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NO. 94860-7

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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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

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**APPELLEE'S ANSWERING BRIEF**

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Toby J. Marshall, WSBA #32726  
TERRELL MARSHALL LAW  
GROUP PLLC  
936 North 34th Street, Suite 300  
Seattle, Washington 98103  
Telephone: (206) 816-6603  
Email: tmarshall@terrellmarshall.com

Daniel F. Johnson, WSBA #27848  
BRESKIN JOHNSON &  
TOWNSEND, PLLC  
1000 Second Avenue, Suite 3670  
Seattle, Washington 98104  
Telephone: (206) 652-8660  
Email: djohnson@bjtlegal.com

Jon W. MacLeod, WSBA #8491  
MacLEOD LLC  
1700 Seventh Avenue, Suite 2100  
Seattle, Washington 98101  
Telephone: (206) 357-8470  
Email: jwmacleodlaw@gmail.com

*Attorneys for Plaintiff-Appellee*

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## I. INTRODUCTION

This class action involves claims under the Washington Minimum Wage Act (“MWA”), chapter 49.46 RCW. The MWA requires employers to pay their employees for all hours of work. Appellee Tiffany Hill alleges that Appellants Xerox Business Services, LLC et al. (“Xerox”) violated this basic obligation by requiring Ms. Hill and her fellow call center workers to spend time performing certain work activities without pay. The United States District Court for the Western District of Washington agreed, denying Xerox’s request for summary judgment.

It is undisputed that when employees are paid on an hourly basis, Washington applies a per-hour measure—as opposed to a workweek measure—to determine MWA compliance.<sup>1</sup> The issue here is whether Xerox treated its call center workers as hourly-based employees. The answer is yes. Xerox calculated the pay of Ms. Hill and the class members based on the precise amount of time they spent performing certain work activities. Specifically, Xerox paid “per-minute” rates for time spent receiving inbound calls and per-hour rates for time spent in other defined categories of work. Xerox violated the MWA, however, by failing to pay

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<sup>1</sup> The converse is not true. Despite statements to the contrary in both the Ninth Circuit’s order and Xerox’s opening brief, Ms. Hill strongly disputes that MWA compliance is measured solely on a workweek basis for workers paid in part by piece rates. *See infra* Section III.C.

anything for the time workers spent performing other work activities, including waiting for calls, making outbound calls, reviewing announcements, and doing “after-call work.”

Xerox maintains it was exempt from the obligation to pay at least the minimum wage for each hour worked, asserting Ms. Hill and the class members were pieceworkers, not hourly-based employees. In support of this position, Xerox argues that a minute is not a measure of time if the employer labels it as a “production minute.” Rather, according to Xerox, a “production minute” is a “unit of work.” This is nothing short of fiction. Under both law and logic, a minute is a fraction of an hour, and paying employees by the minute is for all practical and legal purposes hourly-based pay. Otherwise, any employer could label certain employee work as “production hours,” refuse to pay for other work hours, and avoid the MWA requirement of ensuring that Washington employees receive at least the minimum wage for each hour worked.

Even if Ms. Hill were a pieceworker, the MWA prohibited Xerox from using piecework pay to offset the compensation owed to her for other “non-production” work activities. Xerox was required to pay Ms. Hill no less than the minimum wage for each hour worked, which it admittedly failed to do. Thus, regardless of which category applied to Ms. Hill—

hourly-based employee or piecework employee—the district court’s order denying summary judgment was correct.

## **II. STATEMENT OF THE CASE**

### **A. Under its ABC plan, Xerox failed to pay Ms. Hill for all hours worked.**

Xerox operates call centers in Washington, including the Federal Way call center where Ms. Hill worked from September 2011 to April 2012. ER 308 at ¶ 2. Call center employees or “agents” work in “Strategic Business Units” or “SBUs,” handling incoming calls for Xerox’s client companies. ER 414 at ¶ 3. Agents at the Federal Way call center, for example, handle phone calls from Verizon Wireless customers. SER 216. Until mid-2014, Xerox compensated these workers based on its “Activity Based Compensation” or “ABC” plan. SER 260.

Under the ABC plan, Xerox paid agents only for “productive” time and certain “defined” activities; time spent performing other work activities went unpaid. SER 224-227, 260. Using a telephone timekeeping system, Xerox kept track of the time employees spent on inbound calls and paid specific “per-minute” rates (derived from hourly rates) for that time. SER 260, 302 (Xerox ABC plan listing “Rates Per Minute” for inbound calls and Xerox spreadsheet showing hourly rate conversions to per-minute rates at another Xerox call center); SER 243 (Xerox Rule 30(b)(6) testimony stating that ABC plan implemented in

Washington “was based on hourly and per-minute rates”). Xerox’s Regional Vice President in charge of Washington call centers admitted that Xerox “paid on a per-minute basis.” SER 125. The ABC plan contained a chart displaying the per-minute rates, and that chart had the following heading: “ABC Pay Rates (Rates Per Minute).”<sup>2</sup> SER 260. These “Rates Per Minute” applied only to inbound call time, which Xerox referred to as “production minutes.” SER 224, 260.

The “Rate Per Minute” that Xerox paid to an employee for inbound call time would depend on the employee’s pay “tier.” SER 126, 260. Under the April 2012 Federal Way ABC plan, for example, Xerox paid call center agents in Tier E starting at 15 cents per minute (\$9.00 per hour) for time on inbound calls.<sup>3</sup> SER 260. The highest possible rate, Tier A, was \$15.00 per hour (\$.25 per minute). *Id.*

Xerox acknowledges that under the ABC plan, agents performed other compensable work aside from answering inbound customer calls. SER 128-129. Indeed, the company paid for certain other “defined”

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<sup>2</sup> After this lawsuit was filed, Xerox changed the heading in the ABC plan from “Rates Per Minute” to “Rates per Transaction,” but the rates were still per-minute rates. *Compare* SER 260, 263, 282 (“Rates Per Minute”), *with* SER 265, 269, 273 (“Rates per Transaction”).

<sup>3</sup> At that time, the Washington minimum wage was \$9.04 per hour. *See* Wash. State Dep’t of Labor & Indus., *History of Washington Minimum Wage*, [www.lni.wa.gov/WORKPLACERIGHTS/WAGES/MINIMUM/HISTORY/DEFAULT.ASP](http://www.lni.wa.gov/WORKPLACERIGHTS/WAGES/MINIMUM/HISTORY/DEFAULT.ASP) (last visited Nov. 6, 2017).

activities at set hourly rates. *Id.*; SER 260. But these “defined” activities were limited to select activities approved by management, such as scheduled meetings, trainings, and designated “system down” time. SER 260. Outside of receiving inbound calls and working on the approved “defined” activities, agents performed additional recorded work for which Xerox paid nothing to them, including but not limited to time spent waiting for inbound calls, performing follow-up work, making outbound calls, and reviewing work-related announcements and email. ER 416 at ¶ 9 (“There are no production minutes generated by waiting for calls or for outbound calls . . . .”); SER 224-227. Basically, whenever call center agents stopped receiving inbound calls, they stopped earning pay under the ABC plan unless they were performing work in a “defined activity” approved by management. *Id.* This is true even though the employees remained engaged in work in the interest of Xerox and even though Xerox continued to record their work time.

In a Rule 30(b)(6) deposition, Xerox’s corporate representative admitted that the company failed to pay per-minute ABC rates for several work activities (and, thus, failed to pay for hours worked in those activities). SER 224-227. Specifically, the representative testified that Xerox failed to pay per-minute rates for time spent “reviewing announcements,” “workspace care,” “logging on and off of systems,”

“recording time and work activities,” “after call work,”<sup>4</sup> “outbound calls,” and “case follow-ups.” SER 224-226. And the representative confirmed that these activities were not included in the “defined activities” for which Xerox paid hourly rates. SER 226-227. Thus, some of the time agents spent performing work went unpaid.

Xerox attempted to mask this unpaid work time by totaling weekly wages earned and providing “subsidy pay” if an employee’s total compensation for the week did not meet or exceed the product of the total hours worked multiplied by the minimum wage rate. SER 260. Thus, if an employee’s “per-minute” ABC pay and per-hour “defined” activity pay for the workweek divided by the total recorded hours in that week fell below a set minimum rate, “subsidy pay” was added to earnings to meet the minimum for the workweek. *Id.* But as described below, “subsidy pay” failed to ensure employees received minimum wage for each hour worked.<sup>5</sup>

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<sup>4</sup> Xerox maintains “production minutes” were “generated” when an employee “was completing after-call work.” Opening Br. at 25. But the company’s own testimony contradicts this assertion. *See* SER 224-25. Under oath in a Rule 30(b)(6) deposition, Xerox was asked whether “after call work” is “a task that’s paid at a rate per production minute.” *Id.* The answer was simple: “No.” *Id.* Xerox further testified that its client paid only for “time spent inbound calls” and “continuing education.” SER 218. The client “d[id] not pay Xerox for the time [an] employee spen[t] in after call work.” *Id.*

<sup>5</sup> Xerox makes misleading assertions about subsidy pay in reference to a parallel Fair Labor Standards Act case before the same federal judge, stating that he held the ABC plan was compliant with the FLSA because of the availability of subsidy pay. Opening Br. at 20 n.21. This order was altered on reconsideration, when Judge Coughenour

Plaintiff Tiffany Hill began working under the ABC system in November 2011. A close examination of the pay summaries from Xerox's Front End Payroll System ("FEPS") shows significant amounts of uncompensated work time for Ms. Hill. *See* ER 313-322. The FEPS pay summaries contain two charts. First, at the top, the summaries show the number of recorded hours in four categories: (1) ABC Task Pay, (2) OT Standard (overtime hours), (3) PTO Pay, and (4) Training. *See id.* Second, at the bottom, the "ABC Task Pay Detail" charts display the total minutes spent handling inbound customer care calls ("Inbound Care"). *Id.* These minutes ("Volume") were paid at per-minute rates ("Rate"). *Id.*

For example, during the February 18, 2012 to March 2, 2012 pay period depicted below, Ms. Hill worked 3,394 minutes on inbound customer care calls (including compensable break time) and earned \$591.01 for those minutes. ER 315 ("ABC Task Pay Detail"). Those 3,394 minutes are equal to 56.57 total hours. *Id.* Thus, Ms. Hill received \$591.01 for 56.57 hours of inbound customer care. Yet the Pay Summary reveals that she actually worked a total of 63.40 hours ("ABC Task Pay

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acknowledged he misunderstood subsidy pay and it did not operate to ensure workers received minimum wage for each hour worked. *See Richard v. Xerox Bus. Servs.*, 2016 U.S. Dist. LEXIS 119510 at \*5-6 (W.D. Wash. Feb. 29, 2016).

(BC)”) based on the time clock. *Id.* Thus, 6.83 hours (63.40 minus 56.57) of work during this pay period went wholly uncompensated.

<b>Pay Period</b>	2/18/2012 - 3/2/2012
<b>Employee ID</b>	20454033 ( LVBR - LIVEBRIDGE - WAUB - AUB - VINCENT SMITH )
<b>Employee Name</b>	HILL, TIFFANY

<b>Pay Summary</b>			
<b>Pay Type</b>	<b>Hours</b>	<b>Rate</b>	<b>Amount</b>
ABC Task Pay (BC)	63.40	-	\$591.01
OT Standard (Premium Only) (BO) 02/18/2012-02/24/2012	0.34	\$4.71	\$1.60
PTO Pay (PD)	8.00	\$9.83	\$78.65
Training (TN)	1.33	\$9.04	\$12.02
<b>Totals</b>	<b>73.07</b>		<b>\$683.28</b>

<b>ABC Task Pay Detail</b>								
<b>Job Name</b>	<b>Application</b>	<b>Item Type</b>	<b>Task Name</b>	<b>Quality Grade</b>	<b>Alt Key</b>	<b>Volume</b>	<b>Rate</b>	<b>Amount</b>
Break	Break Week Day	Minutes	Break			160	\$0.1507	\$24.0900
Inbound Care	Cust Care AHT 485 p	Minutes	Customer Service	C1		1726	\$0.18	\$310.6800
Inbound Care	Cust Care AHT 485 p	Minutes	Customer Service	C2		1508	\$0.17	\$256.2400
<b>Totals</b>						<b>3394</b>		<b>\$591.0100</b>

ER 315.

When Xerox provided “subsidy pay” to Ms. Hill, that pay failed to cover all uncompensated time. For example, during the pay period of January 21, 2012 to February 3, 2012 (depicted in the pay summary below), Ms. Hill worked 48.48 hours (2,909 minutes) in inbound customer care (including compensable break time) and received \$500.22 for those 48.48 hours. ER 317. But she worked a total of 54.07 recorded hours (plus 1.75 hours of paid training time). *Id.* Thus, she did not initially receive any pay for 5.59 hours of so-called “non-production” work (54.07 minus 48.48). *Id.* Under the MWA, she should have received \$50.53 in pay for the uncompensated hours (5.59 hours x \$9.04 per hour). *Id.* But Xerox paid Ms. Hill only \$2.87 in subsidy pay calculated on a workweek basis. *Id.* Thus, even with the subsidy pay, Ms. Hill’s compensation for this period was more than \$47 short.

<b>Pay Period</b>	1/21/2012 - 2/3/2012
<b>Employee ID</b>	20454033 ( LVBR - LIVEBRIDGE - WAUB - AUB - VINCENT SMITH )
<b>Employee Name</b>	HILL, TIFFANY

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Pay Summary			
Pay Type	Hours	Rate	Amount
ABC Task Pay (BC)	54.07	-	\$500.22
Non-discretionary/Incent Bonus (IP)	-	-	\$26.00
Subsidy Pay - ABC (SP)	-	\$9.04	\$2.87
Training (TN)	1.75	\$9.04	\$15.82
<b>Totals</b>	<b>55.82</b>		<b>\$544.91</b>

ABC Task Pay Detail								
Job Name	Application	Item Type	Task Name	Quality Grade	Alt Key	Volume	Rate	Amount
Break	Break Week Day	Minutes	Break			130	\$0.1507	\$19.5700
Inbound Care	Cust Care AHT 485 p	Minutes	Customer Service	B2		824	\$0.18	\$148.2600
Inbound Care	Cust Care AHT 485 p	Minutes	Customer Service	C2		1955	\$0.17	\$332.3900
<b>Totals</b>						<b>2909</b>		<b>\$500.2200</b>

ER 317.

Internal FEPS data that Xerox maintained for Ms. Hill also show a clear discrepancy between the recorded time she worked and the ABC “inbound care” time for which Xerox actually paid her on a daily basis.

See SER 114-115 at ¶ 11; SER 246-252. Xerox recorded Ms. Hill's time worked as "TimeCardTime" but failed to pay her for all of this time. *Id.* Instead, Xerox paid her only for her hours worked receiving inbound calls (and training hours), which Xerox tracked as "BatchCardTime." *Id.* Xerox's own pay and timekeeping data reveals that Ms. Hill's daily recorded work hours ("TimeCardTime") regularly exceeded the hours for which she was paid ("BatchCardTime") by more than an hour per day. *Id.*<sup>6</sup>

**B. The federal district court certified a class and held that under the ABC plan, Xerox paid by the hour and not by the piece.**

Ms. Hill filed her initial class action complaint in April 2012 to challenge Xerox's failure to pay for off-the-clock work. *See* ER 657. After initial informal discovery, Ms. Hill amended her complaint to include claims that the ABC plan failed to pay for all hours worked. ER 637-653. In October 2013, she moved for certification of an ABC class for employees who worked under an ABC plan that paid "per-minute" rates and an "Off-the-Clock" class for employees who performed work off the clock. Dkt. 39. On July 10, 2014, the district court granted the motion

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<sup>6</sup> In SER 246-252, the "Volume" column is measured in minutes, and it corresponds to the "BatchCardTime" hours.

for class certification in part, certifying the ABC class but denying certification of the “Off-the-Clock” class. ER 14-18.

At the same time, Xerox moved for partial summary judgment on Ms. Hill’s ABC claims, claiming that the “per-minute” ABC plan was a piece-rate plan and that Xerox was not required to comply with the MWA requirement that minimum wage be paid for each hour worked. *See* ER 8-11.

In its July 10, 2014, order the district court denied Xerox’s motion for partial summary judgment, rejecting the company’s argument that it could avoid paying for each hour worked by averaging pay for certain hours worked across the workweek. ER 8-11. The court concluded that “the Federal Way employees are hourly workers, because ‘production minutes’ are simply calculations of units of time.” ER 9-10. The court distinguished the ABC plan from a “piecework” system: “Piecework employees are ‘paid a fixed amount per unit of work’ . . . but agents being paid for ‘production minutes’ are being paid based on precise units of time.” ER 10 (quoting Wash. DLI Admin. Policy ES.A.8.2 at 3). The court noted that if it were to accept Xerox’s position, “every employer could pay hourly workers a ‘per-minute’ rate and thereby avoid the Washington law governing workers paid on a per-hour rate.” ER 10; *see also Hill v. Xerox Bus. Servs., LLC*, 868 F.3d 758, 762 (9th Cir. 2017)

(noting “the fact that potentially every employer could use [a ‘production minute’] system to possibly circumvent wage and hour laws would be problematic for low-wage workers”) (punctuation altered).

Xerox filed a motion for reconsideration of the district court’s order denying summary judgment and granting class certification. Dkt. 117. With regard to the summary judgment ruling, Xerox claimed to have “new evidence”—which it received approximately two months before the July 10 order—of thirteen complaints concerning Xerox’s failure to pay for outbound calls, which were filed with the Washington State Department of Labor & Industries (“DLI”). *Id.* at 1. Xerox claimed this material warranted reconsideration of the district court’s order denying summary judgment.<sup>7</sup> *Id.* at 1-2.

The district court denied the motion for reconsideration, finding that “Defendants could have submitted [the DLI] evidence in May if Defendants considered it dispositive of the pending motion” and that “Defendants provide no basis for concluding that the DLI investigator evaluated the legal issue presented to this Court, rather than merely accepting Defendants’ description of its compensation system as a piece-

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<sup>7</sup> The actual documents relating to the DLI wage complaints reveal that there was no “determination of compliance,” as Xerox suggested. *See* RCW 49.48.083. Rather, some of the call center workers withdrew their claims (which enabled them to pursue private actions), and DLI declined to accept the others. *See* ER 41, 49 53, 61.

rate system.” ER 3. The district court also reiterated that “a system based on precise calculations of time should be viewed as an hourly system, even if an employer labels each minute as a piece of work.” ER 4.

Xerox petitioned for permission to appeal, which was granted, and the parties briefed the issues to the Ninth Circuit.<sup>8</sup> Oral argument was held on February 6, 2017. On August 7, 2017, the court certified the following question to this Court: “whether an employer’s compensation plan, which includes as a metric an employee’s ‘production minutes,’ qualifies as a piecework plan under Wash. Admin. Code § 296-126-021.” *Hill*, 868 F.3d at 760, 763. The certification order is mistaken in several ways, and the question posed is incomplete. *See, e.g.*, note 1, *supra*, and Section III.D, *infra*. But as the Ninth Circuit’s order properly notes, the “central question” here “is whether ‘production minutes’ can be classified as a unit of work.” *Hill*, 868 F.3d at 762.

### **III. ARGUMENT AND AUTHORITY**

#### **A. Standard of review.**

This Court “treat[s] certified questions as ‘questions of law that [are] reviewed de novo.’” *Allen v. Dameron*, 187 Wn.2d 692, 701, 389 P.3d 487 (2017) (quoting *Carlsen v. Glob. Client Sols., LLC*, 171 Wn.2d

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<sup>8</sup> Ms. Hill moved to certify questions to this Court, which the court referred to the panel to decide after briefing and argument. *See Hill v. Xerox Bus. Servs. LLC*, No. 14-36029, Docket No. 12 (9th Cir. Feb. 17, 2015).

486, 493, 256 P.3d 321 (2011)). The Court “consider[s] the legal issues not in the abstract but based on the certified record provided by the federal court.” *Id.* (quoting *Carlsen*, 171 Wn.2d at 493).

When the certified issue “pertain[s] to a motion for summary judgment,” the Court “perform[s] the same inquiry as the district court.” *Saucedo v. John Hancock Life & Health Ins. Co.*, 185 Wn.2d 171, 178, 369 P.3d 150 (2016) (citing *Smith v. Safeco Ins. Co.*, 150 Wn2d 478, 483, 78 P.3d 1274 (2003)). “All facts and reasonable inferences are viewed in the light most favorable to the nonmoving party,” Ms. Hill. *Smith*, 150 Wn.2d at 485.

Because the MWA is remedial legislation, the Court liberally construes the statute for the benefit and protection of Ms. Hill and other employees. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 870, 281 P.3d 289 (2012); *see also Brady v. Autozone Stores, Inc.*, 188 Wn.2d 576, 584, 397 P.3d 120 (2017).

**B. Ms. Hill was not a “piecemaker” and therefore had to be paid the minimum wage for each hour worked.**

Xerox agrees that for employees who are paid on a per-hour basis, Washington minimum wage compliance is determined on a per-hour basis. Xerox’s only argument is that because it paid call center agents by the “production minute,” those employees were piecemeal workers and could

have their pay averaged over the workweek to determine MWA compliance. This position has no legal support, runs directly contrary to the spirit and purpose of the MWA, and offends common sense.

1. The Minimum Wage Act guarantees a minimum wage for every hour worked.

The MWA provides that “every employer shall pay to each of his or her employees who has reached the age of eighteen years wages at a rate of not less than [the minimum wage] per hour.” RCW 49.46.020(1)-(4) (emphasis added). This obligation applies “for each hour of employment.” Wash. DLI Admin. Policy ES.A.5 at 1 (2002); *see also Miller v. Farmer Bros Co.*, 136 Wn. App. 650, 656, 150 P.3d 598 (2007) (“Under the Act, employees must be paid per hour, and must receive at least the minimum wage.”). Thus, the standard measure of minimum wage compliance is by the hour.

When it comes to minimum wage compliance, this Court has broadly defined “hours worked” to mean “all hours during which the employee is authorized or required to be on duty on the employer’s premises or at a prescribed work place.” *Stevens v. Brink’s Home Sec., Inc.*, 162 Wn.2d 42, 47, 169 P.3d 473 (2007) (citation and internal marks omitted; emphasis added). The basic right to a minimum wage attaches to “all work requested, suffered, permitted or allowed”—including “wait time” and “preparatory and concluding time”—“regardless of whether it is

a full hour or less.” Wash. DLI Admin. Policy ES.C.2 at 1 (2008) (emphasis added). Washington employers “may not avoid or negate payment” for hours worked “by issuing a rule or policy that such time will not be paid or must be approved in advance.” *Id.* Simply put, “[i]f the work is performed, it must be paid.” *Id.*

2. A basic defining attribute of “piecework” is that the work is paid by the piece, and Xerox did not pay by the piece.

It is widely accepted that “pieceworkers” are paid “by the piece” as opposed to by the hour or some other measure of time. *See Burchett v. Dep’t of Labor & Indus.*, 146 Wn. 85, 89, 261 P. 802 (1927) (holding that “[t]he hauling of lumber by the thousand feet” was “piece work”); *Erickson v. Dep’t of Labor & Indus.*, 185 Wn. 618, 620, 56 P.2d 713, 714 (1936) (noting that “piece work” occurs where workers are “paid by the piece instead of by the hour”). DLI, the state agency that enforces the MWA, has said that piece-rate employees “are usually paid a fixed amount per unit of work.” Wash. DLI Admin. Policy ES.A.8.2 at 3 (2014). There is no legal authority to the contrary.

This common understanding is consistent with the plain meaning of the terms at issue. According to Black’s Law Dictionary, “piecework” means “work done or paid for by the piece or job.” Black’s Law Dictionary 1184 (8th ed. 2004). A “minute,” on the other hand, means

“the 60th part of an hour of time: 60 seconds.” See <https://www.merriam-webster.com/dictionary/minute> (last visited Nov. 6, 2017). Thus, per-minute rates, which are measured by time, differ from piece rates, which are measured by “pieces,” “jobs,” or “units of work.” See *Kitsap Cnty. v. Allstate Ins. Co.*, 136 Wn.2d 567, 586-87, 964 P.2d 1173 (1998) (noting courts “turn to the dictionary to determine the plain, ordinary, and popular meanings” of terms); see also *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005) (In undertaking a “plain language analysis, the court must remain careful to avoid ‘unlikely, absurd or strained’ results.”) (citation omitted).

Under the ABC plan, Xerox paid Washington call center workers based on measures of time, not pieces of work. SER 260 (providing for payment using “Rates Per Minute” and “Rate[s] per Hour”). Xerox admits that “production minutes” are simply “an accumulation of seconds spent in specified activities.” ER 416 at ¶ 8. And it is undisputed that “production minutes” last exactly 60 seconds each and are indistinguishable from the measure of time known as a minute. See SER 125.<sup>9</sup>

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<sup>9</sup> Xerox attempts to take language from Ms. Hill’s initial complaint to support its characterization of ABC as a piecework plan. Opening Br. at 21-22. But Ms. Hill did not assert the ABC claim in that complaint. After initial informal discovery revealed the true nature of Xerox’s pay system, Ms. Hill added the ABC claim and amended the complaint to accurately describe Xerox’s ABC plan as a “hybrid model that combines hourly rates with per-minute rates.” ER 643 at ¶ 5.1.

Xerox cites no case in which a court has concluded that workers who were paid based on precise measures of time were considered pieceworkers. Courts outside Washington uniformly recognize that piece-rate standards apply only where a person is paid by unit of work, and not by unit of time. See, e.g., *Ontiveros v. Zamora*, 2009 WL 425962, at \*2 (E.D. Cal. Feb. 20, 2009) (explaining that a “piece rate” compensation method “pays employees set rates for completing certain tasks or producing units of goods”) (citing Cal. Div. of Labor Standards Enforcement Policies & Interpretations Manual (“DLSE Manual”) § 2.5.1); see also *United States v. Rosenwasser*, 323 U.S. 360, 363, 65 S. Ct. 295, 89 L. Ed. 301 (1945) (distinguishing between hourly workers who are paid “by a unit of time” and piece-rate workers who are paid “by the piece”); *Washington v. Miller*, 721 F.2d 797, 802 (11th Cir. 1983) (distinguishing between “workers employed on a time basis,” who are paid based on rates “per unit of time,” and “workers employed on a piece-rate basis,” who are paid by “the number of units of work performed.”).<sup>10</sup>

Because Xerox paid employees under the ABC plan using measures of time—per-minute and per-hour rates—the employees were

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<sup>10</sup> Xerox claims that “per-minute” piecework systems are recognized in the “industry,” citing sources such as an article from about.com and an accounting exam from Ireland. Opening Br. at 24-25. This is not legal analysis or authority and should be disregarded. See *Hill*, 868 F.3d at 762 (finding “[t]hese documents hardly establish an industry standard”).

hourly employees and not pieceworkers. Xerox's attempt to characterize minutes as "units of work" lacks any legal authority, requires an unnatural and strained interpretation of the plain language of the law, and violates the mandate of liberal construction.

3. Pay based on units of time is fundamentally different from pay based on units of work.

Despite the obvious distinction between units of work and units of time, Xerox claims that the ABC plan was a piecework system because it paid employees "based on production." *See* Opening Br. at 32. This is false. Under the ABC plan, Xerox simply paid for some "hours worked" and not others. What Xerox did is no different than a retail employer paying employees at certain hourly rates when customers are present and paying nothing when the store is empty or when the employees are doing something other than attending to customers. The employer, like Xerox, would be paying only for the time it chooses to pay, using pay earned during so-called "productive" work hours to offset the uncompensated time that employees allegedly spend on work activities the employer deems "unproductive."

The proposition that a unit of time can be treated as a "unit of work" is pure artifice. An employee cannot "produce" minutes of work anymore than she can "produce" hours of work. Likewise, an employee cannot complete a "production minute" in more or less than one minute.

Unlike a farm worker, who can pick 60 pounds of fruit in 45, 60, or 75 minutes, a Xerox call center worker credited with 60 “production minutes” will have spent exactly one hour performing that work—every single time. Thus, ABC pay was tied directly to time, not production.<sup>11</sup>

Xerox attempts to obscure this simple practical reality by injecting other “metrics” into the analysis. But those metrics are irrelevant because they were simply used to set Ms. Hill’s per-minute rates, which were then paid based on the amount of time Ms. Hill spent taking inbound calls. The fact that a compensation plan uses more than one hourly rate does not negate an employee’s status as an hourly-based worker. Thus, while Xerox used several rates under the ABC plan, the important point is that Xerox paid those rates based on time, not production.

Moreover, the “metrics” Xerox used to set its hourly rates had nothing to do with output. Indeed, only two variables mattered: (a) the employee’s average customer service score; and (b) the employee’s average handle time or AHT. Below is the breakdown of the hourly rates paid in 2012 (with corresponding per-minute rates shown in parenthesis):

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<sup>11</sup> Compare ABC pay with “flat rate” or “task basis” compensation, whereby “employees are paid according to a pre-set rate for a particular task.” Wash. DLI Admin. Policy ES.A.8.2. “The most obvious example of [flat rate] pay might be a mechanic who is paid an hourly rate to repair a carburetor, a task that is ‘pre-set’ to take 2 hours to complete. The flat rate mechanic would be paid 2 hours pay for that task whether it took 1, 2 or 3 hours to finish.” *Id.* (emphasis added).

Average Customer Rating	AHT 0–485	AHT 485+
100%	\$13.80 (0.23)	\$11.40 (0.19)
95% - 99.9%	\$13.20 (0.22)	\$10.80 (0.18)
90% - 94.9%	\$10.80 (0.18)	\$10.20 (0.17)
85% - 89.9%	\$9.60 (0.16)	\$9.00 (0.15)
0 - 84.9%	\$9.00 (0.15)	\$9.00 (0.15)

As one can see, the primary driving force determining the applicable rate was average customer rating. Good customer service reviews qualified an employee for Tier A. Bad customer service reviews put her in Tier E.

Within each of the five tiers, there were two rates: one for AHTs of 0 to 485 seconds, and one for AHTs of 485 seconds or more. Contrary to Xerox’s suggestions, this was not “designed to incentivize production” of units of work. Opening Br. at 42. In fact, the ABC plan often worked to reward agents who took fewer calls and made each of those calls last longer. For example, an employee who took 25 calls lasting 120 seconds each (for a total of 50 minutes) made less than an employee who took only 8 calls lasting 450 seconds each (for a total of 60 minutes), assuming the same quality service score. The ABC plan did not incentivize production of phone calls or any other “unit of work.”

Even if Xerox attempted to use the metrics in the ABC plan to “incentivize” employees, that has nothing whatsoever to do with whether the plan is an hourly-based or piece-rate plan. Xerox could (and presumably now does) pay variable hourly rates for “production” work—

based on any metric it chooses—so long as it pays minimum wage for all other time worked. The incentives would be exactly the same, if not clearer and better. Employees would be paid at least the minimum wage for each hour worked and more when they excel at certain work activities. In any event, the ABC pay system is not about productivity; rather, Xerox simply paid employees for some work activities and not others.

4. Labels placed on a pay scheme cannot change the actual nature of that scheme.

Xerox also argues its pay plans and other documents somehow “demonstrate” that the ABC plan was a piecework pay plan. *See* Opening Br. at 15-21. Yet Xerox cites no legal authority that such documents have any bearing on the question. *See id.* at 31 & nn. 30-31. It is beyond question that employees cannot waive the protections of the MWA and employers cannot contract around the law’s requirements. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 861, 93 P.3d 108 (2004) (employees and employers may not “bargain away” the requirements of the Minimum Wage Act); *Local 246 Util. Workers Union of Am. v. S. California Edison Co.*, 83 F.3d 292, 297 (9th Cir. 1996) (“An agreement by the parties to treat the payments differently [than they really are] is not determinative.”). The right to receive no less than minimum wage for each hour worked is non-negotiable. *See Hisle* at 861. Any purported agreement between an employee and employer that would require the

employee to work for less than minimum wage for any hour is “no defense” to a minimum wage claim. RCW 49.46.090(1); *see also* Wash. DLI Admin. Policy ES.A.5 at 1 (MWA “prohibits agreements” to work for less than minimum wage). Thus, Xerox is wrong to suggest that the ABC plan was a piecework plan because Ms. Hill allegedly agreed it was.<sup>12</sup>

What matters is not what the ABC plan was said to have been but what it actually was. The application of wage and hour laws “is not fixed by labels that parties may attach to their relationship.” *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 528, 70 S. Ct. 755, 771, 94 L. Ed. 1017 (1950). The term “production minute” is a label. As the district court found, labeling a minute a “production minute” does not change the reality of what a minute is. ER 10 (“By [Xerox’s] reasoning, an employer could even label each hour a ‘unit of work’ and readily turn hourly pay into piecework pay. Yet just as a worker paid an hourly rate is paid a certain amount for the precise amount of time worked, a worker paid by the

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<sup>12</sup> When Xerox’s counsel attempted to have Ms. Hill admit at her deposition that the ABC pay system was a “piece rate” system, Ms. Hill responded that she understood it was “a complicated system,” not a “complicated piece rate” system. SER 191-192. Ms. Hill went on to testify that Xerox never provided her a copy of an ABC plan when she worked at the Federal Way call center and as a result, she did not know the system paid per-minute rates only for so-called “production minutes.” SER 195-200. She simply understood that Xerox “paid by the minute” for “however long you were at work.” SER 190, 197.

‘production minute’ is paid a certain amount for the precise amount of time worked.”).

In short, employers cannot avoid their legal obligations with “mere words in a contract” and “arbitrary labels.” *See Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 461, 68 S. Ct. 1186, 92 L. Ed. 1502 (1948).

Courts focus on the “actual fact” of the compensation system. *Id.* Here, the fact is that “production minutes” lasted exactly as long as real minutes. Xerox paid Ms. Hill and other employees only for time spent engaged in certain work activities. Opening Br. at 25 (“production minutes were not generated by waiting for calls or making outbound calls”). Thus, Xerox violated the MWA by failing to pay for all hours worked. *See Stevens*, 162 Wn.2d at 47, 49-50.<sup>13</sup>

**C. Ms. Hill was not an “other than hourly” worker.**

Finally, Xerox argues that if the ABC plan was not a “piecework” plan, then it provided something “other than hourly” pay. Opening Br. at 45. The district court found this suggestion to be baseless, as did the Ninth Circuit. ER 4, 10; *Hill*, 868 F.3d at 759-60 n.1 (stating “Xerox

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<sup>13</sup> Xerox’s reliance on *Innis v. Tandy Corp.*, 141 Wn.2d 517, 523-24, 534, 7 P.3d 807 (2000), is misplaced. The issue in that case was the “regular rate” of pay under RCW 49.46.130 for overtime pay calculations for salaried employees with a fluctuating workweek. *Innis*, 141 Wn2d at 523-24, 534. Ms. Hill was not salaried, did not work on a fluctuating workweek basis, and was not paid for all straight-time hours worked.

cannot seriously contend that its compensation plan was anything other than” hourly or piecework).

Xerox fails to point to any particular “recognized” payment method that ABC is other than “hourly.” The authorities Xerox cites mention several, such as salary and commission, but a “per minute” scheme is not among them. *See* Opening Br. at 47 (citing WAC 296-128-550; WAC 192-250-045(1)(a); Wash. DLI Admin Policy ES.A.8.1). What Xerox argues, and hopes will offer reprieve, is that the ABC plan was different than regular “hourly pay” at “a set hourly rate,” qualifying it as some unspecified “alternative pay structure.” Opening Br. at 46-48. Based solely on this nebulous assertion, Xerox claims the ABC plan qualifies for a more employer-friendly workweek measure of MWA compliance, rather than the standard, employee-protective hourly measure. The argument is nonsensical, baseless, and contrary to the well-known and well-established rule of liberal construction in favor of protecting low-wage workers’ right to full payment of the wages they are due.

Under the ABC pay scheme, Xerox paid Ms. Hill and other employees on an hourly basis. As a result, compliance with the MWA must be measured on an hourly basis.

**D. Even pieceworkers must be paid minimum wage for non-production work.**

If this Court were to conclude that “per-minute” rates are piece rates, it should nevertheless hold that Xerox violated the MWA by failing to pay Ms. Hill for all hours worked. The Ninth Circuit was mistaken in suggesting that Washington law permits employers to average piecework wages earned from some hours over all hours worked in a week. *Hill*, 868 F.3d at 759-60.<sup>14</sup> In fact, as explained below, when pieceworkers are required to perform non-production work during which they cannot earn piece rates—as the call center workers here were—they are entitled to be paid for each hour of that work time at the minimum wage or higher.

A fundamental tenet of Washington law is that an employer may not require an employee to perform work for which no compensation is paid. *See Stevens*, 162 Wn.2d at 47, 49-50 (holding employees who are “‘on duty’ at a ‘prescribed work place’ . . . [are] entitled to compensation under the MWA for the hours worked”). Employers are obligated to pay Washington employees at no less than the minimum hourly wage for “all work requested, suffered, permitted or allowed.” DLI Admin. Policy

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<sup>14</sup> The Ninth Circuit was also wrong in suggesting that Ms. Hill conceded this point. *See* note 1, *supra*, and note 14, *infra*.

ES.C.2 at 1; *see also Miller*, 136 Wn. App. at 656 (employees “must receive at least the minimum wage [per hour]”).

Here, Xerox admits that “production minutes were not generated by waiting for calls or making outbound calls,” and therefore Ms. Hill could earn no pay during the time she spent performing those activities. Opening Br. at 25. As this Court made clear in *Lopez Demetrio v. Sakuma Bros. Farms, Inc.*, “[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.” 183 Wn.2d 649, 652, 355 P.3d 258 (2015) (emphasis added). Thus, when an employer pays on a piece-rate basis for production work completed over a certain amount of time but fails to pay anything for additional hours of non-production work performed thereafter, no compensation is being paid or received for those non-production hours.

Xerox maintains that WAC 296-126-021 exempts piecework employers from the obligation to pay employees at no less than the minimum wage for each hour of work. Opening Br. at 1 n.1.<sup>15</sup> This argument fails for several reasons.<sup>16</sup>

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<sup>15</sup> Xerox claims Ms. Hill “does not dispute” that “minimum wage compliance for piecework plans is determined on a workweek basis.” Opening Br. at 1. To the contrary, Ms. Hill has challenged Xerox’s interpretation of WAC 296-126-021 throughout this case. *See Hill v. Xerox Bus. Servs., LLC*, Ninth Circuit Court of Appeals Case No. 14-

First, WAC 296-126-021 does not authorize employers to avoid compensating piece-rate employees for non-production hours worked. Rather, the purpose of the regulation is simply to ensure that piece-rate pay, which by definition is tied to the production of units other than time, is sufficient for purposes of the MWA. Xerox argues the regulation goes much further by allowing Washington employers to avoid paying piecework employees for other hours worked. But WAC 296-126-021 explicitly contemplates that employers will pay separately for work performed on some basis other than piecework. *See* WAC 296-126-021. Subsection (1) provides: “The amount earned on [a piecework] basis . . . may be credited as a part of the total wage for that period.” WAC 296-126-021(1) (emphasis added). This means an employee is entitled to have earnings for work performed on some other basis also credited as a part of the total wage for the period. Because such work is not piecework, the default rule of compensation at no less than the minimum wage rate per hour applies. *See* Wash. DLI Admin. Policy ES.C.2 at 1; *Miller*, 136 Wn.

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36029, Dkt. # 21-1 at 52-58; *Hill v. Xerox Bus. Servs., LLC*, W.D. Wash. Case No. 2:12-cv-00717-JCC, Dkt. # 94 at 25-28.

<sup>16</sup> For starters, Chapter 296-126 WAC implements the Industrial Welfare Act, Chapter 49.12 RCW, *see* WAC 296-126-001 (“These rules apply to employers and employees in the state as defined in RCW 49.12.005(3) and (4).”), not the Minimum Wage Act, which is covered in Chapter 296-128 WAC. *See, e.g.*, WAC 296-128-010 (establishing rules for employers of “employees who are subject to RCW 49.46.020”). Notably, there are no provisions in Chapter 296-128 WAC comparable to WAC 296-126-021.

App. at 656. Accordingly, for each “hour worked” on something other than piecework, the employee is entitled to be paid on an hourly basis (at no less than the minimum wage rate) and have that pay credited toward the total wage for the period.

Once both piecework pay and non-piecework pay are added together, the calculation under subsection (2) is performed, which ensures the employee averaged at least the minimum wage for the time spent performing piecework when accounting for the “total wages paid” in the workweek. This interpretation gives meaning to subsection (1) and is consistent with the MWA’s requirement to pay at least the minimum wage for each hour worked.<sup>17</sup>

Washington courts interpret regulations like WAC 296-126-021 “in a manner that gives effect to all [the] language without rendering any part superfluous.” *Bravern Residential, II, LLC v. Dep’t of Revenue*, 183 Wn. App. 769, 778, 334 P.3d 1182, 1187 (2014); *see also Whatcom Cnty. v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) (holding that statutes must be construed so that no portion is rendered superfluous). Xerox’s interpretation of WAC 296-126-021 would render subsection (1) of the regulation superfluous. Specifically, if Xerox were

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<sup>17</sup> The same issue is presented in the farmworker context in another case currently pending in this Court, *Carranza v. Dovex Fruit Co.*, No. 94229.

correct in asserting that a workweek approach for minimum wage compliance is used exclusively whenever an employee receives some piece-rate pay during the week, regardless of how little, subsection (1) would have been omitted entirely, and the regulation would have read: “Where employees are paid on a commission or piecework basis, wholly or partially, the total wages paid for such period shall be computed on the hours worked in that period resulting in no less than the applicable minimum wage.” The regulation must be construed in a manner that gives subsection (1) effect.

The administrative policy on which Xerox relies further underscores the point, providing that “total wages” under WAC 296-126-021 “is meant to include all compensation received for hours worked in the pay period,” not just piecework compensation. Wash. DLI Admin. Policy ES.A.3 at 3 (2014) (emphasis added). The Department of Labor and Industries has defined “hours worked” to mean “all work requested, suffered, permitted or allowed,” and this includes “wait time,” “preparatory and concluding time,” and any other work time. DLI Admin. Policy ES.C.2 at 1. “If the work is performed, it must be paid.” *Id.* The fallacy of Xerox’s argument is that the company failed to compensate Ms. Hill and other employees for all work performed because piece-rate pay compensates only for production work, not other hours worked. *See*

*Lopez Demetrio* 183 Wn.2d at 653, 656, 661-62 (holding piece rates “[are] earned only when the employee is actively producing” and “separate” compensation is required for “other hours worked”).<sup>18</sup>

This approach has been embraced by state and federal courts in California, which hold that employers who pay on a piece-rate basis for production work “must also pay . . . a separate hourly minimum wage for time spent during . . . work shifts . . . [on] non-[production] tasks.”

*Gonzalez v. Downtown LA Motors, LP*, 155 Cal. Rptr. 3d 18, 20, 215 Cal. App. 4th 36, 40 (Cal. Ct. App. 2013) (interpreting wage order with language similar to RCW 49.46.020 and DLI Admin. Policy ES.C.2 that requires payment of not less than minimum wage for all “hours worked”); *see also Armenta v. Osmose*, 37 Cal. Rptr. 3d 460, 467-68, 135 Cal. App. 4th 314, 323-24 (Cal. Ct. App. 2005) (holding employer violated

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<sup>18</sup> Xerox cites two federal cases to support its position regarding WAC 296-126-021: *Helde v. Knight Transp., Inc.*, 2016 WL 1687961 (W.D. Wash. April 26, 2016), and *Mendis v. Schneider Nat'l Carriers Inc.*, 2016 WL 6650992 (W.D. Wash. Nov. 10, 2016). Opening Br. at 4, 39. The decisions in these cases should be rejected for the reasons set forth above. Furthermore, the courts were wrong to conclude that because workweek averaging is used to calculate regular rates for purposes of overtime pay, employers may deduct from piece-rate pay to compensate for non-production work hours. *See Helde*, 2016 WL 6650992, at \*1; *Mendis*, 2016 WL 6650992, at \*3. The obligation to pay for each and every hour of work is separate from (and logically antecedent to) the calculation of a regular rate for purposes of determining overtime compensation, and employees may not waive their basic right to be paid for all hours worked. *Schneider v. Snyder's Foods, Inc.*, 95 Wn. App. 399, 402, 976 P.2d 134 (1999) (holding “rights provided by the MWA may not be waived”). Lastly, “a federal district court [opinion] . . . is not controlling on this court when state substantive law is interpreted.” *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 823-24, 881 P.2d 986 (1994).

minimum wage standard by paying only for so-called “productive” time and refusing to pay for other work activities); *Quezada v. Con-Way Freight, Inc.*, 2012 WL 2847609, at \*4 (N.D. Cal. July 11, 2012) (holding pieceworkers who do non-production work must be separately paid for that time); *Carillo v. Schneider Logistics, Inc.*, 823 F. Supp. 2d 1040, 1044 (C.D. Cal. 2011) (same); *Cardenas v. McLane Foodservices, Inc.*, 796 F. Supp. 2d 1246, 1253 (C.D. Cal. 2011) (same).<sup>19</sup>

Finally, to the extent there are two reasonable interpretations of WAC 296-126-021, the one that “ultimately provides greater protection for workers” is “the better approach.” *Brady*, 188 Wn.2d at 583-84. Here, that is the interpretation advanced by Ms. Hill. If WAC 296-126-021 were interpreted as Xerox posits, to allow an employer to pay piece rates for some work but nothing for other work and average the piecework earnings over all work hours, it would be contrary to the mandate of liberal construction. Under RCW 49.46.020, employers must compensate employees for each and every hour worked. *See Stevens*, 162 Wn.2d at 47-50. If WAC 296-126-021 were read to allow employers to avoid this,

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<sup>19</sup> On issues of first impression, Washington courts may look at cases from other jurisdictions for guidance. *In re Parentage of L.B.*, 155 Wn.2d 679, 702, 122 P.3d 161 (2005). California, like Washington, requires employers to pay employees for “all hours worked,” which is broadly defined. *Gonzalez*, 155 Cal. Rptr. 3d at 23; *see also* DLI Admin. Policy ES.C.2. And California, like Washington, liberally construes its wage and hour laws in favor of protecting workers. *Gonzalez*, 155 Cal. Rptr. 3d at 23; *Anfinson*, 174 Wn. 2d at 870. Thus, case law from California is persuasive.

it would contravene the MWA and be invalid. *See Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 713, 153 P.3d 846 (2007) (“[A]n administrative rule is invalid and unenforceable if it contravenes the statute which it implements.”).

In the event this Court finds that Xerox’s “production minutes” qualified as piece rates, it would be appropriate for the Court to decide whether the MWA permits Xerox to refuse to pay Ms. Hill for non-piecework activities required of her. As the Ninth Circuit noted in its order: “We do not intend our framing of [the certified] question to restrict the Washington Supreme Court’s consideration of any issues that it determines are relevant.” *Hill*, 868 F.3d at 763 (emphasis added); *see also Brady*, 188 Wn.2d at 580 (“court may reformulate the certified question”). For the reasons set forth above, it does not. Accordingly, the district court’s denial of summary judgment must be affirmed.

#### **IV. CONCLUSION**

Washington workers are entitled to be paid at no less than the minimum wage rate for each hour of work. This fundamental right prevails over labels and schemes and ensures the protection of employees in this state. Xerox treated Ms. Hill and the other call center works as hourly-based employees but failed to pay them for all hours worked. As

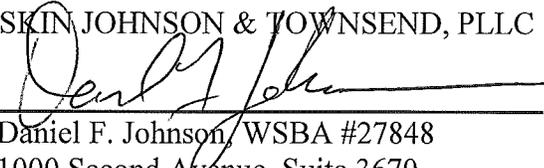
such, Xerox violated the law. This is true even if one considers Ms. Hill to have been employed on a piecework basis.

For the reasons set forth above, this Court should answer the certified question in the negative: A payment plan that compensates for the time an employee works does not qualify as a piecework plan.

If the Court finds the ABC plan was a piecework plan, then the Court should reformulate the certified question as follows: Can an employer refuse to compensate a pieceworker for non-production hours worked? The answer is no.

Dated this 6<sup>th</sup> day of November, 2017.

BRESKIN JOHNSON & TOWNSEND, PLLC

By: 

Daniel F. Johnson, WSBA #27848  
1000 Second Avenue, Suite 3670  
Seattle, Washington 98104  
Telephone: (206) 652-8660  
Facsimile: (206) 652-8290  
Email: [djohnson@bjtlegal.com](mailto:djohnson@bjtlegal.com)

TERRELL MARSHALL LAW GROUP PLLC

Toby J. Marshall, WSBA #32726  
936 North 34th Street, Suite 300  
Seattle, Washington 98103  
Telephone: (206) 816-6603  
Facsimile: (206) 350-3528  
Email: tmarshall@terrellmarshall.com

MacLEOD LLC

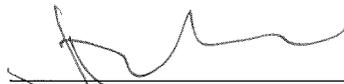
Jon W. MacLeod, WSBA #8491  
1700 Seventh Avenue, Suite 2100  
Seattle, Washington 98101  
Telephone: (206) 357-8470  
Facsimile: (206) 357-8401  
Email: jwmacleodlaw@gmail.com

*Attorneys for Plaintiff-Appellee*

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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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Jamie Telegin, Legal Assistant

**BRESKIN JOHNSON TOWNSEND PLLC**

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Seattle, WA, 98104  
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