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September 19, 2019

### Washington Supreme Court Upholds Workweek Averaging for Non-Agricultural Piece-Rate Workers

On September 5, 2019, the Washington Supreme Court held that non-agricultural employees do not have to be paid a separate hourly rate for time spent on non-piece-rate activities. Further, workweek averaging, as described in WAC 296-126-021, is a valid method for complying with the Washington Minimum Wage Act (MWA).

#### **Piece Work Pay and Workweek Averaging**

Washington's Minimum Wage Act requires that employees be paid at least the minimum wage for all hours worked. Some employers, however, pay based on the number of units produced and not on an hourly basis. For example, long-haul truckers are often compensated per mile driven and some agricultural workers are paid for each box of picked produce.

To explain how piece-rate compensation must be structured to comply with the Washington law, the Department of Labor and Industries (L&I) issued regulation WAC 296-126-021 in 1974, which states:

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

WAC 296-126-021, therefore, has long been interpreted to permit piece-rate pay so long as an employee's total wages divided by the number of hours worked equates to at least the minimum hourly wage. Notably, WAC 296-126-021 does not apply to agricultural workers, and there is no parallel regulation authorizing workweek averaging for agricultural workers.

In 2018, the Washington Supreme Court held in *Carranza v. Dovex Fruit Co.* that piece-rate payment for agricultural fruit pickers only satisfies the MWA for hours spent actually engaged in piece-rate work. 190 Wn.2d 612 (2018). Time spent on tasks not compensated by the piece-rate pay must be paid on a separate hourly basis. The court emphasized that WAC 296-126-021 does not apply to agricultural workers, leaving the question open as to whether non-agricultural workers should also be paid separately for non-piece-rate work.

#### **The Washington Supreme Court is Asked Whether *Carranza* Applies to Non-Agricultural Workers**

In the ongoing federal case *Sampson v. Knight Transp., Inc.*, C17-0028-JCC (W.D. Wash.), the defendant trucking company pays long-haul drivers a mileage-based piece rate. Drivers are also paid set amounts for additional duties, such as loading/unloading, waiting and border crossings. The drivers' compensation does not contain an hourly component.

The drivers filed suit alleging that they were not being paid for all hours worked. The trucking company argued that it satisfied the MWA because the total compensation averages to at least the minimum wage for all hours worked in compliance with WAC 296-126-021. Plaintiffs, relying on *Carranza*, argued that the MWA gives workers a right to per-hour compensation, which is not being paid for certain non-driving tasks.

The federal court certified the following question to the Washington Supreme Court: "Does the Washington Minimum Wage Act require non-agricultural employers to pay their piece-rate employees per hour for time

spent performing activities outside of piece-rate work?"

## **The Washington Supreme Court Validates Workweek Averaging under WAC 296-126-021**

On September 5, 2019, the Washington Supreme Court held that (1) the MWA does not require non-agricultural workers to be paid separately for time spent outside of piece-rate work, and (2) workweek averaging is a permissible method for ensuring piece-work pay complies with the MWA.

The court deferred to L&I's long-held interpretation of WAC 296-126-021, which allows workweek averaging, finding that this interpretation unproblematically comports with the plain language of the regulation. Further, the court held that there is no conflict between WAC 296-126-021 and *Carranza*. Justice Yu explained that *Carranza's* outcome was based on the fact that no regulation exists authorizing workweek averaging for agricultural workers and it does not follow that workweek average is automatically invalid for all workers. Rather, WAC 296-126-021 is a validly promulgated agency regulation that ensures MWA pay requirements are fulfilled for piece-rate workers.

### **Take Aways**

If your company compensates non-agricultural employees on a piece-rate basis, this is a good reminder to routinely audit your compensation practices to ensure employees are receiving minimum wage for all hours worked. Employers should also pay particular attention to meal and rest breaks, as piece-rate workers should be separately compensated for paid rest breaks.

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