

No. 94860-7

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' OPENING BRIEF

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I. INTRODUCTION

Plaintiff Tiffany Hill (“Hill”) worked in a Federal Way call center for Defendants Xerox Business Services, Livebridge, Inc., et al. (“XBS”) as a customer service agent who answered customer calls. This certified matter arises from a minimum wage claim by Hill for times when she was paid under XBS’s Activity Based Compensation (“ABC”) plan. The ABC plan was designed to calculate weekly pay (called “ABC Pay”) for employees based on quality, efficiency, and productivity, with a guarantee that employees would always be paid at least the statutory minimum wage on a weekly basis for all hours they worked. Although XBS used hundreds of different units of work in ABC plans throughout the world, the plan that applied to Hill used a unit of work called “production minutes.”

Hill does not dispute that (1) minimum wage compliance for piecework plans is determined on a workweek basis,¹ and (2) Hill was

¹ The Ninth Circuit has decided this issue. Certification Order to the Washington Supreme Court (“Cert. Order”) at 3 (“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.”). WAC 296-126-021 provides that, to determine minimum wage compliance for employees “paid on a commission or piecework basis, wholly or partially,” “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.” Washington State Department of Labor and Industries (“DLI”) Admin. Policy ES.C.3 (1/2/2002) (“total earnings for the pay period are to be divided by the total hours worked in that period”). Similarly, DLI Admin. Policy ES.A.3 at 2 (7/15/2014) provides for the same weekly calculations whenever an “employee is compensated on other than an hourly basis.”

always paid more than minimum wage when determined weekly.² Hill claims, however, that use of “production minutes” meant that she was paid on an hourly basis, and that minimum wage compliance for hourly employees must be measured (not by the workweek) but by analyzing whether she was paid minimum wage for each discrete hour of work.

In its certified question, the Ninth Circuit is seeking guidance on how to characterize Hill’s compensation under the ABC plan. The Ninth Circuit asks: “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?” As applied to the ABC plan here, the answer is “Yes.”³

In *Demetrio v. Sakuma Bros. Farms, Inc.*, 183 Wn.2d 649, 652, 355 P.3d 258 (2015), this Court defined a piece rate as one that “is tied to the employee’s output...and is earned only when the employee is actively producing.” DLI agrees that “Payments (including bonuses) based on production meet the definition of piecework because the piece-rate is tied to the employee’s output.” DLI Admin. Policy ES.C.6.2 at 5 (8/11/2016); *see also* DLI Admin. Policy ES.A.8.2 at 1 (7/15/2014) (piecework usually

² Ninth Circuit Dkt No. 11-1 at 2 (Hill conceded if “pay may be averaged over the workweek to determine minimum wage compliance, there is no violation”).

³ If this question is answered “No” (which it should not be), the remaining implicit question is how should such a payment plan be characterized. Is it an hourly plan (as argued by Hill) or is it some other type of non-hourly incentive plan? The Court should address this question (if necessary) in order to provide full guidance to the Ninth Circuit.

pays “a fixed amount per unit of work”). The ABC plan qualifies under these definitions. There is no dispute that pay under the ABC plan:

- Is based on the employee’s output and production;
- Is only accrued when the employee is actively producing the relevant unit of work;
- Is paid weekly based on the accumulated products or units of work (called “production minutes”); and
- Is not paid at a set hourly rate.

Moreover, the history of the Federal Way ABC plan demonstrates that it is a piecework plan. The Federal Way ABC plan initially paid an employee a fixed rate for every incoming call the employee handled. The plan encouraged an employee to handle more calls.⁴ XBS tracked calls as units of work and, each week, those units were multiplied by relevant production rates to determine an employee’s weekly ABC pay. If an employee did not handle enough calls for the weekly ABC Pay to reach the minimum wage, then a lump sum weekly payment called Subsidy Pay was added to the weekly pay so that the employee was always paid minimum wage on a weekly basis. This was indisputably a piecework compensation plan because it focused on an employee’s production and

⁴ ABC plans were used throughout XBS operations, but not all ABC plans used calls. The unit of work depended on the type of work employees were performing, and could be documents, bookings, chats, sales, or any other unit of work. ER 414 ¶4.

paid an employee a fixed amount per unit of work.⁵

Federal Way employees complained that it was not fair that they earned the same amount for a 30 minute call as they did for a 30 second call. At the same time, the Verizon contract changed to provide that XBS would be paid for the number of “production minutes” the call center generated. Under the contract, a “production minute” was time spent by an agent on an incoming customer service call, along with any hold time and work done after the call relating to that call. Thus, XBS changed the unit of work in the Federal Way ABC plan to a “production minute” to mirror the product it sold to its client and to more fairly compensate employees.

Everything about the ABC plan still functioned exactly the way it did when it used calls. Production minutes were tracked as units of work and multiplied by production rates (which varied depending on the quality of customer service provided) to generate weekly ABC Pay. The ABC plan still encouraged employees to take more calls, it still paid based on employee production, and it still calculated pay based on a unit of work.

The real issue presented here is whether a piecework plan is somehow transformed into a non-piecework “hourly plan” simply because

⁵ The unit of work in a piecework compensation plan can be an activity (like a mile driven, a call handled, or a production minute (a portion of a call handled)), and does not have to be a tangible item like a shirt or a piece of fruit. *See Helde v. Knight Transportation, Inc.*, 2016 WL 1687961, *2 (W.D.Wash. 2016) (employees paid on a piece rate basis by the mile driven).

the unit of work changes from a call to a production minute, when everything else about the plan stayed the same. The answer should be no. The ABC plan remained a piecework plan that pays based on employee production and by unit of work, not by time at work or a set hourly rate.⁶ This Court does not have to broadly endorse the production minute as a unit of work to hold that the ABC plan was a piecework system, but under the specific (perhaps even unique) facts of this case, it was.

The purpose of the Washington Minimum Wage Act, RCW Chapter 49.46 (“MWA”), is to set a floor below which employee wages may not fall. The compensation plan at issue in this case, the ABC plan, complies with the letter and spirit of the MWA. There is no dispute that employees always made at least the minimum wage for the hours they worked. Each pay period, employees took home more pay than if they had been paid at the minimum wage rate for each hour. Indeed, under the ABC plan, it is not possible for an employee to be paid less than the minimum wage for every hour worked because Subsidy Pay is added to guarantee minimum wage compliance.

XBS employee pay would be indisputably legal if XBS had simply paid employees the hourly minimum wage rate, but employees would have made less than they did under the ABC plan. Instead, XBS’s ABC

⁶ There are certain tasks under the ABC plan that are compensated by a set hourly rate as “Additional Pay,” but that pay is not in dispute here.

plan guaranteed that employees were paid the minimum wage and gave them the ability to earn much more if they produced more of Verizon's product while providing quality work. This type of compensation plan -- which allows employees to earn more take home pay than an hourly minimum wage system -- should be encouraged by this Court.

The Federal Way ABC plan met the criteria for a MWA compliant piecework plan: it paid employees based on their production of a unit of work, and included a guarantee that minimum wage would be paid regardless of production. Because this is a piecework plan, this Court should answer the certified question: Yes.

Alternatively, although the Ninth Circuit has framed the question as whether the ABC plan is piecework (as compared to hourly), a finding that the ABC plan is not piecework will not resolve this case. Washington law does not focus on a piecework-hourly dichotomy. Instead, for purposes of determining minimum wage compliance, Washington law focuses on whether pay systems are "hourly" or "other than hourly." DLI Admin. Policy ES.A.3 at 2 (providing for a workweek calculation for determining "whether an employee has been paid the statutory minimum hourly wage when the employee is compensated on other than an hourly basis"). A piecework plan is one form of "other than hourly"

compensation.⁷ If the Court has any doubt as to whether the ABC plan is a piecework plan (which it should not have), this Court should reframe the question to ask “whether an employer’s payment plan that pays based on production, but that includes as a unit of work an employee’s ‘production minutes,’ qualifies as an hourly compensation plan?” The answer to that question should be “No, it compensates on an other than hourly basis.”

II. FACTS

A. The Federal Way Call Center

Hill was a customer service agent at a call center operated by XBS in Federal Way, Washington, where she handled customer service calls. ER 358-360 ¶2, ¶5. Federal Way provides service to a single client, Verizon Wireless, for that client’s customers. *Id.* ¶3. The Federal Way contract with Verizon contains various metrics, including a unit of work called a “production minute,” and it calculates the amount Verizon pays XBS based on the number of production minutes produced. *Id.* ¶4. Production minutes are produced by agents only while performing particular tasks (e.g., taking inbound calls) and are tracked by task codes in the telephone system. *Id.* The XBS payroll system⁸ then calculates ABC

⁷ Hill concedes in her most recent Complaint that the ABC plan is not hourly, but an “incentive-based compensation plan” that paid “using separate per-minute, per-unit, or per-hour rates for assigned customer service tasks and other activities.” ER 645 ¶5.3.

⁸ The Front End Payroll System (“FEPS”) “is used to track and store information used in generating payroll for employees in various Xerox affiliated companies.” ER 420-21 ¶2-3.

pay by multiplying the number of production minutes by production rates.

ER 421, 415-16 ¶8.

B. Hill's Pay Was Above the Minimum Wage for All Hours Worked

This is not a case about unpaid workers or unpaid time. Hill was paid at or above the minimum wage for all her recorded hours.⁹

1. Hill Was Paid Hourly During Training

Federal Way agents are typically paid an hourly rate during training, which can last up to 90 days. ER 359-60 ¶5; ER 361-62 ¶8. In 2011, Hill's training rate was \$9.00 per hour, when the minimum wage rate was \$8.67. ER 422-23 ¶8; ER 452, 482. Hill has not alleged any claims in relation to this hourly pay. Hourly pay during training contrasts with production-based pay under the ABC plan.

2. Hill Was Paid Based on Production Under the ABC Plan

After training, most Federal Way agents moved from hourly pay to weekly production pay under an ABC plan.¹⁰ ER 415 ¶6. Under the Federal Way ABC plan, Hill was paid at an average hourly rate ranging

⁹ At summary judgment, XBS presented testimony, pay records, and accompanying tables that showed the compensation received and hours recorded by Hill during her employment. ER 422-23 ¶8-9; ER 326-57.

¹⁰ There was more than one ABC plan during the term of Hill's employment, as they were periodically revised. The 2012 plan will be used as the example in this Brief, and the Brief accordingly refers to the "ABC plan." ER 676-678. ABC plans were set forth in two documents: a uniform ABC "Plan Document" (ER 676) provided general terms that applied to many XBS call centers, and a Local ABC "Rate Document" (ER 677-78) provided a detailed description of the rates and tasks for the particular location.

from \$9 to \$10.20 per hour during each week in 2011 (when the minimum wage rate was \$8.67) and at an average hourly rate ranging from \$9.09 to \$12.14 in 2012 (when the minimum wage rate was \$9.04). ER 423 ¶9.

Hill’s hourly rate varied from week to week and was never the same twice.

This was indicative of piecework pay (where pay varied each week depending on quality and production metrics) rather than hourly pay (which would have the same hourly rate from week to week as when Hill was in training). Hill’s weekly ABC Pay can be summarized as:

WeekBegin	WeekEnd	Non-OT Pay	Total Hours	Average Hourly Rate	Min. Wage Rate
10/29/2011	11/4/2011	\$375.77	41.53	\$9.0481	\$8.67
11/5/2011	11/11/2011	\$429.03	47.67	\$9	\$8.67
11/12/2011	11/18/2011	\$421.75	45.75	\$9.2185	\$8.67
11/26/2011	12/2/2011	\$490.36	51.92	\$9.4445	\$8.67
12/3/2011	12/9/2011	\$410.69	45.43	\$9.04	\$8.67
12/10/2011	12/16/2011	\$414.76	45.88	\$9.0401	\$8.67
12/17/2011	12/23/2011	\$379.59	27.99	\$9.0518	\$8.67
12/24/2011	12/30/2011	\$340.02	34.6	\$9.8271	\$8.67
12/31/2011	1/6/2012	\$353.56	27.57	\$10.2031	\$8.67
1/7/2012	1/13/2012	\$455.12	46.19	\$9.8532	\$9.04
1/14/2012	1/20/2012	\$318.54	28.57	\$11.1494	\$9.04
1/21/2012	1/27/2012	\$219.23	22.67	\$9.6704	\$9.04

1/28/2012	2/3/2012	\$325.68	33.15	\$9.8244	\$9.04
2/4/2012	2/10/2012	\$235.47	24.24	\$9.7141	\$9.04
2/11/2012	2/17/2012	\$73.87	8.12	\$9.0972	\$9.04
2/18/2012	2/24/2012	\$457.68	40.34	\$9.3958	\$9.04
2/25/2012	3/2/2012	\$224.00	24.39	\$9.184	\$9.04
3/3/2012	3/9/2012	\$395.35	40.19	\$9.837	\$9.04
3/10/2012	3/16/2012	\$186.68	16	\$11.6675	\$9.04
3/17/2012	3/23/2012	\$409.48	41.79	\$9.7985	\$9.04
3/24/2012	3/30/2012	\$55.38	4.56	\$12.1447	\$9.04

ER 423 ¶9.¹¹

Hill’s time and pay records confirm that Hill was paid in excess of the minimum wage in compliance with RCW 49.46.020 for all her recorded hours.¹² Similarly, when DLI investigated complaints from XBS employees paid under the ABC plan, it reviewed the employees’ pay records and found that they were paid the minimum wage.¹³ ER 28-45.

C. The ABC Plan Compensated Employees Based on Production

The Federal Way ABC plan was designed and functioned as a

¹¹ The compensation information in this table is based on each workweek while pay summaries discussed later are based on a pay period of two weeks.

¹² Hill was also fully paid overtime in compliance with RCW 49.46.130 for all her recorded overtime hours, but that is not an issue certified by the Ninth Circuit.

¹³ DLI investigated wage complaints from XBS employees and determined that they were “paid accordingly [sic] to the State Minimum Wage and Overtime Laws.” ER 28. The wage-analysis spreadsheets (ER 30-39; 42-45) use a workweek analysis and show the employees were paid well in excess of minimum wage for their periods of employment.

weekly piecework plan. It guaranteed that an employee was always paid a weekly amount equal to or above the minimum wage rate, but allowed an employee to make much more. ER 417 ¶12; ER 676 (“This ABC plan rewards you for the quantity and quality of work performed.”). The ABC plan paid employees based on their production, not based on their time at work. This was explained in the Xerox Employee Guidebook:

Activity Based Compensation is offered in many [XBS] business units and departments. **ABC is a pay method under which employees are rewarded for individual efficiency, productivity and quality**...As the quality and quantity of work performed increases, the opportunity for recognition and higher wages increases. With ABC we strive to provide income opportunities that **reward tangible effort and performance rather than the amount of time spent on the job.**¹⁴ ER 178 (emphasis added).

After reading an introduction to the plan, Hill signed a

“Certification of Understanding – The ACS Achievement Based

Compensation (ABC) Overview” that acknowledged she understood:

ABC is fundamentally a pay for performance system. As an ABC employee, **I get paid primarily based on what I produce** – in terms of both quantity and quality.¹⁵ ER 176, 151(emphasis added).

The ABC plan language, discussed in detail below in Section 5, repeatedly explained that employees were paid based on production. ER 676-78.

¹⁴ As noted in the Guidebook, the ABC plan is used in many Xerox “departments.” Other departments often do not use the “production minute” as a unit of work, but they function the same as the Federal Way ABC plan by multiplying whatever unit of work is produced by the rate assigned to that unit. ER 414 ¶4; ER 508-9.

¹⁵ The plan pays “primarily” based on production because there are certain activities that are paid Additional Pay on an hourly basis.

The Ninth Circuit recognized this fact, stating:

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.

The plan had three primary components of compensation: ABC Pay (weekly piecework pay based on production of Verizon's product), Additional Pay (hourly pay for certain designated activities), and Subsidy Pay (a weekly lump sum payment to assure employees were paid at least the minimum wage rate for all hours worked). *Id.* at 5-6; ER 414 ¶4.

1. ABC Pay

ABC Pay compensated agents for all time they worked during which they were not receiving hourly Additional Pay. ER 415-16 ¶8. “ABC Pay was an incentive-based model rewarding agents who were efficient at dealing with customer issues.” Cert Order at 5. ABC plans used qualitative and efficiency measures to determine ABC Pay rates that were then multiplied by the units of work generated by that employee during that week. ER 414 ¶4. This calculation can be demonstrated as follows:

$$\begin{array}{l} \text{ABC Pay rate (calculated on a matrix of quality and efficiency} \\ \text{measures)} \\ \times \quad \text{Units of Work} \\ = \quad \text{Weekly ABC Pay} \end{array}$$

These plans were used throughout the company and used different units of work (also referred to as “transactions” or “item types”). ER 507-10; ER 423-24 ¶10. Any “transaction” could function as a unit of work under the ABC plan: client calls, bookings, chats, sales, or production minutes doing those or other tasks. ER 414 ¶4. These units of work were recorded as transactions in XBS’s payroll tracking system FEPS,¹⁶ which then calculated pay based on the number of transactions multiplied by their rate. ER 423-24 ¶10.

The unit of work used in Federal Way was the “production minute.” As the Ninth Circuit described it:

“Some of these activities—such as receiving inbound calls—[were] paid on a per minute basis, and each minute [was] referred to as a ‘production minute.’” “Production minutes” were only generated when an agent was either on an incoming call, on hold during an incoming call, or completing after-call work related to the incoming call. The rate at which Xerox paid for “production minutes” was determined by both “qualitative and efficiency measures.” The qualitative measure included two components: (1) supervisor evaluations of the employee, and (2) employee success in resolving the customer’s issues. The efficiency measure was based on the employee’s ability to keep his average time spent on calls/call-related activities at or below a set number determined by Xerox. The rates at which employees were paid for their “production minutes” varied from fifteen cents per minute to

¹⁶ A training slide used by Xerox explains that FEPS “is a time and attendance system designed to calculate gross pay for employees, and export pay data to a centralized payroll system to produce paychecks.” SER 58. The slide states that “FEPS captures 2 types of data to calculate an employee’s gross pay:…Time worked: Collects start/stop times from online or physical time clocks for both hourly and activity based employees [and]…Transactions: Collects pay transactions from production tracking systems for activity based compensation employees.” *Id.* Another slide illustrates the separate methods of recording “time worked” and “transactions” in the FEPS database. SER 59.

twenty-five cents per minute. To determine an individual's ABC Pay for the week, Xerox took the total "production minutes" per week and multiplied it by the employee's per-minute rate. All other logged ABC time—i.e., non-"production minutes"—were not given a rate, but were tracked and appeared on an agent's pay statements.

Cert Order at 5-6; *see also* ER 677; ER 414-16 ¶4, ¶8.

The result of this calculation was weekly ABC Pay, which paid for "[a]ll hours worked" unless an agent performed specific activities "designated by management to be payable as Additional Pay." ER 676.

2. Additional Pay

"Xerox used Additional Pay to compensate its agents for some tasks that were not covered by ABC Pay." Cert Order at 6. "These defined activities included (1) training, (2) meeting/coaching, (3) work shortages, (4) system down time, (5) non-ABC Pay tasks or special projects, and (6) break pay." *Id.*; *see also*, ER 415 ¶7. "These activities were always paid at a standard hourly rate based on Washington's minimum wage for the applicable year."¹⁷ *Id.*

3. Subsidy Pay

XBS "used Subsidy Pay to supplement an agent's wages if Xerox determined that the employee's hourly rate did not comply with minimum wage." Cert Order at 6. "To determine whether this supplement was

¹⁷ In 2012, the Additional Pay rate was set at \$9.04, the minimum wage rate that year. Hill admitted that she was paid an hourly rate for these designated activities. ER 481. The sufficiency of the hourly rate for Additional Pay has never been challenged. ER 7.

necessary, Xerox took the Subsidy Pay rate (the minimum wage) and multiplied it by the total hours worked in a given week to calculate an employee's minimum pay." *Id.* "If that amount was greater than the result of adding an employee's ABC Pay to his Additional Pay, then the difference would be paid to the employee as Subsidy Pay in a lump-sum amount." *Id.* Indeed, it was not possible under ABC plans for an employee to be paid less than minimum wage for the weekly hours they worked because Subsidy Pay guaranteed employees would make at least the minimum wage rate for every hour worked regardless of productivity. ER 417 ¶12. For example, if an employee reported to work and generated no production minutes in a week, the employee would be paid at the minimum wage rate for all recorded hours.

4. Bonuses

At times, agents also received pay for referrals, skill development, language skills, hitting targets, and extensive overtime. ER 363 ¶8C.

5. The Language of the ABC Plan Demonstrates It Paid Production-Based Compensation for All Hours Worked on a Weekly Rather than Hourly Basis

The ABC plan explained in detail how employee compensation was calculated and paid. It stated: "This ABC plan rewards you for the quantity and quality of work performed." ER 676. It urged employees to "understand the plan as it relates to your job and compensation." *Id.* To

ensure that employees understood the plan, they were “required to meet regularly with [their] manager to discuss **your productivity which determines the pay you receive.**” *Id.* (emphasis added).

Under the heading “ABC Pay Rates” the plan explained that the production-based ABC Pay compensated them for all hours worked except for specific activities compensated on an hourly basis:

All hours worked will be compensated by ABC Pay, unless your manager authorizes you to perform specific activities which have been designated by management to be payable as Additional Pay.

ER 676. Similarly, the Federal Way Rates Document stated:

ABC Pay rates compensate you for all work 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.

ER 677. The Rates Document then explained that, for Federal Way, weekly ABC Pay is calculated by multiplying “production minutes” by the ABC Pay Rates. *Id.*

Under the heading “Additional Pay Rates,” the Plan Document explained that the only time at work not paid by production-based ABC Pay was when employees received hourly Additional Pay:

All time at work is compensated through ABC Pay, except for certain specific activities that the SBU may deem eligible for Additional Pay instead. . . . While ABC Pay is calculated based upon the quantity and quality of transactions performed, Additional Pay is typically paid on a per hour rate.

ER 676.

The Plan Document also made clear that Subsidy Pay guaranteed payment at or above the minimum wage regardless of productivity:

The Subsidy Pay Rate is the minimum hourly rate (floor) established by management to protect you from making below a certain amount. Your Subsidy Pay amount is calculated by multiplying your total hours worked by your Subsidy Pay Rate. If your Subsidy Pay Amount is greater than the result of adding your ABC Pay to your Additional Pay, then the difference will be paid to you as Subsidy Pay.

ER 676. The 2012 Federal Way Rates Document was even more explicit:

You will be paid an amount no less than \$9.04 multiplied by the total number of hours you work in a work week. This Subsidy Pay Rate amount will be paid to you only if it exceeds the sum of your ABC Pay and Additional Pay for that work week.

ER 677. This language left no doubt that employees could not be paid less than minimum wage, and that the calculation and payment of Subsidy Pay was handled on a weekly basis.

Thus, in a recital just above the employee signature line, the Plan Document summed up those statements:

[Y]ou understand that at minimum, ABC Pay plus Additional Pay along with the protection of Subsidy Pay will ensure that you make wages in compliance with the Fair Labor Standards Act and applicable local wage and hour law.

ER 676.

The ABC plan clearly and repeatedly informed employees that they were being paid based on their production of units of work calculated on a weekly basis, except in limited instances when they were paid hourly.

6. Employee Wage Statements Demonstrated the ABC Plan Paid Based on Production of Units of Work

In addition to explicit plan language, agents also received detailed wage statements (called “Pay Summaries”) that demonstrate that they were paid under a weekly production-based piecework plan. The Pay Summary separately states hourly pay and production-based ABC Pay:

Pay Type	Hours	Rate	Amount
ABC Task Pay (BC)	45.11		\$453.65

Training	1.00	\$9.04	\$ 9.04

ER 313.¹⁸ Hill was paid \$453.65 of ABC Task Pay for 45.11 ABC hours (about \$10.05 per hour). She was also provided Additional Pay at the hourly rate of \$9.04 per hour for tasks such as “Training.”¹⁹

Pay Summaries also include an ABC Task Detail section that breaks down the production-based units of work that generate ABC Pay (showing “Item Type,” “Volume,” “Rate,” and “Amount”):

¹⁸ The Pay Summary represented is for the two-week pay period from 3/17/2012 to 3/30/2012. The Pay Summaries at ER 313-322 were what was available to the employee in the XBS intranet known as Infobank. These Pay Summaries were retrieved from that system by Hill personally and represent information always available to employees. ER 309. The version of wage statements employees received on pay day are represented by printouts from the XBS payroll system. ER 327-57.

¹⁹ Line items for overtime pay and other hourly pay are omitted from this example.

Item Type	Task Name ...	Volume ...	Rate	Amount
Minutes	Customer Service	235	\$0.22	\$51.70
Minutes	Customer Service	2141	\$0.18	\$385.39

Id. The amounts generated by the volume of units of work multiplied by their applicable rates are added up to total the amount of ABC Task Pay. The “Item Type” could just as easily have been calls or chats, but in this case it was production minutes.

The Pay Summaries show that ABC Pay was calculated and paid using a unit of work that varied depending on an employee’s production.²⁰

7. The Testimony of XBS, Hill, and Other Employees Show that the ABC Plan Is a Production-Based Piecework Plan and Not Hourly Compensation

All of the parties to the employment contract—XBS, Hill, and other agents—understood that ABC was a piecework system. XBS witnesses testified that the ABC plans were “mixed piece-rate or piecework compensation systems,” ER 414 ¶4, and “incentive piece rate plans.” ER 361-63 ¶8B. Indeed, in the first two versions of her Complaint, Hill referred to the ABC plan as a “hybrid model that combines an hourly rate with complicated piece rates (the ‘ABC’ compensation system).” Hill Fed. Dist. Dkt. 1, 6 ¶5.1. Hill testified that she believed this description in her first two Complaints was accurate. ER 149-50. Tysheka Richard, a

²⁰ In subsequent pay periods, Hill had a different volume of production minutes and was paid a different hourly wage rate. ER 314 (2756 production minutes-\$9.96/hr); ER 315 (3394 production minutes-\$9.32/hr).

Federal Way employee (and plaintiff in the related case of *Douglas v. XBS*, No. 2:12-cv-01798-JCC)²¹ also testified that ABC Pay was a “piece rate:”

- Q. ...[B]y “piece rate,” were you referring to the ABC pay when you were talking about that? A. That’s right.
- Q. So when you said “piece rate” in the various notes you had, is that kind of what you were thinking of? A. Yes. The piece rate, to me, means the per-minute rate.

ER 499-500.²²

Hill understood that, except for the activities paid at an hourly rate, “everything else was paid through the ABC pay”:

- “Q. Did you understand that all hours worked were compensated by ABC pay? A. Yes.” ER 165-66.
- Q. Beyond “meetings, training, coaching, [and] system down” was there “[a]nything else that you got paid at an hourly rate? A. No, not that I remember. Q. And did you understand otherwise that everything else was paid through the ABC pay? A. Correct.” ER 167.

²¹ *Douglas v. XBS* is a case brought by the same plaintiff’s counsel under the FLSA on behalf of workers at XBS call centers across the country who were paid under ABC plans, including some plans that used production minutes and others that used other units of work. 2015 WL 10791972, *1 (W.D.Wash. 2015). Plaintiff Tysheka Richard worked at the Federal Way call center under the same ABC plan as Hill. *Id.* The same district court that presided over *Hill* granted partial summary judgment to XBS in *Douglas* holding: “[m]inimum wage pay for every hour worked, as required by the FLSA, was provided under the ABC plan...[a]ccordingly, no minimum wage violation occurred.” *Id.* at *7. The court was “particularly persuaded by the availability of subsidy pay” which “ensured that, as an absolute floor, employees paid under the ABC plan were to receive at least the federal minimum wage multiplied by the number of hours worked.” *Id.* at *7. On motion for reconsideration, the district court reaffirmed its ruling but certified the case for interlocutory appeal to the Ninth Circuit. 2016 WL 4017407, *2 (W.D.Wash. 2016).

²² Ms. Richard also testified that she kept contemporaneous notes of problems while she was working in Federal Way. ER 497-98. In one of these notes she stated that “[m]y piece rate has not been corrected,” by which she meant her ABC Pay. *Id.*

This conclusion was warranted because the express terms of the ABC plan do not create an hourly method of compensation. No witness has testified that this was an hourly plan.²³ Hill repeatedly testified that her pay under the ABC plan was not hourly:

- Q. If people were paid on a straight hourly rate, was that different? A. Different from what? Q. Than how you were paid? . . . A. Yes. ER 148.
- Q. ...During training, you were paid a straight hourly rate, correct? A. Correct. Q. So when this is talking about this hybrid model it's talking about once you finished training, is that correct? . . . A. Correct. ER 150.
- Q. Again, your understanding wasn't they would be paid hourly rates, the representation was you would be paid under a system that assured you got the minimum wage, correct? A. Correct. Q. And also had built into it opportunities to earn more than that, correct? A. Correct. Q. So is it fair to say that the company never told you that you would only be paid an hourly wage? . . . A. Correct. ER 163-64.
- Q. Now, in terms of your compensation in Federal Way, would you say that there was a clear distinction between when you were paid hourly in training and when you were paid under the ABC plan? . . . A. Yes. Q. Did you understand that those were different compensation approaches? A. Yes. ER 174-75.

Hill does not even allege in her third Complaint that the ABC plan was an hourly plan. In her Second Amended Complaint (after having

²³ On the contrary, Ms. Richard testified that ABC Pay was not hourly. ER 493-96; 501. She "absolutely" wanted to switch over from an "hourly wage" to "ABC pay" because she "could see in the front-end payroll system that [her] pay, if based off of [her] quality, would have been much higher than the hourly rate [she] was receiving." ER 490. Indeed, she put together a spreadsheet showing how much more she would make under ABC Pay to support her "transition from hourly pay to the ABC pay." ER 493.

described the ABC plan as using “complicated piece rates” in her prior two versions of the Complaint), Hill describes the ABC plan as “a hybrid model that combines hourly rates with per-minute rates and/or per-unit rates for time spent on telephone calls with customers.” ER 643.

D. The Production Minute is Simply a Unit of Work Under the Production-Based ABC Plan

The only reason that there is a question whether the ABC plan is a piecework plan is because the unit of work is called a “production minute.” But the production minute is no different from any other “transactions” that were used under ABC plans throughout the company. ER 414 ¶4; ER 505-10. ABC plans treated any unit of production the same regardless of what it was called. *Id.* All units of work under the ABC plans were tracked in a computer system called FEPS. ER 424. This system tracked transactions and rates and multiplied them to determine ABC pay. *Id.* There was no difference in the system between a “call” or a “sale” or a “production minute” or any other transaction. ER 414 ¶4; ER 505-10. They were simply a unit of work that was multiplied by whatever rate was assigned. *Id.*

Indeed, before 2009, the Federal Way ABC plan used calls as its unit of work. ER 414 ¶5. The prior plan was intended to incentivize

employees to handle more calls.²⁴ The Federal Way ABC plan was modified to use “production minutes” as its unit of work in part to address agent concerns about the unfair nature of paying the same amount for calls whether they lasted less than a minute or more than 30 minutes. *Id.* It was also changed because the contract with Verizon changed and Verizon contracted for and purchased production minutes (i.e., specific call-related activities) and paid XBS based on the number of production minutes XBS produced. ER 414-15 ¶5.

Thus, under its contract with XBS, Verizon paid for a product and, in order to incentivize its agents to produce as many of those products as possible (while meeting quality and efficiency goals), XBS calculated weekly pay for agents based on (1) how many products they produced, and (2) the quality of those products (varying rates for quality measures of resolving customer problems and keeping calls under a particular length).²⁵ ER 414-16 ¶5, 8. Thus, production minutes were a unit of work in the piecework ABC plan, and multiplying those units by ABC Pay rates created a weekly ABC Pay amount that compensated agents for all

²⁴ Under its prior, call-based plan, XBS instructed employees how to determine a “personal production goal” to achieve a particular average hourly rate by taking a certain number of calls per hour. SER 53-54.

²⁵ Because the ABC plan was designed to reward agent efficiency, agents who worked the same number of production minutes could receive different pay depending on whether they handled calls efficiently or took excessive time on each call.

productive and nonproductive activities not covered by Additional Pay.

ER 416-17 ¶¶9, ¶11.

The use of the production minute as a unit of work is not unique to the Verizon-XBS contract. XBS introduced undisputed evidence that production minutes are commonly used in call center piecework compensation plans, including:²⁶

- A January 22, 2006, article in Businessweek that discussed home workers doing call center work and describing a **production minute** concept: “**Agents are paid only for the time spent on the phone—a 21st-century piece-rate system.**” ER 601-3 (emphasis added).
- An About.com article entitled “What Is a Per-Piece Rate or Piece Work” that stated: “**[P]iece work is also used in fields such as data entry, translation, writing, editing and call centers. In these lines of work, the ‘pieces’ may be clearly defined and incorporated in the rate, such as per-minute talktime, per call, per word, per page or on a project basis.**” ER 605 (emphasis added).
- A PowerPoint presentation by Professor Valery Yakubovich at the 2012 Annual Conference of the Industry Studies Association entitled “Labor Market Shelters Within Organizations: A Field Experiment,” containing a slide entitled “Case: Virtual Call Center” with the bullet point “**Piece-rate pay—A fixed rate per minute of time on the phone with callers.**” ER 66 ¶6; ER 121 (emphasis added).
- An accounting test showing a question related to a piecework incentive program using production minutes as the unit of work. ER 67 ¶7; ER 131.

²⁶ While the Ninth Circuit noted that this evidence “hardly establish[ed] an industry standard,” it did “nominally support the idea that compensating employees on a per-minute basis arises out of the unique situation facing call centers.” Cert Order at 10.

- Portions of an Amendment to an AT&T Wireless Services Provider Agreement showing production minutes as the method of billing. ER 67 ¶8; ER 137.
- The City of Miami's Request for Proposals for Call Center Services showing "Cost Per Production Minute per Shared Agent" as part of the cost proposal. ER 67 ¶9; ER 141.

The nature of call center work and the specific requirements of the Verizon contract made the production minute a fair and accurate way to measure productivity for employees. Production minutes were not a continuous measure of time. ER 415-16 ¶8. Agents did not receive production minutes under the plan simply for being present at work. Instead, production minutes were generated only when an agent was on a call, on hold, or completing after-call work. *Id.* ¶9; ER 677. Generally, production minutes were not generated by waiting for calls or making outbound calls, just like fruit pickers do not generate a piece rate while they are walking between trees or orchards. ER 416 ¶9. Thus, ABC Pay was not calculated based on the amount of time employees worked. If Employee A and Employee B had the same quality and efficiency and worked the same number of hours, but Employee A produced more production minutes, XBS paid Employee A more because of that additional output.

ABC Pay rates were designed to compensate for all activities needed for an agent to do productive work (based on the understanding

that some activities counted as production minutes and others did not). ER

416 ¶9. The ABC plan specifically explained this:

ABC Pay rates compensate you for all work 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.

ER 677.

As the Ninth Circuit observed, “Xerox is paid by Verizon on the basis of ‘production minutes’ that its employees spend in assisting Verizon customers.” Cert. Order at 9. “As a result, just like a fruit-seller trying to maximize the amount of fruit he has to sell by incentivizing his employees to pick more through a piecework system, Xerox sought to maximize the amount of minutes it could charge Verizon by incentivizing its agents to generate more ‘production minutes.’” *Id.* The production minute functioned as a unit of work, not a measure of time.

E. DLI Investigation and Testimony Demonstrate that the ABC Plan is a Production-Based Piecework Plan

DLI, the Washington agency charged with enforcing the MWA, also considered the ABC plan to be a piecework system. ER 21-22 ¶5, ¶6. In April 2014, 13 call center agents filed wage complaints with DLI about the ABC plan. Under RCW 49.48.083(1), DLI was obligated to investigate and resolve these claims. ER 56-64. A DLI investigator contacted XBS,

stated that the complaining agents believed they were not paid for outbound calls during the work day, and asked for an explanation of the Federal Way ABC plan. ER 56-57 ¶¶2-3. After XBS's in-house counsel explained how the ABC plan worked, the investigator stated that it sounded like XBS was paying the agents in compliance with the law. *Id.* XBS then provided a written explanation of the ABC plan. ER 57-58 ¶¶5; ER 59-60. After receiving the written explanation, the DLI investigator reported that she would talk to the agents to explain that they were paid for all activities and then close their claims. ER 58 ¶6. DLI explained its reasoning in communications with agents drafted by the investigator:

I went over the law and how the [employer] is paying according to the law. The [employee] stated she understood the law but does not believe she is paid for all hours worked. She stated she works off the clock in the morning and also during outbound calls because there is no timer going when she is doing these tasks. **I explained that the [employer] tracks all hours worked and that most of these tasks are built into the piece rate.** Again I explained the law and how she may have a very low producing day but **at the end of the week the [employer] takes all her hours and divides it by how much she makes and will pay min[imum] wage and [overtime] if need be.**

ER 21 ¶5; ER 48-51 (emphasis added). Thus, the agency charged with enforcing the MWA concluded that production minutes were a proper piece-rate and applied a workweek measure to the ABC plan.²⁷

²⁷ As noted above in Section B.2, the investigator also found that XBS correctly paid the minimum wage.

F. Procedural History.

Hill sued XBS in federal court, claiming that she and a putative class were not properly compensated because the ABC plan did not comply with the MWA. ER 637-38. XBS moved for partial summary judgment that the ABC plan complied with the MWA. ER 8.

In its July 10 Order, the district court denied XBS's motion for partial summary judgment. ER 6. In denying summary judgment regarding the legality of the ABC plan, the court stated it was "sympathetic to Defendants' policy arguments and the reasons why the [ABC payment] system was established in this manner" and that it was "also sympathetic to the general proposition that the division between hourly workers and pieceworkers may fail to reflect the contours of the modern working world." ER 10. But the district court focused on the unit of work for ABC Pay, the "production minute," and held that because it included the word "minute," the ABC plan "more closely resembles an hourly system" than a piecework system.²⁸ ER 10-11.

XBS moved for reconsideration of the denial of partial summary judgment based on new evidence—namely, DLI investigation reports from May 2014, which XBS first obtained after the July 10 Order, finding that the ABC plan complied with the MWA. In the alternative, XBS asked

²⁸ In the *Douglas* case, the same district court found the ABC plan "to be more closely analogous to a commission-based system." 2015 WL 10791972, at *4 n.3.

the court to certify the July 10 Order for immediate interlocutory appeal under 28 U.S.C. § 1292(b). Dkt. No. 117. The court denied the motion for reconsideration but certified the Order for immediate appeal because “the partial-summary-judgment determination affects a significant issue in the case, . . . it implicates issues of first impression on which there are substantial grounds for difference of opinion, and . . . an immediate appeal could advance the ultimate termination of the litigation.” ER 4.

XBS’s Petition for Permission to Appeal was granted. ER 1. XBS then perfected its appeal. The parties briefed and argued the case, and the Ninth Circuit certified the question to this Court. Cert Order at 4.

III. ARGUMENT

A. The Certified Question for Review

The decision whether to answer certified questions of law pursuant to chapter 2.60 RCW is within the discretion of this Court. RAP 16.16(a). The federal court retains jurisdiction over all matters except those certified, but this Court may reformulate the certified question. *Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wn.2d 670, 676, 10 P.3d 371 (2000); *Allen v. Dameron*, 187 Wash.2d 692, 701, 389 P.3d 487 (2017). The Court “consider[s] the legal issues not in the abstract but based on the certified record provided by the federal court.” *Carlsen v. Global Client Solutions, LLC*, 171 Wn.2d 486, 493, 256 P.3d 321 (2011).

Here, the Ninth Circuit certified: “[W]hether 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?”²⁹

The answer should be yes. The ABC plan is designed as a piecework plan and calculates pay based on employees’ production of a unit of work. The unit of work is a “production minute” because Hill works in a call center (where production minutes are a common unit of work) and Verizon pays XBS based on the number of production minutes XBS employees produce. The ABC plan was designed to incentivize employees to produce the product that XBS sold by paying employees based on the number of units they generated each week, and not merely paying them for how long they were at work. In any event, this Court should hold that the ABC plan provides production pay (whatever the label) and does not pay by the hour. The Court may reformulate the question to ask whether the ABC plan was “hourly,” to which question the answer should be: “No.”

²⁹ The text of WAC 296-126-021 reads:
Where employees are paid on a commission or piecework basis, wholly or partially,
(1) The amount earned on such basis in each work-week period may be credited as a part of the total wage for that period; and
(2) The total wages paid for such period shall be computed on the hours worked in that period resulting in no less than the applicable minimum wage rate.

B. The ABC Plan Was a Piecework System

To answer the Ninth Circuit’s question whether the ABC plan qualifies as a piecework plan, this Court should look at the totality of the employment relationship between XBS and its ABC employees to determine whether the ABC plan is piecework, hourly, or some other non-hourly system.³⁰ The Washington Administrative Code and the DLI Administrative Policies focus on how employees are paid or compensated and on the terms of employment agreements in making this determination.³¹ Likewise, federal regulations examine employment agreements to determine FLSA compliance.³² Here, (1) the ABC plan document, (2) how it was communicated to and understood by employees, (3) how compensation was calculated, and (4) how compensation was paid all demonstrate the ABC plan was a piecework plan, and not hourly pay.

³⁰ *E.g., Drinkwitz v. 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”); *Webster v. Pub. Sch. Emps. of Wash. Inc.*, 148 Wn.2d 383, 399, 60 P.3d 1183 (2003) (“The court...should consider the practice ‘in the context of the entire employment relationship’ to determine” employee status under the MWA) (*quoting Drinkwitz*, 140 Wn.2d at 303).

³¹ See WAC 296-126-021 (applies “[w]here employees are paid on commission or piecework basis”); WAC 296-128-550 (applies to “[e]mployees who are compensated on a...piece rate...rather than an hourly wage rate”); DLI Admin. Policy ES.A.3 at 2 (discusses how to determine payment of minimum wage “when an employee is compensated on other than an hourly basis”); DLI Admin. Policy ES.A.5 (MWA “prohibits agreements” to work for less than the minimum wage).

³² 29 C.F.R. § 778.108 (The “regular rate” “must be drawn from what happens under the employment contract.”) (*citing Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 68 S. Ct. 1186, 92 L. Ed. 1502 (1948)).

1. The ABC Plan Qualifies as a Piecework Plan Because It Pays Employees Based on Production

This Court recently enunciated a definition of piecework:

A piece rate is tied to the employee's output (for example, per pound of fruit harvested) and is earned only when the employee is actively producing. Thus for employees paid a piece rate, the clock stops during periods of inactivity however brief.

Demetrio, 183 Wn.2d at 652.³³ This contrasts with an hourly plan that pays an employee at a set hourly rate based on time at work (regardless of production). Cert. Order at 7 (employers can pay a price “per unit of work” or “pay their employees a set hourly rate for their work, otherwise known as an hourly wage”).

DLI subsequently adopted the definition of piecework this Court enunciated in *Demetrio*:

Payments (including bonuses) based on production meet the definition of piecework because the piece-rate is tied to the employee's output.

DLI Admin. Policy ES.C.6.2 at 5.³⁴ DLI's definition of piecework thus focuses on whether pay is “based on production” rather than what the unit of production might be (even if it involves minutes).

³³ This definition was not available to the district court, or for the parties' initial briefing to the Ninth Circuit. XBS submitted the *Demetrio* opinion and the revised DLI Admin. Policy ES.C.6.2 to the Ninth Circuit as supplemental authority, but neither authority was referenced in the court's Certification Order.

³⁴ This definition was articulated in the context of break regulations for agricultural workers, but there is no logical distinction between the definition of what constitutes a piecework system for agricultural workers and non-agricultural workers. A compensation

Here, compensation under the ABC plan is based on production, except for specific tasks that are compensated hourly. The ABC plan undisputedly includes “payments...based on production” because its “piece-rate is tied to the employee’s output.” *Demetrio*, 183 Wn.2d at 652.

Every aspect of the employment relationship demonstrates that the ABC plan compensates based on production:

- The Employee Guidebook states that the plan pays based on “productivity” and “performance rather than the amount of time spent on the job.” ER 178.
- Employees sign an acknowledgement that they are paid “based on what I produce.” ER 176.
- The ABC plan explicitly states that “your productivity...determines the pay you receive.” ER 676.
- The ABC plan states that ABC Pay is determined by multiplying production minutes by ABC Pay Rates. ER 677.
- The FEPs system tracks the number of “units,” in this case production minutes, and multiplies them by the applicable rate to generate ABC Pay. ER 414 ¶4; ER 505-510; ER 424.
- The wage statement shows that ABC Pay is determined by multiplying the number of production minutes that the employee generated each pay period by the applicable rate. ER 313.
- The number of production minutes each employee generated varied from week to week. ER 313-22.
- Actual pay varied from pay period to pay period depending on the number of production minutes generated. *Id.*; ER 423 ¶9.

The way the ABC plan functioned and the way employees were paid shows that this is a production-based system. Two employees with

system can be based on production whether that production involves picked fruit, miles, calls, or minutes helping customers on the phone.

identical compensation terms and who worked the same hours would have received different amounts of pay based on the metrics for ABC Pay, including the number of production minutes generated. For example, an employee under the 2012 ABC plan who produced 2200 production minutes in a 40 hour workweek with reasonable quality (a rate of 20 cents per production minute) would earn \$440 (an average of \$11 per hour) for those hours, while a second employee who worked the same hours, under the same plan, with the same quality³⁵ (also a rate of 20 cents per production minute) but lower production (1890 production minutes) would earn \$378.00 (an average of \$9.45 per hour). In contrast, compensation under an hourly plan does not vary in this way and both employees would earn the same amount for working 40 hours at the same rate.

As the Ninth Circuit correctly observed, “[i]t is not the total hours worked, but the total minutes spent on incoming calls, that determines an employee’s pay.” Cert Order at 9 n. 6. “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.” *Id.* This Court’s holding in *Demetrio* and the DLI guidance based on that holding correctly

³⁵ If quality varied, the ABC Pay rate would also vary. For example, the agent might receive \$0.18 per production minute.

define the production-based ABC plan as piecework. Thus, the certified question should be answered: “Yes.”

2. The ABC Plan Qualifies as a Piecework Plan Because It Calculates Pay Based on a Unit of Work

As the Ninth Circuit noted, “[a]ccording to the [DLI], ‘[p]iece rate payment is usually a price paid per unit of work.’” Cert. Order at 7 (citing DLI website); *see also* DLI Admin. Policy ES.A.8.2 (“Piece rate employees are usually paid a fixed amount per unit of work.”).³⁶ In addition to satisfying the *Demetrio* production standard, the ABC plan meets this “unit of work” standard because production minutes function as a unit of work under the plan, just as calls did in its previous incarnation.

The production minute is a unit of work. “Work” is defined in a standard dictionary as follows: “[p]hysical or mental effort or activity directed toward the production or accomplishment of something.” The American Heritage College Dictionary (4th ed.). The production minute falls within the definition of work because it measures “physical or mental effort or activity” (talking on the phone for a minute) “directed toward the production or accomplishment of something” (resolving customer issues

³⁶ This definition is also consistent with the definitions in Black’s Law Dictionary and standard dictionaries. See Black’s Law Dictionary (10th ed.) (“Piecework. Work done or paid for by the piece or job.”); Black’s Law Dictionary (6th ed.) (“Piecework. Work done or paid for by the piece or quantity.”); The American Heritage Dictionary (5th ed.) (“Work paid for according to the number of units turned out.”).

in an efficient manner, which Verizon defined and paid for in its contract as a production minute).

The text of the employment agreement, the method of pay, and the undisputed testimony of XBS witnesses shows that the ABC plan was designed to function, and did in fact function, as a piecework system. ER 676-678. The ABC plan specified quality measures—namely, the quality and efficiency of call handling—and set the variable rates for the unit of work – namely, the production minute. It stated that “ABC Pay rates compensate you for all work time and activities” “except time spent on activities specifically assigned an hourly rate.” ER 677. And it detailed how the piece rate was multiplied by the unit of work; how that total was then added to hourly Additional Pay; and, if that amount fell short of a minimum hourly rate when divided by all hours worked for the week, how Subsidy Pay made up the difference. *Id.* Undisputed evidence showed that: (1) the production minute was designed to function as a “unit of work” or “piece” under the ABC plan, *id.*; (2) the ABC plan correctly paid minimum wage and overtime as a piecework system when averaged over the week, ER 422-23 ¶¶8, 9; (3) XBS, Hill, and other agents (i.e., the parties to the employment contract) understood that the ABC plan was a piecework system;³⁷ and (4) DLI understood the ABC plan to be a

³⁷ ER 414 ¶4; ER 361-63 ¶8B; ER 497-500; ER 458.

piecework system, telling employees after an investigation that XBS “tracks all hours worked and that most of these tasks are built into the piece rate.” ER 56-58; ER 21-22 ¶5, ¶6.

It is undisputed that Federal Way’s sole client, Verizon, compensated XBS on the basis of production minutes produced. This unit of work is common in call centers,³⁸ and rewards certain desired activities for call center agents. These are the characteristics of a piecework system.

In the face of the above undisputed evidence and uncontradicted authority, Hill’s arguments contradict her own testimony.³⁹ Hill has argued that because the production minute is labeled as a minute, it actually pays as a fraction of an hour, and the ABC plan is therefore an hourly compensation system. This argument ignores the way the production minute actually functions and the way the ABC plan uses the production minute to compensate employees. It elevates form over substance by arguing the label of “minute” should trump the actual function of the ABC plan. Cert. Order at 9.

Because the ABC plan is a piecework plan using the production minute as the “unit of work,” the answer to the certified question is “Yes.”

³⁸ ER 601-3; ER 605; ER 121; ER 131; ER 137; ER 141.

³⁹ Hill testified that the ABC plans were piecework systems, she never believed the plans to be hourly systems, and she understood that ABC Pay paid for all time worked. ER 148-50, 163-67, 174-75.

C. Hill’s Argument that a Production Minute Cannot Be a Unit of Work in a Piecework Plan Is Wrong

Hill has never disputed that the ABC plan functions as described above. Instead she argues that the production minute cannot be a unit of work because it is also a unit of time. But there is nothing in the MWA that forbids the use of a production minute as the unit of work in a piecework plan. In fact, there is nothing in the MWA that dictates the specifics of any compensation plan.

RCW 49.46.020 contains the MWA minimum wage standard. Subsection (4)(a) provides that “every employer shall pay to each of his or her employees . . . wages at a rate of not less than the amount established under (b) of this subsection.” Subsection (4)(b) provides that, on September 30 of each year, the DLI “shall calculate an adjusted minimum wage rate to maintain employee purchasing power by increasing the current year’s minimum wage rate by the rate of inflation,” with the new rate taking effect on the following January 1.⁴⁰ The MWA “merely sets the floor below which the agreed rate cannot fall without violating the statute.” *Seattle Prof’l Eng’g Emp.s Ass’n v. Boeing Co.*, 139 Wn.2d 824,

⁴⁰ It is significant that the MWA sets a “minimum wage **rate**” per hour, rather than just a minimum wage per hour. “‘Wage’ means compensation due to an employee by reason of employment” RCW 49.46.010(7). “Rate” is defined as “[p]roportional or relative value; the proportion by which quantity or value is adjusted.” Black’s Law Dictionary (10th ed. 2014). This means that the relative value of the wage is measured per hour (*e.g.*, weekly earnings divided by hours worked), but it does not require an hourly payment.

835, 991 P.2d 1126 (2000) (“SPEAA”). The stated purpose of the MWA is met when “actual weekly compensation for each [employee is] never less than the total weekly compensation based upon the minimum hourly wage.” *Inniss v. Tandy Corp.*, 141 Wn.2d 517, 533-34, 7 P.3d 807 (2000).

The MWA requires pay at least equal to the minimum wage rate, but employers and employees otherwise remain free to negotiate the type of agreement they enter into.⁴¹ *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 861, 93 P.3d 108 (2004) (“Although employees and employers may not bargain away these minimum requirements, they are free to bargain collectively ‘in order to establish wages or other conditions of work in excess of the applicable minimum.’”).⁴² As the U.S. Supreme Court observed 70 years ago:

Congress approached the problem of improving labor conditions by the establishment of a minimum wage in certain industries. It required that workers in these industries receive compensation at least as great as that fixed by the [FLSA]. Except for that

⁴¹ Any payment method is allowed as long as it complies with the minimum wage once that method is translated into an hourly rate. *U.S. v. Rosenwasser*, 323 U.S. 360, 363-64, 65 S.Ct. 295, 89 L.Ed. 301 (1945) (“The fact that section 6[a] speaks of a minimum rate of pay ‘an hour,’ ... does not preclude application of the Act to piece workers... Congress necessarily had to create practical and simple measuring rods to test compliance with the requirements as to minimum wages...[and] did so by setting the standards in terms of hours and hourly rates...But other measures of work and compensation are not thereby voided or placed outside the reach of the Act...[and] Such other modes merely must be translated or reduced by computation to an hourly basis”).

⁴² See also *Helde*, 2016 WL 1687961, at *1 (“as long as the employer pays its employees the equivalent of the minimum wage rate for each hour of work, the parties are free to establish a salary, commission, piece rate, hourly rate, or other system of compensation”) (citing WAC 296-128-550); *Mendis v. Schneider National Carriers Inc.*, 2016 WL 6650992, *3 (W.D.Wash. 2016) (“The MWA ‘provides flexibility in negotiating the method and amount of compensation in an employment relationship.’”) (quoting *Helde*).

requirement the employer was left free, in so far as the Act was concerned, to work out the compensation problem in his own way.

Williams v. Jacksonville Terminal Co., 315 U.S. 386, 408, 62 S. Ct. 659, 86 L. Ed. 914 (1942).⁴³ The MWA's flexible approach to compensation assures that the minimum wage rate is always satisfied, but also promotes economic growth and innovation.

Here, XBS "established wages or other conditions of work in excess of the applicable minimum." *Hisle*, 151 Wn.2d at 861. It modified its pre-existing ABC plan, indisputably a piecework plan, to change the unit of work from calls to production minutes to better reflect the product it was selling and to more fairly compensate employees. The ABC plan was designed to better incentivize these specific call center employees, guaranteeing the payment of the minimum wage while allowing a better chance to exceed that minimum. Hill's payment history (which was not disputed) demonstrates compliance with the MWA because, every week, she was paid compensation for all hours she worked at an hourly rate above the minimum wage rate. ER 422-23 at ¶ 8, 9. Indeed, Hill has conceded that if her "pay may be averaged over the workweek to

⁴³ Authority interpreting the FLSA is instructive in interpreting the MWA. *Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d 851, 868, 281 P.3d 289 (2012) ("We have repeatedly recognized that the 'MWA is based on the Fair Labor Standards Act of 1938.'").

determine minimum wage compliance, there is no violation.” Ninth Circuit Dkt No. 11-1 at 2.

Instead of arguing that the ABC plan does not function as a piecework system, Hill argued in conclusory fashion that the ABC plan is not a piecework system because its unit of work is also a unit of time. In doing so she pointed to no authority that the MWA somehow limits what unit of work can be used in a piecework system. Rather she cited to authority that has no relevance to the issues in this case. For example, *Washington v. Miller*, 721 F.2d 797, 802 (11th Cir. 1983),⁴⁴ merely quoted a section of the (since-repealed) Farm Labor Contractor Registration Act that dealt with recordkeeping:

Farm Labor contractors are required by 7 U.S.C. § 2045(e) to keep payroll records which “show for each worker total earnings in each payroll period, all withholdings from wages, and net earnings. In addition, for workers employed on a time basis, the number of units of time employed and rate per unit of time shall be recorded on the payroll records, and for workers employed on a piece-rate basis, the number of units of work performed and the rate per unit shall be recorded.

Id. Hill argued that, because the Farm Labor Act “describes two types of workers,” one that records units of time and one that records units of work, a unit of time (which is not a correct description of a production minute) cannot be a unit of work. Neither the Farm Labor Act nor the *Miller* case supports that conclusion. All the statute said was that hourly

⁴⁴ Hill cited additional inapposite authority at the district court and Ninth Circuit.

workers must have adequate records of their hours and their pay rate to determine what they should be paid, and pieceworkers must have adequate records of the units of production and the applicable rate to determine what they should be paid. It said nothing about what constitutes a permissive piece rate (and the Farm Labor Act would be more likely to deal with apples than with production minutes). The case is simply not on point.

The form of a unit of work under a piecework system does not matter; instead, as this Court recognized in *Demetrio*, the question is whether the compensation system is designed to incentivize production of that unit. It is not the form, but the function of the unit of work that matters. Compliance with the MWA does not turn on whether the unit of work is an apple, a shirt, a mile driven, a telephone call, or a production minute. What matters is whether the metrics associated with that unit of work calculate a rate that, when totaled for the week and divided by all of the hours worked, meets the minimum wage rate, or there is a system in place that makes up any shortfall.

The Ninth Circuit explained how Hill's argument was flawed:

[S]imply stating that the ABC Plan is not a piecework compensation system because it is novel in its application of units of time as production units is an overly simplistic analysis that ignores how the plan actually functions.

Cert. Order at 9. The Ninth Circuit further agreed that, “[t]o some extent, that characterization elevates the form of the production unit—time—over how it functions—as a compensable unit of production being sold. Xerox is paid by Verizon on the basis of ‘production minutes’ that its employees spend in assisting Verizon customers:”

As a result, just like a fruit-seller trying to maximize the amount of fruit he has to sell by incentivizing his employees to pick more through a piecework system, Xerox sought to maximize the amount of minutes it could charge Verizon by incentivizing its agents to generate more “production minutes.” Although it may seem odd for a unit of work to be simultaneously a measurement of time, this does not necessarily mean it cannot be so. In a sense, Xerox’s compensation system responds to a modern problem—one in which the “goods” are not always tangible.

Id. at 9-10.

Clearly recognizing that the ABC plan functions as a piecework system, the only thing that appears to have stopped the Ninth Circuit from finding it was a piecework system is the speculative possibility that a piecework system that uses production minutes could somehow be used to circumvent minimum wage law. *Id.* at 8-9. But this claim by Hill has never been anything more than unsupported suspicion. The undisputed evidence here is that the ABC plan was designed and functioned as a piecework plan, the production minute was the product sold to the client, and Hill was paid minimum wage for every recorded hour. There was no hint of circumventing the law. In any event, neither Hill nor the district or

appeals court ever articulated how employees could be disadvantaged.⁴⁵

Indeed, there is not a scintilla of evidence that any XBS employee compensated under the ABC plan was ever paid less than the minimum wage for all hours worked. If an employer is permitted to pay the minimum wage on an hourly basis, why would paying at least that much on a non-hourly workweek basis be a circumvention of the law?

In this case, Hill's baseless suspicion about circumventing the law could never be true. Even if an employee's production did not generate sufficient pay, the ABC plan assured that employees were always paid at least the minimum wage rate for all recorded hours through the use of Subsidy Pay. Minimum wage was guaranteed.⁴⁶

Moreover, to the extent this Court is concerned about any alleged circumvention of the law, those issues can be addressed in such fact-specific circumstances if and when they are presented. They do not exist here. Because there is no policy reason why a piecework plan like the

⁴⁵ MWA compliance does not require that a court agree with the particulars of the compensation arrangement. *Innis*, 141 Wn.2d at 535 ("Regardless what our reaction may be to the compensation provided its management employees by Respondent ... we note that in this case it is based upon voluntary acceptance by Petitioner employees of the compensation plan promulgated in writing by Respondent employer."); *see also Parth v. Pomona Valley Hosp. Medical Center*, 630 F.3d 794, 799 (9th Cir. 2010) ("we do not decide whether the agreement was an ideal, or even preferred, method of contracting; we decide only whether the agreement... was permissible under the FLSA").

⁴⁶ This was acknowledged by the Ninth Circuit. Cert. Order at 6 ("Xerox used Subsidy Pay to supplement an agents' wages if Xerox determined that the employee's hourly rate did not comply with minimum wage."); *see also Douglas*, 2015 WL 10791972, *7 (Subsidy Pay "ensured that, as an absolute floor, employees paid under the ABC plan were to receive at least the ... minimum wage multiplied by the number of hours worked").

ABC plan cannot use a production minute as a unit of work, the certified question should be answered: “Yes.”⁴⁷

D. The ABC Plan Is Not Hourly

This Court should find that the ABC plan is a piecework plan, but if it does not, this Court should alternatively hold that the ABC plan is not an hourly plan.⁴⁸ Although the Ninth Circuit’s “view” was that the ABC plan had to be either a piecework system or an hourly system, Cert. Order at 4 n.1, that approach ignores a vast range of payment methods recognized under Washington law, including “commission,... salary, non-discretionary bonus, etc., combinations thereof, or an alternative pay structure combined with an hourly rate.” *E.g.*, DLI Admin. Policy ES.A.8.1 at 1 (7/19/2014). The choice under Washington law is not between piecework and hourly compensation, but instead between hourly

⁴⁷ This Court does not answer the certified question in the abstract. *Carlsen*, 171 Wn.2d at 493. The holding can be limited to the facts of the case. Here, the evidence is undisputed that the production minute was the product that XBS was selling and that it was treated as a unit of work under the terms of the agreement (and the reality of payment). A production minute need not be universally approved as a unit of work absent this type of evidence, but the reality is that it was a unit of work here.

⁴⁸ This is important in this case because the district court and the Ninth Circuit will determine MWA compliance for piecework employees on a workweek basis and for hourly employees on a “per-hour” basis. Cert. Order at 7-8 (*citing Alvarez v. IBP, Inc.*, 339 F.3d 894, 912 (9th Cir. 2003)). In *Alvarez*, the Ninth Circuit predicted that this Court would hold that minimum wage compliance for “hourly employees” should be calculated on a per-hour basis. *Alvarez* dealt with a very different situation from the present case because the defendants in *Alvarez* sought to credit a portion of the pay employees received for recorded hours at their contractually set per-hour rate to off-the-clock work, thereby reducing their per-hour compensation below the amount set in the contract. Here, Hill received the pay provided for in her contract, in the way provided for in her contract, and it is undisputed that her weekly pay was never less than if she was paid the minimum wage on an hourly basis.

and “other than hourly” compensation.

The workweek measure applies if the ABC plan paid employees “on other than an hourly basis.” DLI Admin. Policy ES.A.3 at 2. As DLI has explained:

In order to determine whether an employee has been paid the statutory minimum hourly wage **when the employee is compensated on other than an hourly basis**, the following standards should be used:

- If the pay period is weekly, the **employee’s total weekly earnings are divided by the total weekly hours worked** (including hours over 40). Earnings must equal minimum wage for each hour worked. If such earnings do not equal minimum wage, the employer must pay the difference.

Id. (emphasis added).

This Court could find that the ABC plan was not a piecework plan, but still paid “other than hourly.” As discussed above, based on the way it calculates and pays compensation, the ABC plan does not pay on an hourly basis.

As the Ninth Circuit recognized, “hourly” pay under Washington law means compensation paid at a set hourly rate. Cert. Order at 7 (employers can “pay their employees a set hourly rate for their work, otherwise known as an hourly wage”). This definition is consistent with common sense and with the dictionary definition of “hourly.” Standard dictionary definitions show that “hourly” means pay by the hour as a unit

(as opposed to by the second, minute, day, week, or month):

Hourly adj. 1. Occurring every hour: *hourly chimes*. 2. Frequent; continual. 3. By the hour as a unit: *hourly pay*.

The American Heritage College Dictionary (4th ed. 2007).⁴⁹

This definition is also consistent with the discussion of ‘hourly’ compensation in the Washington Administrative Code and DLI Administrative Policies. For example, WAC 296-128-550 contrasts an “hourly wage rate” with a list of other compensation methods (“[e]mployees who are compensated on a salary, commission, piece rate or percentage basis, rather than an hourly wage rate”), and it applies the workweek measure to those pay systems that are not hourly (“the regular rate of pay may be determined by dividing the amount of compensation received per week by the total number of hours worked during that week”).⁵⁰ DLI Admin. Policy ES.A.8.1 at 1 elaborates on this regulation and broadens the contrast between employees who are “paid hourly” and those paid in “**some other manner**, (commission, piecework, salary, non-discretionary bonus, etc., combinations thereof, or an **alternative pay**

⁴⁹ Dictionary definitions can be used to determine the meaning of undefined terms in statutes and regulations. *LaCoursiere v. Camwest Dev., Inc.*, 181 Wn.2d 734, 741-42, 339 P.3d 963 (2014).

⁵⁰ Other regulations also contrast hourly and non-hourly work. See WAC 192-250-045(1)(a) (pay on a “basis other than hourly wage” “includes, but is not limited to, . . . piece rate, mileage rate, job rate, salary, or commission basis”).

structure combined with an hourly rate)” (emphasis added).⁵¹

The ABC plan does not pay employees a set hourly rate. Indeed, Hill has never attempted to articulate a set hourly rate to which she was entitled.⁵² Rather, one component (Additional Pay) uses an hourly rate,⁵³ and all the other compensation components (ABC Pay, Subsidy Pay, and bonuses) provide weekly lump sum payments. Hill understood that, other than for specific hourly tasks, “all hours worked were compensated by ABC pay.” ER 165-67. XBS and Hill, the parties to the employment agreement, both agree the ABC plan is not an hourly plan. ER 148, 150, 163-64, 174-75.⁵⁴

Hill has argued that “production minutes” are simply minutes, or “fractions of an hour,” and can therefore be multiplied by 60 to create an hourly rate. She argues that if an hourly rate can be created in this way, the ABC plan is therefore an “hourly” plan that should use the per-hour measure. But this argument ignores the provisions of the ABC plan and

⁵¹This Court gives “great deference” to DLI’s interpretations. *Silverstreak, Inc. v. DLI*, 159 Wn.2d 868, 884-85, 154 P.3d 891 (2007).

⁵² Hill’s pay history shows that after she left training (where she was paid a single hourly rate on a per-hour basis) and started being compensated under the ABC plan, her rate was never the same from week to week. Also, the amount of money Hill made each week was not determined solely by the number of hours she worked. Her pay had none of the common characteristics of hourly pay.

⁵³ Which was undisputedly set at or above the minimum wage rate (\$9.04 in 2012).

⁵⁴ Hill does not even allege that ABC Pay is hourly compensation in her Complaint. ER 643.

how it uses “production minutes.”⁵⁵ They are not used as a measure of continuous time, but as a unit of work.

If the ABC plan was an hourly system, employees would make the same amount of pay whether they were engaged in efficiently solving customer issues on the phone (for which Verizon compensated XBS) or sitting and staring into space; however, the ABC plan is not an hourly system, and employees make different amounts of pay based on their quality and productivity. This Court should reject Hill’s argument that the plan is hourly as it would stretch the definition of “hourly” beyond any rational understanding of that word.⁵⁶

This Court should answer the certified question, “yes.” But if it does not find that the ABC plan is a piecework plan, it should reformulate the question to ask whether the ABC plan is “hourly,” and answer that certified question: “No, the ABC plan pays employees on an ‘other than

⁵⁵ This argument also ignores that paying on the basis of minutes spent doing particular tasks is not the same as paying “hourly.” As recognized by the U.S. Supreme Court in *Rosenwasser*, “employees working on an hourly wage scale” are different from “employees paid by other units of time or by the piece.” 323 U.S. at 364.

⁵⁶ Given the undisputed facts regarding its language and design, if the ABC plan was not a piecework plan (which is not true), it was certainly not hourly but rather an “alternative pay structure” (weekly payments, ABC Pay, Subsidy Pay, and bonuses) “combined with an hourly rate” (Additional Pay), as discussed in DLI Admin. Policy ES.A.8.1. The ABC plan conforms to the ES.A.8.1 definition of a non-hourly plan (“alternative pay structure combined with an hourly rate”) even if this Court accepts Hill’s semantic argument that the ABC plan “pays by the minute.” The minutes paid under the ABC plan are part of an incentive compensation system that pays weekly for minutes spent doing particular tasks at rates that vary by quality and efficiency metrics. This weekly pay is combined with other weekly pay, and hourly pay for specific tasks. Under any interpretation, the ABC plan is a non-hourly plan under DLI’s Administrative Policies.

hourly basis' and, therefore, pursuant to DLI Admin. Policy ES.A.8.1, MWA compliance should be determined on a workweek basis.”

IV. CONCLUSION

For the reasons above, this Court should answer the certified question, “Yes.” In the alternative, the question should be reformulated to confirm that the ABC plan is not “hourly.”

RESPECTFULLY SUBMITTED this 2nd day of October, 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 October 2, 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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