail sale, or any use  
9 of an article of tangible personal property, upon which a state tax is  
10 imposed pursuant to chapter 82.08 or 82.12 RCW, as they now exist or  
11 may hereafter be amended: PROVIDED, HOWEVER, That the term shall not  
12 include a retail sale taxable pursuant to RCW 82.08.150, as now or  
13 hereafter amended;

14       (~~(9)~~) (10) "Treasurer or other legal depository" shall mean the  
15 treasurer or legal depository of a county or city.

16       NEW SECTION.   **Sec. 4.** This act is necessary for the immediate  
17 preservation of the public peace, health, or safety, or support of the  
18 state government and its existing public institutions, and takes effect  
19 July 1, 2001.

      Passed the House March 12, 2001.

      Passed the Senate April 10, 2001.

      Approved by the Governor May 7, 2001.

      Filed in Office of Secretary of State May 7, 2001.

## OFFICE RECEPTIONIST, CLERK

---

**To:** Cronan, Sheila  
**Cc:** Berger, Adam; Donna Alexander; Garfinkel, Marty; Geoff Swindler; Kathryn Rosen; Michelle Kritsonis; Portia Moore; Taylor Ball; Valerie Macan  
**Subject:** RE: Cooper v. AlSCO; Supreme Court #91801-5

Received on 10-28-2015

Supreme Court Clerk's Office

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**From:** Cronan, Sheila [mailto:cronan@sgb-law.com]  
**Sent:** Wednesday, October 28, 2015 1:54 PM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Cc:** Berger, Adam <berger@sgb-law.com>; Cronan, Sheila <cronan@sgb-law.com>; Donna Alexander <donnaalexander@dwt.com>; Garfinkel, Marty <garfinkel@sgb-law.com>; Geoff Swindler <gds@swindlerlaw.com>; Kathryn Rosen <katierosen@dwt.com>; Michelle Kritsonis <michellekritsonis@dwt.com>; Portia Moore <portiamoore@dwt.com>; Taylor Ball <taylorball@dwt.com>; Valerie Macan <valeriemacan@dwt.com>  
**Subject:** Cooper v. AlSCO; Supreme Court #91801-5

Dear Supreme Court Clerk:

I attach for filing the following documents:

1. Respondents/Plaintiffs' Response to Appellant AlSCO, Inc.'s Opening Brief;
2. Respondents/Plaintiffs' Appendix (totaling 5 pages); and
3. Respondents/Plaintiffs' Appendix of Statutes, Rules, and Administrative Policies (totaling 15 pages).

Regards,

Sheila Cronan, Paralegal to  
Adam J. Berger, WS BA #20714  
Martin S. Garfinkel, WSBA #20787  
Counsel for Respondents/Plaintiffs

---

Sheila Cronan  
Paralegal  
Schroeter Goldmark & Bender  
810 Third Avenue, Suite 500  
Seattle, WA 98104  
☎ 206.622.8000 | Fax 206.682.2305  
☎ Direct: 206.233.1221  
✉ cronan@sgb-law.com

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STATE OF WASHINGTON  
Oct 28, 2015, 1:58 pm  
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CLERK

E

RECEIVED BY E-MAIL

NO. 91801-5

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.

---

RESPONDENTS/PLAINTIFFS' APPENDIX

---

ADAM J. BERGER, WSBA #20714  
MARTIN S. GARFINKEL, WSBA #20787  
**SCHROETER GOLDMARK & BENDER**  
810 Third Avenue, #500  
Seattle, Washington 98104  
(206) 622-8000

GEOFFREY D. SWINDLER, WSBA # 20176  
**LAW OFFICE OF GEOFFREY D. SWINDLER**  
103 E. Indiana Ave., Suite A  
Spokane, WA 98104  
(509) 326-7700

Counsel for Respondents/Plaintiffs  
David Cooper and Jerry Scott

 ORIGINAL

FILED AS  
ATTACHMENT TO EMAIL

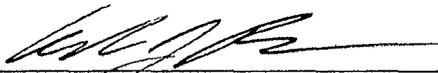
Respondents/plaintiffs hereby submit the following appendix in support of its responsive brief:

<u>Document Title</u>	<u>Docket No.</u>	<u>Pages</u>
Order Granting Plaintiffs' Motion For Partial Summary Judgment Striking Two Affirmative Defenses	53	RESP_APP 001143-001144

DATED this 28<sup>th</sup> day of October, 2015.

Respectfully submitted,

SCHROETER GOLDMARK & BENDER



---

Adam J. Berger, WSBA #20714  
Martin S. Garfinkel, WSBA #20787

810 Third Avenue, Suite 500  
Seattle, Washington 98104  
(206) 622-8000

Geoffrey D. Swindler, WSBA # 20176  
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103 E. Indiana Ave., Suite A  
Spokane, WA 98104  
(509) 326-7700

Counsel for Respondents/Plaintiffs  
David Cooper and Jerry Scott

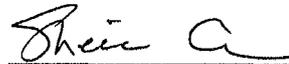
**DECLARATION OF SERVICE**

I, Sheila Cronan, a resident of the County of Kitsap, declare under penalty of perjury under the laws of the State of Washington that on October 28, 2015, I caused to be delivered in the manner indicated below true and correct copies of this document on the following counsel of record:

Kathryn S. Rosen  
Portia R. Moore  
Davis Wright Tremaine LLP  
1201 Third Avenue, Suite 2200  
Seattle, WA 98101  
*Via email and first class mail*

Geoffrey D. Swindler  
Law Office of Geoffrey D. Swindler  
103 E. Indiana Ave., Suite A  
Spokane, WA 99207  
*Via email and first class mail*

DATED at Seattle, Washington this 28<sup>th</sup> day of October, 2015.



---

SHEILA CRONAN  
Paralegal

Hon. William L. Downing  
Motion Date: November 22, 2013  
Without Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

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

Plaintiffs,

v.

ALSCO, INC., a foreign corporation,

Defendant.

No. 12-2-31451-9 SEA

ORDER GRANTING PLAINTIFFS'  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT STRIKING TWO  
AFFIRMATIVE DEFENSES

~~PROPOSED~~

THIS MATTER having come on for hearing on Plaintiffs' Motion for Partial Summary Judgment Striking Two Affirmative Defenses, the Court having considered the following pleadings:

1. Plaintiffs' Motion for Partial Summary Judgment Striking Two Affirmative Defenses;
2. Declaration of Martin S. Garfinkel, dated September 18, 2013, with exhibits attached thereto;
3. Defendant Alasco Inc.'s Notice of Non-Opposition To Plaintiffs' Motion for Partial Summary Judgment;

ORDER GRANTING PLAINTIFFS' MOTION  
FOR PARTIAL SUMMARY JUDGMENT STRIKING  
TWO AFFIRMATIVE DEFENSES - 1  
836758

RESP\_APP 001143

SCHROETER GOLDMARK & BENDER  
810 Third Avenue, Suite 500 • Seattle, WA 98104  
Phone (206) 422-8000 • Fax (206) 482-2305

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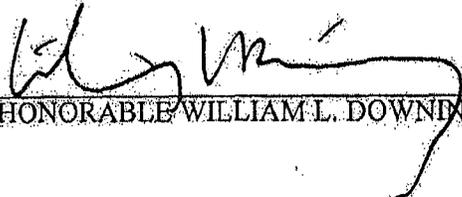
And the Court being fully advised,

NOW, THEREFORE,

IT IS HEREBY ORDERED that Plaintiffs' Motion for Partial Summary Judgment Striking Two Affirmative Defenses is hereby GRANTED.

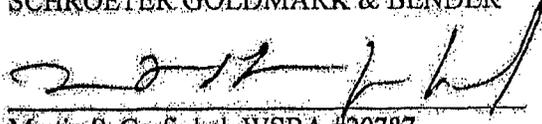
IT IS HEREBY FURTHER ORDERED that defendant Alcoa's 4<sup>th</sup> affirmative defense (exhaustion by arbitration) and 5<sup>th</sup> affirmative defense (preemption under Section 301 of the LMRA) are hereby STRICKEN and DISMISSED.

DATED this 14<sup>th</sup> day of November, 2013.

  
HONORABLE WILLIAM L. DOWNING

Presented by:

SCHROETER GOLDMARK & BENDER



Martin S. Garfinkel, WSBA #20787

Adam J. Berger, WSBA #20714

LAW OFFICES OF GEOFFREY D. SWINDLER



Geoffrey D. Swindler, WSBA #20176

Attorneys for Plaintiffs

RESP\_APP 001144

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**Cc:** Berger, Adam; Donna Alexander; Garfinkel, Marty; Geoff Swindler; Kathryn Rosen; Michelle Kritsonis; Portia Moore; Taylor Ball; Valerie Macan  
**Subject:** RE: Cooper v. AlSCO; Supreme Court #91801-5

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Regards,

Sheila Cronan, Paralegal to  
Adam J. Berger, WS BA #20714  
Martin S. Garfinkel, WSBA #20787  
Counsel for Respondents/Plaintiffs

-----  
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✉ cronan@sgb-law.com

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