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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

MARIANO CARRANZA and ELISEO MARTINEZ, individually and on behalf of all others similarly situated,

Petitioners/Plaintiffs,

v.

DOVEX FRUIT COMPANY,

Respondent/Defendant.

PLAINTIFFS' OPENING BRIEF ON CERTIFIED QUESTIONS

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I. INTRODUCTION

Washington law requires employers to pay employees for all time worked. This case concerns the obligation of agricultural employers to pay farm workers for time worked outside of piece-rate picking. During the harvest, Dovex Fruit Company ("Dovex") pays migrant and seasonal farm workers on a piece-rate basis for time spent picking apples, pears, or cherries and emptying the fruit into bins. But Dovex also regularly requires the workers to perform other work activities, such as traveling between orchards, attending meetings, storing equipment and materials, and transporting ladders to trailers. Until recently, however, Dovex paid nothing for this work. As soon as the workers stopped picking fruit to travel to another orchard, to bring their ladders to a trailer, or to attend a work meeting, Dovex stopped paying them.

In *Lopez Demetrio v. Sakuma Brothers Farms, Inc.*, this Court held that a piece rate "is earned only when the employee is actively producing." 183 Wn.2d 649, 652, 355 P.3d 258 (2015). Under its compensation system, Dovex has forced workers to finance their own unpaid work time using piece-rate pay earned during active production. The company has essentially deducted piece-rate pay earned during fruit-picking time to offset its payment obligations for other hours worked.

Under the Washington Minimum Wage Act ("MWA") and this Court's holding in *Lopez Demetrio*, the refusal to pay for time worked outside of piecework is unlawful. Employers must pay employees for all time worked. Thus, employers who pay for some work on a piece-rate basis must separately pay workers no less than minimum wage for time worked outside of active production—when no piece rate can be earned.

In response to the questions certified from the United States District Court for the Eastern District of Washington ("district court"), this Court should hold that (1) employers must separately pay piece-rate farm workers for time worked outside of piecework, and (2) employers must calculate the pay for such work time based on either minimum wage or the agreed hourly rate for non-piecework time, whichever is greater.

II. CERTIFIED QUESTIONS

The district court certified the following questions to this Court:

1. Does Washington law require agricultural employers to pay their pieceworkers for time spent performing activities outside of piece-rate picking work (e.g., "Piece Rate Down Time" and similar work)?

2. If the answer to the above question is "yes," how must agricultural employers calculate the rate of pay for time spent performing activities outside of piece-rate picking work (e.g., "Piece Rate Down Time" and similar work)?

Dkt. 41 at 2.

III. STANDARD OF REVIEW

This Court reviews certified questions "de novo and in light of the

federal court record." *Lopez Demetrio*, 183 Wn.2d at 655 (citing *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 420, 334 P.3d 529 (2014)).

IV. STATEMENT OF THE CASE

A. Factual Background

Plaintiffs Mariano Carranza and Eliseo Martinez and the proposed class members ("the workers") are migrant or seasonal farm workers who have worked for Dovex under a piece-rate compensation system that pays them based on the amount of fruit they pick. Dkt. 1 at ¶ 3.19; Dkt. 21 at ¶ 3.19; Dkt. 39, Ex. 11 at DOV001272–1276. Each summer, Dovex hires hundreds of migrant and seasonal workers to harvest fruit at its orchards in Washington. Dkt. 1 at ¶ 3.16; Dkt. 21 at ¶ 3.16. The workers pick apples, pears, and cherries during the seasonal harvest, and Dovex pays them on a piece-rate basis—for example, a certain amount per bin of apples or per lug of cherries. Dkt. 1 at ¶¶ 3.16, 3.19; Dkt. 21 at ¶¶ 3.16, 3.19; Dkt. 39, Ex. 11 at DOV001272–1276.

Dovex admits "there are times in which workers perform work *in addition to* picking during the work day." Dkt. 39 at 3 (emphasis added). This work includes, but is not limited to, traveling between orchards and orchard blocks (by foot or by vehicle), attending required work meetings or trainings, storing equipment and materials, and transporting ladders to a company trailer (or from the trailer to the areas where fruit picking

occurs). *Id.* at 3–4. Indeed, Dovex maintains a summary of work codes, including one for "Piece Rate Down Time," which describes "Moving Ladders, moving from block to block, weather down time, waiting for bins." Dkt. 39, Ex. 11 at DOV001279. The summary also has a code for "Safety Training," described as "Employee Training, Safety meetings, Job training at the block."[1] *Id.*

Dovex has refused to pay its piece-rate employees for these work activities or any other work performed in addition to piecework.[2] Dkt. 39 at 3–4. Instead, Dovex has paid its piece-rate employees based *only* on the amount of fruit they picked. *Id.* at 3 & Ex. 11 (listing "piece rate picking wages" for apples, pears, and cherries as rates "per bin" or "per lug"). If a piece-rate employee stopped picking fruit to attend a meeting, travel to another orchard block, or carry a ladder to a company trailer, the employee stopped earning money. *See id.* at 3, ¶ 2 (Dovex's admission in its answer that it "did not pay" a "separate rate of at least minimum wage for all non-piece-rate work performed").

For its *hourly* employees, however, Dovex has paid regular hourly rates for time spent attending meetings or trainings, moving between

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[1] The workers report they also regularly had to wait for equipment and materials necessary for picking work and to wait in one orchard block after picking is complete before traveling to the next orchard block. Dkt. 39 at 4; Dkt. 1 at 10–11.

[2] Dovex claims that it began paying for these work activities on or about January 12, 2016, but discovery is in its early stages. Dkt. 39 at 4.

fields, waiting, carrying ladders to trailers, and performing other non-picking work. Dkt. 39 at 5. Thus, in contrast to migrant or seasonal piece-rate workers like Mr. Carranza and Mr. Martinez, hourly workers who worked an eight-hour day received eight hours of pay even though they spent time during the day in so-called "non-productive" tasks. *See id.*

Every year from 2012 to 2016, Dovex completed a Department of Labor Form WH-516, which provided the "Terms and Conditions of Employment" for migrant and seasonal employees. Dkt. 39, Ex. 11. In an attachment to each form, Dovex listed an hourly wage rate for "General /Miscellaneous Work."[3] *Id.* Dovex failed, however, to pay this rate for time spent in non-piecework activities workers performed while otherwise working on a piece-rate basis. *See* Dkt. 39 at 3, ¶¶ 1–2.

Dovex attempted to mask the unpaid time by dividing the total weekly piece-rate pay by the total recorded hours worked (including the unpaid non-piecework hours) to come up with an average hourly rate *for the week.* Dkt. 39, Ex. 4. If this *average* hourly rate exceeded a set hourly

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[3] Until 2016, the rate corresponded to the Washington state minimum hourly wage. *See History of Washington Minimum Wage*, WASH. STATE DEP'T OF LABOR & INDUS., http://www.lni.wa.gov/WorkplaceRights/Wages/Minimum/History/default.asp (last visited April 4, 2017). In 2016, the rate appears to be just above the Adverse Effect Wage Rate for foreign labor certification. *See FY 2016 Adverse Effect Wage Rates*, UNITED STATES DEP'T OF LABOR, OFFICE OF FOREIGN LABOR CERTIFICATION, https://www.foreignlaborcert.doleta.gov/pdf/AEWR/AEWR_Map_2016.pdf (last visited April 4, 2017) (providing rate of $12.69 per hour for Washington state); Dkt. 39, Ex. 11 at DOV001276 (promising "Minimum wage" of "$12.75 per hour" for "General /Miscellaneous Work").

rate (which was slightly higher than the hourly minimum wage), the company paid nothing more—despite the fact that work time spent outside of piecework went entirely unpaid each week. *See id.*

For example, if a worker spent 35 hours picking apples during a week in 2015—earning $420 in piece-rate pay for that time—and spent five hours the same week attending unpaid meetings, traveling between orchard blocks, and carrying ladders to a trailer, Dovex paid the worker nothing for the five hours. Instead, Dovex credited the pay earned from piece-rate picking time toward the hours spent performing otherwise unpaid work activities. As a result, Dovex shorted the worker at least $47.35 for the week (five hours x 2015 minimum wage of $9.47 per hour).

If the average hourly rate for the week was below minimum wage, Dovex grossed the average hourly pay up to a set hourly rate. Dkt. 39, Exs. 4, 12. But even when this occurred, Dovex's so-called "gross-up" still did not ensure that the workers received the hourly minimum wage for *each hour* worked. Instead, it ensured only a *weekly average* minimum wage. For example, if in 2015, the same worker described above earned $400 in piece-rate pay for 35 hours of picking time but worked five additional unpaid hours outside of piecework (for a total of 40 hours in the week), Dovex paid no more than $20 to "gross up" the worker's *weekly* wages to an *average* hourly rate of $10.50 for the week (40 hours x $10.50

= $420). *See* Dkt. 39, Ex. 12. This "gross up" still left the worker short of the actual hourly minimum wage amount for the five hours of unpaid time. Under Washington law, the worker should have received no less than $47.35 in additional pay for the non-piecework hours (five hours x 2015 minimum wage of $9.47 per hour). *See* Dkt. 39, Ex. 4.

In its answer to Plaintiffs' complaint and in the Stipulation of Facts for Questions Certified to the Washington Supreme Court, Dovex admitted (1) its piece-rate workers "also perform work in addition to picking during the work day," and (2) while Dovex paid *hourly* employees for all time worked outside of picking, it "did not pay" its piece-rate workers a "at least minimum wage for all non-piece-rate work performed." Dkt. 21 at ¶ 5.3; Dkt. 39 at 3–4.

B. Procedural Background

In February 2016, the workers filed a class action complaint in the district court to challenge Dovex's systematic scheme of wage and hour violations against migrant and seasonal employees who perform piece-rate fruit harvest work. Dkt. 1 at ¶ 1.1. The lawsuit alleges that Dovex failed to pay for all work performed, failed to pay minimum wage, failed to provide rest breaks, failed to separately pay for rest breaks, failed to provide accurate statements of actual hours worked, and failed to keep accurate records of actual hours worked. *Id.* at ¶¶ 1.1, 3.5–3.7, 3.12–3.14,

5.2–5.6. The workers maintain that Dovex's conduct violates Washington wage and hour laws—including the MWA, the agricultural worker rest break regulation (WAC 296-131-020(2)), and the Wage Rebate Act (RCW 49.52.050)—as well as the federal Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. §§ 1821, 1831). *Id.* at ¶¶ 1.1, 6.2–12.4.

With regard to the claims at issue here, Dovex admits "it did not pay both a piece-rate of no less than minimum wage for all piece-rate time worked plus a separate rate of at least minimum wage for all non-piece-rate work performed, but denies that it was required to do so." Dkt. 39 at 3, ¶ 2 (quoting Dkt. 21 at 10, ¶ 5.3).

After reviewing briefing from the parties regarding potential certified questions, the district court decided to certify questions to this Court about "how Washington law accounts for work performed by piece-rate workers that is not explicitly accounted for through piece-rate compensation (e.g., 'Piece rate Down Time' and similar work)." Dkt. 38 at 6–7. The district court recognized "the piece rate is the only compensation the Workers receive," and "if the worker 'is not picking . . ., the picker is not earning money.'" *Id.* at 7 (quoting *Lopez Demetrio*, 355 P.3d at 261). The court therefore stated it would certify questions regarding pay for work performed outside of piece-rate picking work and ordered the parties to meet and confer and stipulate to a factual record to

certify along with the proposed questions. *Id.* at 13.

At the time the district court entered its initial order on certification, discovery had just begun regarding the scope of non-piece-rate work that Dovex required its workers to perform without pay. Dkt. 23 at 3–5; Dkt. 24. The parties have not exchanged interrogatories nor conducted depositions. *Id.* at 4. But the key facts are undisputed. Indeed, Dovex has admitted it did not pay "at least minimum wage for all non-piece-rate work performed," Dkt. 21 at 10, and produced two documents that contained information relevant to the certified questions: (1) a summary of codes related to specific work tasks, including "Piece Rate Down Time" ("Moving Ladders, moving from block to block, weather down time, waiting for bins"); and (2) a pay summary that provides "General /Miscellaneous Work" would be paid at "Minimum wage" and identifying the rate. Dkt. 23 at 4–5; Dkt. 24; Dkt. 24-1 (Dkt. 39, Ex. 9); Dkt. 24-2 (Dkt. 39, Ex. 11).

The parties met and conferred in early February to discuss the stipulated facts. When proposing changes to the agreed facts in the stipulation, Dovex's attorneys, for the first time, called the company's compensation structure a "base rate" system, rather than the "piece-rate" system Dovex previously acknowledged. *Compare* Dkt. 10, 16, 21, 22, 35 (identifying pay structure as piece-rate system with no mention of "base

rate"), *with* Dkt. 39, Ex. 3 (describing system for the first time as a "base rate" system). Before that time, Dovex admitted it paid workers "on a piece-rate basis" without any mention of a "base rate." Dkt. 10, 16, 21, 22, 35. Indeed, Dovex filed an Answer (Dkt. 10), an Amended Answer (Dkt. 21), a Joint 26(f) Report (Dkt. 16), two briefs regarding certification to this Court (Dkt. 22, 35), and a response to a motion to compel (Dkt. 29) without ever using the term "base rate" or describing its pay structure as anything other than "piece-rate." Its "Terms and Conditions of Employment" similarly describe "piece rate picking wages." Dkt. 39, Ex. 11.

Although the parties were unable to agree as to the proper description of Dovex's compensation structure, the parties agreed to a Stipulation of Facts for Questions Certified to Washington Supreme Court, which recognizes that, at least before January 12, 2016, Dovex did not separately pay piece-rate workers for time spent in work activities outside of piecework. Dkt. 39 at 3–4, ¶¶ 2–4. In addition to the stipulation and attached exhibits, the parties stipulated that several documents in the district court record be included in the certified record submitted to this Court. Dkt. 39 at 6, ¶ 8.

The district court then entered an order certifying the questions concerning agricultural employers' obligations to pay pieceworkers for

time spent outside of piece-rate picking work. Dkt. 41 at 2. The district court also certified the parties' stipulated record and accompanying exhibits, Dkt. 39, as well as the entire existing record in this case, pursuant to RCW 2.60.030(2) and Rule of Appellate Procedure 16.16(d). Dkt. 41 at 2–3.

V. ARGUMENT

A. Summary of Argument

Under Washington law, employers must pay employees for all time worked. Dovex cannot escape this obligation by paying piece rates to farm workers for the amount of fruit they pick and asserting that such pay is sufficient to cover non-picking work that otherwise goes unpaid.

In *Lopez Demetrio*, this Court found that a piece rate "is earned only when the employee is actively producing." 183 Wn.2d at 652. Thus, piece-rate workers must be paid separately for all time spent performing non-piecework activities—that is, when no piece rate can be earned. Employers may not fold payment for non-productive time into a piece rate because such time is "hours worked" that must be paid "separate and apart from the piece rate." *See id.* at 652–53, 661. An all-inclusive piece rate compensates workers for work performed outside of piecework only by deducting pay from the piece-rate wages the employee has accumulated that day. *See id.* at 653. This forces workers to "finance" their own work

time outside of piecework using piece-rate wages already earned for active production. *Id.*

Here, Dovex has forced its workers to finance their unpaid work time spent traveling between orchards, attending meetings, and storing equipment and materials using piece-rate pay already earned during fruit-picking time. The company uses piece-rate pay earned during active production to offset its payment obligations for other hours worked. Under Washington law, this is unlawful.

Washington farm workers have the same right to be paid for all time worked as other Washington workers. Depriving piece-rate farm workers of compensation for work performed on non-piecework activities contravenes Washington's long and proud history of protecting employee rights, improperly excludes a historically marginalized group from important minimum wage requirements, and perpetuates abusive employer actions that take the fruit of workers' labor without paying for it. If Dovex's argument were accepted, any agricultural employer could pay farm workers in Washington only for certain so-called "production" work, refuse to pay for other "non-production" work, and avoid the MWA requirement that employees receive at least minimum wage for all time worked.

No Washington statute, regulation, or case provides that

agricultural employers may spread piece-rate pay across unpaid hours worked to comply with the MWA. The plain language of the MWA, this Court's case law, longstanding L&I policy, case law from other jurisdictions, and sound public policy all support the requirement to pay piece-rate farm workers for all time worked, including time spent working on non-piecework activities.

For these reasons, this Court should answer the first certified question in the affirmative. As to the second question, this Court should hold that employers must separately pay farm workers for time spent performing work outside of piece-rate picking at the minimum hourly wage or any agreed rate for non-piecework activities, whichever is higher.

B. Washington Employers That Pay Farm Workers on a Piece-Rate Basis Must Also Pay for Time Worked Outside of Piecework Because a Piece Rate Is Earned Only When a Worker Is Actively Producing.

1. Washington's statutory wage scheme provides remedial worker protections that are liberally construed in favor of employees.

Washington has a "long and proud history of being a pioneer in the protection of employee rights." *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 298, 996 P.2d 582 (2000). The state legislature has "evidenced a strong policy in favor of payment of wages due employees by enacting a comprehensive statutory scheme to ensure payment of

wages." *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 157, 961 P.2d 371 (1998). Courts must liberally construe Washington's remedial wage statutes in favor of employees to protect employee rights. *Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d 851, 870, 281 P.3d 289 (2012) (citing *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 45, 42 P.3d 1265 (2002)). The central wage protection for workers in Washington is the MWA, which requires employers to pay employees no less than the minimum wage "per hour." RCW 49.46.020.

2. Washington employers must pay employees for all time worked.

Under Washington law, employers must pay employees no less than the minimum wage for all "hours worked." *See Stevens v. Brink's Home Sec., Inc.*, 162 Wn.2d 42, 47, 169 P.3d 473 (2007) ("Under the MWA, employees are entitled to compensation for regular hours worked," and "hours worked" means "all hours during which the employee is authorized or required . . . to be on duty on the employer's premises or at a prescribed work place" (quoting WAC 296–126–002(8))). The MWA provides that "every employer shall pay to each of his or her employees who has reached the age of eighteen years wages at a rate of not less than [the minimum wage] *per hour*." RCW 49.46.020 (emphasis added). This obligation applies "for each hour of employment." Wash. DLI Admin.

Policy ES.A.5 at 1 (2002);[4] *see also Miller v. Farmer Bros Co.*, 136 Wn. App. 650, 656, 150 P.3d 598 (2007) ("Under the Act, employees must be paid per hour, and must receive at least the minimum wage."); *Alvarez v. IBP, Inc.*, 339 F.3d 894, 912–13 (9th Cir. 2003) (holding that employees have a per-hour right to minimum wage under Washington law).

In *Seattle Professional Engineering Employees Association v. Boeing Co.* ("*SPEEA*"), this Court upheld the trial court's application of the per-hour approach to minimum wage compliance under the MWA. 139 Wn.2d 824, 828–29, 835 n.6, 839–40, 991 P.2d 1126 (2000), *opinion corrected on denial of reconsideration* at 1 P.3d 578. *SPEEA* concerned Boeing's requirement that new employees "attend, without pay, a 'pre-employment' orientation session." *Id.* at 827. Rejecting a workweek-averaging approach to minimum wage compliance, the trial court in *SPEEA* adopted the per-hour approach, concluding that the Boeing employees were entitled to compensation for the orientation session "measured by the statutory hourly wage." *Id.* at 828–29; *see also Seattle Prof'l Eng'g Emps. Ass'n v. Boeing Co.*, Case No. 92-2-29005-7, 1995 WL 17873923, at 9 (King Cnty. Sup. Ct. Oct. 17, 1995) (rejecting workweek averaging and stating "DLI, the agency charged with

[4] The DLI Administrative Policies cited in this brief are included in the appendix. *See* RAP 10.4(c).

administration of the MWA, has concluded that the measuring standard for compliance should be hour by hour"). The trial court explained: "The plain meaning of the language employed in the MWA is to guarantee certain employees a minimum hourly wage for each hour worked. It is only by measuring compliance on an hour by hour basis that this legislative mandate is fulfilled." *Id.*

This Court affirmed. *SPEEA*, 139 Wn.2d at 835 n.6, 839–40. Rather than applying a workweek-averaging approach, this Court explained that because "the employees were not paid *at all* for attending orientation . . . no amount need be subtracted from their recovery." *Id.* at 835 n.6 (emphasis added).

The same rule applies here. Because Dovex did not pay the workers "at all" for attending required meetings, traveling between orchard blocks, transporting equipment to and from company trailers, and storing equipment and materials, Dkt. 39 at 3–4, Dovex violated the MWA. *See SPEEA*, 139 Wn.2d at 835 n.6.

Furthermore, in construing the MWA, this Court defers to Department of Labor and Industries ("DLI") interpretations that are consistent with the remedial purposes of the MWA. *See Stevens*, 162 Wn.2d at 54 (Madsen, J., concurring) (relying on DLI administrative policy for meaning of "hours worked"); *Bostain v. Food Express, Inc.*, 159

Wn.2d 700, 712–15, 153 P.3d 846 (2007) (cautioning that Washington courts defer only to DLI interpretations that are "consistent with the plain language" of the MWA, "the stated purposes of the MWA," and "the [liberal construction] principles that apply to interpretation of remedial legislation governing payment of wages").

The per-hour approach to minimum wage compliance has long been the standard in Washington and the policy of DLI. *See* RCW 49.46.020 (requiring payment of not less than minimum wage "per hour"); Wash. DLI Admin. Policy ES.A.5 at 1 ("RCW 49.46.020 is a minimum guarantee to all employees covered by the Washington Minimum Wage Act (MWA) for *each* hour of employment." (Emphasis added.)). Indeed, Greg Mowat, Program Manager for the Employment Standards Division of DLI, submitted a declaration in the *SPEEA* case in 1994, which stated:

> The Department of Labor and Industries interprets the Washington Minimum Wage Act to require that an employer must pay an employee not less than the minimum rate of pay for *each* hour of work. The requirements of the Washington Minimum Wage Act are not satisfied if any hours of work are not compensated, even if the total wages paid for a workweek divided by the total number of hours worked yields an average wage greater than the minimum. Each hour worked must be paid at a rate not less than the minimum.

Dkt. 34-2, Ex. 2 (emphasis in original). This declaration accurately stated

the law, which, in substance, has not changed since 1994.[5] Current DLI administrative policy confirms that the MWA establishes a minimum wage "for each hour of employment," not for each week of employment. Wash. DLI Admin. Policy ES.A.5 at 1. And for purposes of compliance, "hours worked" means "all time worked regardless of whether it is a full hour or less." Wash. DLI Admin. Policy ES.C.2 at 1 (2008). This means an employee is entitled to receive no less than the minimum wage for "all time worked," even if the unpaid time amounts to less than an hour. *Id.*

3. The per-hour approach to minimum wage compliance applies to unpaid time worked regardless of the pay basis for other time worked.

Where an employer pays an employee for *some* hours worked on a piece-rate basis, the MWA does not permit the employer to refuse to pay for *other* hours worked outside of piecework. *See Lopez Demetrio*, 183 Wn.2d at 652–53, 662. Indeed, the "pay basis is immaterial" to whether an employee is entitled to be paid for all hours worked. Wash. DLI Admin. Policy ES.C.2 at 1. "If the work is performed, it must be paid." *Id.* Thus, for each "hour worked" on something other than piecework, an employee is entitled to be paid at no less than the minimum wage rate. *See Lopez Demetrio*, 183 Wn.2d at 652–53, 662.

[5] The only changes to the MWA minimum hourly wage provision since 1994 have been minimum wage increases pursuant to Initiative 1433 (2016) and Initiative 688 (1998). *See* RCW 49.46.020.

In *Lopez Demetrio*, this Court found that a piece rate "is earned only when the employee is actively producing." 183 Wn.2d at 652. Piece-rate workers therefore must receive no less than minimum wage for all time worked when they are *not* actively producing—that is, when no piece rate can be earned. In *Lopez Demetrio*, the Court held that employers could not fold payment for non-productive time (in the form of rest breaks) into a piece rate because such time is "hours worked" that must be paid "separate and apart from the piece rate." *Id.* at 652–53, 661. As the Court explained: "An all-inclusive piece rate compensates employees for rest breaks by deducting pay from the wages the employee has accumulated that day." *Id.* at 653.

In *Lopez Demetrio*, the "hours worked" were rest break hours. 183 Wn.2d at 662. Here, the work hours at issue are those spent on activities outside of piecework. If employers must separately pay pieceworkers for "hours worked" in the form of rest breaks, then they must separately pay pieceworkers for active "hours worked" outside of piecework. Indeed, it would be an anomalous result if rest break "hours worked" warranted separate pay but "hours worked" in non-piecework activities did not. Rest break hours are not valued more than other hours worked; rather, all hours worked must be paid. *See id.* ("Time spent on rest breaks and time spent in active work are both hours worked for the employer . . . ."). Simply

put, an employer may not choose to pay for some hours but not others.

The principle that employees who work on a piece-rate basis must also be paid for all "hours worked" outside of the piece-rate work is not new. In *Martini v. State, Employment Security Department*, the Court of Appeals analyzed a compensation system in which the employer paid the plaintiff, a long-haul truck driver, a piece rate based on the number of miles he drove. 98 Wn. App. 791, 792–93, 990 P.2d 981 (2000). There, the employer "did not compensate [the driver] for time spent cleaning, fueling, inspecting, and maintaining the vehicle." *Id.* In addition, the driver "was unpaid for at least 30 minutes of wait time on over 90 percent of his trips." *Id.* at 798. The court stated that these facts "present a clear violation of the Washington Minimum Wage Act . . . ." *Id.* Failing to pay piece-rate apple pickers for time spent traveling between fields, attending work meetings, storing equipment and materials, transporting ladders to a trailer, and waiting time similarly presents "a clear violation of the Washington Minimum Wage Act." *Id.*

4. Washington law does not provide agricultural employers an exemption from the requirement to pay for time worked outside of piece-rate picking.

Dovex seeks an exemption from the MWA requirement to pay workers at no less than the minimum wage rate "per hour" for all time worked. Dkt. 22 at 6. Dovex's position is that employers who compensate employees on a piece-rate basis have no obligation to pay for certain hours worked so long as the pay earned from piecework—when spread across otherwise unpaid periods of work—averages at least minimum wage for the week.[6] *See id.* at 5–6.

"Exemptions from remedial legislation, such as the MWA . . . are narrowly construed and applied only to situations which are plainly and unmistakably consistent with the terms and spirit of the legislation." *Drinkwitz*, 140 Wn.2d at 301. The exemption Dovex seeks is inconsistent with both the terms of the MWA, which requires payment of no less than minimum wage "per hour," and the spirit of the MWA, which must be liberally construed for the benefit of employees. *See* RCW 49.46.020; *Anfinson*, 174 Wn. 2d at 870. If granted, the exemption would allow an employer to offset unpaid hours worked with compensation paid for other

[6] If Dovex were correct, an hourly employer could make the same argument. Under Dovex's approach, an employer could pay $20 per hour for the first 35 hours of the week and refuse to pay for the final five hours of the week because—when spread across the five hours of unpaid time—the pay from the first 35 hours would result in a *weekly average* of more than minimum wage ($20 per hour x 35 hours = $700, which is higher than the minimum wage of $11 per hour x 40 hours, or $440).

hours worked, which is impermissible. *See Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 914 (9th Cir. 2004) ("Crediting money already due an employee for some other reason against the wage he is owed is not paying that employee the compensation to which he is entitled by statute.").

Excluding farm workers paid on a piece-rate basis for certain work from the "per hour" protections of the MWA for other work is not "plainly and unmistakably consistent with the terms and spirit of the legislation." *Drinkwitz*, 140 Wn.2d at 301. To the contrary, nothing in the MWA suggests that an employer may refuse to pay for certain hours worked so long as the employer pays on a piece-rate basis for other work and ensures an "average" of minimum wage for the week. Therefore, employers who pay farm workers on a piece-rate basis are not exempt from the requirement to pay no less than minimum wage for hours worked outside of piecework.

C. Persuasive Cases from California Interpreting a Similar Minimum Wage Provision Support the Requirement to Separately Pay for All Time Worked Outside of Piecework.

The plain language of the MWA, this Court's decision in *Lopez Demetrio*, previous Washington case law (including *SPEEA* and *Martini*), and DLI interpretations establish that the failure to pay farm workers for time worked outside of piecework activities violates the MWA. But if the

Court believes this is still an issue of first impression in Washington, the Court may look at cases from other jurisdictions for guidance. *See In re Parentage of L.B.*, 155 Wn.2d 679, 702, 122 P.3d 161 (2005).

California's minimum wage law has language that is essentially the same as the MWA's language. *See Armenta v. Osmose*, 135 Cal. App. 4th 314, 323–24, 37 Cal. Rptr. 3d 460, 467 (Cal. Ct. App. 2005) (holding that because state minimum wage law requires payment to each employee of "not less than [the applicable minimum wage] *per hour for all hours worked*," the workweek averaging method is inappropriate (emphasis added)). California, like Washington, requires employers to pay employees for "all hours worked," a phrase which is broadly defined. *Id.*; *Gonzalez v. Downtown LA Motors, LP*, 215 Cal. App. 4th 36, 44–45, 155 Cal. Rptr. 3d 18, 23 (Cal. Ct. App. 2013); WAC 296-126-002(8); Wash. DLI Admin. Policy ES.C.2. And California, like Washington, liberally construes its wage and hour laws in favor of protecting workers. *Gonzalez*, 215 Cal. App. 4th at 44; *Anfinson*, 174 Wn.2d at 870. Thus, case law from California on the issue of minimum wage compliance is persuasive.

Interpreting California's similar statutory language, courts have held that employers who pay on a piece-rate basis for production work must also pay "a separate hourly minimum wage" for work time spent on

non-production tasks. *Gonzalez*, 215 Cal. App. 4th at 40–41; *see also Ridgeway v. Wal-Mart Stores, Inc.*, 107 F. Supp. 3d 1044, 1052–53 (N.D. Cal. 2015) (finding activities by truck drivers that are not separately compensated may not properly be built into or subsumed by the piece rate); *Quezada v. Con-Way Freight, Inc.*, No. C 09-03670 JW, 2012 WL 2847609, at *4, 6 (N.D. Cal. July 11, 2012) (holding truck drivers who earn piece rates for miles they drive must be paid separately for non-production work); *Carrillo v. Schneider Logistics, Inc.*, 823 F. Supp. 2d 1040, 1044 (C.D. Cal. 2011) ("Where employees are purportedly paid by the piece, the employer must separately compensate employees for all hours spent performing non-piece rate work."); *Cardenas v. McLane Foodservices, Inc.*, 796 F. Supp. 2d 1246, 1253 (C.D. Cal. 2011) (holding that piece-rate system that did not separately compensate for non-productive work violated minimum wage law).

The California cases interpreting similar minimum wage language provide that employers may not refuse to pay for so-called "non-productive" time, including travel time and time spent loading equipment and supplies. *See, e.g., Armenta*, 135 Cal. App. 4th at 316–17, 323–24, 467–68; *Ridgeway*, 107 F. Supp. 3d at 1052–53 (recognizing that because minimum wage standards "apply to each hour worked," "an employer may not refuse to pay for time spent on tasks like completing paperwork");

Quezada, 2012 WL 2847609, at *6 (stating that "employees must be directly compensated for all time worked"). In these cases, the employers, like Dovex here, argued that they should be allowed to "average" the pay received by the workers for "productive" work time across the entire pay period to determine whether they satisfied minimum wage compliance, but the courts consistently rejected workweek averaging. *See, e.g., Ridgeway*, 107 F. Supp. 3d at 1050–53; *Quezada*, 2012 WL 2847609, at *4–5.

Like California law, Washington law requires employers to pay employees no less than the minimum wage "per hour" for all "hours worked." RCW 49.46.020; *Stevens*, 162 Wn.2d at 47–50 (applying broad definition of "hours worked" in WAC 296-126-002(8) to minimum wage claims involving unpaid drive time). Therefore, this Court should reject a workweek-averaging approach that would allow an employer to refuse to pay for certain work time.

D. Migrant and Seasonal Piece-Rate Farm Workers Have the Same Right to the Hourly Minimum Wage for All Time Worked as Hourly Workers.

The MWA does not distinguish between hourly workers and pieceworkers. Instead, it requires "every employer" to pay no less than the minimum wage "per hour" for all hours worked. RCW 49.46.020. Under Washington law, "hours worked" includes "travel time and meeting time, wait time, on-call time, preparatory and concluding time." Wash.

DLI Admin. Policy ES.C.2 at 1. It is undisputed that hourly employees are entitled to continue receiving their hourly pay during travel time, meeting time, wait time, and preparatory and concluding time. *Id.*

There is no valid reason to exclude piece-rate farm workers from the minimum pay rights that hourly employees enjoy. Indeed, farm workers earn very low wages as it is. An extensive survey found the average household income for Washington farm workers interviewed in 2006 was approximately $17,596, which was below the federal poverty level. WASHINGTON STATE FARMWORKER HOUSING TRUST, A SUSTAINABLE BOUNTY: INVESTING IN OUR AGRICULTURAL FUTURE, WASHINGTON STATE FARMWORKER SURVEY (July 2008) at 4, https://static1.squarespace.com/static/58178a6cbe659444e1f37890/t/588d40141b10e309aee5b0bb/1485651993974/SustainableBounty.pdf (last visited April 11, 2017). Furthermore, farm workers historically come from marginalized groups and must overcome prejudices and barriers. *Id.* at 13–15 (noting that farm workers interviewed were almost entirely Latino, were primarily immigrants, and over 78% could neither read nor write English). This makes it imperative that piece-rate farm workers receive at least the same minimum wage protections as other Washington workers.

Washington's legislature, people, and courts have taken important steps to recognize farm workers' rights to equal protection in employment. In 1983, this Court declared that a provision excluding farm workers from the protections of our state's workers' compensation law was invalid. *Macias v. Dep't of Labor & Indus.*, 100 Wn.2d 263, 274–75, 668 P.2d 1278 (1983). In 1988, Washington voters extended the minimum wage to farm workers. Initiative Measure 518 (1988). In 1989, the legislature provided for child labor standards in agriculture and extended unemployment compensation and rest break rights to farm workers. Laws of 1989, ch. 380. In 1995, this Court recognized the right of farm workers to engage in concerted activity to improve working conditions. *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 748–49, 888 P.2d 147 (1995). More recently, this Court held that piece-rate farm workers must receive separate pay for their rest breaks, *Lopez Demetrio*, 183 Wn.2d at 653, and that workers' immigration status is inadmissible due to the danger of unfair prejudice, *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673–74, 230 P.3d 583 (2010).

Just last month, this Court reaffirmed the need to ensure that immigrants have equal access to justice in our state. *See* Letter from Mary E. Fairhurst, Chief Justice of Washington Supreme Court, to John F. Kelly, Secretary of Homeland Security, U.S. Department of Homeland

Security (Mar. 22, 2017) (on file with author). As the Chief Justice recognized, current developments in federal immigration policy "impede the fundamental mission of our courts, which is to ensure due process and access to justice for everyone, regardless of their immigration status." *Id.* If the courthouse doors were closed to immigrant farm workers who wished to be paid for all time worked simply because they work on a piece-rate basis, it would increase existing inequality and impede their access to justice, making them more vulnerable to employment abuses.

The workers here ask the Court to continue Washington's long and proud tradition of protecting the rights of vulnerable employees by ensuring that piece-rate farm workers receive compensation for all time worked, just like other Washington workers. Otherwise, certain workers—most of whom are Latino immigrants—would be singled out for less favorable treatment under the MWA. To ensure basic wage protections for Washington farm workers, this Court should hold that piece-rate farm workers are entitled to separate pay for work performed outside of piecework.

E. WAC 296-126-021 Does Not Apply to Farm Workers and Even if It Did, It Would Not Allow Nonpayment for Certain Work Time.

In briefing before the district court, Dovex relied on WAC 296-126-021, suggesting that the regulation permits employers to refuse to pay

piece-rate employees for certain non-productive work time so long as "weekly wages" from piece-rate pay "average at least minimum wage." Dkt. 22 at 6. As the district court recognized, WAC 296-126-021 is not applicable to farm workers. *See* WAC 296-126-001(2)(c) (excluding "agricultural labor" from the provisions of WAC 296-126); Dkt. 38 at 7 n.3 (recognizing WAC 296-126 regulations at issue in non-agricultural case involving truck drivers "do not apply to agricultural workers").

But even if WAC 296-126-021 did apply here, the regulation does not permit an employer to refuse to pay for time worked outside of piecework. A Washington employer may not require an employee to perform work for which no compensation is paid. *See Stevens*, 162 Wn.2d at 47. WAC 296-126-021 provides that where non-agricultural workers are paid on a "piecework basis, wholly or partially,"

> (1) The amount earned on such basis in each work-week period may be credited as *a part* of the total wage for that period; and
>
> (2) The total wages paid for such period shall be computed on the hours worked in that period resulting in no less than the applicable minimum wage rate.

WAC 296-126-021(emphasis added).

Washington courts interpret regulations like WAC 296-126-021 "in a manner that gives effect to all [the] language without rendering any part superfluous." *Bravern Residential, II, LLC v. Dep't of Revenue*, 183

Wn. App. 769, 778, 334 P.3d 1182 (2014); *see also Whatcom Cnty. v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) (holding that statutes must be construed so that no portion is rendered unnecessary). An interpretation of WAC 296-126-021 that would permit an employer to refuse to pay for certain work time so long as the employer paid a workweek average of minimum wage would render subsection (1) of the regulation superfluous. If a workweek approach for minimum wage compliance is used exclusively whenever an employee receives some piece-rate pay during the week, regardless of how little, subsection (1) would have been omitted entirely, and the regulation would have read: "Where employees are paid on a commission or piecework basis, wholly or partially, the total wages paid for such period shall be computed on the hours worked in that period resulting in no less than the applicable minimum wage." But subsection (1) exists and must be construed in a manner that gives it effect.

Subsection (1) provides: "*The amount earned on [a piecework] basis* . . . may be credited as *a part* of the total wage for that period." WAC 296-126-021(1) (emphasis added). This means an employee is entitled to have earnings for work performed *on some other basis* also credited as *a part* of the total wage for the period. Because such work is not piecework, the default rule is compensation at no less than the

minimum wage rate "per hour." *See* RCW 49.46.020. Accordingly, for each "hour worked" on something other than piecework, employees are entitled to be paid at no less than the minimum wage rate for such work and to have that pay credited toward the total wage for the period.

Once both piecework pay and non-piecework pay are added together, the calculation under subsection (2) is performed, which ensures that the employee averaged at least the minimum wage for the time spent performing piecework when accounting for the "total wages paid" in the workweek. This interpretation gives meaning to subsection (1) and is consistent with the MWA's requirement to pay at least the minimum wage for all time worked. Otherwise, an employer could require an employee to perform five hours of piece-rate work and 35 hours of other work activities in a week and refuse to pay the employee for the 35 hours of non-piece-rate work so long as the employee receives at least minimum wage when averaging out the five hours of piece-rate compensation over the entire 40-hour week. This is not the law. *See* Wash. DLI Admin. Policy ES.A.5 at 1 (stating the MWA establishes a minimum wage "for each hour of employment"); Wash. DLI Admin. Policy ES.C.2 (providing that compensable "hours worked" include "all hours during which the employee is authorized or required, known or reasonably believed by the

employer to be on duty on the employer's premises or at a prescribed work place").

In sum, WAC 296-126-021 has no application in this case because it does not apply to farm workers, but even if it did apply, the regulation would not permit Dovex to refuse to pay for certain time worked by averaging piece-rate pay across the workweek.

F. The Rate of Pay for Work Time Outside of Piecework Must Be the Minimum Hourly Wage or the Agreed Rate, Whichever Is Higher.

If this Court holds that employers are obligated to separately pay piece-rate farm workers for time worked outside of piecework, the Court must determine the proper rate of pay for this work time. The MWA "sets the floor below which the agreed rate cannot fall without violating the statute." *SPEEA*, 139 Wn. 2d at 835, 991 P.2d 1126. Therefore, piece-rate farm workers who perform work outside of piecework must be separately paid at no less than the minimum wage for the time worked outside of piecework. *Id.* (recognizing that "the employees' recovery under the WMWA is limited to the statutory minimum wage"). Under the MWA, if a Dovex farm worker spends 38 hours in a week picking fruit on a piece-rate basis and two unpaid hours attending meetings, traveling between orchard blocks, and storing equipment and materials, then Dovex must pay the worker for the two unpaid hours at the existing minimum

wage, regardless of the amount of compensation earned for the 38 hours of piece-rate picking work. For work performed in 2017, the worker would be entitled to $22.00 ($11.00 x 2 hours) for the unpaid "non-productive" time. *See* RCW 49.46.020(1)(a).

But as this Court recognized in *SPEEA*, workers may also pursue both contractual and statutory remedies for "unpaid wages owing under a contract." *SPEEA*, 139 Wn.2d at 835. Indeed, "Chapters 49.48 and 49.52 RCW reinforce contract obligations to pay *above minimum* wage rates." *Id.* (emphasis in original). Here, for example, Dovex has produced documents that reveal it promised to pay migrant and seasonal employees a set hourly rate for "General /Miscellaneous Work," which for 2016 was $12.75 per hour. Dkt. 39, Ex. 11 at DOV001276. If an employer has promised an hourly rate above minimum wage for non-piece-rate work time, the employer must pay that agreed rate. *See Lopez Demetrio*, 183 Wn.2d at 663 n.5 ("We recognize that the rate at which rest breaks are paid might be the subject of voluntary bargaining between an employer and employee, and this opinion does not impair the ability of parties to contract within the scope of the law."). As in *Lopez Demetrio*, where there is no agreed rate, courts must "f[a]ll back to the MWA as the measure of damages" for the unpaid hours worked. *Id.* at 660 n.2 (citing *SPEEA*, 139 Wn.2d at 833–34, 835).

For these reasons, this Court should hold that employers must separately pay piece-rate farm workers for time worked outside of piecework based on either the applicable minimum wage rate or the agreed hourly rate for non-piecework time, whichever is greater. This approach ensures that the minimum hourly wage floor is satisfied and that employees and employers may agree to a higher rate for non-productive time if they so choose.

VI. CONCLUSION

Washington's long and proud history of being a pioneer in the protection of employee rights is not limited to particular industries or particular employees. Rather, Washington's employment laws must be liberally construed to protect all covered employees, including farm workers paid on a piece-rate basis for picking the fruit we eat. Under Washington law, employers must pay employees for all time worked. An employer may not refuse to pay piece-rate farm workers for certain work time even if total pay for the week results in an average hourly rate above the minimum.

To ensure piece-rate farm workers receive the same "per hour" minimum wage protections as hourly employees, this Court should hold that (1) employers must separately pay piece-rate farm workers for time worked outside of piecework, and (2) employers must calculate the pay for

such work time based on either minimum wage or the agreed hourly rate for non-piecework time, whichever is greater.

RESPECTFULLY SUBMITTED AND DATED this 21st day of April, 2017.

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CERTIFICATE OF SERVICE

I certify that on April 21, 2017, I caused a true and correct copy of the foregoing to be filed with the Washington Supreme Court and copies were served to the following counsel of record via email (per agreement of the parties):

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APPENDIX A

ADMINISTRATIVE POLICY

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
EMPLOYMENT STANDARDS

TITLE:	**PAYMENT OF WAGES LESS THAN MINIMUM WAGE—EMPLOYER'S LIABILITY**	**NUMBER:**	**ES.A.5**
CHAPTER:	**RCW 49.46.090**	**REPLACES:**	**ES-010**
		ISSUED:	**1/2/2002**

ADMINISTRATIVE POLICY DISCLAIMER

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

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

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

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

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

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

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

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

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

APPENDIX B

ADMINISTRATIVE POLICY

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
EMPLOYMENT STANDARDS

TITLE:	**HOURS WORKED**	**NUMBER:**	**ES.C.2**
CHAPTER:	**RCW 49.12** **WAC 296-126**	**REPLACES:**	**ES-016**
		ISSUED:	**1/2/2002**
		REVISED:	**6/24/2005**
		REVISED:	**11/28/2007**
		REVISED:	**9/2/2008**

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1. The department has the authority to investigate and regulate "hours worked" under the Industrial Welfare Act.

"Hours worked," means all hours during which the employee is authorized or required, known or reasonably believed by the employer to be on duty on the employer's premises or at a prescribed work place. An analysis of "hours worked" must be determined on a case-by-case basis, depending on the facts. See WAC 296-126-002(8). *See Administrative Policy ES.C.1*.

The department's interpretation of "hours worked" means all work requested, suffered, permitted or allowed and includes travel time, training and meeting time, wait time, on-call time, preparatory and concluding time, and may include meal periods. "Hours worked" includes all time worked regardless of whether it is a full hour or less. "Hours worked" includes, for example, a situation where an employee may voluntarily continue to work at the end of the shift. The employee may desire to finish an assigned task or may wish to correct errors, prepare time reports or other records. The reason or pay basis is immaterial. If the employer knows or has reason to believe that the employee is continuing to work, such time is working time.

An employer may not avoid or negate payment of regular or overtime wages by issuing a rule or policy that such time will not be paid or must be approved in advance. If the work is performed, it must be paid. It is the employer's responsibility to ensure that employees do not perform work that the employer does not want performed.

The following definitions and interpretations of "hours worked" apply to all employers bound by the Industrial Welfare Act, even those not subject to the Minimum Wage Act. There is no similar

definition of "hours worked" in RCW 49.46, the Minimum Wage Act, or in WAC 296-128, Minimum Wage rules. Therefore, these definitions and interpretations apply to all employers subject to RCW 49.12, regardless of whether they may be exempt from or excluded from the Minimum Wage Act.

2. What is travel time and when it is considered hours worked?

Introductory statement to the policy:

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

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

The purpose of this policy statement is to update section two of Labor and Industries' administrative policy ES.C.2 (section 2) pertaining to hours worked. Following the *Stevens v. Brink's Home Security* decision, Labor and Industries committed to updating this section of the policy to reflect the Supreme Court decision in the *Brink's* case and address ambiguity created by that case. [*Stevens v. Brink's Home Security*, 162 Wn.2d 42, 169 P.3d 473 (2007)]. This policy is not intended to address or cover all employee travel time issues. Instead, it is limited to the particular issues raised in the *Brink's* case regarding whether time spent driving a company-provided vehicle between home and the first or last job site of the day constitutes compensable "hours worked."

Whether time spent driving in a company-provided vehicle constitutes paid work time depends on whether the drive time is considered "hours worked."

Whether travel or commute time is compensable depends on the specific facts and circumstances of each individual employee, employer, and work week. If the travel or commute time is considered "hours worked" under RCW 49.46.020 and WAC 296-126-002(8), then it is compensable and the employee must be paid for this time. These statutory and regulatory requirements cannot be waived through a collective bargaining agreement or other agreement.

"Hours worked" means all hours when an employee is authorized or required by the employer to be on duty on the employer's premises or at a prescribed workplace. WAC 296-126-002(8).

There are three elements to the definition of hours worked:

1- An employee is authorized or required by the employer,
2- to be on duty,
3- On the employer's premises or at a prescribed workplace.

If any of the three elements is not satisfied, then the time spent driving in a company-provided vehicle is not considered "hours worked." The specific factors used to establish the "authorized

or required" element are not listed in this policy. However, the element must be met for "hours worked" under the law.

Time spent driving a company-provided vehicle during an employee's ordinary travel, when the employee is not on duty and performs no work while driving between home and the first or last job site of the day, is not considered hours worked.

Time spent driving a company-provided vehicle from the employer's place of business to the job site is considered hours worked. Time spent riding in a company-provided vehicle from the employer's place of business to the job site is not considered hours worked when an employee voluntarily reports to the employer's location merely to obtain a ride as a passenger for the employee's convenience, is not on duty, and performs no work. Time spent driving or riding as a passenger from job site to job site is considered hours worked.

Factors to consider in determining IF AN EMPLOYEE IS "on duty" when driving a company-provided vehicle between home and work.

To determine if the employee is on duty, you must evaluate the extent to which the employer restricts the employee's personal activities and controls the employee's time. This includes an analysis of the frequency and extent of such restrictions and control. Following is a non-exclusive list of factors to consider when making a determination if an employee is "on duty." There may be additional relevant factors that the Supreme Court or L&I have not considered. All factors must be considered and weighed in combination with each other. The mere presence or absence of any single factor is not determinative.

1. The extent to which the employee is free to make personal stops and engage in personal activities during the drive time between home and the first or last job site of the day, or whether the vehicle may only be used for company business.

2. The extent to which the employee is required to respond to work related calls or to be redirected while enroute.

3. Whether the employee is required to maintain contact with the employer.

4. The extent to which the employee receives assignments at home and must spend time writing down the assignments and mapping the route to reach the first job site before beginning the drive.

Factors to consider in determining if an employee is "on the employer's premises or at a prescribed work place" when driving a company-provided vehicle between home and work.

To determine if a company-provided vehicle constitutes a "prescribed work place," you must evaluate whether driving the particular vehicle is an integral part of the work performed by the employee. Following is a non-exclusive list of factors to consider when making a determination if an employee is "on the employer's premises or at a prescribed work place." There may be additional relevant factors that the Supreme Court or L&I have not considered. All factors must

be considered and weighed in combination with each other. The mere presence or absence of any single factor is not determinative.

1. Whether the nature of the business requires the employee to drive a particular vehicle provided by the employer to carry necessary nonpersonal tools and equipment to the work site.

2. The extent to which the company-provided vehicle serves as a location where the employer authorizes or requires the employee to complete business required paperwork or load materials or equipment.

3. The extent to which the employer requires the employee to ensure that the vehicle is kept clean, organized, safe, and serviced.

The following are two examples of how this policy may be used to determine whether or not drive time between home and the first or last job site of the day in a company-provided vehicle is compensable. These examples are illustrative and are not intended to create additional factors or address other scenarios where the facts differ from those below.

COMPENSABLE EXAMPLE:

1. In this example, the facts establish that the drive time between home and the first or last job site of the day in a company-provided vehicle is compensable. For purposes of this example, all of the following facts are present. The employee drives between home and the first or last job site of the day in a company-provided vehicle:

- As a matter of accepted company practice, the employee is prohibited from any personal use of the vehicle, which must be used exclusively for business purposes; and

- <u>The employer regularly requires the employee to perform services for the employer during the drive time including being redirected to a different location; and</u>

- The employee regularly transports necessary nonpersonal tools and equipment in the vehicle between home and the first or last job site of the day; and

- <u>The employee receives his/her daily job site assignments at home in a manner that requires the employee to spend more than a de minimis amount of time writing down the assignments and mapping travel routes for driving to the locations.</u>

NON COMPENSABLE EXAMPLE:

2. In this example, the facts establish that the drive time between home and the first or last job site of the day in a company-provided vehicle is not compensable. For purposes of this example, all of the following facts are present. The employee drives between home and the first or last job site of the day in a company-provided vehicle:

- <u>The employer does not strictly control the employee's ability to use the vehicle for personal purposes. E.g., the employee, as a matter of accepted company practice, is</u>

able to use the vehicle for personal stops or errands while driving between home and the job site; and

- The employee is not required to perform any services for the employer during the drive including responding to work related calls or redirection; and

- The employee does not perform any services for the employer during the drive including work related calls or redirection.

3. What constitutes training and meeting time and when is it considered "hours worked"?

Training and meeting time is generally interpreted to mean all time spent by employees attending lectures, meetings, employee trial periods and similar activities required by the employer, or required by state regulations, and shall be considered hours worked.

Time spent by employees in these activities need *not* be counted as hours worked if all of the following tests are met:

3.1 Attendance is voluntary; and

3.2 The employee performs no productive work during the meeting or lecture; and

3.3 The meeting takes place outside of regular working hours; and

3.4 The meeting or lecture is not directly related to the employee's current work, as distinguished from teaching the employee another job or a new, or additional, skill outside of skills necessary to perform job.

If the employee is given to understand, or led to believe, that the present working conditions or the continuance of the employee's employment, would be adversely affected by non-attendance, time spent shall be considered hours worked.

Time spent in training programs mandated by state or federal regulation, but *not* by the employer, need not be paid if the first three provisions are met; that is, if attendance is voluntary, the employee performs no productive work during the training time, and the training takes place outside of normal working hours.

A state regulation may require that certain positions successfully complete a course in Cardio-Pulmonary Resuscitation (CPR). The rules may require that in order to be employed in such a position the person must be registered with the state or have successfully completed a written examination, approved by the state, and further fulfilled certain continuous education requirements. However, should the employer require all employees to attend training, all employees attending the training must be paid for the hours spent in the training course.

Although the training course may be directly related to the employee's job, the training is of a type that would be offered by independent institutions in the sense that the courses provide generally applicable instruction which enables an individual to gain or continue employment with any employer which would require the employee to have such training, then this training would be regarded as primarily for the benefit of the employee and not the employer. In training of this type, where the employee is the primary beneficiary, the employee need not be paid for attending.

Where an employer (or someone acting on the employer's behalf), either directly or indirectly, requires an employee to undergo training, the time spent is clearly compensable. The employer in such circumstances has controlled the employee's time and must pay for it. However, where

the state has required the training, as in the example stated above, a different situation arises. When such state-required training is of a general applicability, and not tailored to meet the particular needs of individual employers, the time spent in such training would not be compensable.

When state or federal regulations require a certificate or license of the employee for the position held, time spent in training to obtain the certificate or license, or certain continuous education requirements, will not be considered hours worked. The cost of maintaining the certificate or license may be borne by the employee.

4. What determines an employment relationship with trainees or interns?

As the state and federal definition of "employ" are identical, the department looks to the federal Fair Labor Standards Act for certain training conditions exempted from that act. Under certain conditions, persons who without any expressed or implied compensation agreement may work for their own advantage on the premises of another and are not necessarily employees. Whether trainees are employees depends upon all of the circumstances surrounding their activities on the premises of the employer. If all six of the following criteria are met, the trainees are not considered employees:

4.1 The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school; and

4.2 The training is for the benefit of the trainee; and

4.3 The trainees do not displace regular employees, but work under their close observation; and

4.4 The business that provides the training derives no immediate advantage from the activities of the trainees, and may in fact be impeded; and

4.5 The trainees are not necessarily entitled to a job at the conclusion of the training period; and

4.6 The trainees understand they are not entitled to wages for the time spent in the training.

5. What constitutes paid or unpaid work for students in a school-to-work program?

Students may be placed in a school-to-work program on a paid or unpaid basis. The department will not require payment of minimum wage provided all of the following criteria are met. If all five requirements are not met, the business will not be relieved of its obligation to pay minimum wage, as required by the Minimum Wage Act.

5.1 The training program is a bona fide program certified and monitored by the school district or the Office of the Superintendent of Public Instruction; and

5.2 A training plan exists that establishes a link to the academic work, e.g., a detailed outline of the competencies to be demonstrated to achieve specific outcomes and gain specific skills. The worksite effectively becomes an extension of the classroom activity and credit is given to the student as part of the course; and

5.3 The school has a designated district person as an agent/instructor for the worksite activity and monitors the program; and

5.4 The worksite activity is observational, work shadowing, or demonstrational,

with no substantive production or benefit to the business. The business has an investment in the program and actually incurs a burden for the training and supervision of the student that offsets any productive work performed by the student. Students may not displace regular workers or cause regular workers to work fewer hours as a result of any functions performed by the student, and

5.5 The student is not entitled to a job at the completion of the learning experience. The parent, student, and business all understand the student is not entitled to wages for the time spent in the learning experience.

If a minor student is placed in a paid position, all requirements of the Minimum Wage Act, the Industrial Welfare Act, and minor work regulations must be met. Minor students placed in a paid position with public agencies are subject to the Industrial Welfare Act.

Public agencies are not subject to the state minor work regulations, but they are subject to payment of the applicable state minimum wage. Note: Public agencies employing persons under age 18 are subject to the federal Child Labor Regulations and should contact the United States Department of Labor for specific information on hours and prohibited occupations.

6. What constitutes "waiting time" and when is it considered "hours worked"?

In certain circumstances employees report for work but due to lack of customers or production, the employer may require them to wait on the premises until there is sufficient work to be performed. "Waiting time" is all time that employees are required or authorized to report at a designated time and to remain on the premises or at a designated work site until they may begin their shift. During this time, the employees are considered to be engaged to wait, and all hours will be considered hours worked.

When a shutdown or other work stoppage occurs due to technical problems, such time spent waiting to return to work will be considered hours worked *unless* the employees are completely relieved from duty and can use the time effectively for their own purposes. For example, if employees are told in advance they may leave the job and do not have to commence work until a certain specified time, such time will not be considered hours worked. If the employees are told they must "stand by" until work commences, such time must be paid.

7. Is there a requirement for "show up" pay?

An employer is not required by law to give advance notice to change an employee's shift or to shorten it or lengthen it, thus there is no legal requirement for show-up pay. That is, when employees report to work for their regularly scheduled shift but the employer has no work to be performed, and the employees are released to leave the employer's premises or designated work site, the employer is not required to pay wages if no work has been performed.

8. What constitutes "on-call" time and when is it considered "hours worked"?

Whether or not employees are "working" during on-call depends upon whether they are required to remain on or so close to the employer's premises that they cannot use the time effectively for their own purposes.

Employees who are not required to remain on the employer's premises but are merely required to leave word with company officials or at their homes as to where they may be reached are not working while on-call. If the employer places restrictions on where and when the employee may travel while "on call" this may change the character of that "on call" status to being engaged in the performance of active duty. The particular facts must be evaluated on a case-by-case basis.

9. What constitutes preparatory and concluding activities and when is this time considered "hours worked"?

Preparatory and concluding activities are those activities that are considered integral or necessary to the performance of the job. Those duties performed in readiness and/or completion of the job shall be considered hours worked. When an employee does not have control over when and where such activities can be made, such activities shall be considered as hours worked.

Examples may include the following:

9.1 Employees in a chemical plant who cannot perform their principle activities without putting on certain clothes, or changing clothes, on the employer's premises at the beginning and end of the workday. Changing clothes would be an integral part of the employee's principle activity.

9.2 Counting money in the till (cash register) before and after the shift, and other related paperwork.

9.3 Preparation of equipment for the day's operation, i.e., greasing, fueling, warming up vehicles; cleaning vehicles or equipment; loading, and similar activities.

10. When are meal periods considered "hours worked"?

Meal periods are considered hours worked if the employee is required to remain on the employer's premises at the employer's direction subject to call to perform work in the interest of the employer. In such cases, the meal period time counts toward total number of hours worked and is compensable. See Administrative Policy *ES.C.6*.