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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

TIFFANY HILL,

Plaintiff-Appellee,

v.

XEROX BUSINESS SERVICES, LLC; LIVEBRIDGE, INC., an Oregon
corporation; AFFILIATED COMPUTER SERVICES INC., a Delaware
corporation; AFFILIATED COMPUTER SERVICES LLC, a Delaware
limited liability company,

Defendants-Appellants.

DEFENDANTS-APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

The question certified to this Court was whether the ABC plan was a piecework compensation plan. The answer to that question is “yes.”

Despite much rhetoric, Hill does not dispute that:

- *Demetrio v. Sakuma Bros. Farms, Inc.*, 183 Wn.2d 649, 652 (2015), defines a piece rate as pay “tied to the employee’s output;”
- DLI agreed “Payments (including bonuses) based on production meet the definition of piecework because the piece-rate is tied to the employee’s output,” Admin. Policy ES.C.6.2 at 5 (8/11/2016); and
- The “production minute” is the product that XBS sells to its client Verizon. Verizon pays XBS for each “production minute” a call center agent produces; and agents who generate more production minutes are paid more under the ABC plan.

Rather than addressing any of these core issues, Hill asks this Court to rule based on conclusory assertions that any measures containing the term “minutes” cannot be “units of work.” Hill asks the Court to ignore the employment agreement, the method of payment, all other aspects of the employment relationship, and her own admissions. Instead, Hill argues the ABC plan is an hourly plan, not because it pays on an hourly basis, but because it uses “production minutes” as a unit of work. Hill’s legal authority and policy arguments do not support her position.

Hill also attempts to go beyond the question certified to this Court, asking it to radically change the law regarding how minimum wage compliance is determined for piece rate compensation. Hill argues that non-agricultural pieceworkers must be separately compensated for every second that they are not actively generating a piece rate. Hill's request would essentially read WAC 296-126-021 out of existence, and require the Court to ignore WAC 296-128-550 and DLI Admin. Policies ES.A.3, ES.A.8.1, ES.A.8.2, and ES.C.3. The Court should reject this invitation.

II. ARGUMENT

A. This Court Should Look Beyond Hill's Rhetoric

Throughout her brief, Hill relies on rhetoric that is unsupported in the record and misleading. In the parallel case of *Douglas v. Xerox Business Servs., LLC*, 2017 WL 5474213 (9th Cir. Nov. 15, 2017), where the same attorneys argued for hourly minimum wage compliance under the federal FLSA for the same Federal Way employees, the Ninth Circuit dispatched with many of Hill's unsupported assertions. For example:

- Hill repeatedly asserts agents have "unpaid time." Not true. As *Douglas* (at *5) found: "Xerox's payment plan compensates employees for all hours worked." Unlike cases (*e.g.*, *Stevens*) cited by Hill, this case does not involve off-the-clock (or unrecorded) time for which no payment was planned or made.

- Hill asserts that Washington law is distinct from the FLSA because the FLSA uses the term “in any workweek,” but the WMWA does not. Hill’s counsel argued the opposite position in *Douglas*, and the Ninth Circuit (at *2 n.1) agreed that language did not address “compliance with the minimum-wage requirement.” There is thus no reason for this Court to draw a distinction between federal and state law, when the WMWA was patterned after the FLSA. *E.g., Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d 851, 868, 281 P.3d 289 (2012).

- Hill repeatedly asserts that wage statutes were intended to ensure the payment of wages and should be liberally construed in favor of employees. Truisms that have no impact here. As *Douglas* (at *3, 4) explains, there is “no empirical evidence that broad application of the workweek standard disadvantages employees so long as they ultimately receive the stipulated hourly rate” and, under a weekly measure, “employees receive compensation for every hour worked at a rate no less than the congressionally prescribed minimum hourly wage to guarantee the bare necessities of life.”¹

Ironically, while the Ninth Circuit in *Douglas* (at *3) found that there were no federal regulations supporting weekly minimum wage compliance, Washington has such a regulation in WAC 296-126-021. Hill

¹ In fact, the evidence shows that agents wanted to move from hourly pay to ABC pay because they could make more money under an ABC plan. Op Br. at 21 n.23; ER 490.

asks this Court to construe WAC 296-126-021 in a manner inconsistent with interpretations by the Ninth Circuit in this case, three federal district court decisions, the Attorney General of Washington, and DLI.²

Put simply, Hill's rhetoric should not dictate the outcome in this case. Instead, this Court should focus on the unrebutted facts.

B. The ABC Plan Is a Piecework Compensation Plan

1. The ABC Plan Pays by the Unit of Work

In its Opening Brief ("Op.Br.") (at 35-37), XBS detailed how the production minute functions as a unit of work under the ABC plan. As predicted, Hill argues (at 17) that the ABC plan is not a piecework plan because production minutes cannot be "units of work." But she ignores how production minutes function under the plan. The aspects of the plan left undiscussed and therefore uncontested by Hill are:

- "Production minutes" are the product for which Verizon pays XBS and are commonly used in the industry.³ Op.Br. at 22-25.
- The ABC plan provided: "ABC Pay rates compensate you for all time and activities (including time spent reviewing announcements, workspace care, logging on and off systems and recording time and work activities), except time spent on activities specifically assigned an hourly rate." *Id.* at 16.
- By agreeing to the ABC plan, Hill agreed to being paid based on a

² Admin. Policies ES.A.3 and ES.C.3; *Carranza v. Dovex Fruit Co.* ("Carranza"), Amicus Brief of the Attorney General of Washington ("AG Amicus Brief") at 6.

³ Hill states (at 19 n.10) that evidence showing that production minutes are units of work in the call center industry is "not legal analysis or authority and should be disregarded." While not legal authority, it is evidence, and it is undisputed. The Ninth Circuit noted this evidence "nominally support[s] the idea that compensating employees on a per-minute basis arises out of the unique situation facing call centers." Cert. Order at 10.

weekly calculation of ABC Pay, hourly pay for specific tasks, and weekly subsidy pay. *Id.* at 17.

- Hill testified the plan was not hourly, ABC Pay compensated her for “all hours worked,” and it was a piecework plan. *Id.* at 19-22.

Hill concedes (at 17) that under Washington law “[p]iece rate employees are usually paid a fixed amount per unit of work.” ES.A.8.2 at 3. Hill then asserts (at 18) that “per-minute rates, which are measured by time, differ from piece rates, which are measured by ‘pieces,’ ‘jobs,’ or ‘units of work,’” but offers no authority for that statement. Instead, Hill (at 17, 19) attacks the concept of a “production minute” by citing cases that do not discuss “production minutes” and that deal with unrelated issues:

- *Burchett v. DLI* does not support Hill’s argument that piecework cannot use production minutes as a unit of work. *Burchett* does not deal with any issue remotely related to that subject.
- *Erickson v. DLI* stands for nothing more than what is stated in the DLI regulations and policies—namely, that piecework is a different compensation method from hourly pay or day rates. *Erickson* does not address whether a production minute is a permissible “unit of work.”
- *Ontiveros v. Zamora*⁴ is not on point and actually supports the conclusion that the ABC plan is a piecework system: “piece rate” compensation “pays employees set rates for completing certain tasks or producing units of goods.” 2009 WL 425962, at *2. The ABC plan pays employees set rates for producing production minutes, which are the units of goods sold to Verizon.
- As discussed in the Opening Brief (at 41), *Washington v. Miller* has no relevance and does not support Hill’s argument.

Hill also makes a sweeping assertion (at 19-20) that: “[b]ecause

⁴ As discussed in section D.4 below, *Ontiveros* was decided under California law that is very different from and not persuasive authority regarding the WMTA.

Xerox paid employees under the ABC plan using measures of time—per-minute and per-hour rates—the employees were hourly employees and not pieceworkers.” None of the authority Hill cites (*Erickson*, *Rosenwasser*, or *Washington*) supports that assertion. Indeed, to the extent the cases address the argument at all, they contradict it.

- *Erickson* discusses workers appearing to be engaged in work “paid by the piece instead of by the hour or day,” but nothing in that statement supports the idea that any compensation method that involves a purported measure of time must be hourly. Instead, it distinguishes between two methods that use time: “hourly” and “day.” 185 Wash. at 620. This is consistent with DLI policies that treat day rates as non-hourly. Admin. Policy ES.A.8.1 at 4.
- *Rosenwasser* does not state that compensation by any “unit of time” means hourly compensation. 323 U.S. 360, 363-64 (1945). Instead, it distinguishes “employees working on an hourly wage scale” from “employees paid **by other units of time** or by the piece.” *Id.* at 364 (emphasis added). *Rosenwasser* actually contradicts Hill’s argument by distinguishing between “hourly” pay and pay “by other units of time.”
- *Washington* merely quotes a statutory provision requiring different record keeping for hourly work and piecework.⁵ Here, the ABC Task Pay Detail cited by Hill reflects piecework recordkeeping.

Hill’s unsupported argument that production minutes are not units of work should be rejected.

2. The ABC Plan Pays for Production

Hill does not dispute that this Court has defined piecework plans as plans based on production, *Demetrio*, 183 Wn.2d at 652, or that DLI has adopted that definition, Admin. Policy ES.C.6.2 at 5. Instead, Hill argues

⁵ It is undisputed that XBS kept detailed piecework records in this case. Indeed, the “minutes” that Hill adds up and compares (at 9) to “recorded hours” are only listed in the ABC Task Pay Detail because they are the “pieces” in a piece rate system.

(at 20) that pay under the ABC plan is not based on production.

This argument ignores the employment relationship between XBS and Hill. As discussed in the Opening Brief (at 33), ABC plans calculated pay based on the number of production minutes produced in a week, and pay statements showed that employees were paid based on the number of production minutes. The Ninth Circuit agreed, finding as a matter of fact:

Hill's contention is incorrect...It is not the total hours worked, but the total minutes spent on incoming calls, that determines an employee's pay. So, even though two employees may work the same number of total hours, one will earn more money if, during those hours, he spends more time than the other agent on incoming calls—just like a person who picks more strawberries.

Cert Order at 9 n. 6. Instead of addressing how the plan functions and pays, Hill repeats conclusory arguments that the ABC plan is hourly and pays for some "hours worked" and not others. Not true. The ABC plan tracks and pays for all hours worked, and undisputed evidence shows Hill was paid minimum wage for all hours. Op.Br. at 8-10; *Douglas* (at *5).

Hill argues (at 20) that the ABC plan is not based on production because an employee cannot "produce" a minute of work. However, a production minute is not just a minute of work. It is the product XBS sold to Verizon. It is 60 seconds spent performing particular tasks, subject to specific metrics, that qualify as a "production minute" that can be charged

to Verizon. To hold that a production minute cannot be a unit of work would be to hold that XBS cannot sell production minutes to Verizon.

Moreover, a “minute” and a “production minute” are not the same: an employee could sit at a desk all day, not take a call, and not produce a single production minute. XBS would still pay them at least minimum wage (through subsidy pay), but Verizon would not pay anything to XBS for that time. So, while that employee spends, and is paid for, 60 “minutes” per hour at work, no “production minutes” are produced.

Hill asserts (at 21) that a “call center worker credited with 60 ‘production minutes’ will have spent exactly one hour performing that work—every single time.” Not true. In fact, an employee’s efficiency in transitioning from call to call and endurance for handling repeated calls determines how many production minutes are produced in an hour, day, or week. It could take one hour to produce 60 production minutes, or it could take one hour and ten minutes, or two hours, or more.

Hill’s hypothetical (on 22) demonstrates that the ABC plan compensates based on production.⁶ The hypothetical posits two employees

⁶ This hypothetical misrepresents what is being incentivized. Hill states that “[c]ontrary to Xerox’s suggestions, this was not ‘designed to incentivize production’ of units of work...[i]n fact, the ABC plan often worked to reward agents who took fewer calls and made each of those calls last longer.” But, the product sold to Verizon was “production minutes,” not calls. So, the plan was designed to incentivize “production minutes.” The employee who took fewer calls (while maintaining an average handle time under 485 seconds) and produced more production minutes did exactly what the plan intended, earning more money for herself and the company.

who have the same rate per production minute because they have the same customer service score and their calls meet the targeted average handle time. The only difference is that one employee was more efficient in handling calls and generated 60 production minutes in an hour while the other generated 50. Hill admits that the employee who generated 60 production minutes earned more than the employee who generated 50. That was the point of the ABC plan, to incentivize the generation of production minutes. So, Hill's statement (at 22) that "[t]he ABC plan did not incentivize production of phone calls or any other 'unit of work'" is proven wrong by her own hypothetical. The plan paid for production.⁷

3. The Employment Relationship Demonstrates That the ABC Plan Was a Piecework Compensation System

Hill asserts (at 23) that XBS "cites no legal authority that" "its pay plans [pay stubs and testimony by plaintiff and other employees]" "have any bearing on the question" of whether the ABC plan was a piecework pay plan. Not true. In fact, XBS cited authority, Op.Br. at 31, from this Court holding that "the entire employment relationship" should be considered to determine the compensation method. *E.g., Drinkwitz v.*

⁷ Hill's other hypothetical (at 20), in which a retail employer pays employees at certain hourly rates when customers are present and nothing when the store is empty, has no application here. The employees in the hypothetical are hourly employees, not pieceworkers. Additionally, unlike the hypothetical, there is no time unpaid under the ABC plan because the plan tracks and pays for every hour. A more applicable hypothetical would be a retail employee who is paid on a commission rather than hourly. The commission the employee generates by selling when customers are in the store pays for times when the employee is waiting for the next customer and the store is empty.

Alliant Techsystems, Inc., 140 Wn.2d 291, 303, 996 P.2d 582 (2000) (employment practices should be “considered in the context of the entire employment relationship to determine whether the employment is salaried or hourly”); *see also Inniss v. Tandy Corp.*, 141 Wn.2d 517, 534-35, 7 P.3d 807 (2000)⁸ (construing compensation plan to determine whether it meets requirements of fluctuating workweek). Hill’s position that her employment agreement and pay records are not relevant when deciding the type of plan under which she was paid is absurd. These documents must be considered as part of the “entire employment relationship.”

Moreover, Hill’s argument begs the question: what is relevant to deciding the type of compensation plan under which an employee is paid if not the employment contract and pay records? Hill never answers this question. Instead, Hill argues (at 23) that employees cannot “agree to alter their right to receive at least the minimum wage.” This is true, but Hill puts the cart before the horse. The contract, records, compensation method, and measure of compliance determine whether minimum wage was received.

Hill concedes (at 24) that “[t]he application of wage and hour laws ‘is not fixed by labels that parties may attach to their relationship,’” and yet her entire argument is premised on labeling the production minute as a

⁸ Hill attempts (at 25 n.13) to distinguish *Inmiss* as dealing only with overtime, but the court also discussed minimum wage requirements. 141 Wn.2d at 521, 533.

“minute.” Hill does not contest, or address in any way, the fact that production minutes are the product sold to Verizon. She does not contest that ABC Pay is calculated by adding up production minutes over the course of the week. And, Hill does not contest that, in the employment arrangement here, the production minute functions as a unit of work in the production-based ABC plan.

4. The ABC Plan Is Not Hourly

Even if it is not a piecework system, the ABC plan is certainly not hourly. Hourly pay means payment at a set hourly rate. Cert. Order at 7; Op.Br. at 45-49. The “employment relationship” (plan language, pay stubs, and Hill’s testimony) shows that the plan is not hourly (although some tasks are hourly). Hill argues (at 25-26) that the ABC plan does not compensate on “other than an hourly basis,” because XBS does not “point to any particular ‘recognized’ payment method that ABC is other than ‘hourly.’” But the choice under DLI guidelines is not “hourly” or “recognized method,” it is “hourly” or “other than hourly.” Hill fails to respond to XBS’s citation in its Opening Brief (at 46) to Admin. Policy ES.A.3, which articulates how to measure minimum wage compliance. ES.A.3 states that “the employee’s total weekly earnings are divided by the total weekly hours worked” (or the hours in the pay period) to determine minimum wage compliance “when the employee is

compensated on other than an hourly basis.” It does not list specific payment methods. The ABC plan is an “other than hourly” system under ES.A.3 because it pays employees weekly ABC Pay, weekly Subsidy Pay and weekly non-discretionary bonuses. Additionally, contrary to Hill’s assertion, Admin. Policy ES.A.8.1, does not require a “recognized” compensation method. Instead, it provides a non-exclusive list of compensation methods that it contrasts with employees who are “paid hourly,” discussing employees paid in “some other manner, (commission, piecework, salary, non-discretionary bonus, etc., combinations thereof, or an alternative pay structure combined with an hourly rate).” This language is open ended and contemplates a wide variety of non-hourly compensation options. The ABC plan is accurately described as an “alternative pay structure combined with an hourly rate.”

C. The ABC Plan Paid for All Time Worked and Hill’s Claims of “Unpaid Time” Should Be Rejected

1. The ABC Plan Properly Paid Agents Based on the Workweek

Hill repeatedly asserts that ABC workers are “paid nothing” for any time spent doing activities that do not generate production minutes, so called “non-productive activities.” Not true.⁹ Undisputed evidence

⁹ This assertion is unsupported by evidence. For example, Hill claims (at 5), XBS corporate representatives testified that XBS “failed to pay per-minute ABC rates for several work activities.” This misrepresents that testimony. The witness merely testified that some activities generate production minutes under the ABC plan and some do not.

demonstrated that Hill was paid over the minimum wage for every recorded hour. Op Br. at 8-10 (citing ER 423 ¶9). And Hill concedes (at 5) that XBS “continued to record [employee] work time” even when they were not generating production minutes. So all work hours were paid.

Hill’s attorneys have been making this argument about unpaid time to numerous courts and it has been repeatedly rejected. Most recently, it was rejected in *Douglas*, 2017 WL 5474213 (at *5), which involved the same arguments about unpaid time (under the FLSA) by the same plaintiffs’ attorneys under an identical ABC plan. The court held that:

Xerox is not asserting that it can take money already due and apply it against unpaid hours to avoid an FLSA violation. Instead, Xerox’s payment plan compensates employees for all hours worked by using a workweek average to arrive at the appropriate wage.

Id. The Ninth Circuit in the present case implicitly rejected Hill’s argument as well, holding that “Piecework employees...are entitled to a minimum wage based on a work-week period.” Cert. Order at 7.

Three federal district court decisions have also rejected these arguments by Hill’s counsel.¹⁰ In *Helde*, for example, Judge Lasnik

SER 22. And at the end of those questions, the witness clarified that: **“every activity [employee’s] do is part of the—their ABC pay.”** SER 226 (emphasis added). This testimony is entirely consistent with the piece-rate.

¹⁰ See *Helde v. Knight Transportation, Inc.*, 2016 WL 1687961, *2 (W.D.Wash. 2016); *Mendis v. Schneider National Carriers Inc.*, 2016 WL 6650992, *3 (W.D.Wash. 2016); *Sampson v. Knight Trasp., Inc.*, 2017 U.S. Dist. LEXIS 119783, *4 (W.D.Wash. 2017).

detailed how WAC 296-126-021 functions to determine minimum wage compliance:

Washington regulations specify how the minimum wage calculation is performed if a compensation scheme other than an hourly wage is used. Pursuant to WAC 296-126-021.... If an employee earns both piece rate and other forms of compensation, the total wages earned in the week are added together and then divided by the total number of hours worked to determine whether the minimum wage requirement is satisfied.

2016 WL 1687961, *1. Plaintiff made the same argument Hill makes here:

Despite the analytical framework provided by WAC 296-126-021, plaintiffs make no attempt to show that their total wages earned in a week average out to less than the minimum wage. Rather, they argue that Washington law imposes an obligation to pay for each “hour of work,” and that, because Knight’s piece rate is based on a per-mile calculation, it covers only hours spent driving. Thus, the argument goes, plaintiffs were paid \$0.00 per hour for the time spent on non-driving tasks in violation of the minimum wage requirement.

Id. at *2. The court held: “Plaintiffs’ underlying assumption is faulty: the MWA does not require payment on an hourly basis.” *Id.*; *see also Mendis*, 2016 WL 6650992, *3 (“This Court reiterates...that Plaintiffs’ underlying assumption is faulty”).

2. Hill Introduced No Evidence the ABC Plan Did Not Pay Legally on an Hourly Basis

Hill claims to be seeking an “hourly” determination of minimum wage, but she introduced no evidence of a single hour that was paid below the minimum wage. Hill actually articulates (at 7-11) a weekly (not hourly) method of measuring compliance that is unsupported by any authority. For example, Hill analyzes one of her Pay Summaries and

misconstrues the contents of the ABC Task Pay Detail, which is the required record of the piece rate that makes up her ABC Pay. Rather than looking at each hour to determine if she was paid minimum wage for that hour, she proposes (at 7) to take seconds and minutes from the entire week and form them into a workweek of “unpaid” time. She proposes dividing the 3,394 production minutes generated over the course of the pay period by 60 to determine a fictional number of “hours” that were “paid.” She then subtracts those “hours” from the total recorded time paid by ABC Pay to come up with 6.83 hours. This compilation of allegedly unpaid seconds and minutes between calls over two weeks does not reflect real hours. This is not an “hourly” method of determining minimum wage compliance: it is a workweek or pay period method. Hill’s use of a workweek analysis for her own calculations demonstrates (and is an admission) that a workweek measure is necessary, and an hourly approach cannot rationally be applied to the non-hourly ABC plan.

An approach that would look more like an “hourly” approach would be to divide the 3,394 production minutes, that Hill admits were paid, by the total recorded ABC Pay hours: 63.40 hours. The result is an average of 53.53 production minutes generated each hour for that pay period. This shows two things. First, the time Hill spent in transition between calls was on average very small, roughly 6 minutes per hour.

Second, at her lower rate of \$.17 per production minute, Hill averaged \$9.10 per hour at a time when the minimum wage was \$9.04.

XBS does not concede that any of these methods is a legally correct way to determine compliance with the minimum wage. But, this mathematical exercise illustrates that Hill does not really seek an “hourly” compliance measure and, if an “hourly” compliance measure was applied, Hill has never demonstrated any violation.

D. This Court Should Reject Hill’s Argument that Pieceworkers Must Be Paid Hourly Wages for Non-Production Work

1. This Issue Is Beyond the Questions Certified

Hill argues (at 27) that pieceworkers must be paid hourly wages for non-production work. This issue is beyond the certified question and this Court lacks jurisdiction to answer it. *Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wn.2d 670, 676, 10 P.3d 371 (2000); RAP 16.16(a). Because the federal court retains jurisdiction over all matters except local questions that are certified, this Court should only address those arguments necessary to answer the certified questions. *Id.*

The Ninth Circuit certified the question “whether an employer’s payment plan, which includes as a metric an employee’s ‘production minutes,’ qualifies as a piecework plan under Washington Administrative Code Section 296–126–021?” It did not certify questions regarding the method of determining minimum wage compliance for a piecework plan

and did not certify interpretation of the MWA related to piecework. The Ninth Circuit has already decided that, if this Court answers the question “yes,” “Hill’s claim fails.” Cert. Order at 8. Hill’s “non-production work” argument would render the certified question moot, substituting a new issue. This is not “reformulating the question.”

The certified question assumes the workweek averaging method articulated in WAC 296-126-021 applies here. The Ninth Circuit held:

Under Washington law, when an employee is paid on a piecework basis, as opposed to an hourly basis, it is permissible for an employer to determine whether the employee’s compensation complies with the MWA on the basis of a work-week period... In other words, as long as the total wages paid for a given week, divided by the total hours worked that week, averages to at least the applicable minimum wage, an employee’s compensation complies with Washington law.

Cert. Order at 3 (*citing* WAC 296-126-021; Admin. Policy ES.A.3).

Hill concedes this point and should not be allowed to raise an argument on appeal not contested before the federal courts. *Baccei v. U.S.*, 632 F.3d 1140, 1149 (9th Cir. 2011); RAP 2.5. Although Hill asserts (at 27 n.14) that she did not concede this point, the Ninth Circuit and district court held that she did. Cert. Order at 3 (“[t]he parties do not dispute the applicability of Washington’s framework for determining [compliance] with Washington’s minimum wage law”); ER 9 (“For workers who are paid on a commission or piecework basis, the right accrues across the workweek, **a fact which Plaintiff never contests.**”) (emphasis added).

2. WAC 296-126-021 Does Not Authorize Additional Payment for Non-Production Time

The argument Hill makes here appears to be a version of the argument made by these same attorneys in the *Carranza* case pending before this Court. But those arguments do not apply here.

First, as the certified question states, this case is governed by WAC 296-126-021, which uses the workweek to determine minimum wage compliance. And, as the Attorney General explained, WAC 296-126-021 is inconsistent with plaintiffs “non-production time” argument and has resolved any ambiguity in the WMWA for non-agricultural workers:

Another reasonable reading is that RCW 49.46.020 permits workweek averaging in some circumstances, such as employees being paid on a commission basis. See WAC 296-126-021. Under this reading, the employer need not account for and compensate each discrete hour of work, provided that the employee’s total weekly wage divided by the number of hours worked meets or exceeds the minimum hourly rate in RCW 49.46.020....By rule, DLI has approved workweek averaging in some circumstances for non-agricultural workers covered by the Industrial Welfare Act, RCW 49.12. WAC 296-126-021. This rule is a valid resolution of RCW 49.46.020’s ambiguity for those workers.

AG Amicus Brief at 6. The Attorney General argued the regulation does not apply to agricultural workers (as in *Carranza*), but it clearly applies here and allows workweek averaging.

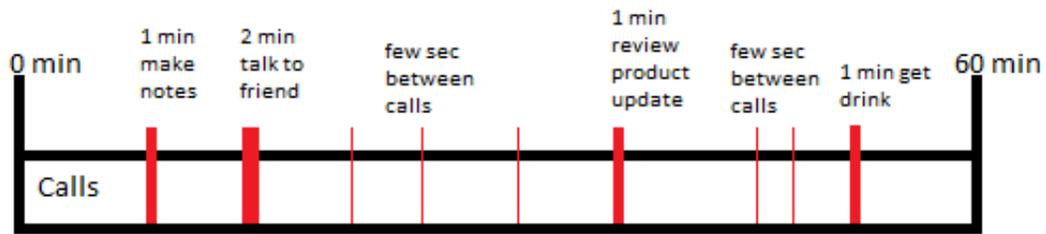
Second, the ABC plan compensates employees in precisely the way that Carranza advocated in his case. In his Reply Brief, Carranza states that separate payment is only required for “work time during which

no piece rate can be earned because no pieces can be produced:”

This includes meetings, down time..., wait time mandated by the employer, travel time, and equipment transport time...[but] does not include time in which workers pick fruit, climb up and down ladders, empty fruit into bins, or move from tree to tree.

Plaintiffs’ Reply Brief on Certified Questions at 7.

Essentially, time in the orchard is production time. Here, the ABC plan provides separate hourly pay for defined activities, including: “(1) training, (2) meeting/coaching, (3) work shortages, (4) system down time, (5) non-ABC Pay tasks or special projects, and (6) break pay.” Cert. Order at 6. This matches the “non-production time” outlined by Plaintiff’s counsel in *Carranza* almost exactly (considering it is work in a call center, not an orchard). But here, those same attorneys seek to expand the “non-production time” to include not only activities where the employee cannot earn a piece rate (training, meetings, down time), but also “time in the orchard,” those few seconds or minutes that an employee is waiting for a call, transitioning between calls, reviewing an email, recording a call entry, or doing something to prepare for a call. Even if this issue was not answered by WAC 296-126-021, Hill is seeking to impose an obligation for separate hourly payment for production work time, i.e., time sitting at their phone when employees can take a call and generate the piece rate. It is the call center equivalent of paying for only the actual picking of fruit as a piece rate, but not for climbing the ladder or emptying the basket.



As this chart (which shows about 6 minutes in an hour not on a call) illustrates, Hill seemingly wants a chess clock used to parse between production-related activities. This approach has no support in the regulations and would create an impossible task for judges to sort through time and pay records to decide what seconds count as “production time.”

3. Hill’s Interpretation of WAC 296-126-021 Is Erroneous

Recognizing that WAC 296-126-021 applies in this case, Hill seeks to support her argument for separate payment of some ABC time by arguing (at 29) for a convoluted and incorrect interpretation of the regulation. Hill’s tortured interpretation would require this Court to ignore the plain language of WAC 296-126-021 as well as ignore the five other places where the measure of compliance for piecework is discussed: WAC 296-128-550, and Admin. Policies ES.A.3, ES.A.8.1, ES.A.8.2, and ES.C.3. Hill’s interpretation ignores that the regulation discusses paying on a “piecework basis, wholly or partially.”

The regulation addresses minimum wage compliance “[w]here employees are paid on a commission or piecework basis, **wholly or partially.**” (emphasis added). The emphasized language is key to the

meaning of section (1) because there can be mixed compensation systems, like the ABC plan. WAC 296-126-021 makes clear that “[t]he amount earned on such basis” (the “basis” being the piecework part of the pay) “in each work-week period” (applying the workweek measure) “may be credited as a part of the total wage for that period” (recognizing that piecework wages may be added to hourly, bonus or other pay). Section (1) simply provides that commission or piecework compensation, in a partially piecework plan, “may be” added as part of total compensation with other methods of pay.¹¹ Section (2) states that “[t]he total wages paid for such period shall be computed on the hours worked in that period.” Thus, the “total wages,” which means the pay from all sources, whether piecework alone (i.e., “wholly”) or combined with other pay (section (1)), are totaled and divided by the “hours worked” for the workweek.

This interpretation is consistent with DLI’s interpretation.¹² For example, Admin. Policy ES.C.3 applies the following rules:

Wages earned in each workweek period may be credited as part of the total wage for the period . . . [and] [t]o obtain the regular rate of pay, the total earnings for the pay period are to be divided by the total hours worked in that period.

There is no mention of wages earned for productive time, or dividing

¹¹ This is in contrast with compensation like “tips,” which may not be combined with other compensation. *See* Admin. Policy ES.A.3 at 3.

¹² It is also consistent with how *Helde II*, 2016 WL 1687961, at *2 interpreted the regulation: “If an employee earns both piece rate and other forms of compensation, the total wages earned in the week are added together and then divided by the total number of hours worked to determine whether the minimum wage requirement is satisfied.”

earnings by hours worked on productive tasks only. Instead of focusing on productive tasks, “total earnings”¹³ are “divided by total hours worked.”¹⁴

Hill argues (at 33) that, to the extent there are two reasonable interpretations of WAC 296-126-021, the interpretation more protective of workers should be adopted. But, Hill’s interpretation is not reasonable. The Ninth Circuit, federal district courts, Attorney General, and DLI have all found WAC 296-126-021 clearly authorizes workweek averaging by dividing total pay by total hours worked. Moreover, Hill offers no evidence that her interpretation is more protective. As the Ninth Circuit held when discussing the same ABC plan in *Douglas* (at *4), “the Employees cite no empirical evidence that broad application of the workweek standard disadvantages employees so long as they ultimately receive the stipulated hourly rate.”

4. California Law Is Not Persuasive

Hill argues (at 32) that this Court should follow California law in its approach to piecework. California law does not help Hill’s argument. Hill’s citation to *Gonzalez v. Downtown LA Motors*, and *Armenta v. Osmose*, and other California case law actually highlights the reasons that the workweek measure should apply to the ABC plan.

¹³ Admin. Policy ES.A.3 at 3 states “total earnings is meant to include all compensation received for hours worked in the pay period, as well as any additional payments.”

¹⁴ “‘Hours worked’ means all hours during which the employee is authorized or required..to be on duty...at a prescribed work place.” Admin. Policy ES.C.2 at 1.

First, there is a “distinction between the California Labor Code and Washington’s MWA.” *Anfinson v. FedEx Ground Package System, Inc.*, 159 Wn. App. 35, 58, 244 P.3d 32 (2010), *aff’d*, 174 Wn.2d 851. “[T]he genesis of California’s minimum wage laws is distinct from the FLSA . . . [indeed], California adopted its minimum wage laws in 1913, several decades before the FLSA was enacted.” *Id.* *Anfinson* held that, “[b]ecause the California Labor Code and minimum wage laws are not patterned on the FLSA, the trial court incorrectly relied on the California courts’ articulation of that state’s common law test [for a determination] under the MWA.” *Id.* Likewise, the *Armenta* line of cases under the California Labor Code are not persuasive here.

Second, the holding in *Armenta* upon which Hill relies—that “productive” and “non-productive” work cannot be “averaged” to determine minimum wage compliance—is based on an entirely unique aspect of California law.¹⁵ As discussed in *Gonzalez*:

As support for its ruling, the *Armenta* court cited a January 29, 2002 opinion letter issued by the Division of Labor Standards Enforcement (DLSE) as persuasive reasoning why, under California law, the employees were entitled to compensation for all hours worked.... DLSE acknowledged that the minimum wage law is “susceptible” to two “divergent” interpretations, as espoused by the parties in *Armenta*... “(1) that the obligation to pay minimum wages attaches to each and every separate hour worked during the

¹⁵ This judicial change to the law in California required the state legislature to intervene and change the law to provide clearer guidance and a safe harbor for businesses to transition to the new requirements. Labor Code 226.2 (AB 1513) (2016).

payroll period...or 2) that the obligation to pay minimum wages for the total number of hours worked in the pay period is determined ‘backwards’ from the date that a payment is due, without considering any hour (or part of any hour) in isolation.’” **The DLSE endorsed the former interpretation, requiring payment of the minimum wage for “each and every separate hour worked.” The DLSE noted that although federal courts had consistently applied the latter interpretation, significant differences between federal and California labor laws required a different approach in California.**(bold added)

215 Cal.App.4th 36, 46-47, 155 Cal.Rptr.3d 18, 24-25 (Cal. App. 2013).

Gonzalez expanded the application of the *Armenta* rule to pieceworkers, rejecting the argument that *Armenta* applied only to hourly workers, by interpreting a California Industrial Welfare Commission Wage Order that stated it applied “to all persons...*whether paid on a time, piece rate, commission, or other basis.*” *Id.* at 48-49 (emphasis in original). On the basis of the DLSE letter and the IWC Wage Order, *Gonzalez* held that the fact that employees were paid “on a piece-rate basis is not a valid ground for varying either the application or interpretation of the wage order” as requiring each separate hour to be paid.¹⁶ *Id.* at 49.

In Washington, the DLI (the Washington equivalent to the DLSE) has promulgated regulations and policies that state the exact opposite of the DLSE letter and IWC Wage Order. DLI’s regulations and policies

¹⁶ The other cases cited by Hill rely on the same DLSE letter, or cases that rely on that letter, to reach equally inapplicable conclusions. *See Cardenas v. McLane Foodservices, Inc.*, 796 F.Supp.2d 1246, 1251-2 (C.D. Cal. 2011) (relying on the DLSE opinion); *Quezada v. Con-Way Freight, Inc.*, 2012 WL 2847609, *3-6 (N.D. Cal. July 11, 2012) (relying on *Armenta*, *Cardenas* and DLSE opinion); *Carillo v. Schneider Logistics, Inc.*, 823 F.Supp.2d 1040, 1044 (C.D.Cal. 2011) (relying on *Armenta* and *Cardenas*).

make it clear that piecework, commissions, and other non-hourly compensation methods apply the workweek measure for minimum wage compliance (*e.g.*, WAC 296-128-550, 296-126-021, Admin. Policies ES.A.3, ES.A.8.1, and ES.C.3), as recognized in *Inniss* and the Ninth Circuit in this case. In addition, the AG’s Amicus Brief in *Carranza* states that workweek averaging has been adopted by DLI in WAC 296-126-021.

E. Any Change in the Law Should be Prospective Only

If this Court accepts Hill’s argument regarding non-production time, it will contradict WAC 296-126-021 and the interpretation of that regulation by DLI, the Attorney General, and the federal courts. The Court should not invalidate the regulation or its interpretation. Such changes are best left to the Legislature. If this Court does take such action, however, any ruling should be prospective only. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 271, 208 P.3d 1092 (2009).

III. CONCLUSION

This Court should answer the certified question “Yes,” and also confirm that the ABC plan is not an “hourly” compensation plan.

RESPECTFULLY SUBMITTED this 21st day of November 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Supreme Court for the State of Washington by using the Supreme Court's electronic filing system on November 21, 2017.

I further certify that all participants in the case are registered users and that service will be accomplished by the Supreme Court electronic filing system.

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