CHL CLASS ACTION REPORT

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Washington State Minimum Wage Act
Wash. Rev. Code § 49.46.010 *et seq.* (2014).[1]

1. Under the statutory minimum wage laws of Michigan, Maine, Oregon, Washington and Pennsylvania, please identify for each State separately:

a) The factors that are considered in determining whether a person is an employee within the meaning of the statute. Please identify the sources relied upon in the statute, jurisprudence, policy directives or tribunal decisions/directives. Also, please consider where the person and employer must be domiciled to fall under the wage law.

(1) It is important at the outset to note that most state minimum wage acts were adopted after and in response to Congress' adoption of the Fair Labor Standards Act of 1938 which established the minimum wage and overtime requirements for employees in the private sector and in Federal, State, and local governments.[2] Further, the majority of federal courts have adopted the "economic realities" test in order to determine if an individual is an employee or independent contractor for coverage under the Fair Labor Standards Act of 1938.[3]

The Washington State Minimum Wage Act is remedial in nature and accordingly should be liberally construed.[4] The applicable statute defines "employ" as "to engage, suffer or permit to work.[5]" The statute defines "employee" to include any individual employed by an employer not subject to one of the enumerated exceptions.[6] The statute itself does not define what constitutes an employment relationship. "The parties' characterization of their employment relationship is not determinative" as to whether an employment relationship exists.[7]

With regard to whether an individual is an employee or an independent contractor under the State Minimum Wage Act is a mixed question of fact and law.[8] Since the statute does not define what constitutes an employment relationship, Washington state courts generally use the "economic realities" test. For example, the appellate court in *Anfinson*

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[1] All subsequent references are to the 2014 statutory compilation unless otherwise noted.
[2] 29 U.S.C. §§ 201, *et seq.*
[3] *Anfinson v. FedEx Ground Package Sys., Inc.*, 159 Wash. App. 35 at 54 244 P.3d 32 (Wash. App. 2010).
[4] *Becerra Becerra v. Expert Janitorial, LLC*, 181 Wash.2d 186, 195, 332 P.3d 415 (Wash. 2014).
[5] *See* Wash. Rev. Code § 49.46.010 (2); Wash. Admin. Code 296-126-002(3).
[6] *See* Wash. Rev. Code § 49.46.010 (5).
[7] *Becerra Becerra v. Expert Janitorial, LLC*, 181 Wash.2d 186, 196, 332 P.3d 415 (Wash. 2014), *Real v. Driscoll Strawberry Assocs.*, 603 F.2d 748, 755 (9th Cir. 1979) (citing *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1315 (5th Cir. 1976)).
[8] *Anfinson v. FedEx Ground Package Sys., Inc.*, 159 Wash. App. 35, 244 P.3d 32 (Wash. Ct. App. 2010) (*citing Graves v. P.J. Taggares Co.*, 94 Wash. 298, 302-03, 616 P.2d 1223 (1980); *Larner v. Torgerson Corp.*, 93 Wash.2d 801, 804, 613 P.2d 780 (1980)).

stated that ". . . we hold that the economic realities test used by the majority of the federal circuits should be the proper legal test for determining whether a worker is an employee under the Minimum Wage Act.[9]" Specifically, the economic realities test, adopted by a majority of federal courts, uses the following six factors to determine if an employee or an independent contractor relationship exists:

> (1) the permanence of the working relationship between the parties;
> (2) the degree of skill the work entails;
> (3) the extent of the worker's investment in equipment or materials;
> (4) the worker's opportunity for profit or loss;
> (5) the degree of the alleged employer's control over the worker;
> (6) whether the service rendered by the worker is an integral part of the alleged employer's business.[10]

The Washington State Supreme Court affirmed the *Anfinson* appellate court and held that the definition of employee is subject to the "economic realities" test developed by federal courts interpreting the Fair Labor Standards Act.[11]

(2) In my opinion, the statute establishes the minimum wage standards for all employment *within the state of Washington. See* Wash. Rev. Code § 49.46.005 (emphasis added).

b) Are there any exemptions under the statutes that would apply to hockey players?

In my opinion, there are no exemptions for hockey players under the statute.[12] However, Washington State House Bill 1930 2015-2016 and Senate Bill 5893 2015-2016, which have been introduced to their respective legislative chambers, would specifically exclude teams affiliated with the Western Hockey League as an employer for wage purposes.[13]

c) Is there a civil action available to employees for a violation of the statute? What is the nature of the action/complaint and what heads of damages are available?

(1) In my opinion, an individual may file a civil action for violations of the statute pursuant to Wash. Rev. Code § 49.46.[14]

(2) Section 49.46.090(1) of the Washington Minimum Wage Act states "[a]ny employer who pays any employee less than wages to which such employee is entitled under or

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[9] *Anfinson v. FedEx Ground Package Sys., Inc.*, 159 Wash. App. 35 at 54 244 P.3d 32 (Wash. App. 2010).
[10] *Id.*
[11] *See Anfinson v. FedEx Ground Package Sys.*, 174 Wash.2d 851, 281 P.3d 289 (Wash. 2012).
[12] *See* Wash. Rev. Code § 49.46.010(3)(a)-(n).
[13] Copies of House Bill 1930 2015-2016 and Senate Bill 5893 2015-2016 are attached as Appendix A.
[14] *See* Administrative Policy of State of Washington, Department of Labor & Industries Employment Standards, No. ES.A.1 (July 15, 2014) (attached as Appendix B).

by virtue of this chapter, shall be liable to such employee affected for the full amount of such wage rate, less any amount actually paid to such employee by the employer, and for costs and such reasonable attorney's fees as may be allowed by the court. Any agreement between such employee and the employer to work for less than such wage rate shall be no defense to such action.[15]" Where an employee prevailed on a wage claim, he was entitled to attorney fees because this section grants attorney fees to an employee who is successful in a claim for wages against his employer.[16]

If the violation is "willful," Wash. Rev. Code § 49.52.070 provides:

> Any employer and any officer, vice principal or agent of any employer who shall violate any of the provisions of RCW 49.52.050 (1) and (2) shall be liable in a civil action by the aggrieved employee or his or her assignee to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees: PROVIDED, HOWEVER, That the benefits of this section shall not be available to any employee who has knowingly submitted to such violations.[17]

Wash. Rev. Code § 49.52.050(2) provides that an employer who has violated the statute may only avoid a finding of willfulness, and avoid double damages, if the employer was careless or erred in failing to pay or a bona fide dispute existed between the employer and employee regarding the payment of wages.[18] The Washington Supreme Court explained "our test for willful failure to pay has not been stringent: the employer's refusal to pay must be volitional. Willful means merely that the person knows what he is doing, intends to do what he is doing, and is a free agent. The nonpayment of wages is willful when it is the result of a knowing and intentional action.[19]" "The Washington definition of "willful" sets a low bar. Employers need only be aware that they have not paid employees for certain actions.[20]"

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[15] Wash. Rev. Code § 49.46.090.

[16] *Dice v. City of Montesano*, 131 Wash. App. 675, 128 P.3d 1253 (Wash. App. 2006), *aff'd,* 158 Wash.2d 1017, 149 P.3d 377 (Wash. 2006).

[17] Wash. Rev. Code § 49.52.070. *See Chelius v. Questar Microsystems, Inc.*, 107 Wash. App. 678, 27 P.3d 681 (Wash. App. 2001), *review denied*, 145 Wash.2d 1037, 43 P.3d 21 (Wash. 2002).

[18] *Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 175 Wash.2d 822, P.3d 516 (Wash. 2012), *reconsideration denied, Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 2013 Wash. LEXIS 1025 (Wash. 2013); *Morgan v. Kingen*, 166 Wash.2d 526, 534, 210 P.3d 995 (Wash. 2009).

[19] *Schilling v. Radio Holdings, Inc.*, 136 Wash. 2d 152, 159-60, 961 P.2d 371 (1998).

[20] *Chavez v. IBP, Inc.*, 2005 U.S. Dist. LEXIS 29682, 100 (E.D. Wash., June 27, 2005).

A bona fide dispute is a "fairly debatable" dispute over whether all or a portion of wages must be paid.[21] The burden falls on the employer to show the bona fide dispute exception applies.[22]

The MWA also imposes personal liability on officers and directors for unpaid wages, punitive damages (double damages), and attorney's fees if the violation is "willful.[23]" It is important to note that the court in *Schilling* stated that the purpose of Wash. Rev. Code § 49.52 is to ensure that employees may recover the full amount of wages due pursuant to statute, ordinance, or contract.[24]

d) What is the effect of a written contract which purports to limit compensation for services to an amount that is less than the minimum wage laws?

In my opinion, parties may not contract for wages below the statutory amount pursuant to the statute. "Any agreement between such employee and the employer to work for less than such wage rate shall be no defense to such action." *See* Wash. Rev. Code § 49.46.090(1). Further, employees are not required to arbitrate their non-negotiable substantive rights granted by Washington's MWA. *Hisle v. Todd Pac. Shipyards Corp.*, 113 Wash. App. 401, 54 P.3d 687, 2002 Wash. App. LEXIS 2227 (Wash. App. 2002), *aff'd*, 151 Wash.2d 853, 93 P.3d 108, 2004 Wash. LEXIS 448 (Wash. 2004).

e) What is the limitation period to commence proceedings under the statute and what is the age of majority?

(1) In my opinion, the statue of limitations to file a complaint for unpaid wages upon an oral contract is three (3) years and six (6) years for unpaid wages upon a written contract.[25] Any action based upon a written employment contract is barred after six years.[26] Even though a contract may not provide the exact compensation amount, as long as it specifies that compensation is owed, the writing is sufficient to bring the contract within the six-year limit statute of limitations.[27] Further, the statute of limitations is tolled during Department of Labor & Industries' investigations of wage complaints.[28]

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[21] *Schilling v. Radio Holdings, Inc.*, 136 Wash.2d 152, 161 (1998).
[22] *Schilling v. Radio Holdings, Inc.*, 136 Wash.2d 152, 165 (1998).
[23] *Morgan v. Kingen,* 169 P.3d 487 (Wash. Ct. App. 2007), *aff'd,* 210 P.3d 995 (Wash. 2009) (finding willful violation because executives were in control of funds when payroll was due).
[24] *Schilling v. Radio Holdings, Inc.*, 136 Wash.2d 152 (1998).
[25] *See* Wash. Rev. Code §§ 4.16.080, 4.16.040(1). *See Bennett v. Computer Task Group, Inc.*, 112 Wash. App. 102, 47 P.3d 594 (Wash. App. 2002); *Seattle Prof'l Eng'g Emps. Ass'n v. Boeing Co.*, 139 Wash.2d 824, 991 P.2d 1126 (Wash. 2000).
[26] *Ferris v. Snively*, 172 Wash. 167, 19 P.2d 942, 1933 Wash. LEXIS 801, 90 A.L.R. 278 (Wash. 1933); *Malcolm v. Yakima Sch. Dist.*, 23 Wash.2d 80, 159 P.2d 394 (1945).
[27] *Kloss v. Honeywell*, 77 Wash. App. 294, 890 P.2d 480, 1995 Wash. App. LEXIS 115 (Wash. App. 1995).
[28] *See* Wash. Rev. Code § 49.48.083.

(2) In my opinion, the age of majority under Washington law is eighteen (18) years old. Specifically, the statute states, "[e]xcept as otherwise specifically provided by law, all persons shall be deemed and taken to be of full age for all purposes at the age of eighteen years.[29]"

2. **In your opinion, based on a review of the documents and accepting the allegations of fact in the pleadings to be correct, are the players belonging to teams located in the States of Michigan, Pennsylvania, Washington, Maine and Oregon employees of those teams? Please explain the basis for your conclusion. Please assume that the standard form player agreement for the years Mr. Walter played in the State of Washington was signed by all the players playing for US teams in the WHL and that the facts pleaded in the statements of claim for his duties and time apply equally to all the players.**

Based upon a review of the documents and accepting the allegations of fact in the pleadings to be true it appears that players belonging to a team in Washington State are "employees" subject to the Washington State Minimum Wage Act. While the Washington State Minimum Wage Act does not specifically define an employment relationship, it is clear that in order for an individual to be covered under the Washington State Minimum Wage Act the individual must be an employee and not an independent contractor. Since the statute does not define independent contractor, Washington State courts have adopted the "economic realities" test in order to determine if an individual is an employee for minimum wage purposes. The test is rooted in the Appellant decision of *Anfinson v. FedEx Ground Package Sys., Inc.* and the analysis was ultimately upheld and adopted by the Washington Supreme Court, the highest court in Washington State. The Appellant decision of *Anfinson v. FedEx Ground Package Sys., Inc* laid out the following criteria:

> (1) the permanence of the working relationship between the parties;
> (2) the degree of skill the work entails;
> (3) the extent of the worker's investment in equipment or materials;
> (4) the worker's opportunity for profit or loss;
> (5) the degree of the alleged employer's control over the worker;
> (6) whether the service rendered by the worker is an integral part of the alleged employer's business.[30]

When applying the economic reality test, courts have looked to the totality of the circumstances and no single factor is determinative if an individual is an employee.[31] The

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[29] *See* Wash. Rev. Code § 26.28.010.

[30] *Anfinson v. FedEx Ground Package Sys., Inc.*, 159 Wash. App. 35 at 54 244 P.3d 32 (Wash. App. 2010), *aff'd Anfinson v. FedEx Ground Package Sys.*, 174 Wash.2d 851, 281 P.3d 289 (Wash. 2012).

[31] *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir. 1981). ("Neither the presence nor the absence of any individual factor is determinative." "Whether one is an employee for purposes of the FLSA depends on the totality of the circumstances and whether, "as a matter of economic reality," the individual is dependent on the business he or she is serving.")

focus should be whether the individual is economically dependent on the employer.[32] At the outset, it is important to note that the "parties' characterization of their employment relationship is not determinative" as to whether an employment relationship exists."[33]

In my opinion, the most important factors a court would consider under Washington State law are the permanence of the working relationship between the parties, the extent of the worker's investment in equipment and materials, and the degree of the alleged employer's control over the worker. In this matter, players and teams execute a written contract which provides players with a certain amount of pay per week in exchange for services as a hockey player. *See* Tab 2. In other words, hockey players such as Mr. Walter provide a service in exchange for pay and the teams in return gain a significant amount of control over the hockey player. Furthermore, in my opinion the following relevant facts would lead a reasonable fact finder to conclude that a hockey player is an employee under Washington State law include, but are not limited to:

- The contract's terms are applicable up to three years and the player is unable to play for other hockey teams while under contract or subject to a protective player agreement. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article and Mr. Walter's Affidavit #6 and #8.

- Teams have the right to suspend, sanction, and assign the player during the life of the contract. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 7 and 8.

- Players play exclusively for the team in all exhibition, preseason, regular season, playoff games and tournament games. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 4.1(a)-(e) and Tab 6 – QMJHL/LHJMQ – Rights and Obligations of Players Manual.

- Players must abide the team's practice schedule. Mr. Walter's Affidavit #43. Players often work six (6) days a week and work more than 40+ hours during the week. Mr. Walter's Affidavit #28 and #42.

- Players must participate in promotional activities and must abide by all rules created by the team "on and off the ice." *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 4.2(c) and (d). The player does not receive any extra compensation for attending the team's promotional events. Mr. Walter's Affidavit #58. In fact, the Teams have so much control over the player that they even limit the player's recreational activities and establish a curfew. *See* Tab 1 - WHL Standard Player

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[32] *Id.*

[33] *Becerra Becerra v. Expert Janitorial, LLC*, 181 Wash.2d 186, 196, 332 P.3d 415 (Wash. 2014), *Real v. Driscoll Strawberry Assocs.*, 603 F.2d 748, 755 (9th Cir. 1979) (citing *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1315 (5th Cir. 1976)).

Agreement - Terms and Conditions Schedule Article 4.2(k) and Mr. Walter's Affidavit #43 and #46.

- Players must sign over their rights to their own image, statistical, and biographical for the profit of the Team. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 4.3 and 4.4.

- Teams determine the rate of pay and pay the player's salary. *See* Tab 1 and 2. In fact, the salary is non-negotiable. *See* Mr. Walter's Affidavit #13. Further, the wages are limited pursuant to contract. *See* Tab 7 –QMJHL Schedule B and Tab 6 – QMJHL/LHJMQ – Rights and Obligations of Players Manual.

- Teams pay the player's room and board, travel accommodations, and expenses. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 2.3, 2.4, 5.1(e) and Mr. Walter's Affidavit #16 and #22.

- Teams provide the players with medical and dental coverage. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 5.1(h).

- Teams provide the players with equipment. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 5.1(d) and Tab 6 – QMJHL/LHJMQ – Rights and Obligations of Players Manual Article 3.1.

- Teams petition and are granted nonimmigrant work visas from the United States Immigration Services for players to work within the United States. This shows that the team intended the players to be their employees. *See* Tab 4 and 5 and Mr. Walter's Affidavit #15.

- Teams identify themselves as employers and pay employment taxes to the Canadian Revenue Agency. *See* Tab 8 – Canada Revenue Agency. Teams issue players "Records of Employment." *See* Tab 9

Accordingly, applying the economic reality test pursuant to Washington State law, the evidence at hand establishes that the hockey players are employees and are economically dependent upon the team and therefore subject to the Washington State Minimum Wage Act.

3. In your opinion, are the teams participating in the CHL located in the States of Michigan, Pennsylvania, Washington, Maine and Oregon obligated to pay their players minimum wages under the statutes in each State? If so, what are the applicable statutes and the minimum wages in each of the States?

In my opinion, yes, for the reasons found in my response to question #2, the teams (Tri-City Americans, Seattle Thunderbirds, Everett Silvertips, and Spokane Chiefs) participating in the CHL in Washington are obligated to pay their employees minimum wage pursuant to the Washington Minimum Wage Act, Wash. Rev. Code § 49.46.010 *et*

seq. (2014) and, if applicable, overtime wages pursuant to Wash. Rev. Code § 49.46.130 (2014). The minimum wage in Washington State is currently $9.47 per hour.[34] Minors under the age of sixteen (16) may be paid 85% ($8.05) of the state minimum wage.

[34] *See* Announcement of Washington State Department of Labor & Industries FY15-309 (Dec. 2014) (attached as Appendix C).

Oregon Wage Claim Act
Or. Rev. Stat. § 652.140 *et seq.* (2015).[35]

1. Under the statutory minimum wage laws of Michigan, Maine, Oregon, Washington and Pennsylvania, please identify for each State separately:

a) The factors that are considered in determining whether a person is an employee within the meaning of the statute. Please identify the sources relied upon in the statute, jurisprudence, policy directives or tribunal decisions/directives. Also, please consider where the person and employer must be domiciled to fall under the wage law.

(1) It is important at the outset to note that most state minimum wage acts were adopted after and in response to Congress' adoption of the Fair Labor Standards Act of 1938 which established the minimum wage and overtime requirements for employees in the private sector and in Federal, State, and local governments.[36] Further, the majority of federal courts have adopted the "economic realities" test in order to determine if an individual is an employee or independent contractor for coverage under the Fair Labor Standards Act of 1938.[37]

For example, the Oregon Court of Appeals Stat. § 653.010(2) defines "employ," for purposes of Or. Rev. Stat. §§ 653.010 - 653.261, to include to suffer or permit to work. Under the Oregon Wage Act, an independent contractor is specifically excluded from the definition of "employee.[38]" However, the statute itself does not define what constitutes an employment relationship. For this reason, Oregon courts generally use the "economic realities" test adopted from the state court's decision in *Presley* which upheld the Bureau of Labor and Industries Wage and Hour Division's use of the "economic reality" test.[39] The *Presely* court noted that the state's Bureau of Labor and Industries uses the following five factors to determine if an employee or an independent contractor relationship exists:

> (1) the degree of control exercised by the alleged employer;
> (2) the extent of the investment in the worker and the alleged employer in the business;
> (3) the degree to which the worker's opportunity for profit and loss is determined by the alleged employer;

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[35] All subsequent references are to the 2015 statutory compilation unless otherwise noted.
[36] 29 U.S.C. §§ 201, *et seq.*
[37] *Anfinson v. FedEx Ground Package Sys., Inc.*, 159 Wash. App. 35 at 54 244 P.3d 32 (Wash. App. 2010).
[38] *See* Or. Rev. Stat. § 652.310(2).
[39] *Presley v. Bureau of Labor & Indus.*, 200 Or. App. 113, 112 P.3d 485 (Oregon Ct. App. 2005), *see also* Or. Rev. Bureau of Labor and Industries Wage and Hour Division. *See Geoffrey Enterprises, Inc.*, 15 BOLI 148 (1996); *"Economic Reality" Test* Handout from Bureau of Labor and Industries (2011) (attached as Appendix D).

(4) the skill and initiative required in performing the job; and
(5) the permanence of the relationship.

The Oregon Court of Appeals in *Cejas* stated "[w]e conclude that the legislature intended courts to apply the economic-realities test under ORS 653.010(2), and we overrule our prior cases to the extent that they conflict with that holding.[40]"

(2) The statute applies to an employer operating in Oregon pursuant to Or. Rev. Stat. § 653.010(3). Further, a private corporation may be sued either where it resides or where the cause arose, except in those cases that have been impressed with a local character by the statute.[41]

b) Are there any exemptions under the statutes that would apply to hockey players?

In my opinion, there are no exemptions for hockey players under the statute.[42]

c) Is there a civil action available to employees for a violation of the statute? What is the nature of the action/complaint and what heads of damages are available?

(1) In my opinion, an individual may file a civil action for violations of the statute.[43]

(2) In my opinion, an employer who violates the Oregon Wage Claim Act is liable for full payment of wages, civil penalties pursuant to Or. Rev Stat. § 652.150, and reasonable attorney fees.[44]

Or. Rev Stat. § 652.150 provides that any employer who willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in Or. Rev Stat. § 652.140, is subject to a penalty payment of up to 30 days' wages. "In civil cases the word 'willful,' as ordinarily used in courts of law, does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done was done or

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[40] *Cejas Commer. Interiors, Inc. v. Torres-Lizama*, 260 Or. App. 87, 316 P.3d 389, 395 (Or. Ct. App. 2013). A copy of the court's decision is attached as Appendix E.
[41] *Holgate v. Or. Pac. R. Co.,* 16 Or. 123, 17 P. 859 (1888); *Bailey v. Malheur Irr. Co.*, 36 Or. 54, 58, 57 P. 910 (1899); *Winter v. Union Packing Co.*, 51 Or. 97, 93 P. 930 (1908); *Cunningham v. Klamath Lake R. Co.*, 54 Or. 13, 16, 101 P. 1099 (1913); *State v. Almeda Consol. Mines Co.*, 107 Or. 18, 212 P. 789 (1923); *State v. Updegraff*, 172 Or. 246, 141 P.2d 251 (1943); *Mutzig v. Hope*, 176 Or. 368, 158 P.2d 110 (1945); *State v. Circuit Court*, 187 Or. 591, 211 P.2d 994 (1949).
[42] *See* Or. Rev Stat. § 653.020; Or. Admin. R. 839-020-0300; Or. Admin. R. 839-001-0125.
[43] Or. Rev. Stat. § 652.140 *et seq.* (2015).
[44] *See* Or. Rev Stat. § 653.055.

omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent."[45]

An employer may not avoid litigation simply by paying the unpaid wages. Instead, the employee may sue to recover penalty wages and attorneys' fees even after the employer pays the underlying wages.[46]

d) What is the effect of a written contract which purports to limit compensation for services to an amount that is less than the minimum wage laws?

In my opinion, parties may not contract for wages below the statutory amount pursuant to the statute. "An employer may not by special contract or any other means exempt the employer from any provision of or liability or penalty imposed by ORS 652.310 to 652.414 or any statute relating to the payment of wages, except insofar as the Commissioner of the Bureau of Labor and Industries in writing approves a special contract or other arrangement between the employer and one or more of the employer's employees. The commissioner may not give approval unless the commissioner finds that such contract or arrangement will not prejudicially affect the interest of the public or of the employees involved, and the commissioner may at any time retract such approval, first giving the employer not less than 30 days' notice in writing.[47]"

e) What is the limitation period to commence proceedings under the statute and what is the age of majority?

(1) In my opinion, the statue of limitations to file a complaint for all unpaid wages, except overtime wages, is six (6) years.[48] The statute of limitations for overtime wages is two (2) years.[49]

(2) In my opinion, the age of majority under Oregon law is eighteen (18) years old.[50] It is important to note that the Oregon Wage Claim Act also defines "minor" as an individual under the age of eighteen (18) years old.[51] Minors are subject to the provisions found in Or. Rev. Stat. § 653.305-991 and Or. Admin. Rules 839-021-0006 *et seq.*

2. In your opinion, based on a review of the documents and accepting the allegations of fact in the pleadings to be correct, are the players belonging to teams located in the States of Michigan, Pennsylvania, Washington, Maine and Oregon employees of those teams? Please explain the basis for your conclusion. Please assume that the standard

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[45] *Sabin v. Willamette-W. Corp.*, 276 Or. 1083, 1093, 557 P.2d 1344 (1976) (quoting *Nilsen v. Johnston*, 233 Or. 103, 108, 377 P.2d 331 (1962)).
[46] *See Wyatt v. Body Imaging, PC*, 163 Or. App. 526, 989 P.2d 36, 41-2 (Or. App. 1999).
[47] Or. Rev. Stat. § 652.360(1).
[48] Or. Rev. Stat. § 12.080.
[49] Or. Rev. Stat. § 12.110(3).
[50] *See* Or. Rev. Stat. § 109.510.
[51] Or. Rev. Stat. § 653.010.

form player agreement for the years Mr. Walter played in the State of Washington was signed by all the players playing for US teams in the WHL and that the facts pleaded in the statements of claim for his duties and time apply equally to all the players.

Based upon a review of the documents and accepting the allegations of fact in the pleadings to be true it appears that players belonging to a team in Oregon are "employees" subject to the Oregon Wage Claim Act. While the Oregon Wage Claim Act does not specifically define an employment relationship, it is clear that in order for an individual to be covered under the Oregon Wage Claim Act the individual must be an employee and not an independent contractor. Since the statute does not define independent contractor, Oregon courts have adopted the "economic realities" test in order to determine if an individual is an employee for minimum wage purposes. The test is rooted in the Appellant decision of *Presley v. Bureau of Labor & Indus.* which upheld Oregon's Bureau of Labor and Industries Wage and Hour Division's use of the "economic reality" test. The Appellant decision of *Presley v. Bureau of Labor & Indus.* adopted the following criteria:

> (1) the degree of control exercised by the alleged employer;
> (2) the extent of the investment in the worker and the alleged employer in the business;
> (3) the degree to which the worker's opportunity for profit and loss is determined by the alleged employer;
> (4) the skill and initiative required in performing the job; and
> (5) the permanence of the relationship.[52]

When applying the economic reality test, courts have looked to the totality of the circumstances and no single factor is determinative if an individual is an employee.[53] The focus should be whether the individual is economically dependent on the employer.[54]

In my opinion, the most important factors a court would consider under Oregon law are the permanence of the working relationship between the parties, the extent of the worker's investment in equipment and materials, and the degree of the alleged employer's control over the worker. In this matter, players and teams execute a written contract which provides players with a certain amount of pay per week in exchange for services as a hockey player. *See* Tab 2. In other words, hockey players such as Mr. Walter provide a service in exchange for pay and the teams in return gain a significant amount of control over the hockey player. Furthermore, in my opinion the following relevant facts would lead a reasonable fact finder to conclude that a hockey player is an employee under Oregon law include, but are not limited to:

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[52] *Presley v. Bureau of Labor & Indus.*, 200 Or. App. 113, 112 P.3d 485 (Oregon Ct. App. 2005).
[53] *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir. 1981). ("Neither the presence nor the absence of any individual factor is determinative." "Whether one is an employee for purposes of the FLSA depends on the totality of the circumstances and whether, "as a matter of economic reality," the individual is dependent on the business he or she is serving.")
[54] *Id.*

- The contract's terms are applicable up to three years and the player is unable to play for other hockey teams while under contract or subject to a protective player agreement. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article and Mr. Walter's Affidavit #6 and #8.

- Teams have the right to suspend, sanction, and assign the player during the life of the contract. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 7 and 8.

- Players play exclusively for the team in all exhibition, preseason, regular season, playoff games and tournament games. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 4.1(a)-(e) and Tab 6 – QMJHL/LHJMQ – Rights and Obligations of Players Manual.

- Players must abide the team's practice schedule. Mr. Walter's Affidavit #43. Players often work six (6) days a week and work more than 40+ hours during the week. Mr. Walter's Affidavit #28 and #42.

- Players must participate in promotional activities and must abide by all rules created by the team "on and off the ice." *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 4.2(c) and (d). The player does not receive any extra compensation for attending the team's promotional events. Mr. Walter's Affidavit #58. In fact, the Teams have so much control over the player that they even limit the player's recreational activities and establish a curfew. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 4.2(k) and Mr. Walter's Affidavit #43 and #46.

- Players must sign over their rights to their own image, statistical, and biographical for the profit of the Team. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 4.3 and 4.4.

- Teams determine the rate of pay and pay the player's salary. *See* Tab 1 and 2. In fact, the salary is non-negotiable. *See* Mr. Walter's Affidavit #13. Further, the wages are limited pursuant to contract. *See* Tab 7 –QMJHL Schedule B and Tab 6 – QMJHL/LHJMQ – Rights and Obligations of Players Manual.

- Teams pay the player's room and board, travel accommodations, and expenses. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 2.3, 2.4, 5.1(e) and Mr. Walter's Affidavit #16 and #22.

- Teams provide the players with medical and dental coverage. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 5.1(h).

- Teams provide the players with equipment. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 5.1(d) and Tab 6 – QMJHL/LHJMQ – Rights and Obligations of Players Manual Article 3.1.

- Teams petition and are granted nonimmigrant work visas form the United States Immigration Services for players to work within the United States. This shows that the team intended the players to be their employee. *See* Tab 4 and 5 and Mr. Walter's Affidavit #15.

- Teams identify themselves as employers and pay employment taxes to the Canadian Revenue Agency. *See* Tab 8 – Canada Revenue Agency. Teams issue players "Records of Employment." *See* Tab 9

  Accordingly, applying the economic reality test pursuant to Oregon law the evidence at hand establishes that the hockey players are employees and are economically dependent upon the team and therefore subject to the Oregon Wage Claim Act.

3. **In your opinion, are the teams participating in the CHL located in the States of Michigan, Pennsylvania, Washington, Maine and Oregon obligated to pay their players minimum wages under the statutes in each State? If so, what are the applicable statutes and the minimum wages in each of the States?**

   In my opinion, yes, for the reasons found in my response to question #2, the team located in Oregon (Portland Winterhawks) is obligated to pay their employees minimum wage pursuant to the Oregon Wage Claim Act, Or. Rev. Stat. § 652.140 *et seq.* and, if applicable, overtime wages pursuant to Or. Rev. Stat. § 653.261. The minimum wage in Oregon is currently $9.25 per hour.[55]

[55] *See* Letter from Oregon's Bureau of Labor & Industries Commissioner Avakian (Sept. 17, 2014) (attached as Appendix F).

Michigan Workforce Opportunity Wage Act
Mich. Comp. Laws § 408.411 *et seq.* (2014).[56]

1. Under the statutory minimum wage laws of Michigan, Maine, Oregon, Washington and Pennsylvania, please identify for each State separately:

a) The factors that are considered in determining whether a person is an employee within the meaning of the statute. Please identify the sources relied upon in the statute, jurisprudence, policy directives or tribunal decisions/directives. Also, please consider where the person and employer must be domiciled to fall under the wage law.

(1) It is important at the outset to note that most state minimum wage acts were adopted after and in response to Congress' adoption of the Fair Labor Standards Act of 1938 which established the minimum wage and overtime requirements for employees in the private sector and in Federal, State, and local governments.[57] Further, the majority of federal courts have adopted the "economic realities" test in order to determine if an individual is an employee or independent contractor for coverage under the Fair Labor Standards Act of 1938.[58]

"The payment of wages act is remedial in that it provides a means to enforce rights with respect to wages and fringe benefits and prescribes remedies for violations of these rights.[59]" The Michigan Workforce Opportunity Act defines "employ" as "to engage, suffer or permit to work.[60]" The Act further defines "employee" as an individual over the age of sixteen (16) employed by an employer.[61] The statute itself does not define what constitutes an employment relationship. Accordingly, Michigan courts and their administrative agencies have adopted the "economic realities" test to determine if an individual is an employee or an independent contractor for wage purposes.[62] The "test takes into account the totality of the circumstances around the work performed,"[63] with an emphasis on the following factors:

(1) [the] control of a worker's duties,
(2) the payment of wages,

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[56] All subsequent references are to the 2014 statutory compilation unless otherwise noted.
[57] 29 U.S.C. §§ 201, *et seq.*
[58] *Anfinson v. FedEx Ground Package Sys., Inc.*, 159 Wash. App. 35 at 54 244 P.3d 32 (Wash. App. 2010).
[59] *Buckley v. Prof'l Plaza Clinic Corp.*, 281 Mich. App. 224, 236; 761 N.W.2d 284 (2008).
[60] Mich. Comp. Laws § 408.412(b).
[61] Mich. Comp. Laws § 408.412(d).
[62] *Buckley v. Prof'l Plaza Clinic Corp.*, 281 Mich. App. 224; 761 N.W.2d 284 (2008). *See also* Unemployment Insurance Agency publication 1982-L, *Independent Contractors* (2012), attached as Appendix G.
[63] *Mantei v. Mich. Pub. Sch. Emps. Retirement Bd.*, 256 Mich. App. 64, 79; 663 N.W.2d 486 (2003).

(3) the right to hire and fire and the right to discipline, and
(4) the performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal.[64]

Finally, it is important to remember that no one factor is dispositive and courts may consider other factors on a case by case basis.[65] For example, while "[a] contract between the parties which states that their relationship is that of an independent contractor is . . . a factor to be considered... it is not determinative."[66]

(2) In my opinion, the Michigan Workforce Opportunity Act sets wages for all employees within the state of Michigan.[67]

b) Are there any exemptions under the statutes that would apply to hockey players?

In my opinion, there are no exemptions for hockey players under the statute. Specifically, the Michigan Workforce Opportunity Act does not contain an exemption for hockey players.[68]

c) Is there a civil action available to employees for a violation of the statute? What is the nature of the action/complaint and what heads of damages are available?

(1) In my opinion, an individual may file a civil action for violations of Michigan Workforce Opportunity Wage Act.[69]

(2) In my opinion, an individual may "[b]ring a civil action for the recovery of the difference between the amount paid and the amount that, but for the violation, would have been paid the employee under this act and an equal additional amount as liquidated damages together with costs and reasonable attorney fees as are allowed by the court.[70]" Further, the individual may be subject to a civil fine of $1,000.00.[71]

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[64] *Buckley v. Prof'l Plaza Clinic Corp.,* 281 Mich. App. 224, 236; 761 N.W.2d 284 (2008); *Clark v. United Techs. Auto., Inc.*, 459 Mich. 681, 688; 594 N.W.2d 447 (1999) (*quoting Askew v. Macomber*, 398 Mich. 212, 217-218; 247 N.W.2d 288 (1976)). A copy of the *Buckley* decision is attached as Appendix H.
[65] *See Buckley v. Prof'l Plaza Clinic Corp.,* 281 Mich. App. 224, 236; 761 N.W.2d 284 (2008) and *Rakowski v. Sarb*, 269 Mich. App. 619, 625-626; 713 NW2d 787 (2006).
[66] *Buckley v. Prof'l Plaza Clinic Corp.*, 281 Mich. App. 224; 761 N.W.2d 284 (2008); quoting *Detroit v. Salaried Physicians Ass'n, UAW*, 165 Mich. App. 142, 148; 418 NW2D 679 (1987).
[67] Mich. Comp. Laws § 408.411.
[68] *See* Mich. Comp. Laws § 408.411 *et seq.*
[69] *See* Mich. Comp. Laws § 408.419(1)(a) and the Michigan Occupational Safety and Health Administration's required minimum wage poster which is attached as Appendix I.
[70] Mich. Comp. Laws § 408.419(1)(a).
[71] Mich. Comp. Laws § 408.419(3).

d) What is the effect of a written contract which purports to limit compensation for services to an amount that is less than the minimum wage laws?

In my opinion, an employer cannot limit their minimum wage obligations through contract or any other agreement pursuant to statute.[72]

e) What is the limitation period to commence proceedings under the statute and what is the age of majority?

(1) In my opinion, the statue of limitations to file a complaint for unpaid wages is three (3) years.[73]

(2) In my opinion, the age of majority under Michigan law is eighteen (18) years old.[74]

2. In your opinion, based on a review of the documents and accepting the allegations of fact in the pleadings to be correct, are the players belonging to teams located in the States of Michigan, Pennsylvania, Washington, Maine and Oregon employees of those teams? Please explain the basis for your conclusion. Please assume that the standard form player agreement for the years Mr. Walter played in the State of Washington was signed by all the players playing for US teams in the WHL and that the facts pleaded in the statements of claim for his duties and time apply equally to all the players.

Based upon a review of the documents and accepting the allegations of fact in the pleadings to be true it appears that players belonging to a team in Michigan are "employees" subject to the Michigan Workforce Opportunity Act. While the Michigan Workforce Opportunity Act does not specifically define an employment relationship, it is clear that in order for an individual to be covered under the Michigan Workforce Opportunity Act the individual must be an employee and not an independent contractor. Since the statute does not define independent contractor, Michigan courts and its administrative agencies have adopted the "economic realities" test in order to determine if an individual is an employee for minimum wage purposes. The test is rooted in the Appellant decision of *Buckley v. Prof'l Plaza Clinic Corp.* which adopted the following criteria:

> (1) [the] control of a worker's duties,
> (2) the payment of wages,
> (3) the right to hire and fire and the right to discipline, and
> (4) the performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal.[75]

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[72] *See* Mich. Comp. Laws § 408.419(2).
[73] Mich. Comp. Laws § 408.419(1).
[74] Mich. Comp. Laws § 722.52.
[75] *Prof'l Plaza Clinic Corp.*, 281 Mich. App. 224; 761 N.W.2d 284 (2008). *See also* Unemployment Insurance Agency publication 1982-L, *Independent Contractors* (2012), attached as Appendix G.

When applying the economic reality test, courts have looked at the totality of the circumstances and a single factor, by itself, is not necessarily determinative.[76]

In my opinion, the most important factors a court would consider under Michigan law are the payment of wages, the control of a worker's duties, the right to hire and fire and the right to discipline. In this matter, players and teams execute a written contract which provides players with a certain amount of pay per week in exchange for services as a hockey player. *See* Tab 2. In other words, hockey players such as Mr. Walter provide a service in exchange for pay and the teams in return gain a significant amount of control over the hockey player. Furthermore, in my opinion the following relevant facts would lead a reasonable fact finder to conclude that a hockey player is an employee under Michigan law include, but are not limited to:

- The contracts terms are applicable up to three years and the player is unable to play for other hockey teams while under contract or subject to a protective player agreement. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article and Mr. Walter's Affidavit #6 and #8.

- Teams have the right to suspend, sanction, and assign the player during the life of the contract. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 7 and 8.

- Players play exclusively for the team in all exhibition, preseason, regular season, playoff games and tournament games. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 4.1(a)-(e) and Tab 6 – QMJHL/LHJMQ – Rights and Obligations of Players Manual.

- Players must abide the team's practice schedule. Mr. Walter's Affidavit #43. Players often work six (6) days a week and work more than 40+ hours during the week. Mr. Walter's Affidavit #28 and #42.

- Players must participate in promotional activities and must abide by all rules created by the team "on and off the ice." *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 4.2(c) and (d). The player does not receive any extra compensation for attending the team's promotional events. Mr. Walter's Affidavit #58. In fact, the Teams have so much control over the player that they even limit the player's recreational activities and establish a curfew. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 4.2(k) and Mr. Walter's Affidavit #43 and #46.

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[76] *Mantei v. Mich. Pub. Sch. Emps. Retirement Bd.*, 256 Mich. App. 64, 79; 663 N.W.2d 486 (2003) and *Buckley v. Prof'l Plaza Clinic Corp.*, 281 Mich. App. 224, 236; 761 N.W.2d 284 (2008) and *Rakowski v. Sarb*, 269 Mich. App. 619, 625-626; 713 NW2d 787 (2006).

- Players must sign over their rights to their own image, statistical, and biographical for the profit of the Team. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 4.3 and 4.4.

- Teams determine the rate of pay and pay the player's salary. *See* Tab 1 and 2. In fact, the salary is non-negotiable. *See* Mr. Walter's Affidavit #13. Further, the wages are limited pursuant to contract. *See* Tab 7 –QMJHL Schedule B and Tab 6 – QMJHL/LHJMQ – Rights and Obligations of Players Manual.

- Teams pay the player's room and board, travel accommodations, and expenses. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 2.3, 2.4, 5.1(e) and Mr. Walter's Affidavit #16 and #22.

- Teams provide the players with medical and dental coverage. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 5.1(h).

- Teams petition and are granted nonimmigrant work visas form the United States Immigration Services for players to work within the United States. This shows that the team intended the players to be their employee. *See* Tab 4 and 5 and Mr. Walter's Affidavit #15.

- Teams identify themselves as employers and pay employment taxes to the Canadian Revenue Agency. *See* Tab 8 – Canada Revenue Agency. Teams issue players "Records of Employment." *See* Tab 9

  Accordingly, applying the economic reality test pursuant to Michigan law the evidence at hand establishes that the hockey players are employees and are economically dependent upon the team and therefore subject to the Michigan Workforce Opportunity Act.

3. In your opinion, are the teams participating in the CHL located in the States of Michigan, Pennsylvania, Washington, Maine and Oregon obligated to pay their players minimum wages under the statutes in each State? If so, what are the applicable statutes and the minimum wages in each of the States?

In my opinion, yes, for the reasons found in my response to question #2, the teams (Saginaw Spirit and Plymouth Whalers) located in Michigan are obligated to pay their employees minimum wage pursuant to the Michigan Workforce Opportunity Wage Act, Mich. Comp. Laws § 408.411 *et seq.* and, if applicable, overtime wages pursuant to Mich. Comp. Laws § 408.414a. The minimum wage in Michigan is currently $8.15 per hour.[77] Minors may be paid less pursuant to statute. Specifically, ". . . the minimum hourly wage for an employee who is less than 18 years of age is 85% of the general minimum hourly wage established in section 4.[78]"

[77] *See* Mich. Comp. Laws § 408.414(1)(b).
[78] Mich. Comp. Laws § 408.414b(2).

Pennsylvania Minimum Wage Act of 1968
43 Pa. Cons. Stat. § 333.101 *et seq.* (2014).[79]

1. Under the statutory minimum wage laws of Michigan, Maine, Oregon, Washington and Pennsylvania, please identify for each State separately:

a) The factors that are considered in determining whether a person is an employee within the meaning of the statute. Please identify the sources relied upon in the statute, jurisprudence, policy directives or tribunal decisions/directives. Also, please consider where the person and employer must be domiciled to fall under the wage law.

(1) It is important at the outset to note that most state minimum wage acts were adopted after and in response to Congress' adoption of the Fair Labor Standards Act of 1938 which established the minimum wage and overtime requirements for employees in the private sector and in Federal, State, and local governments.[80] Further, the majority of federal courts have adopted the "economic realities" test in order to determine if an individual is an employee or independent contractor for coverage under the Fair Labor Standards Act of 1938.[81]

The applicable statute defines "employ" as ". . . to suffer or permit to work.[82]" The statute defines "employee" to include any individual employed by an employer not subject to one of the enumerated exceptions.[83]

The statute itself does not itself define what constitutes an employment relationship. However, case law confirms that the distinction between employee and independent contractor is important as independent contractors are not covered under the Pennsylvania Minimum Wage Act of 1968.[84] Since the statute does not define what constitutes an employment relationship, Pennsylvania courts generally use the "economic realities" test. For example, the appellate court in *Stuber* stated that "because the state and federal acts have identity of purpose, we hold that federal case law, and the 'economic reality' test employed by the federal courts, is the appropriate standard to use.[85]" In Pennsylvania, the various factors used to determine if an individual is an employee or an independent contractor are:

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[79] All subsequent references are to the 2014 statutory compilation unless otherwise noted.
[80] 29 U.S.C. §§ 201, *et seq.*
[81] *Anfinson v. FedEx Ground Package Sys., Inc.*, 159 Wash. App. 35 at 54 244 P.3d 32 (Wash. App. 2010).
[82] *See* 43 Pa. Cons. Stat. § 333.103(f).
[83] *See* 43 Pa. Cons. Stat. § 333.103(g).
[84] *Commonwealth v. Stuber*, 822 A.2d 870, 872-875 (Pa. Commw. Ct. 2003), *aff'd* 859 A.2d 1253 (Pa. 2004).
[85] *Commonwealth v. Stuber*, 822 A.2d 870, 874 (Pa. Commw. Ct. 2003), *aff'd* 859 A.2d 1253 (Pa. 2004).

(1) the degree of control exercised by the employer over the worker;
(2) the worker's opportunity for profit or loss depending upon managerial skill;
(3) the worker's investment in equipment or material required for the tasks or the employment of helpers;
(4) whether the service rendered requires special skill;
(5) the degree of permanence of the working relationship; and
(6) the extent to which the work is an integral part of the employer's business.[86]

"When applying the economic reality test, the federal courts have looked at the totality of the circumstances and a single factor, by itself, is not necessarily determinative. Moreover, merely because a worker initially calls the particular arrangement something different, does not mean that there was no employer/employee relationship.[87]"

(2) In my opinion, the statute establishes the minimum wage standards in Pennsylvania. "Employes are employed in some occupations in the Commonwealth of Pennsylvania for wages unreasonably low and not fairly commensurate with the value of the services rendered." "The evils of unreasonable and unfair wages as they affect some employes employed in the Commonwealth of Pennsylvania are such as to render imperative the exercise of the police power of the Commonwealth for the protection of industry and of the employes employed therein and of the public interest of the community at large." 43 Pa. Cons. Stat. § 333.101.

b) Are there any exemptions under the statutes that would apply to hockey players?

In my opinion, there are no exemptions for hockey players under the statute. The statute does not specifically exclude hockey players from minimum wage or overtime requirements of Pennsylvania.[88]

c) Is there a civil action available to employees for a violation of the statute? What is the nature of the action/complaint and what heads of damages are available?

(1) Yes, an individual may file a civil action for violations 43 Pa. Cons. Stat. § 333.101 *et seq.*, pursuant to 43 Pa. Cons. Stat. § 333.113. The statute states, "[i]f any employe [sic] is paid by his or her employer less than the minimum wages provided by section 4 of this act or by any regulation issued thereunder . . .," such worker may recover in a civil action the full amount of such minimum wage less any amount actually paid to the worker by the employer, together with costs and such reasonable attorney's fees as may be allowed by the court . . ." [89]

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[86] *Commonwealth v. Stuber*, 822 A.2d 870, 874-875 (Pa. Commw. Ct. 2003), *aff'd* 859 A.2d 1253 (Pa. 2004).
[87] *Commonwealth v. Stuber*, 822 A.2d 870, 875 (Pa. Commw. Ct. 2003), *aff'd* 859 A.2d 1253 (Pa. 2004).
[88] *See* 43 Pa. Cons. Stat. § 333.105.
[89] 43 Pa. Cons. Stat. § 333.113.

The Pennsylvania Wage Payment and Collection Law ("WPCL") may provide another vehicle for the recovery of wages due by statute such as the Fair Labor Standards Act or the Pennsylvania Minimum Wage Act of 1968, just as it does for wages that are due by contract or agreement. An individual may bring a civil action under the WPCL to recover unpaid wages and class actions are specifically permitted.[90]

While the Pennsylvania Supreme Court has not issued a decision on the matter, the Pennsylvania Superior Court in *Lugo* held that individuals could use the WPCL to recover minimum wages due to them under the Pennsylvania Minimum Wage Act.[91]

Following the *Lugo* decision, the District Court for the Western District of Pennsylvania similarly held that even in the absence of a contract, a claim for wages under the Pennsylvania Minimum Wage Act may be recovered under the WPCL.[92] The District Court for the Eastern District of Pennsylvania has reached a similar conclusion:

> With regard to the WPCL, the defendants argue that plaintiff had no written employment contract and that the claim should be brought under the Pennsylvania Minimum Wage Act ("PMWA"). The plaintiff has alleged the existence of an oral agreement that she would be paid a certain amount, which likely renders the WPCL applicable, ***and a right to wages that may be asserted under the PMWA may also be litigated under the WPCL.***[93]

In the related opinion of *Moser v. Papadopoulos,* the court stated, without actually deciding the issue (because the case was being remanded to the Court of Common Pleas):

> *Lugo* adopts a broader interpretation of the WPCL as a vehicle for employees to recover unpaid wages, regardless of the source of their employer's obligation to pay the wages. That holding departs from the 'contractual approach' adopted in earlier Superior Court opinions, under which the WPCL was interpreted only as a vehicle

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[90] 43 Pa. Cons. Stat. § 260.9(a)-(b).

[91] *Lugo v. Farmers Pride, Inc.,* 967 A.2d 963, 969 (Pa. Super. Ct. 2009), *appeal denied,* 602 Pa. 668, 980 A.2d 609 (Pa. 2009) ("Since the averments of appellants' complaint indicate that certain wages may still be owed to appellants under the [Minimum Wage Act], we find that appellants could also enforce their right to those wages under the WPCL.").

[92] *See also Galloway v. George Jr. Republic,* Civ. A. No. 12–1399, 2013 WL 5307584, at *16 (W.D. Pa. Sept.19, 2013) (interpreting *Lugo* to mean that "where a complaint alleges that certain wages may be owed under the PMWA (a statutory basis), a plaintiff may also enforce the right to those wages under the WPCL, even in the absence of a contract").

[93] *See Lugo v. Farmers Pride, Inc.,* 967 A.2d 963 (Pa. Super. Ct. 2009) and *Zebroski v. Gouak* 2009 WL 2950813, * (E.D. Pa. 2009) (emphasis added).

> for plaintiffs to recover unpaid wages due to them under an employment contract.[94]

In addition, the statutory language of the WPCL directly supports this analysis. The WPCL defines "wages" as follows:

> "Wages." Includes all earnings of an employe [sic], regardless of whether determined on time, task, piece, commission or other method of calculation. The term "wages" also includes fringe benefits or wage supplements whether payable by the employer from his funds or from amounts withheld from the employes' pay by the employer.[95]

The definition of "wages" says nothing about contracts or agreements. Only later in the statute does the WPCL refer to the notion of an agreement, when it defines "fringe benefits and wage supplement." In this definition, the WPCL provides:

> "Fringe benefits or wage supplements." Includes all monetary employer payments to provide benefits under any employe benefit plan, as defined in section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* as well as separation, vacation, holiday, or guaranteed pay; reimbursement for expenses; union dues withheld from the employes' pay by the employer; and any other amount to be paid **pursuant to an agreement to the employe**, a third party or fund for the benefit of employes.[96]

Thus, the statute makes a distinction between its definition of "wages," which makes no reference to any "agreement," and its definition of "fringe benefits or wage supplements," which does make such a reference. Under the Pennsylvania rules of statutory construction, Pennsylvania courts should interpret the WPCL in a manner that honors this distinction by giving effect to both provisions.[97]

(2) In my opinion, an individual may file a civil action for a violation of the statute. Specifically, section 333.113 of the Pennsylvania Minimum Wage Act of 1968 states that an individual ". . . may recover in a civil action the full amount of such minimum wage less any amount actually paid to the worker by the employer, together with costs and such reasonable attorney's fees as may be allowed by the court...[98]" An employee is entitled to costs and attorney's fees in successful claim under the Pennsylvania Minimum Wage Act of 1968.[99]

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[94] *Moser v. Papadopoulos,* Civ. A. No. 10–6791, 2011 WL 2441304, at *3 (E.D. Pa. June 16, 2011).
[95] 43 Pa. Cons. Stat. § 260.2a.
[96] 43 Pa. Cons. Stat. § 260.2a (emphasis added).
[97] 1 Pa. Cons. Stat. § 1921(a).
[98] 43 Pa. Cons. Stat. § 333.113.
[99] *Leclair v. Diakon Lutheran Soc. Ministries*, 2013 Pa. Dist. & Cnty. Dec. LEXIS 1 (Jan. 14, 2013).

Under the WPCL, if wages remain unpaid thirty (30) days after the regularly scheduled payday, or if a shortage in the wage payments exceeds 5% of the gross wages due on two (2) paydays in the same calendar quarter, and where no good faith contest or dispute accounting for nonpayment exists, the employee is entitled to a claim of liquidated damages equal to the greater of 25% of the total wages due or $500.00.[100] In a civil action by an employee to recover unpaid wages, the court shall award reasonable attorney's fees in addition to any judgment award to the plaintiff.[101]

d) What is the effect of a written contract which purports to limit compensation for services to an amount that is less than the minimum wage laws?

In my opinion, parties may not contract for wages below the statutory amount pursuant to the statute, and "any agreement between the employer and the worker to work for less than such minimum wage shall be no defense to such action.[102]" An individual cannot waive his or her status as an employee.[103] Further, an employee cannot waive the requirements of the Wage Payment and Collection Law by private agreement.[104]

e) What is the limitation period to commence proceedings under the statute and what is the age of majority?

(1) In my opinion, the statute of limitations for under the Pennsylvania Minimum Wage Act of 1968 is three (3) years.[105] The statute of limitations under the WPCL is three (3) years.[106]

(2) In my opinion, the age of majority under Pennsylvania law is eighteen (18) years old. Specifically, the statue states, "(a) *Age for entering into contracts.* --Any individual 18 years of age and older shall have the right to enter into binding and legally enforceable contracts and the defense of minority shall not be available to such individuals. (b) *Age for suing and being sued.* --Except where otherwise provided or prescribed by law, an individual 18 years of age and older shall be deemed an adult and may sue and be sued as such.[107]"

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[100] 43 Pa. Cons. Stat. § 260.10.
[101] 43 Pa. Cons. Stat. § 260.9a(f).
[102] *See* 43 Pa. Cons. Stat. § 333.113 (2014).
[103] *Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662, 667 (5th Cir. 1983).
[104] 43 Pa. Cons. Stat. § 260.7.
[105] *See* 43 Pa. Cons. Stat. § 333.108; *Curtis v. Cargill Meat Solutions Corp.*, 2006 U.S. Dist. LEXIS 64634 (M.D. Pa. 2006); *Caucci v. Prison Health Servs., Inc.*, 153 F. Supp.2d 605 (E.D. Pa. 2001) (citing *Harris v. Mercy Health Corp.*, 2000 U.S. Dist. LEXIS 11228, 2000 WL 1130098, *5 (E.D.Pa. 2000); *Friedrich v. U.S. Computer Servs.*, 833 F. Supp. 470, 477 (E.D. Pa. 1993).
[106] 43 Pa. Cons. Stat. § 260.9a(g).
[107] *See* 23 Pa. Cons. Stat. § 510.

2. **In your opinion, based on a review of the documents and accepting the allegations of fact in the pleadings to be correct, are the players belonging to teams located in the States of Michigan, Pennsylvania, Washington, Maine and Oregon employees of those teams? Please explain the basis for your conclusion. Please assume that the standard form player agreement for the years Mr. Walter played in the State of Washington was signed by all the players playing for US teams in the WHL and that the facts pleaded in the statements of claim for his duties and time apply equally to all the players.**

Based upon a review of the documents and accepting the allegations of fact in the pleadings to be true it appears that players belonging to a team in Pennsylvania are "employees" subject to the Pennsylvania Minimum Wage Act of 1968. While the Pennsylvania Minimum Wage Act of 1968 does not specifically define an employment relationship, it is clear that in order for an individual to be covered under the Pennsylvania Minimum Wage Act of 1968 the individual must be an employee and not an independent contractor. Since the statute does not define independent contractor, Pennsylvania courts have adopted the "economic realities" test in order to determine if an individual is an employee for minimum wage purposes. The test is rooted in the Appellant decision of *Commonwealth v. Stuber* which adopted the following criteria:

(1) the degree of control exercised by the employer over the worker;
(2) the worker's opportunity for profit or loss depending upon managerial skill;
(3) the worker's investment in equipment or material required for the tasks or the employment of helpers;
(4) whether the service rendered requires special skill;
(5) the degree of permanence of the working relationship; and
(6) the extent to which the work is an integral part of the employer's business.[108]

"When applying the economic reality test, the federal courts have looked at the totality of the circumstances and a single factor, by itself, is not necessarily determinative. Moreover, merely because a worker initially calls the particular arrangement something different, does not mean that there was no employer/employee relationship."[109]

In my opinion, the most important factors a court would consider under Pennsylvania law are the permanence of the working relationship between the parties, the extent of the worker's investment in equipment and materials, and the degree of the alleged employer's control over the worker. In this matter, players and teams execute a written contract which provides players with a certain amount of pay per week in exchange for services as a hockey player. *See* Tab 2. In other words, hockey players such as Mr. Walter provide a service in exchange for pay and the teams in return gain a significant amount of control over the hockey player. Furthermore, in my opinion the following relevant facts would lead a reasonable fact finder to conclude that a hockey player is an employee under Pennsylvania law include, but are not limited to:

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[108] *Commonwealth v. Stuber*, 822 A.2d 870 (Pa. Commw. Ct. 2003), *aff'd* 859 A.2d 1253 (Pa. 2004).
[109] *Id.*

- The contracts terms are applicable up to three years and the player is unable to play for other hockey teams while under contract or subject to a protective player agreement. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article and Mr. Walter's Affidavit #6 and #8.

- Teams have the right to suspend, sanction, and assign the player during the life of the contract. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 7 and 8.

- Players play exclusively for the team in all exhibition, preseason, regular season, playoff games and tournament games. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 4.1(a)-(e) and Tab 6 – QMJHL/LHJMQ – Rights and Obligations of Players Manual.

- Players must abide the team's practice schedule. Mr. Walter's Affidavit #43. Players often work six (6) days a week and work more than 40+ hours during the week. Mr. Walter's Affidavit #28 and #42.

- Players must participate in promotional activities and must abide by all rules created by the team "on and off the ice." *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 4.2(c) and (d). The player does not receive any extra compensation for attending the team's promotional events. Mr. Walter's Affidavit #58. In fact, the Teams have so much control over the player that they even limit the player's recreational activities and establish a curfew. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 4.2(k) and Mr. Walter's Affidavit #43 and #46.

- Players must sign over their rights to their own image, statistical, and biographical for the profit of the Team. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 4.3 and 4.4.

- Teams determine the rate of pay and pay the player's salary. *See* Tab 1 and 2. In fact, the salary is non-negotiable. *See* Mr. Walter's Affidavit #13. Further, the wages are limited pursuant to contract. *See* Tab 7 –QMJHL Schedule B and Tab 6 – QMJHL/LHJMQ – Rights and Obligations of Players Manual.

- Teams pay the player's room and board, travel accommodations, and expenses. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 2.3, 2.4, 5.1(e) and Mr. Walter's Affidavit #16 and #22.

- Teams provide the players with medical and dental coverage. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 5.1(h).

- Teams provide the players with equipment. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 5.1(d) and Tab 6 – QMJHL/LHJMQ – Rights and Obligations of Players Manual Article 3.1.

- Teams petition and are granted nonimmigrant work visas form the United States Immigration Services for players to work within the United States. This shows that the team intended the players to be their employee. *See* Tab 4 and 5 and Mr. Walter's Affidavit #15.

- Teams identify themselves as employers and pay employment taxes to the Canadian Revenue Agency. *See* Tab 8 – Canada Revenue Agency. Teams issue players "Records of Employment." *See* Tab 9

  Accordingly, applying the economic reality test pursuant to Pennsylvania law the evidence at hand establishes that the hockey players are employees and are economically dependent upon the team and therefore subject to the Pennsylvania Minimum Wage Act of 1968.

3. In your opinion, are the teams participating in the CHL located in the States of Michigan, Pennsylvania, Washington, Maine and Oregon obligated to pay their players minimum wages under the statutes in each State? If so, what are the applicable statutes and the minimum wages in each of the States?

In my opinion, yes, for the reasons found in my response to question #2, the team (Erie Otters) located in Pennsylvania, is obligated to pay their employees minimum wage pursuant to Pennsylvania Minimum Wage Act of 1968, 43 Pa. Cons. Stat. § 333.101 *et seq.* and, if applicable, overtime wages pursuant to 43 Pa. Cons. Stat. § 333.104(c), 34 Pa. Code §§ 231.41, 231.43. The minimum wage in Pennsylvania is currently $7.25 per hour pursuant to 43 Pa. Cons. Stat. § 333.104(a.1).[110] Pennsylvania law allows employers to credit against minimum wage, the reasonable costs of meals, lodging or other facilities customarily furnished by employers.[111] Minors under the age of eighteen (18) are subject to Pennsylvania's Child Labor Act.[112]

[110] *See* Minimum Wage Law Summary of Pennsylvania Department of Labor & Industry, LLC-1 (Feb. 2012) (attached as Appendix J).
[111] 43 Pa. Cons. Stat.. § 333.103(d); 34 Pa. Code § 231.22.
[112] A copy of Pennsylvania's Child Labor Act is attached as Appendix K.

Maine Minimum Wage Act
Me. Rev. Stat. 26, § 661 *et. seq.* (2014).[113]

1. Under the statutory minimum wage laws of Michigan, Maine, Oregon, Washington and Pennsylvania, please identify for each State separately:

a) The factors that are considered in determining whether a person is an employee within the meaning of the statute. Please identify the sources relied upon in the statute, jurisprudence, policy directives or tribunal decisions/directives. Also, please consider where the person and employer must be domiciled to fall under the wage law.

(1) It is important at the outset to note that most state minimum wage acts were adopted after and in response to Congress' adoption of the Fair Labor Standards Act of 1938 which established the minimum wage and overtime requirements for employees in the private sector and in Federal, State, and local governments.[114] Further, the majority of federal courts have adopted the "economic realities" test in order to determine if an individual is an employee or independent contractor for coverage under the Fair Labor Standards Act of 1938.[115]

For purposes of minimum wage, the statute defines "employ" as "to suffer or permit to work" and "employee" as an individual employed or permitted to work.[116] This provision of the statute does not define what constitutes an employment relationship. The Supreme Court in Maine, in deciding whether an individual is an employee or an independent contractor for worker's compensation purposes used the common law right to control test. Specifically, the Maine Supreme Court used an eight part test:

> (1) the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price; (2) independent nature of his business or his distinct calling; (3) his employment of assistants with the right to supervise their activities; (4) his obligation to furnish necessary tools, supplies, and materials; (5) his right to control the progress of the work except as to final results: (6) the time for which the workman is employed; (7) the method of payment, whether by time or by job; (8) whether the work is part of the regular business of the employer.[117]

However, on January 1, 2013, Maine's administrative agencies, including Maine's Department of Labor - Wage & Hour Division, adopted the "Employment Standard

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[113] All subsequent references are to the 2014 statutory compilation unless otherwise noted.
[114] 29 U.S.C. §§ 201, *et seq.*
[115] *Anfinson v. FedEx Ground Package Sys., Inc.*, 159 Wash. App. 35 at 54 244 P.3d 32 (Wash. App. 2010).
[116] Me. Rev. Stat. 26, § 633(2)-(3).
[117] *Murray's Case*, 130 Me. 181, 154 A. 352, 354 (Me. 1931); *see also Scovil v. FedEx Ground Package Sys.*, 886 F. Supp. 2d 45 (2012).

Defining Employee vs. Independent Contractor," which is codified at Me. Rev. Stat. 26, § 1043(11)(E).[118]

Maine's Labor and Industry code defines independent contractor as ". . . an individual who qualifies as an independent contractor under section 1043, subsection 11, paragraph E.[119]" The referenced paragraph states,

> E. Services performed by an individual for remuneration are considered to be employment subject to this chapter unless it is shown to the satisfaction of the bureau that the individual is free from the essential direction and control of the employing unit, both under the individual's contract of service and in fact, and the employing unit proves that the individual meets all of the criteria in subparagraph (1) and criteria of at least 3 divisions of subparagraph (2). In order for an individual to be considered an independent contractor:
>
> 1) The following criteria must be met:
>
> a) The individual has the essential right to control the means and progress of the work except as to final results;
>
> b) The individual is customarily engaged in an independently established trade, occupation, profession or business;
>
> c) The individual has the opportunity for profit and loss as a result of the services being performed for the other individual or entity;
>
> d) The individual hires and pays the individual's assistants, if any, and, to the extent such assistants are employees, supervises the details of the assistants' work; and
>
> e) The individual makes the individual's services available to some client or customer community even if the individual's right to do so is voluntarily not exercised or is temporarily restricted; and
>
> 2) At least 3 of the following criteria must be met:
>
> a) The individual has a substantive investment in the facilities, tools, instruments, materials and knowledge used by the individual to complete the work;

[118] A copy of the adopted standard is attached as Appendix L.
[119] Me. Rev. Stat. 26, § 591(3).

b) The individual is not required to work exclusively for the other individual or entity;

c) The individual is responsible for satisfactory completion of the work and may be held contractually responsible for failure to complete the work;

d) The parties have a contract that defines the relationship and gives contractual rights in the event the contract is terminated by the other individual or entity prior to completion of the work;

e) Payment to the individual is based on factors directly related to the work performed and not solely on the amount of time expended by the individual;

f) The work is outside the usual course of business for which the service is performed; or

g) The individual has been determined to be an independent contractor by the federal Internal Revenue Service.[120]

(2) In my opinion, Maine's minimum wage provisions sets wages for all employees within the state of Maine. "It is the declared public policy of the State of Maine that workers employed in any occupation should receive wages sufficient to provide adequate maintenance and to protect their health, and to be fairly commensurate with the value of the services rendered.[121]" "'Employe' means an individual, partnership, association, corporation, legal representative, trustee, receiver, trustee in bankruptcy and any common carrier by rail, motor, water, air or express company doing business in or operating within the State.[122]"

b) Are there any exemptions under the statutes that would apply to hockey players?

In my opinion, there are no exemptions for hockey players under the statute. *See* Me. Rev. Stat. 26, § 663.

c) Is there a civil action available to employees for a violation of the statute? What is the nature of the action/complaint and what heads of damages are available?

(1) In my opinion, an individual may file a civil action for violations of Me. Rev. Stat. 26, § 661 *et. seq.*

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[120] Me. Rev. Stat. 26, § 1043(11)(E).
[121] Me. Rev. Stat. 26, § 661.
[122] Me. Rev. Stat. 26, § 591.

(2) "Any employer shall be liable to the employee or employees for the amount of unpaid minimum wages. Upon a judgment being rendered in favor of any employee or employees, in any action brought to recover unpaid wages under this subchapter, such judgment shall include, in addition to the unpaid wages adjudged to be due, an additional amount equal to such wages as liquidated damages, and costs of suit including a reasonable attorney's fee.[123]" The liquidated damages provision in Maine's overtime recovery statute entitles a worker to recover liquidated damages equal to actual unpaid wages awarded, in effect doubling the award.[124] Further, the party may be awarded pre-judgment interest.[125]

d) What is the effect of a written contract which purports to limit compensation for services to an amount that is less than the minimum wage laws?

In my opinion, an employer cannot limit their minimum wage obligations through contract or any other agreement pursuant to statute.[126]

e) What is the limitation period to commence proceedings under the statute and what is the age of majority?

(1) In my opinion, the statue of limitations to file a complaint is six (6) years for unpaid wages.[127]

(2) In my opinion, the age of majority under Maine law is eighteen (18) years old.[128]

2. **In your opinion, based on a review of the documents and accepting the allegations of fact in the pleadings to be correct, are the players belonging to teams located in the States of Michigan, Pennsylvania, Washington, Maine and Oregon employees of those teams? Please explain the basis for your conclusion. Please assume that the standard form player agreement for the years Mr. Walter played in the State of Washington was signed by all the players playing for US teams in the WHL and that the facts pleaded in the statements of claim for his duties and time apply equally to all the players.**

Based upon a review of the documents and accepting the allegations of fact in the pleadings to be true it appears that players belonging to a team in Maine are "employees" subject to the minimum wage provisions. While Maine's statute does not specifically define an employment relationship, it is clear that in order for an individual to be covered under the statute the individual must be an employee and not an independent contractor. Maine's Labor and Industry code defines independent contractor as ". . . an individual

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[123] *See* Me. Rev. Stat. 26, § 670.
[124] *Avery v. Kennebec Millwork, Inc.*, 2004 ME 147, 861 A.2d 634 (2004).
[125] Me. Rev. Stat. 14, § 1602-B.
[126] *See* Me. Rev. Stat. 26, § 672.
[127] Me. Rev. Stat. 14, § 752.
[128] Me. Rev. Stat. 1, § 73.

who qualifies as an independent contractor under section 1043, subsection 11, paragraph E. Under Maine law, Maine assumes that an individual is an employee unless an alleged employer can show that the individual is free from the essential direction and control in contract and in fact.[129]

In this matter, players and teams execute a written contract which provides players with a certain amount of pay per week in exchange for services as a hockey player. *See* Tab 2. In other words, hockey players such as Mr. Walter provide a service in exchange for pay and the teams in return gain a significant amount of control over the hockey player.

In my opinion, it would be extremely difficult for a team to establish that a player is an independent contractor under Maine law. In particular, the team could not prove that the player has the essential right to control the means and progress of the work except as to final results; that the player is engaged in an independent trade; the individual is able to contract its services out; the player does not play exclusively for the team; and that the player pays for his own tools. Furthermore, in my opinion the following relevant facts would lead a reasonable fact finder to conclude that a hockey player is an employee under Maine law include, but are not limited to:

- The contracts terms are applicable up to three years and the player is unable to play for other hockey teams while under contract or subject to a protective player agreement. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article and Mr. Walter's Affidavit #6 and #8.

- Teams have the right to suspend, sanction, and assign the player during the life of the contract. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 7 and 8.

- Players play exclusively for the team in all exhibition, preseason, regular season, playoff games and tournament games. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 4.1(a)-(e) and Tab 6 – QMJHL/LHJMQ – Rights and Obligations of Players Manual.

- Players must abide the team's practice schedule. Mr. Walter's Affidavit #43. Players often work six (6) days a week and work more than 40+ hours during the week. Mr. Walter's Affidavit #28 and #42.

- Players must participate in promotional activities and must abide by all rules created by the team "on and off the ice." *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 4.2(c) and (d). The player does not receive any extra compensation for attending the team's promotional events. Mr. Walter's Affidavit #58. In fact, the Teams have so much control over the player that they even limit the player's recreational activities and establish a curfew. *See* Tab 1 - WHL Standard Player

[129] Me. Rev. Stat. 26, § 1043(11)(E).

Agreement - Terms and Conditions Schedule Article 4.2(k) and Mr. Walter's Affidavit #43 and #46.

- Players must sign over their rights to their own image, statistical, and biographical for the profit of the Team. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 4.3 and 4.4.

- Teams determine the rate of pay and pay the player's salary. *See* Tab 1 and 2. In fact, the salary is non-negotiable. *See* Mr. Walter's Affidavit #13. Further, the wages are limited pursuant to contract. *See* Tab 7 –QMJHL Schedule B and Tab 6 – QMJHL/LHJMQ – Rights and Obligations of Players Manual.

- Teams pay the player's room and board, travel accommodations, and expenses. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 2.3, 2.4, 5.1(e) and Mr. Walter's Affidavit #16 and #22.

- Teams provide the players with medical and dental coverage. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 5.1(h).

- Teams provide the players with equipment. *See* Tab 1 - WHL Standard Player Agreement - Terms and Conditions Schedule Article 5.1(d) and Tab 6 – QMJHL/LHJMQ – Rights and Obligations of Players Manual Article 3.1.

- Teams petition and are granted nonimmigrant work visas form the United States Immigration Services for players to work within the United States. This shows that the team intended the players to be their employee. *See* Tab 4 and 5 and Mr. Walter's Affidavit #15.

- Teams identify themselves as employers and pay employment taxes to the Canadian Revenue Agency. *See* Tab 8 – Canada Revenue Agency. Teams issue players "Records of Employment." *See* Tab 9

Accordingly, applying the economic reality test pursuant to Maine law the evidence at hand establishes that the hockey players are employees and are economically dependent upon the team and therefore subject to Maine's minimum wage provisions.

3. **In your opinion, are the teams participating in the CHL located in the States of Michigan, Pennsylvania, Washington, Maine and Oregon obligated to pay their players minimum wages under the statutes in each State? If so, what are the applicable statutes and the minimum wages in each of the States?**

In my opinion, yes, for the reasons found in my response to question #2, the team (Lewiston Maineiacs) located in Maine, prior to its dissolution was obligated to pay their employees minimum wage pursuant to the Maine Minimum Wage Act and, if applicable,

overtime wages pursuant to Me. Rev. Stat. 26, § 661. The minimum wage in Maine is currently $7.50 per hour.[130]

This is Exhibit "B" referred to in the Affidavit of Ryan Allen Hancock sworn to before me, this 31st day of March, 2015.

Catherine Pantalone
Notary

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
CATHERINE PANTALONE, Notary Public
City of Philadelphia, Phila. County
My Commission Expires June 16, 2018

[130] *See* Maine's Department of Labor Minimum Wage Poster attached as Appendix M.

APPENDIX "A"

H-2003.1

SUBSTITUTE HOUSE BILL 1930

State of Washington 64th Legislature 2015 Regular Session

By House Labor (originally sponsored by Representatives MacEwen, Riccelli, Parker, Tharinger, McCaslin, Ormsby, Sells, and Robinson)

READ FIRST TIME 02/20/15.

AN ACT Relating to the nonemployee status of athletes in amateur sports; amending RCW 49.12.005 and 49.17.020; and reenacting and amending RCW 49.46.010.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. RCW 49.12.005 and 2003 c 401 s 2 are each amended to read as follows:

For the purposes of this chapter:

(1) "Department" means the department of labor and industries.

(2) "Director" means the director of the department of labor and industries, or the director's designated representative.

(3)(a) Before May 20, 2003, "employer" means any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees but does not include the state, any state institution, any state agency, political subdivision of the state, or any municipal corporation or quasi-municipal corporation. However, for the purposes of RCW 49.12.265 through 49.12.295, 49.12.350 through 49.12.370, 49.12.450, and 49.12.460 only, "employer" also includes the state, any state institution, any state agency, political subdivisions of

the state, and any municipal corporation or quasi-municipal corporation.

(b) On and after May 20, 2003, "employer" means any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees, and includes the state, any state institution, state agency, political subdivisions of the state, and any municipal corporation or quasi-municipal corporation. However, this chapter and the rules adopted thereunder apply to these public employers only to the extent that this chapter and the rules adopted thereunder do not conflict with: (i) Any state statute or rule; and (ii) respect to political subdivisions of the state and any municipal or quasi-municipal corporation, any local resolution, ordinance, or rule adopted under the authority of the local legislative authority before April 1, 2003.

(4) "Employee" means an employee who is employed in the business of the employee's employer whether by way of manual labor or otherwise. <u>"Employee" does not include any individual for the purposes of training or playing as an athlete for a team affiliated with the Western Hockey League.</u>

(5) "Conditions of labor" means and includes the conditions of rest and meal periods for employees including provisions for personal privacy, practices, methods and means by or through which labor or services are performed by employees and includes bona fide physical qualifications in employment, but shall not include conditions of labor otherwise governed by statutes and rules and regulations relating to industrial safety and health administered by the department.

(6) For the purpose of chapter 16, Laws of 1973 2nd ex. sess. a minor is defined to be a person of either sex under the age of eighteen years.

Sec. 2. RCW 49.17.020 and 2010 c 8 s 12005 are each amended to read as follows:

For the purposes of this chapter:

(1) The term "agriculture" means farming and includes, but is not limited to:

(a) The cultivation and tillage of the soil;

(b) Dairying;

(c) The production, cultivation, growing, and harvesting of any agricultural or horticultural commodity;

(d) The raising of livestock, bees, fur-bearing animals, or poultry; and

(e) Any practices performed by a farmer or on a farm, incident to or in connection with such farming operations, including but not limited to preparation for market and delivery to:

(i) Storage;

(ii) Market; or

(iii) Carriers for transportation to market.

The term "agriculture" does not mean a farmer's processing for sale or handling for sale a commodity or product grown or produced by a person other than the farmer or the farmer's employees.

(2) The term "director" means the director of the department of labor and industries, or his or her designated representative.

(3) The term "department" means the department of labor and industries.

(4) The term "employer" means any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees or who contracts with one or more persons, the essence of which is the personal labor of such person or persons and includes the state, counties, cities, and all municipal corporations, public corporations, political subdivisions of the state, and charitable organizations: PROVIDED, That any person, partnership, or business entity not having employees, and who is covered by the industrial insurance act shall be considered both an employer and an employee.

(5) The term "employee" means an employee of an employer who is employed in the business of his or her employer whether by way of manual labor or otherwise and every person in this state who is engaged in the employment of or who is working under an independent contract the essence of which is his or her personal labor for an employer under this chapter whether by way of manual labor or otherwise. <u>"Employee" does not include any individual for the purposes of training or playing as an athlete for a team affiliated with the Western Hockey League.</u>

(6) The term "person" means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons.

(7) The term "safety and health standard" means a standard which requires the adoption or use of one or more practices, means, methods, operations, or processes reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

(8) The term "workplace" means any plant, yard, premises, room, or other place where an employee or employees are employed for the performance of labor or service over which the employer has the right of access or control, and includes, but is not limited to, all workplaces covered by industrial insurance under Title 51 RCW, as now or hereafter amended.

(9) The term "working day" means a calendar day, except Saturdays, Sundays, and all legal holidays as set forth in RCW 1.16.050, as now or hereafter amended, and for the purposes of the computation of time within which an act is to be done under the provisions of this chapter, shall be computed by excluding the first working day and including the last working day.

Sec. 3. RCW 49.46.010 and 2014 c 131 s 2 and 2013 c 141 s 1 are each reenacted amended to read as follows:

As used in this chapter:

(1) "Director" means the director of labor and industries;

(2) "Employ" includes to permit to work;

(3) "Employee" includes any individual employed by an employer but shall not include:

(a) Any individual (i) employed as a hand harvest laborer and paid on a piece rate basis in an operation which has been, and is generally and customarily recognized as having been, paid on a piece rate basis in the region of employment; (ii) who commutes daily from his or her permanent residence to the farm on which he or she is employed; and (iii) who has been employed in agriculture less than thirteen weeks during the preceding calendar year;

(b) Any individual employed in casual labor in or about a private home, unless performed in the course of the employer's trade, business, or profession;

(c) Any individual employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesperson as those terms are defined and delimited by rules of the director. However, those terms shall be defined and delimited by the human resources director pursuant to chapter 41.06 RCW for employees employed under the director of personnel's jurisdiction;

(d) Any individual engaged in the activities of an educational, charitable, religious, state or local governmental body or agency, or nonprofit organization where the employer-employee relationship does not in fact exist or where the services are rendered to such organizations gratuitously. If the individual receives reimbursement in lieu of compensation for normally incurred out-of-pocket expenses or receives a nominal amount of compensation per unit of voluntary service rendered, an employer-employee relationship is deemed not to exist for the purpose of this section or for purposes of membership or qualification in any state, local government, or publicly supported retirement system other than that provided under chapter 41.24 RCW;

(e) Any individual employed full time by any state or local governmental body or agency who provides voluntary services but only with regard to the provision of the voluntary services. The voluntary services and any compensation therefor shall not affect or add to qualification, entitlement, or benefit rights under any state, local government, or publicly supported retirement system other than that provided under chapter 41.24 RCW;

(f) Any newspaper vendor, carrier, or delivery person selling or distributing newspapers on the street, to offices, to businesses, or from house to house and any freelance news correspondent or "stringer" who, using his or her own equipment, chooses to submit material for publication for free or a fee when such material is published;

(g) Any carrier subject to regulation by Part 1 of the Interstate Commerce Act;

(h) Any individual engaged in forest protection and fire prevention activities;

(i) Any individual employed by any charitable institution charged with child care responsibilities engaged primarily in the development of character or citizenship or promoting health or physical fitness or providing or sponsoring recreational opportunities or facilities for young people or members of the armed forces of the United States;

(j) Any individual whose duties require that he or she reside or sleep at the place of his or her employment or who otherwise spends a substantial portion of his or her work time subject to call, and not engaged in the performance of active duties;

(k) Any resident, inmate, or patient of a state, county, or municipal correctional, detention, treatment or rehabilitative institution;

(l) Any individual who holds a public elective or appointive office of the state, any county, city, town, municipal corporation or quasi municipal corporation, political subdivision, or any instrumentality thereof, or any employee of the state legislature;

(m) All vessel operating crews of the Washington state ferries operated by the department of transportation;

(n) Any individual employed as a seaman on a vessel other than an American vessel;

(o) Any farm intern providing his or her services to a small farm which has a special certificate issued under RCW 49.12.470;

(p) Any individual for the purposes of training or playing as an athlete for a team affiliated with the Western Hockey League;

(4) "Employer" includes any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee;

(5) "Occupation" means any occupation, service, trade, business, industry, or branch or group of industries or employment or class of employment in which employees are gainfully employed;

(6) "Retail or service establishment" means an establishment seventy-five percent of whose annual dollar volume of sales of goods or services, or both, is not for resale and is recognized as retail sales or services in the particular industry;

(7) "Wage" means compensation due to an employee by reason of employment, payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value, subject to such deductions, charges, or allowances as may be permitted by rules of the director.

--- END ---

ENGROSSED SENATE BILL 5893

State of Washington 64th Legislature 2015 Regular Session

By Senators Fain, Mullet, Litzow, Liias, and Hargrove

Read first time 02/09/15. Referred to Committee on Commerce & Labor.

AN ACT Relating to the nonemployee status of athletes in amateur sports; amending RCW 49.12.005 and 49.17.020; and reenacting and amending RCW 49.46.010.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. RCW 49.12.005 and 2003 c 401 s 2 are each amended to read as follows:

For the purposes of this chapter:

(1) "Department" means the department of labor and industries.

(2) "Director" means the director of the department of labor and industries, or the director's designated representative.

(3)(a) Before May 20, 2003, "employer" means any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees but does not include the state, any state institution, any state agency, political subdivision of the state, or any municipal corporation or quasi-municipal corporation. However, for the purposes of RCW 49.12.265 through 49.12.295, 49.12.350 through 49.12.370, 49.12.450, and 49.12.460 only, "employer" also includes the state, any state institution, any state agency, political subdivisions of

the state, and any municipal corporation or quasi-municipal corporation.

(b) On and after May 20, 2003, "employer" means any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees, and includes the state, any state institution, state agency, political subdivisions of the state, and any municipal corporation or quasi-municipal corporation. However, this chapter and the rules adopted thereunder apply to these public employers only to the extent that this chapter and the rules adopted thereunder do not conflict with: (i) Any state statute or rule; and (ii) respect to political subdivisions of the state and any municipal or quasi-municipal corporation, any local resolution, ordinance, or rule adopted under the authority of the local legislative authority before April 1, 2003.

(4) "Employee" means an employee who is employed in the business of the employee's employer whether by way of manual labor or otherwise. <u>"Employee" does not include any individual for the purposes of training or playing as an athlete for a team affiliated with the Western Hockey League.</u>

(5) "Conditions of labor" means and includes the conditions of rest and meal periods for employees including provisions for personal privacy, practices, methods and means by or through which labor or services are performed by employees and includes bona fide physical qualifications in employment, but shall not include conditions of labor otherwise governed by statutes and rules and regulations relating to industrial safety and health administered by the department.

(6) For the purpose of chapter 16, Laws of 1973 2nd ex. sess. a minor is defined to be a person of either sex under the age of eighteen years.

Sec. 2. RCW 49.17.020 and 2010 c 8 s 12005 are each amended to read as follows:

For the purposes of this chapter:

(1) The term "agriculture" means farming and includes, but is not limited to:

(a) The cultivation and tillage of the soil;

(b) Dairying;

(c) The production, cultivation, growing, and harvesting of any agricultural or horticultural commodity;

(d) The raising of livestock, bees, fur-bearing animals, or poultry; and

(e) Any practices performed by a farmer or on a farm, incident to or in connection with such farming operations, including but not limited to preparation for market and delivery to:

(i) Storage;

(ii) Market; or

(iii) Carriers for transportation to market.

The term "agriculture" does not mean a farmer's processing for sale or handling for sale a commodity or product grown or produced by a person other than the farmer or the farmer's employees.

(2) The term "director" means the director of the department of labor and industries, or his or her designated representative.

(3) The term "department" means the department of labor and industries.

(4) The term "employer" means any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees or who contracts with one or more persons, the essence of which is the personal labor of such person or persons and includes the state, counties, cities, and all municipal corporations, public corporations, political subdivisions of the state, and charitable organizations: PROVIDED, That any person, partnership, or business entity not having employees, and who is covered by the industrial insurance act shall be considered both an employer and an employee.

(5) The term "employee" means an employee of an employer who is employed in the business of his or her employer whether by way of manual labor or otherwise and every person in this state who is engaged in the employment of or who is working under an independent contract the essence of which is his or her personal labor for an employer under this chapter whether by way of manual labor or otherwise. <u>"Employee" does not include any individual for the purposes of training or playing as an athlete for a team affiliated with the Western Hockey League.</u>

(6) The term "person" means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons.

(7) The term "safety and health standard" means a standard which requires the adoption or use of one or more practices, means, methods, operations, or processes reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

(8) The term "workplace" means any plant, yard, premises, room, or other place where an employee or employees are employed for the performance of labor or service over which the employer has the right of access or control, and includes, but is not limited to, all workplaces covered by industrial insurance under Title 51 RCW, as now or hereafter amended.

(9) The term "working day" means a calendar day, except Saturdays, Sundays, and all legal holidays as set forth in RCW 1.16.050, as now or hereafter amended, and for the purposes of the computation of time within which an act is to be done under the provisions of this chapter, shall be computed by excluding the first working day and including the last working day.

Sec. 3. RCW 49.46.010 and 2014 c 131 s 2 and 2013 c 141 s 1 are each reenacted amended to read as follows:

As used in this chapter:

(1) "Director" means the director of labor and industries;

(2) "Employ" includes to permit to work;

(3) "Employee" includes any individual employed by an employer but shall not include:

(a) Any individual (i) employed as a hand harvest laborer and paid on a piece rate basis in an operation which has been, and is generally and customarily recognized as having been, paid on a piece rate basis in the region of employment; (ii) who commutes daily from his or her permanent residence to the farm on which he or she is employed; and (iii) who has been employed in agriculture less than thirteen weeks during the preceding calendar year;

(b) Any individual employed in casual labor in or about a private home, unless performed in the course of the employer's trade, business, or profession;

(c) Any individual employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesperson as those terms are defined and delimited by rules of the director. However, those terms shall be defined and delimited by the human resources director pursuant to chapter 41.06 RCW for employees employed under the director of personnel's jurisdiction;

(d) Any individual engaged in the activities of an educational, charitable, religious, state or local governmental body or agency, or nonprofit organization where the employer-employee relationship does not in fact exist or where the services are rendered to such organizations gratuitously. If the individual receives reimbursement in lieu of compensation for normally incurred out-of-pocket expenses or receives a nominal amount of compensation per unit of voluntary service rendered, an employer-employee relationship is deemed not to exist for the purpose of this section or for purposes of membership or qualification in any state, local government, or publicly supported retirement system other than that provided under chapter 41.24 RCW;

(e) Any individual employed full time by any state or local governmental body or agency who provides voluntary services but only with regard to the provision of the voluntary services. The voluntary services and any compensation therefor shall not affect or add to qualification, entitlement, or benefit rights under any state, local government, or publicly supported retirement system other than that provided under chapter 41.24 RCW;

(f) Any newspaper vendor, carrier, or delivery person selling or distributing newspapers on the street, to offices, to businesses, or from house to house and any freelance news correspondent or "stringer" who, using his or her own equipment, chooses to submit material for publication for free or a fee when such material is published;

(g) Any carrier subject to regulation by Part 1 of the Interstate Commerce Act;

(h) Any individual engaged in forest protection and fire prevention activities;

(i) Any individual employed by any charitable institution charged with child care responsibilities engaged primarily in the development of character or citizenship or promoting health or physical fitness or providing or sponsoring recreational opportunities or facilities for young people or members of the armed forces of the United States;

(j) Any individual whose duties require that he or she reside or sleep at the place of his or her employment or who otherwise spends a substantial portion of his or her work time subject to call, and not engaged in the performance of active duties;

(k) Any resident, inmate, or patient of a state, county, or municipal correctional, detention, treatment or rehabilitative institution;

(l) Any individual who holds a public elective or appointive office of the state, any county, city, town, municipal corporation or quasi municipal corporation, political subdivision, or any instrumentality thereof, or any employee of the state legislature;

(m) All vessel operating crews of the Washington state ferries operated by the department of transportation;

(n) Any individual employed as a seaman on a vessel other than an American vessel;

(o) Any farm intern providing his or her services to a small farm which has a special certificate issued under RCW 49.12.470;

(p) Any individual for the purposes of training or playing as an athlete for a team affiliated with the Western Hockey League;

(4) "Employer" includes any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee;

(5) "Occupation" means any occupation, service, trade, business, industry, or branch or group of industries or employment or class of employment in which employees are gainfully employed;

(6) "Retail or service establishment" means an establishment seventy-five percent of whose annual dollar volume of sales of goods or services, or both, is not for resale and is recognized as retail sales or services in the particular industry;

(7) "Wage" means compensation due to an employee by reason of employment, payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value, subject to such deductions, charges, or allowances as may be permitted by rules of the director.

--- END ---

APPENDIX "B"

ADMINISTRATIVE POLICY

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
EMPLOYMENT STANDARDS

TITLE:	**MINIMUM WAGE ACT APPLICABILITY**	**NUMBER:**	**ES.A.1**
CHAPTER:	**RCW 49.46** **WAC 296-128**	**REPLACES:**	**ES-005**
		ISSUED:	**1/2/2002**
		REVISED:	**6/24/2005**
		REVISED:	**3/24/2006**
		REVISED:	**7/15/2014**

1. When does Chapter 49.46, the Washington Minimum Wage Act, apply?

The Washington Minimum Wage Act (MWA), RCW 49.46, establishes a minimum wage for employees in Washington State in RCW 49.46.005 and RCW 49.46.020. The MWA also requires employers to pay overtime wages of at least one and one-half an employee's regular rate of pay for hours worked in excess of 40 in a week, per RCW 49.46.130.

The MWA is an additional protection to workers employed in Washington State who are already protected by the Industrial Welfare Act (IWA), RCW 49.12. While the IWA makes it illegal for an employer to employ workers at wages that are not adequate for their maintenance or under conditions of labor detrimental to their health, the MWA specifically sets forth an "adequate" wage (the current statutory minimum) and provides the additional protection of overtime compensation.

The MWA is in addition and supplementary to not only the IWA, but to all other standards (state, federal or local law, ordinance, rule or regulation) relating to wages, hours and working conditions. See RCW 49.46.120. If, however, the alternative standard provides either more protection or is more favorable to an employee, the more protective authority will apply. Individuals with questions as to the more protective standards found in federal law should contact the U.S. Department of Labor, Wage and Hour Division.

WAC 296-128 generally contains rules promulgated subject to RCW 49.46. All of these rules have the same force of law as the provisions of RCW 49.46 itself.

2. Which employers are subject to RCW 49.46?

Generally, an "employer" under RCW 49.46.010(4) is "any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee."

Public agencies subject to the MWA may nonetheless, in certain situations, be exempt from the requirement to pay overtime wages. **See** *ES.A.8.1* Overtime.

Employers who do business in other states, in addition to Washington, may be engaged in interstate commerce and are subject to the Fair Labor Standards Act (FLSA), in addition to the MWA. FLSA is administered by the U.S. Department of Labor, and clarification must be obtained from that agency.

Employers must follow the laws that are more protective to the worker when there is a difference between the applicability of state and federal laws.

3. Which employees are subject to the protections of RCW 49.46?

The protections of the MWA apply to all "employees." An "employee" is defined as "any individual employed by an employer" *except* those employees specifically excluded by the legislature in RCW 49.46.010(3)(a) through (n). Minimum wage is not required for employees who are excluded from the MWA. Note that there are additional exceptions to overtime, and as a result an employee can be entitled to minimum wage even if overtime pay is not required. See RCW 49.46.130 and administrative policy **ES.A.8.1**, related to overtime.

4. Definition of employ. "Employ" means to engage, suffer or permit to work. See RCW 49.46.010 (3) and WAC 296-126-002 (3).

See ES.C.2 for a detailed discussion of the hours worked for which the employee must be paid at least the applicable minimum wage. The same concepts apply to employers and employees subject to the MWA.

5. Independent contractors are not employees. A bona fide independent contractor is exempt from the MWA because that person is not "employed" by an employer. However, an employer cannot avoid conforming to the MWA by merely referring to someone as an "independent contractor." Whether a worker is an independent contractor must be carefully evaluated on a case-by-case basis.

6. Which employees are excluded from the protections of the MWA?

The following exemptions are found in RCW 49.46.010(3). Application of these exemptions depends on the facts, which must be carefully evaluated on a case-by-case basis:

(a) **Certain agricultural employees:** An individual who is employed as a hand harvest pieceworker in the region of employment, *and* who commutes daily from his or her permanent residence to the farm upon which he or she is employed *and* who has been

employed in agriculture less than thirteen weeks during the preceding calendar year. Each of the elements listed above must be met in order for the exemption to apply.

Note: All other agricultural workers *are* covered under MWA. The employer has the burden of proving that agricultural workers fall within the above exemption.

(b) **Casual Laborers:** Any individual "employed in casual labor in or about a private home" *unless* the labor is performed in the course of the employer's trade, business, or profession.

Casual refers to employment that is irregular, uncertain or incidental in nature and duration. This must be determined on a case-by-case basis by looking at the scope, duration and continuity of employment. Employment that is intended to be permanent in nature is not casual, and is not exempt, regardless of the type of work performed. Employment of housekeepers, caregivers, or gardeners on a regular basis is not considered"employed in casual labor" and such workers may be subject to the protections of the MWA.

(c) **Executive, Administrative, Professional, Computer Professional or Outside Sales.** **See ES.A.9.2 through ES.A.9.8** for further discussion of the "white collar" exemptions.

Note: The rules promulgated by the Washington State Department of Personnel affecting civil service employees have no bearing on department rules for wage and hour purposes. Public employees in executive, administrative, or professional positions are included in the "salary basis" regulation, WAC 296-128-532 and 533. *See administrative policy ES.A.9.1.*

(d) **Volunteer work for an educational, charitable, religious, state or local governmental body or agency or non-profit organization**: Any person engaged in the activities of the above type of organizations as long as there is no employer-employee relationship between the organization and the individual *or* the individual gives his or her services gratuitously to the organization

The department uses the following interpretation in determining whether workers are volunteers exempt from the MWA: Individuals will be considered volunteers only where their services are offered freely and without pressure or coercion, direct or implied, from an employer. Individuals who volunteer or donate their services, usually on a part-time basis, for public service or for humanitarian objectives, not as employees and without contemplation of pay, are not considered employees of the entities that received their services. However, if these people are paid for their services beyond reimbursement for expenses, reasonable benefits or a nominal fee, they are employees and not volunteers.

Individuals do not lose their volunteer status if they receive a nominal fee or stipend. A nominal fee is not a substitute for wage compensation and must not be tied to productivity. An individual who volunteers to provide periodic services on a year-round basis may receive a nominal monthly or annual fee without losing volunteer status.

An individual will not be considered a volunteer if he or she is otherwise employed by the same agency or organization to perform similar or identical services as those for which

the individual proposes to volunteer. Any individual providing services as a volunteer who then receives wages for services, is no longer exempt and must be paid at least minimum wage and overtime pay for hours worked in excess of 40 hours per workweek. Unpaid employment is unlawful. An employee-employer relationship is deemed to exist where there is a contemplation or expectation of payment for goods or services provided.

Note that this interpretation is identical to that used to determine whether a worker is a volunteer and thus exempt from the protections of RCW 49.12, the Industrial Welfare Act.

Volunteers are not allowed in a "for-profit" business. Any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer, who permits any individual to work, is subject to the provisions of the MWA.

(e) **Individuals who are employed full time by a state or local governmental agency or nonprofit educational, charitable, or religious organization and who also do volunteer work for the agency**. Such individuals are exempt from the MWA only with respect to the voluntary services.

(f) **Newspaper vendors or carriers.** The department construes "newspaper vendors or carriers" very narrowly and does not include magazine carriers or vendors, those who distribute advertising circulars, or persons who sell or distribute literature at sporting events etc.

(g) **Employees of carriers subject to Part I of the Interstate Commerce Act (Railroads and Pipelines):** Part I of the Interstate Commerce Act is limited to railroads and pipelines only. Interstate motor carriers are covered under Part II of the Interstate Commerce Act and are not exempted from the MWA by this definition.

Non-railroad employees may also be subject to this exemption from the MWA if their activity is integral to the interstate commerce of the railroads. Whether non-railroad employees are exempt should be considered on a case-by-case basis.

(h) **Forest protection and fire prevention.** Any persons engaged in forest protection and fire prevention activities.

(i) **Employees of charitable institutions charged with child care responsibilities.** Employees of charitable institutions charged with child care responsibilities as long as the charitable institution is "engaged primarily in the development of character or citizenship or promoting health or physical fitness or providing or sponsoring recreational opportunities or facilities for young people or members of the armed forces of the United States."

"Charitable institution" traditionally includes churches and other organizations commonly set up under the not-for-profit corporations act if they are recognized by the United States Internal Revenue Service under the tax exemption provision, section 501(c)(3). Typical examples may include the YMCA or YWCA, Girl Scout or Boy Scout

organizations, etc. "Charged with child care responsibilities" would include reference to this activity in the organization's by-laws and incorporation documents.

(j) **Individuals whose duties require they reside or sleep at their place of employment or who otherwise spend a substantial portion of their work time subject to call.** This exemption encompasses two categories of workers: (1) Those individuals whose duties require that they reside or sleep at their place of employment, and (2) Those individuals who otherwise spend a substantial portion of work time subject to call and not engaged in the performance of active duties.

(1) Reside or sleep: Employees whose job duties require them to reside at the place of employment exempt from both the minimum wage and overtime requirements. Merely residing or sleeping at the place of employment does not exempt individuals from the Minimum Wage Act. In order for individuals to be exempt, their duties must require that they sleep or reside at the place of their employment. An agreement between the employee and employer for the employee to reside or sleep at the place of employment for convenience or merely because housing is available at the place of their employment would not meet the exemption.

Typical examples of this exemption if their duties require them to reside or sleep at the place of their employment may include apartment managers, maintenance personnel, hotel/motel managers, managers of self-storage facilities, and agricultural workers such as sheepherders.

(k) **Inmates and others in custody.** Residents, inmates or patients of state, county or municipal correctional, detention, treatment or rehabilitative institution would not be required to be paid minimum wage if they perform work directly for, and at, the institution's premises where they are incarcerated, and remain under the direct supervision and control of the institution. State inmates assigned by prison officials to work on prison premises for a private corporation at rates established and paid for by the state are not employees of the private corporation and would not be subject to the MWA.

(l) **Elected or appointed public officials and employees of the state legislature.** The MWA does not apply to any individual who holds a public elective or appointive office of the state, any county, city, town, municipal corporation, political subdivision, or any instrumentality thereof, or any employee of the state legislature.

(m) **Washington State ferry crews.** Vessel operating crews of the Washington State ferries, as long as the Department of Transportation operates the ferries.

(n) **Crews of non-American vessels.** The MWA applies to persons employed as seamen on an American vessel but does not apply to seamen employed on non-American vessels.

7. What is the scope of the department's authority under the Minimum Wage Act?

Assuming that the type of employees and employers involved in a particular case are covered under the MWA, the department has the authority to investigate and gather data and may enter workplaces, examine and copy records, question employees and investigate such facts conditions practices or matters deemed necessary or appropriate to determine whether there has been a violation of the MWA. RCW 49.46.040.

See ES.D.1 for a complete discussion of the record keeping types of records employers subject to the MWA must maintain and produce to the department and to employees.

8. What is the department's enforcement authority regarding violations of the Minimum Wage Act?

If, after investigation, the Department determines that there has been a violation of the MWA in that an employer has paid an employee less than minimum wage or has not paid overtime to an entitled employee, the department may, on the employees' behalf, bring a civil action against an employer to recover unpaid wages. An employee also has the express right to bring a private action for unpaid wages or overtime and to seek costs and attorney fees. See RCW 49.46.090(1). Also **see ES.A.5** for additional discussion of payment of wages less than minimum wage and the employer's liability.

An employer who fails or refuses to comply with the record keeping requirements found in the MWA and in the department's corresponding rules or an employer who refuses to cooperate with the department's reasonable investigation could be subject to criminal prosecution. See RCW 49.46.100.

An employer who pays less than minimum wage or violates other provisions of the MWA (including overtime) could also be subject to criminal prosecution under RCW 49.46.100. Also **see ES.A.3** for definition of wage and methods of calculation to determine whether employee has been paid the applicable minimum wage.

Finally, an employer who fires or discriminates against an employee because the employee has complained to the department about unpaid wages or any other provision of the MWA (including record keeping responsibilities) may be subject to criminal prosecution under RCW 49.46.100. The department does not have the authority to assert criminal charges and criminal fines against such employers. A county or city prosecutor must take such action.

Notwithstanding the department's authority to investigate and bring legal action against an employer for violations of RCW 49.46 on behalf of workers, aggrieved workers retain the right to seek private counsel in order to file a civil action against the employer.

APPENDIX "C"

Washington State Department of Labor & Industries

Announcement

2015 minimum wage: $9.47 per hour

Washington's minimum wage will be $9.47 per hour beginning Jan. 1, 2015. Workers who are 14 or 15 years old may be paid 85% of the adult minimum wage, or $8.05 per hour.

For more information about Washington's minimum wage law, see the required workplace poster *Your Rights as a Worker in Washington State* or visit **www.WorkplaceRights.Lni.wa.gov**.

FY15-309 [12-2014]

APPENDIX "D"

Bureau of Labor and Industries

"Economic Reality" Test

The protections of the wage and hour laws enforced by BOLI apply to "employment relationships." Because an "independent contractor" is excluded from the definition of an "employee" (at ORS 652.310(2)(a)), a worker is either an independent contractor or an employee, but never both.

BOLI's Wage and Hour Division applies the "economic reality" test to determine whether there is an employment relationship.

The "economic reality" test consists of the following five factors which gauge the degree of a worker's economic dependency on the business to which he or she is providing services. Generally speaking, the more dependent a worker is on a particular business, the more likely they are to be an employee.

In weighing these factors, it is important to remember that no single factor is determinative for an investigator, administrative law judge or a trial court judge to find that a worker is an independent contractor or an employee. The elements are:

(1) The degree of control exercised by the alleged employer

(2) The extent of the relative investments of the worker and alleged employer

(3) The degree to which the worker's opportunity for profit and loss is determined by the alleged employer

(4) The skill and initiative required in performing the job

(5) The permanency of the relationship

Although not part of the official test, the following questions may help to illustrate whether a worker is performing work as an employee or an independent contractor:

(1) The degree of control exercised by the alleged employer
- Who sets the hours of work?
- Who is responsible for quality control?
- Does the worker have other customers?
- Who determined the rate of pay? Was it negotiated?
- Who determines how the work gets performed?

(2) The extent of the relative investments of the worker and alleged employer
- Does the worker supply his or her own tools?
- Does the worker purchase materials necessary to do the job?

- Has the worker invested in bonds / insurance / advertising?

(3) The degree to which the worker's opportunity for profit and loss is determined by the alleged employer
- Is the worker free to bring on additional workers to speed up the job? At whose expense?
- Does working or managing the project more efficiently increase profit for the worker?
- Does the worker risk a loss if the job goes awry?

(4) The skill and initiative required in performing the job
- Does the level of skill and initiative required for the job rise to the level demonstrated by an independent business competing in an open market?
- Is a license required to perform the work?

(5) The permanency of the relationship
- How long has the job lasted? Is an ending date contemplated (upon completion of the work)?
- Is the contract (if any) subject to periodic review or automatic renewal?

THE LEGAL PRECEDENT....

The current test applied by BOLI was adopted in *In the Matter of Geoffrey Enterprises, Inc.*, 15 BOLI 148 (1996). In that case, the Commissioner adopted the "economic reality" test articulated in *Circle C Investments, Inc.* 998 F.2d 324 (5th Cir 1993), a similar case brought by US DOL involving the question of whether certain dancers were employees under the FLSA. In adopting the test, the Commissioner noted that the relevant definitions of "employer" and "employ" in state law were taken from the FLSA and that federal courts have adopted an expansive interpretation of the definition of "employer" under the FLSA in order to effectuate "its broad remedial purposes." As noted by the *Circle* court in its analysis, the focal point of the test is "whether the alleged employee, as a matter of economic reality, is economically dependent upon the business to which she renders her services."

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Independent Contractors

The protections and obligations of employment laws generally extend to "employees" but not "independent contractors." While it is tempting to try to avoid the costs and responsibilities associated with employees by calling them "independent contractors," the courts and agencies that enforce employment laws do not rely on the label "independent contractor."

The Bureau of Labor and Industries (BOLI), like the U.S. Department of Labor and the courts, use criteria that have been established through previous court cases to take a close look at the actual realities of the relationship. For purposes of wage and hour law, BOLI uses the "economic reality test" to determine whether there is an employment relationship.

BOLI utilizes a different test, the "right-to-control test", to determine whether a given worker is an employee or an independent contractor for purposes of civil rights law. Some civil rights statutes protect not only workers, but also job applicants and customers. In those situations, it would not matter whether an individual is an independent contractor or employee.

It is also important to remember that other state agencies will make their own determination on whether a worker is an independent contractor or an employee. For example, ORS 670.600 is an Oregon statute that defines an "independent contractor" for the Department of Revenue, Employment Department, Construction Contractors Board and Landscape Construction Board. These agencies require that the person performing the work meet all the criteria of that law in order to be considered an independent contractor.

You can visit www.oregonindependentcontractors.com for more information about the independent contractor classification criteria applied by other state agencies.

FAQs

Q: So what is an independent contractor, really?
A: To cut to the chase, the tests applied by the courts and regulatory agencies exist to gauge whether a worker who provides services is operating an independent business. They do this primarily by weighing facts to determine (1) whether the worker is free from direction and control and/or (2) whether the worker is, as a matter of economic reality, independent of the business to which services are being provided.

Q: What happens when an employee is misclassified as an independent contractor?
A: There are several potentially expensive costs to misclassifying an employee. Often, state agencies are required by law to assess back taxes, penalties, and interest in cases of misclassification. Employees who were not properly paid wages may also seek back wages, penalty wages and interest though BOLI or the courts. Additional civil penalties may be assessed if minimum wage and overtime claims are involved.

Q: How can I be sure my independent contractors won't be classified as employees?
A: Generally, the courts and regulatory agencies will consider workers to be employees unless they meet the definition of an independent contractor. It is critical, therefore, that you compare the reality of your relationship to an independent contractor with the various tests for an independent contractor. BOLI's tests as well as the criteria of ORS 670.600 are available by way of the links listed above. The IRS also has classification criteria available online.

Q: Does it make a difference if I have a contract and report income under a Form 1099?
A: The determination will depend on a consideration of the facts of the entire relationship, not a title. A contract, even if it correctly captures the intent of the parties involved, will not suffice if the facts of the matter do not show that the worker in question satisfied the legal criteria required of an independent contractor.

Q: One of my employees has a side business. Can I have him provide services as an independent contractor so long as the duties he performs as an employee are different?
A: Not according to the U.S. Department of Labor. In an opinion letter dated July 5, 2000, DOL was asked whether an employee who worked as a graphic designer could also perform work as an independent contractor for the same employer. Although the duties performed by the employee in each capacity would be distinct, DOL opined that the worker would be an employee and not an independent contractor in regard to all work performed. DOL also stated that, "It has long been the position of the Wage and Hour Division that it is unrealistic to assume that an employment and "independent contractor relationship" may exist concurrently between the same parties in the same workweek."

Q: I want to hire someone to remodel my house. Can I safely assume that this person will be an independent contractor and not an employee?
A: Not necessarily. Although construction is an industry that often uses the work of independent contractors, this is not always so. A recent BOLI case illustrates that if enough of the factors of the "economic reality" test are met, an employment relationship may exist. See In the Matter of Laura M. Jaap, (April 8, 2009) Case No. 32-08, where the Commissioner found that the Respondent exercised significant control, provided tools and materials, and there was an aspect of permanency to the relationship.

This page updated on November 1, 2013.

DISCLAIMER

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BOLI
Bureau of Labor and Industries
Technical Assistance
for Employers!

THIS INFORMATION IS AVAILABLE IN AN ALTERNATE FORMAT.

APPENDIX "E"

CEJAS COMMERCIAL INTERIORS, INC., an Oregon corporation, Plaintiff-Respondent, v. JORGE TORRES-LIZAMA and FELIX TORRES-LIZAMA, Defendants-Appellants, and VIEWPOINT CONSTRUCTION, LLC, an Oregon limited liability company, Defendant.

A148291

COURT OF APPEALS OF OREGON

260 Ore. App. 87*; *316 P.3d 389*; *2013 Ore. App. LEXIS 1493

November 29, 2012, Argued and Submitted
December 18, 2013, Filed

PRIOR HISTORY: [***1]
Multnomah County Circuit Court. 100100532. Janice R. Wilson, Judge.

DISPOSITION: Award of attorney fees pursuant to *ORS 20.105* reversed; award of enhanced prevailing party fee pursuant to *ORS 20.190(3)* vacated and remanded for reconsideration; otherwise affirmed.

COUNSEL: D. Michael Dale argued the cause for appellants. With him on the briefs was Law Office of D. Michael Dale.

Roger J. Leo argued the cause and filed the brief for respondent.

Kenneth A. Kreuscher, Cathy Highet, and Portland Law Collective, LLP, filed the brief Amici Curiae for Oregon American Federation of Labor and Congress of Industrial Organizations, Oregon State Building and Construction Trade Council, International Union of Painters and Allied Trades District Council No. 5, and National Employment Law Project.

JUDGES: Before Armstrong, Presiding Judge, and Duncan, Judge, and Brewer, Judge pro tempore.

OPINION BY: DUNCAN

OPINION

[**390] [*89] DUNCAN, J.

In this declaratory judgment action, defendants Felix and Jorge Torres- Lizama appeal a judgment declaring that they were not employed by plaintiff, Cejas Commercial Interiors, Inc., within the meaning of Oregon's minimum-wage law, *ORS 653.025*. [1] Defendants contend that plaintiff, a drywall contractor, was their employer while they did [***2] drywall work that plaintiff had subcontracted to Viewpoint Construction, LLC (Viewpoint). Consequently, defendants assert, plaintiff was required to compensate them for their work when Viewpoint and its crew foreman, Miguel Muñoz, failed to pay defendants and disappeared. Defendants also argue that the trial court abused its discretion in awarding plaintiff attorney fees of $5,000 and an enhanced prevailing party fee of $5,000 on a counterclaim that defendants raised under the federal Fair Labor Standards Act (FLSA), *29 USC §§ 201 to 219*. We affirm the trial court's determination that plaintiff did not employ defendants under *ORS 653.025*, reverse the award of attorney fees, and remand for reconsideration of the enhanced prevailing party fee.

1 As explained below, the trial court entered a default judgment against defendant Viewpoint Construction, LLC, and Viewpoint is not a party to this appeal. Throughout this opinion, we refer only to Jorge and Felix Torres-Lizama as "defendants"; we refer to Viewpoint by name.

I. FACTS AND PROCEDURAL HISTORY

After a bench trial, we review the trial court's factual findings for any competent evidence. *ORCP 62 F*; *Sutherlin Sch. Dist. # 130 v. Herrera, 120 Ore. App. 86, 91,*

851 P.2d 1171 (1993). [***3] [2] We state the facts consistently with those findings. *Sutherlin Sch. Dist. # 130, 120 Ore. App. at 91.* Plaintiff is a construction contractor licensed by the Construction Contractors Board (CCB) and specializing in [*90] drywall, metal framing, and acoustical ceilings. Its Chief Executive Officer is Jose Ignacio Ceja, commonly known as "Nacho." [3] Plaintiff has a [**391] regular crew of eight to ten employees, most of whom are Ceja family members. Plaintiff's crew members fill out W-4s, have taxes withheld from their pay, and are paid semi-monthly by check.

2 We decline defendants' invitation, made in a footnote in their brief, to review the record *de novo. See ORS 19.415(3)(b)* (in an equitable action, we have discretion to review the record *de novo*); *ORAP 5.40* (we exercise our discretion to review *de novo* only in "exceptional cases"). Defendants provide no support for their contention that this is an equitable case for which *de novo* review is discretionary under *ORS 19.415(3)*, and, in any event, we would not exercise that discretion in this case. The only significant conflicts in the evidence in the record were the result of conflicting testimony, and the trial court made express credibility findings [***4] regarding that testimony that would carry great weight even if we were to review *de novo. See Niman and Niman, 206 Ore. App. 400, 420, 136 P3d 1186 (2006).*

3 Throughout this opinion, we refer to Jose Ignacio Ceja as Nacho Ceja to avoid confusion with his nephew, Jose Ceja, Jr., who, as explained below, was plaintiff's on-site supervisor for the relevant drywall project.

In 2008, plaintiff contracted with general contractor Lorentz Bruun Co., Inc., to complete the drywall part of a mixed commercial and residential construction project at the intersection of 20th Avenue and Southeast Hawthorne Boulevard in Portland. The project, the largest that plaintiff had ever undertaken, was too large for plaintiff's crew to complete within Lorentz Bruun's desired timeframe, so Nacho Ceja decided to subcontract the "production" part of the contract to another company. Drywall production work involves hanging and taping full sheets of drywall on unobstructed walls and ceilings. Plaintiff's crew would do the remaining drywall work, which required more time and expertise than the production work. Plaintiff's crew's work included installing "pre-rock" and installing drywall around elevator assemblies and [***5] stairwells.

Plaintiff offered to subcontract the production work for $.28 per square foot, with "patches and additional work" extra, and several companies submitted bids. Nacho Ceja testified that that price was generous and provided an opportunity for a subcontractor to make a significant profit. Plaintiff decided to subcontract with Viewpoint, which had worked on smaller projects for plaintiff in the past and with whose work Nacho Ceja had been satisfied. Plaintiff supplied the drywall, tape, and mud for the drywall work that Viewpoint was to perform; Viewpoint's workers provided their own tools.

Before plaintiff awarded Viewpoint the contract, Nacho Ceja used the CCB's website to confirm that Viewpoint had an active license with the CCB and was bonded and insured. Nacho Ceja also required Viewpoint to provide a liability insurance certificate showing plaintiff as [*91] an additional insured and to add plaintiff as an insured on its workers' compensation insurance.

Victor Rodriguez, Viewpoint's principal, signed the contract on behalf of Viewpoint. During performance of the contract, Rodriguez came to the site only periodically to pick up checks from plaintiff. Plaintiff paid Viewpoint in [***6] full under the contract; the last check was deposited on May 21, 2009.

Defendants Jorge and Felix Torres-Lizama are brothers. At the time relevant to this action they lived together in Vancouver, Washington. Miguel Muñoz, the foreman for Viewpoint's taping crew, called them at home and asked them to work on the drywall for the 20th and Hawthorne project. Both defendants had worked on crews headed by Muñoz before. Neither had ever been on plaintiff's payroll, although Felix believed that he had worked on another job where plaintiff had had the drywall contract. Defendants had not heard of Viewpoint.

Defendants worked at the 20th and Hawthorne project from February 16 to March 26, 2009. Muñoz promised to pay defendants $10 per hour. He paid Jorge $1,100 and Felix $1,200, all in cash, and then failed to make any further payments.

Jose Ceja, Jr., who is Nacho Ceja's nephew, was plaintiff's on-site supervisor for the 20th and Hawthorne project. He would learn from Lorentz Bruun's foreman which areas or apartment units were ready for drywall hanging and taping and pass that information on to Muñoz, who would tell the taping crew where to work. Jose Ceja, Jr., was also responsible for the safe [***7] performance of all the drywall work at the site. That was true whether the safety risk was to plaintiff's workers, Viewpoint's workers, or any other worker on the site.

The trial court determined that, although Jose Ceja, Jr., may have interacted directly with defendants about their work on occasion, "such direct interaction was minor and incidental." More often, Jose Ceja, Jr., spoke to Muñoz about any problems with the crew's work; defendants and other crew members were often nearby and

overheard those conversations. Jose Ceja, Jr., did not set the construction [*92] schedule or require defendants to work more hours when the work fell behind schedule, although he did communicate with Muñoz as necessary to ensure that Viewpoint completed the subcontract in a timely manner.

[**392] Defendants first complained to Muñoz about his failure to pay them, and he told them to be patient. In March, they stopped working on the project because they had not been paid. In the end of June, defendants told Nacho Ceja that they had not been paid. Soon after, they brought wage claims against plaintiff and Viewpoint before the CCB.

In response, pursuant to *former* ORS 701.148(4) (2007), *repealed by* Or Laws 2011, ch 630, § 53, [***8] [4] plaintiff brought this declaratory judgment action against defendants and Viewpoint, seeking, among other things, a declaration that defendants "do not possess any justiciable right over which a legal claim may be brought for wages, penalty wages, penalties or attorneys fees in any form before the [CCB] or any court." Defendants counterclaimed for Oregon minimum-wage and overtime compensation, *ORS 653.025*, *ORS 653.055*, *ORS 653.261*; penalties for failure to promptly pay wages, *ORS 653.055*, *ORS 652.150*; federal minimum-wage and overtime compensation under the FLSA; and breach of contract. [5] They sought their unpaid wages, overtime [*93] wages, penalty wages, and attorney fees. Neither plaintiff nor defendants could locate Viewpoint or Muñoz, and the trial court entered a default judgment against Viewpoint.

4 *Former ORS 701.148(4)* provided, in part:

> "A party to a complaint that is subject to a [CCB] order of binding arbitration under subsection (1) of this section may avoid the arbitration if the party requests to have the complaint resolved through a contested case hearing or files a court action."

5 *ORS 653.010(2)* defines "employ," for purposes of *ORS 653.010* to *ORS 653.261*, to include [***9] "to suffer or permit to work." *ORS 653.025(1)* establishes a minimum wage "for each hour of work time that the employee is gainfully employed." *ORS 653.261* authorizes the Commissioner of the Bureau of Labor and Industries to adopt rules regarding, *inter alia*, overtime pay. *ORS 653.055* creates a cause of action for enforcement of *ORS 653.025* and rules established under *ORS 653.261*:

> "(1) Any employer who pays an employee less than the wages to which the employee is entitled under *ORS 653.010 to 653.261* is liable to the employee affected:
>
> "(a) For the full amount of the wages, less any amount actually paid to the employee by the employer; and
>
> "(b) For civil penalties provided in *ORS 652.150*.
>
> "(2) Any agreement between an employee and an employer to work at less than the wage rate required by *ORS 653.010 to 653.261* is no defense to an action under subsection (1) of this section."

The case went to trial. After the close of the evidence, defendants voluntarily dismissed their breach-of-contract counterclaim. The trial court found that, under Oregon's minimum-wage and overtime laws, Jorge should have been paid an additional $1256.20 and Felix should have been paid an additional $1,005.00. However, [***10] the court determined that plaintiff did not "employ" defendants within the meaning of *ORS 653.010(2)* and, therefore, plaintiff was not obliged to pay defendants' wages. The court also determined that defendants had failed to prove that the FLSA applied to plaintiff. It entered a judgment declaring that defendants were not employed by plaintiff and, for that reason, rejecting defendants' counterclaims under Oregon minimum-wage and overtime law.

The trial court also concluded that defendants' attempt at trial to prove that the FLSA was applicable, which was based on a series of inferences that the court did not find persuasive, was unreasonable in light of the lack of evidence. Consequently, it awarded plaintiff an enhanced prevailing party fee of $5,000 under *ORS 20.190(3)* and $5,000 in attorney fees under *ORS 20.105*.

Defendants appeal, contending that the trial court erred in concluding that they were not employees of plaintiff for purposes of Oregon's minimum-wage and overtime statutes and that the court abused its discretion in awarding plaintiff attorney fees and an enhanced prevailing party fee on defendants' FLSA claim. We address

those issues in turn, beginning with whether defendants [***11] were employed by plaintiff.

II. "EMPLOY" AS USED IN *ORS 653.010*

ORS 653.025(1) provides that, with exceptions not relevant here, "no employer shall employ * * * any employee" at a wage lower than the "Oregon minimum wage" defined [**393] in *ORS 653.025(2)*. "'Employer' means any person who employs another person * * *." *ORS 653.010(3)*. "'Employ' [*94] includes to suffer or permit to work * * *." *ORS 653.010(2)*. [6] ORS chapter 653 does not define "employee."

6 *ORS 653.010(2)* provides:

> "'Employ' includes to suffer or permit to work but does not include voluntary or donated services performed for no compensation or without expectation or contemplation of compensation as the adequate consideration for the services performed for a public employer referred to in subsection (3) of this section, or a religious, charitable, educational, public service or similar nonprofit corporation, organization or institution for community service, religious or humanitarian reasons or for services performed by general or public assistance recipients as part of any work training program administered under the state or federal assistance laws."

In the trial court, the parties disagreed about how the trial court should interpret [***12] the definition of "employ" in *ORS 653.010(2)*. Each party proposed a different test; in general, the test that plaintiff advocated defines the employment relationship more narrowly than the test that defendants advocated. Plaintiff also contended, in the alternative, that even under the test that defendants proposed, it did not employ defendants.

Because the dispute about which test to apply is one of the major issues on appeal, we pause here to provide some background about the two tests. Defendants argued that the trial court should apply the "economic-realities test." Federal courts apply that test to determine whether a worker is employed within the meaning of the FLSA. Like *ORS 653.010(2)*, the FLSA defines "employ" to include "to suffer or permit to work." *29 USC § 203(g)*. That definition of "employ" originated in child-labor statutes intended to impose liability on individuals and corporations who engaged children to work for them directly or who suffered or permitted children to work for others involved in the enterprise. *See, e.g., People ex rel Price v. Sheffield Farms-Slawson-Decker Co., 225 NY 25, 33, 121 NE 474 (1918)* (farm "permitted" hiring of children although farm prohibited [***13] the practice by rule and occasional inspection); *Curtis & Gartside Co. v. Pigg, 39 Okla 31, 134 P 1125, 1129 (1913)* (company "suffered" or "permitted" child to work at dangerous task by instructing him to do so although his contract of employment did not cover the dangerous task). After Congress adopted the phrase "to suffer or permit to work" to define "employ" in the FLSA, the United States Supreme Court adopted the economic-realities test to [*95] capture that broader employment relationship. *Goldberg v. Whitaker House Co-op., Inc., 366 US 28, 33, 81 S Ct 933, 6 L Ed 2d 100 (1961)*; *Rutherford Food Corp. v. McComb, 331 US 722, 728-29, 67 S Ct 1473, 91 L Ed 1772 (1947)* (*Rutherford*).

Because of that history, the economic-realities test is recognized to be broader than common-law tests for employment. As the Supreme Court has explained, the FLSA's definition of "employ" is "'comprehensive enough to require its application to many persons and working relationships, which prior to [enactment of the FLSA], were not deemed to fall within an employer-employee category.'" *Rutherford, 331 US at 729* (quoting *Walling v. Portland Terminal Co., 330 US 148, 150-51, 67 S Ct 639, 91 L Ed 809 (1947)*). The [***14] test represents a "reject[ion of] the common-law definition of employment, which is based on limiting concepts of control and supervision." *Antenor v. D & S Farms, 88 F3d 925, 929 (11th Cir 1996)*. Instead, the focus of the test is whether "an entity has functional control over workers even in the absence of the formal control" that is the focus of common-law tests. *Zheng v. Liberty Apparel Co. Inc., 355 F3d 61, 72 (2d Cir 2003)*. The goal of the economic-realities test is to determine whether, "as a matter of economic reality, [the worker] is dependent on the [putative employer]." *Antenor, 88 F3d at 929*.

Defendants contended that, because the Oregon legislature adopted the FLSA's definition of "employ," the test for employment under *ORS 653.010* should be the economic-realities test, as applied in federal courts, rather than the "right-to-control test" that Oregon courts apply in a number of other contexts.

[**394] Plaintiff disagreed, contending that, under some of our cases, the court was required to apply the right-to-control test in interpreting *ORS 653.010(2)*. That test derives from common law, and its focus is on the putative employer's formal control over workers. *See, e.g., Henn v. SAIF, 60 Ore. App. 587, 591, 654 P.2d*

1129 (1982), [***15] *rev den, 294 Ore. 536, 660 P.2d 682 (1983)* ("The principal factors showing right of control are: (1) direct evidence of the right to or the exercise of control; (2) the method of payment; (3) the furnishing of equipment; [*96] and (4) the right to fire."). Oregon courts employ forms of the right-to-control test under a variety of statutes that define the employment relationship in terms of direction and control or a contractual relationship. *See, e.g., ORS 656.005(13)* (defining "employer," for purposes of the workers' compensation statutes, as "any person * * * who contracts to pay a remuneration for and secures the right to direct and control the services of any person"); *ORS 657.030 - 657.094* (defining "employment," with numerous exceptions, for purposes of the unemployment insurance statutes, as "service for an employer * * * performed for remuneration or under any contract of hire, written or oral, express or implied").

The trial court noted that "the appellate case law interpreting the Oregon statute on this point is not very illuminating." Based on some of that case law, the court agreed with defendants that the economic-realities test applies to employment determinations for the purposes of ORS chapter 653. [***16] However, the court agreed with plaintiff's alternative argument that, even under that test, plaintiff did not employ defendants.

On appeal, the parties renew the arguments they made below. Defendants point out that the provisions of ORS chapter 653 "are patterned after the [FLSA]," *State ex rel Roberts v. Acropolis McLoughlin, Inc., 149 Ore. App 220, 223, 942 P2d 829 (Acropolis I), adh'd to as modified on recons, 150 Ore. App 180, 945 P2d 647 (1997) (Acropolis II)*; *Northwest Advancement v. Bureau of Labor, 96 Ore. App. 133, 136 n 4, 772 P.2d 934*, rev den, *308 Ore. 315, 779 P.2d 618 (1989), cert den, 495 U.S. 932, 110 S. Ct. 2172, 109 L. Ed. 2d 501 (1990)*, in that, like the FLSA, it defines "employ" to include "to suffer or permit to work" and contains no stand- alone definition of "employer" or "employee." *ORS 653.010* (defining "employ" to include "to suffer or permit to work"; defining "employer" as "any person who employs another person * * *"); *29 USC § 203(g)*. Plaintiff remonstrates that our case law indicates that the right-to-control test is the relevant test under ORS chapter 653.

As the trial court noted, and as discussed in more detail below, our case law on the issue is inconsistent. In some cases, we have indicated that the economic-realities [***17] [*97] test applies, and, in others, we have indicated that the right-to-control test applies. As explained above, Or App at (slip op at 8-10), the two tests are intended to capture different groups of relationships. The right-to-control test covers a core group of employment relationships in which the employer exercises, or has the right to exercise, direct control over the worker. By contrast, the economic-realities test covers a broader group of relationships, including some situations where the worker is not directed or controlled by the employer but, nevertheless, as a matter of economic reality, depends on the employer such that the employer is responsible for ensuring that the worker receives at least minimum wage.

Because the tests are aimed at different groups of relationships and because our case law fails to provide guidance to litigants, agencies, and trial courts as to which test applies, we now address the question. We consider the text, context, and legislative history of *ORS 653.010(2)* to determine which test the legislature intended courts to apply. *See State v. Gaines, 346 Ore. 160, 171-72, 206 P3d 1042 (2009)*. We conclude that the legislature intended courts to apply [***18] the economic-realities test under *ORS 653.010(2)*, and we overrule our prior cases to the extent that they conflict with that holding.

We begin with the text of the statute, viewed in context. *Gaines, 346 Ore. at 171*. In patterning Oregon's minimum-wage provisions after the FLSA and adopting the FLSA's definition of "employ," the legislature adopted an established term [**395] of art from federal law. In 1967, when the legislature enacted the minimum-wage provisions, the leading United States Supreme Court case interpreting the definition of "employ" under the FLSA was, and had been for many years, *Rutherford*. In that case, the Court applied the economic-realities test and explained that the FLSA's definition of "employ" applies to "'many persons and working relationships, which prior to [enactment of the FLSA], were not deemed to fall within an employer-employee category.'" *331 US at 729* (quoting *Walling, 330 US at 150*). Thus, when the legislature defined "employ" to include "to suffer or permit to work," *ORS 653.010(2)*, the broad scope of that definition [*98] and the applicability of the economic-realities test had been established in federal law for at least 20 years.

The legislative history supports [***19] the understanding that, in defining "employ" to include "to suffer or permit to work," the legislature intended to include more relationships than are included under the right-to-control test. As described below, the legislative history shows that the committee that first considered the bill recognized that defining "employ" to include "to suffer or permit to work" captured more relationships than a more traditional definition that turned on the employer's right to direct and control the worker.

In 1967, the legislature enacted the provision that became *ORS 653.010* as the definitions section of Oregon's first comprehensive minimum-wage law. Or Laws

1967, ch 596, § 2. The first version of the bill, House Bill (HB) 1340 defined "employ" as it is defined now: to include "to suffer or permit to work." That version also provided, "'employer' means *any person who contracts for and secures the right to direct and control the services of an employe*, and includes any person acting in the interest, directly or indirectly, of an employer in relation to an employe." HB 1340 Re-Engrossed and Enrolled (1967) (emphasis added). That definition of "employer" made a person's status as an employer contingent [***20] on the person's right to direct and control workers.

During the first public hearing on the bill, before the House Committee on Labor and Management, Belton Hamilton, who represented the Bureau of Labor, offered amendments, including modification of that definition of employer. Minutes, House Committee on Labor and Management, HB 1340, Mar 10, 1967, 2. Hamilton explained that the definition of "employer" needed modification because it was narrower than the definition of "employ." He informed the committee that, if the original definition were not modified, it would be possible for a person to be employed within the meaning of the bill, but, nevertheless, for the person who employed him or her not to be an employer. *Id.* [7] That [*99] explanation reflects an intention that the phrase "to suffer or permit to work" should encompass more relationships than a traditional right to direct and control: If the definition of "employer" referred to the right to direct and control the worker's services, some people who suffered or permitted workers to work--that is, people who "employ[ed]" workers--would not qualify as employers.

> 7 Audio recordings of the March 10, 1967, session of the House Committee on Labor [***21] and Management are unavailable; the minutes are the only archived record of the session.

The committee adopted the amendments. Minutes, House Committee on Labor and Management, HB 1340, Mar 17, 1967, 4. The new definition of employer provided, as it does today, that "'[e]mployer' means any person who employs another person." HB 1340 Re-Engrossed and Enrolled (1967); *ORS 653.010(3)*. Thus, the committee replaced the "contracts for and secures the right to direct and control" wording of the original definition of "employer" with a definition of "employer" that relies on the definition of "employ" for its content. That action, considered with Hamilton's explanation that the original definition of "employer" was narrower than the definition of "employ," demonstrates that the committee intended the definition of "employ" in *ORS 653.010* to encompass more relationships than the right-to-control definition.

Thus, the text of the statute and its legislative history support the conclusion that the legislature intended the definition of "employ" in *ORS 653.010* to sweep more broadly [**396] than the right-to-control test. The choice of the text "to suffer or permit to work," whose meaning was well established [***22] in federal law at the time, suggests that the legislature intended Oregon courts to apply that broader definition through the economic-realities test.

Although we have stated, in some of our cases on the topic, that the right- to-control test applies, the foregoing analysis persuades us that those statements are incorrect. The main case holding that we apply the right-to-control test in evaluating an employment relationship under *ORS 653.010* is *Chard v. Beauty-N-Beast Salon, 148 Ore. App 623, 941 P2d 611 (1997)*. In *Chard*, the plaintiff sued the defendant, a salon, arguing that the defendant had employed her within the meaning of *ORS 653.010* while she operated a tanning bed at the salon and performed salon-related tasks. [*100] The defendant responded that it did not employ the plaintiff; as to the plaintiff's tanning-related tasks, it contended, the plaintiff was a lessee of the tanning bed, and, as to the plaintiff's salon- related tasks, the plaintiff was an independent contractor. *Id. at 625, 628*.

With regard to the meaning of "to suffer or permit to work," we held:

> "In distinguishing an employee from an independent contractor for purposes of ORS chapter 653, we and the Oregon Bureau of Labor [***23] and Industries (BOLI) employ the common-law 'right of control' test. *See, e.g., Harvey v. Employment Division, 66 Ore. App 521, 524, 674 P2d 1204 (1984)*; *In the Matter of U.S. Telecom International*, 13 BOLI 114, 120-21 (1994)."

Chard, 148 Ore. App. at 628. We then applied the "right-of-control" factors that BOLI had employed in resolving a wage claim under ORS chapter 652, which defines the employment relationship differently than *ORS 653.010*. *ORS 652.310(1)* ("'Employer' means any person who in this state * * * engages personal services of one or more employees * * *."); *In the Matter of All Season Insulation Company, Inc.*, 2 BOLI 264, 272, 274-77 (1982) (concluding that "[a]t all times material, the Employer * * * was an employer *subject to the provisions of ORS 652.310 to 652.405, 652.140, and 652.150*" (emphasis added)). We also noted that "the parties do not raise or urge any other formulation or test." *Chard, 148 Ore. App. at 630 n 7*. We have applied

Chard's holding in one other case, *Perri v. Certified Languages International, LLC, 187 Ore. App 76, 82, 66 P3d 531 (2003)*, in which we cited *Acropolis I* (which cited *Chard*) for the proposition that "Oregon courts generally have used a common-law [***24] 'right to control' test in determining the status of a worker."

There are at least three reasons--apart from the text and legislative history of *ORS 653.010* set out above--to doubt the correctness of *Chard*'s holding that the right-to-control test applies to the definition of "employ" in *ORS 653.010*. First, and most significantly, the authority that we cited for that proposition does not support it. Our holding in *Chard* rested on a citation to *Harvey v. Employment Division, 66 Ore. App 521, 524, 674 P2d 1204 (1984)*. *Harvey* [*101] involved a claim for unemployment tax by the Employment Division under *ORS 657.040*. We concluded that the petitioner had employed a minor because the minor was not "free from the employer's control and direction." *Harvey, 66 Ore. App at 523, 525*. Thus, the legal issue in *Harvey*--the meaning of "free from the employer's control and direction" as used in *ORS 657.040*--was unrelated to the proposition for which we cited it in *Chard*--the meaning of "to suffer or permit to work" in *ORS 653.010*. [8]

> 8 In *Harvey*, we did mention the minimum-wage law, *ORS 653.025*, and the definition of "employ" in *ORS 653.010(2)*, but that reference was made in passing during a discussion of whether a minor [***25] who worked for the defendant was an employee for unemployment-tax purposes--that is, under *ORS 657.040*. *66 Ore. App at 524* ("While the evidence does not show whether the payment to [the minor, which had been labeled a gift,] was equal to or greater than the minimum wage for the time he spent, *the payment was legally not a gift but a wage for his services, and he was thus employed for remuneration* [under *ORS 657.040*]." (Emphasis added.)). Thus, contrary to our statement in *Chard*, in Harvey, we did not apply the common-law right-to-control test to distinguish an employee from an independent contractor for purposes of ORS chapter 653.

[**397] The second reason to doubt our holding in *Chard* is that, when we decided *Chard*, we had already construed the definition of "employ" in *ORS 653.010* in accordance with the FLSA. In *Northwest Advancement*, we noted that "to suffer or permit to work," *ORS 653.010*, is adopted from the FLSA and construed it by reference to federal authorities interpreting the FLSA. *96 Ore. App at 136-37*. We did not mention *Northwest Advancement* in *Chard*.

Finally, although we have never overruled *Chard*, we have never accepted it as conclusively settling the question that it purports to [***26] answer. Almost immediately after we decided *Chard*, we noted the relationship between the minimum-wage provisions of ORS chapter 653 and the FLSA and suggested that the question of which test applies remained open: In *Acropolis I*, we acknowledged our holding in *Chard* but noted that "[t]he minimum wage provisions and definitions in ORS chapter 653 are patterned after the [FLSA]," and we declined to decide which test applied because the dispute was not preserved. *149 Ore. App at 223-26*. In *Acropolis II*, we responded to BOLI's contention that we should decide which test applied by stating, "This court will take up [the issue of which test applies in state [*102] minimum-wage cases] when it is argued on appeal *and* preserved at trial." *150 Ore. App at 184* (emphasis in original).

In the most recent case addressing the question, we distinguished all of our prior cases on the ground that they involved purported independent contractors while the case then before us required us to determine whether the purported employee was jointly employed. *Dinicola v. State of Oregon, 246 Ore. App 526, 544-45, 268 P3d 632 (2011), rev den, 352 Ore. 377, 290 P.3d 813 (2012), cert den, ___ U.S. ___, 134 S. Ct. 66, 187 L. Ed. 2d 28 (2013)*. After making that distinction, [***27] we readily reached the opposite conclusion from the one we reached in *Chard* and held that the economic-realities test applied to the state-law claims at issue in the case. *Dinicola, 246 Ore. App at 544*. Although it is true that the facts in *Dinicola* differed from those in our earlier cases--in the earlier cases, the question was whether the purported employees were independent contractors, whereas the question in *Dinicola* was whether the purported employee was jointly employed--there is only one definition of "employ" in *ORS 653.010*, and it appears to apply to both independent-contractor and joint-employment situations. In the absence of any textual indication to the contrary, it is unlikely that the legislature intended courts to define "employ" more or less broadly depending on whether the question was one involving independent contractors or joint employment. [9]

> 9 Our holding in this case does not preclude the possibility that, under the economic-realities test, different factors may be relevant in independent-contractor and joint-employment situations. *See* Or App (slip op at 24) (noting that we accept the factors applied by the trial court in this case as correct and complete [***28] because the parties do not dispute them).

In sum, in *Chard*, we mistakenly relied on *Harvey* for the proposition that the right-to-control test applied to

minimum-wage claims under ORS chapter 653. In earlier and subsequent cases, we recognized that *ORS 653.010*'s definition of "employ" is the same as the FLSA's definition of "employ" and variously stated and suggested that the economic-realities test should apply. We have minimized our holding in *Chard*, indicated that it did not answer the question conclusively, and attempted to distinguish it. We have never provided any analysis to support its conclusion, and our present analysis of the text of *ORS 653.010(2)* and [*103] its legislative history demonstrates that its holding contradicts the legislature's intent. Accordingly, we now overrule *Chard* and disavow statements in subsequent cases suggesting its correctness. We will apply the economic- realities test to determine whether a given relationship is an employment relationship under *ORS 653.010(2)*.

III. APPLICATION OF THE ECONOMIC-REALITIES TEST

As noted above, our goal in applying the economic-realities test is to determine whether, "as a matter of economic reality, [the worker] is dependent [***29] on the [putative employer]." *Antenor, 88 F3d at 929*. As [**398] the Second Circuit has explained, the test "is intended to expose outsourcing relationships that lack a substantial economic purpose, but it is manifestly not intended to bring normal, strategically oriented contracting schemes within the ambit of the FLSA." *Zheng, 355 F3d at 76*. That is so because an outsourcing relationship that lacks a substantial economic purpose is likely "a subterfuge meant to evade the FLSA or other labor laws." *Id. at 72*.

The factors that federal courts consider in applying the economic-realities test--and those that the trial court considered in this case--are based on the Supreme Court's analysis in *Rutherford. See, e.g., Zheng, 355 F3d at 72* (listing and discussing factors from *Rutherford*); *Antenor, 88 F3d at 930-31* (discussing *Rutherford*). Accordingly, we discuss that case in some detail. In *Rutherford*, the Administrator of the Wage and Hour Division of the Department of Labor alleged that the Rutherford Food Corporation and a related corporation, Kaiser Packing Company, employed butchers but paid them less than minimum wage. *331 US at 724*. The butchers worked in a room in Kaiser's meat-processing plant [***30] into which Kaiser employees brought prepared carcasses on an overhead rail. The butchers moved the carcasses around the room on the rail, each taking part of the carcass for boning. They put the boned meat into barrels provided by Kaiser, and employees of Kaiser trimmed the meat in the same room, as necessary. Then Kaiser employees moved the barrels out of the room for the next step of the process. *Id. at 725-26*.

[*104] Kaiser originally agreed to pay Reed, the head butcher, by the hundredweight of boned meat; Reed shared that payment equally with the other butchers. When Reed left the work after a little more than a year, Kaiser contracted on the same terms with a series of other head butchers. The butchers provided their own meat hooks, knives, sharpeners, and aprons. The plant manager often went through the room where the butchers worked and exhorted them to get all the meat off the carcasses. The butchers' work rate was determined by the number of cattle slaughtered at the plant; they had to keep up with the carcasses brought into their room.

The district court concluded that the butchers were independent contractors, not employees; the Tenth Circuit disagreed and reversed. *331 US at 723*. [***31] The Supreme Court concluded that the butchers were employees of Kaiser. It disagreed with the district court's evaluation, explaining:

> "We think, however, that the determination of the relationship * * * depend[s] * * * on the circumstances of the whole activity. Viewed in this way, the workers did a specialty job on the production line. The responsibility under the boning contracts without material changes passed from one [butcher] to another. The premises and equipment of Kaiser were used for the work. The group had no business organization that could or did shift as a unit from one slaughter-house to another. The managing official of the plant kept close touch on the operation. While profits to the [butchers] depended upon the efficiency of their work, it was more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor. Upon the whole, we must conclude that these [butchers] were employees of the slaughtering plant under the Fair Labor Standards Act."

Rutherford, 331 US at 730.

Thus, the Court's reasoning is organized around two main themes, with some degree of overlap: the integration of the [***32] workers into the employer's production process and the lack of any independent workers' business organization. First, the workers' integration into the production process [*105] was significant because it was not temporary or sporadic; the workers formed part of the permanent production line and the employer could not produce any finished product without their

participation. [10] The individuals doing [**399] the work remained the same, and were paid the same way, through the tenure of several managers, indicating that they were primarily associated with the employer's operation.

> 10 We note that the fact that the workers are a necessary part of the employer's production, alone--like any single fact--does not determine the outcome of the inquiry. For example, the fact that the services of a plumber are necessary to the successful completion of every home-building project undertaken by a general contractor, in the absence of other facts indicating that the plumber is actually an employee, is not sufficient to show an employment relationship. If the general contractor always employs the same plumber, at the same rate, and the plumber works for no one but the general contractor, it may be a closer case. However, [***33] even under those circumstances, many other factors may be relevant, including the existence of an open bidding process, the length of time that the exclusive relationship exists, and evidence of industry custom and historical practice.

In *Zheng*, the Second Circuit noted that industry custom and historical practice may be relevant to whether there is a substantial economic reason for outsourcing part of a firm's production process or, conversely, whether outsourcing is a subterfuge meant to avoid labor laws. It explained:

> "Industry custom may be relevant because, insofar as the practice of using subcontractors to complete a particular task is widespread, it is unlikely to be a mere subterfuge to avoid complying with labor laws. At the same time, historical practice may also be relevant, because, if plaintiffs can prove that, as a historical matter, a contracting device has developed in response to and as a means to avoid applicable labor laws, the prevalence of that device may, in particular circumstances, be attributable to widespread evasion of labor laws."

355 F3d at 73-74. Both industry custom and historical practice could be relevant here, but there is no evidence on either of those [***34] issues in the record before us.

Second, the workers were not part of any independent businesses or joint business organization. The workers did not work elsewhere, alone or as a group, and the employer's overseer directed their work. They worked on the premises and with equipment of the employer, and they had no significant risk of loss and no enterprise that was dependent on their initiative, judgment, or foresight. Finally, their rate of pay, which was based on production, remained the same over several contracts, and they could not control their rate of production because it depended on the speed of the rest of the production process. Thus, Kaiser, rather than another employer or the butchers themselves, had *de facto* control over the butchers' pay.

[*106] In this case, after determining that the economic-realities test applied, the trial court noted that the parties "largely agree[d]" on the factors that it should apply under that test. The first group of factors, which the parties and the court referred to as the "regulatory" factors, relate to whether the putative employer formally controls the terms and conditions of the worker's employment. [11] The second group of factors, referred to [***35] as the "nonregulatory" factors, are derived from *Rutherford* and assist the court in determining whether, notwithstanding the absence of formal control, the putative employer nevertheless functionally controls the terms and conditions of employment. The trial court summarized the factors as follows:

> "The 'regulatory factors' are (1) the nature and degree of control of the workers; (2) the degree of supervision of the work, whether direct or indirect; (3) the power to determine the rates or methods of payment; (4) the right to hire, fire or modify employment conditions, either directly or indirectly; and (5) the preparation of payroll and the payment of wages.
>
> "The 'non-regulatory factors' (derived from case law, especially *Rutherford* * * *) are (1) whether the work was a specialty job on the production line; (2) whether responsibility under the contracts passed from one subcontractor to another without material changes; (3) who controls the premises and equipment used for the work; (4) whether the group of workers had a business organization that could or did shift as a unit from one employer to another; (5) the level of supervision over the work; (6) whether the success of the workers' [***36] enterprise depends on

> the initiative, judgment or foresight of the typical independent contractor; (7) whether there is permanence and exclusivity in the working relationship; and (8) whether the service rendered is an integral part of the putative employer's business."

[**400] Those factors are the same ones that defendants advocate on appeal. [12] Because the parties do not dispute them, we accept them as correct and complete for purposes of this appeal.

> 11 The "regulatory factors" are so called because they derive from federal regulations interpreting the Migrant and Seasonal Agricultural Worker Protection Act, *29 USC §§ 1801-72*, which incorporates the definition of "employ" from the FLSA. *Aimable v. Long & Scott Farms, 20 F.3d 434, 439 (11th Cir), cert den, 513 U.S. 943, 115 S. Ct. 351, 130 L. Ed. 2d 306 (1994)*.
>
> 12 Defendants note that the fifth nonregulatory factor listed by the trial court duplicates the second regulatory factor.

[*107] In light of those factors, viewed as a whole and understood in light of the Supreme Court's analysis in *Rutherford*, we agree with the trial court that plaintiff neither formally nor functionally controlled the terms and conditions of defendants' employment. To the contrary, the evidence indicates that [***37] plaintiff had a "substantial economic purpose" for entering into the subcontracting arrangement here and that it was not a subterfuge intended to avoid labor laws. *Zheng, 355 F3d at 76*. Defendants were not economically dependent on plaintiff; rather, plaintiff was a "mere business partner[ ] of [defendants'] direct employer." *Id.*

First, we consider the regulatory factors, and we conclude that plaintiff did not formally control the terms and conditions of defendants' employment. Plaintiff did not control defendants' work. Although Jose Ceja, Jr., occasionally spoke to defendants about their work, that interaction was aimed at ensuring site safety and the quality required by the subcontract; Jose Ceja, Jr., did not direct defendants' taping work. *See Zheng, 355 F3d at 75* ("[S]upervision with respect to contractual warranties of quality and time of delivery has no bearing on the joint employment inquiry, as such supervision is perfectly consistent with a typical, legitimate subcontracting arrangment."). Plaintiff did not determine when, how, or how much defendants were paid; it contracted with Viewpoint for a price per square foot, and Viewpoint, through Muñoz, promised to pay defendants [***38] by the hour. Plaintiff also lacked the right to hire or fire defendants, did not control their work hours, and did not manage their payroll.

Next, we consider whether plaintiff functionally controlled the terms and conditions of defendants' employment. In doing so, we are guided by the Supreme Court's analysis in *Rutherford*. We begin with the integration of defendants into plaintiff's production process. In that regard, we note that plaintiff did not always subcontract out parts of its drywall projects. The 20th and Hawthorne project was the largest that plaintiff had ever undertaken, and Nacho Ceja decided to subcontract the production work because his crew was not capable of finishing the work on time. Although this was not the first time that plaintiff had subcontracted production work, no evidence indicates that it did so consistently. Thus, [*108] unlike in *Rutherford*, where Kaiser could not produce any boned meat without the participation of the butchers, here, plaintiff could, and did, complete many drywall projects using only its own crew. See *Antenor, 88 F3d at 937* (pickers were "dependent on the growers' overall production process, of which they were one small but indispensable part").

It [***39] is also significant that, at most, one of the two defendants may have worked on one of plaintiff's projects before. Unlike the butchers in *Rutherford*, who continued working in Kaiser's plant through the tenure of three head butchers, defendants had no significant association with plaintiff outside of the 20th and Hawthorne project, on which they worked for approximately six weeks. By contrast, they had worked for Muñoz in the past. When "employees are tied to an entity such as the slaughterhouse rather than to an ostensible direct employer such as the boning supervisor," "it is difficult *not* to draw the inference that a subterfuge arrangement exists." *Zheng, 355 F3d at 74* (emphasis in original). "Where, on the other hand, employees work for an entity (the purported joint employer) only to the extent that their direct employer is hired by that entity, [that circumstance] does not in any way support the determination that a joint employment relationship exists." *Id.*

We turn now to whether defendants lacked independent businesses or a joint business organization. We conclude that they were part of an independent business operation--Viewpoint. Defendants worked for plaintiff for six weeks [***40] on one project. At other times, [**401] they had worked on many other projects, including projects where Muñoz was their supervisor. On the project at issue, Muñoz, not Jose Ceja, Jr., directed their work. Thus, defendants were part of a "business organization that could [and] did shift as a unit from one [drywall project] to another." *Rutherford, 331 US at 730.*

Because Viewpoint provided the business organization of which defendants were part, we evaluate whether

that organization undertook a risk of loss and whether it was an enterprise that required initiative, judgment, and foresight. [13] We begin with the risk of loss. Viewpoint agreed [*109] with plaintiff that it would complete the production drywall based on a price per square foot. It agreed with defendants that it would pay them by the hour. Thus, Viewpoint took the risk that its employees would not complete the work quickly enough to make a profit--or the profit that it anticipated--on the subcontract with plaintiff. It had an interest in ensuring that its employees worked quickly and efficiently, and Muñoz was present to direct the employees and protect Viewpoint's interest.

13

> "[T]he amount of initiative or judgment required for a job * * [***41] * is of minimal value for deciding whether workers already acknowledged to be the employees of one employer should likewise be deemed the employees of the second employer, as it tests principally for a worker's independence from all employers rather than for a worker's dependence on a particular employer."

Zheng, 355 F3d at 74 n 10 (citations and internal quotation marks omitted).

Similarly, the record indicates that Viewpoint was an enterprise dependent on intitiative, judgment, and foresight--that is, it was a legitimate business and not merely a way for plaintiff to avoid labor laws. Nacho Ceja received bids from other subcontractors about the project before he awarded it to Viewpoint, and he made sure that it was properly licensed, bonded, and insured before awarding it the contract. As explained above, Viewpoint took a risk by bidding on the project at a square-foot price and promising to pay defendants by the hour. Although plaintiff provided the drywall and drywall mud for the project, defendants provided their own tools. In short, the facts in the record do not indicate that Viewpoint was an enterprise in name only; although it has failed to appear in this case, the record does [***42] not indicate that it was other than a legitimate business. Accordingly, we conclude that defendants were part of a business organization other than plaintiff.

Overall, the record does not show that plaintiff formally or functionally controlled the terms and conditions of defendants' employment. This was a typical subcontracting situation; while defendants were economically dependent on Viewpoint, they were not economically dependent on plaintiff. Thus, the trial court correctly held that plaintiff did not employ defendants within the meaning of *ORS 653.010*. [14]

> 14 We reiterate that, in reaching that conclusion, we rely on the economic-reality test factors that defendants advanced in the trial court and on appeal, which, for the purposes of this opinion, we assume are correct and complete. Or App (slip op at 24).

[*110] In doing so, the trial court properly rejected defendants' argument that the FLSA standard for employment reduces to only whether the putative employer was in a position to know of the violations and had the economic power to prevent them and that, under that standard, they were employed by plaintiff. Even assuming, for the sake of argument, that that is a legally correct [***43] way to understand the term "employ," defendants would not be employed by plaintiff under that test. The trial court noted that, in this case, "[plaintiff] was in a position to know how Viewpoint's workers, including defendants, were being paid only if it interjected itself into Viewpoint's operations to a much greater extent than one would assume is permissible under the subcontract or is customary in construction contracting."

We agree with the trial court that the record does not indicate that plaintiff had the right to, or did, interject itself into Viewpoint's operations so as to have reason to know that defendants had not been paid in time to exercise its economic power to prevent the violation. Although defendants rely on the fact that Muñoz admitted to Nacho Ceja that he owed defendants wages, they fail to note that that admission took place in [**402] late June, and plaintiff had paid Viewpoint in full under the subcontract in May. Defendants do not point to any facts in the record to support the view that plaintiff should have known of Viewpoint's unreliability before plaintiff paid Viewpoint. [15]

> 15 We note in particular that, contrary to the assertions of *amici curiae* in their brief, [***44] there is no evidence in the record that plaintiff made arrangements directly with Muñoz or that it had any notice of the fact--if true--that Viewpoint was a "fly-by-night" "labor contractor." Before entering into a contract with Viewpoint through its principal, Victor Rodriguez, Nacho Ceja made sure that Viewpoint was licensed, bonded, and insured. No evidence in the record, including the price per square foot that plaintiff paid Viewpoint for its work, indicates that plaintiff had any reason to suspect that Viewpoint was other than a

legitimate drywall subcontractor that would pay its employees through its own payroll.

In sum, the trial court correctly held that plaintiff did not employ defendants within the meaning of *ORS 653.010(2)*. Because that conclusion was correct, the trial court did not err in providing plaintiff with the declaratory relief that it sought or rejecting defendants' counterclaims based on Oregon minimum-wage and overtime laws.

[*111] IV. FEE AWARDS

We turn to defendants' remaining assignments of error. As explained above, defendants assign error to the trial court's award of $5,000 in attorney fees to plaintiff under *ORS 20.105* and its award of a $5,000 enhanced prevailing [***45] party fee to plaintiff under *ORS 20.190(3)*. Both awards stem from defendants' attempt, at trial, to prove that the FLSA applied to their claim because plaintiff was an "[e]nterprise engaged in commerce or in the production of goods for commerce." *29 USC §§ 203(s)(1), 206(a)*.

We begin with the attorney fee award. *ORS 20.105(1)* provides, as relevant here, that a circuit court "shall" award reasonable attorney fees to a party who prevails against a claim "upon a finding by the court * * * that there was no objectively reasonable basis for asserting the claim[.]" [16] Defendants do not dispute that plaintiff is the prevailing party. Instead, defendants argue that the trial court abused its discretion in awarding fees under *ORS 20.105* because there was evidence from which a trier of fact reasonably could have concluded that the FLSA applied to plaintiff and because the court did not accord sufficient weight to the deterrent effect that such an award would have on potentially meritorious wage claims in the future. Plaintiff remonstrates that the court did not abuse its discretion because defendants' FLSA claim, as a whole, was unreasonable.

16 *ORS 20.105(1)* provides, in full:

> "In any civil action, [***46] suit or other proceeding in a circuit court or the Oregon Tax Court, or in any civil appeal to or review by the Court of Appeals or Supreme Court, the court shall award reasonable attorney fees to a party against whom a claim, defense or ground for appeal or review is asserted, if that party is a prevailing party in the proceeding and to be paid by the party asserting the claim, defense or ground, upon a finding by the court that the party willfully disobeyed a court order or that there was no objectively reasonable basis for asserting the claim, defense or ground for appeal."

We first note that we review a trial court's conclusion that "there was no objectively reasonable basis for asserting [a] claim," *ORS 20.105(1)*, for errors of law. [17] *Williams v. Salem Women's Clinic, 245 Ore. App 476, 482, 263 P3d 1072* [*112] *(2011)*; *Olson v. Howard, 237 Ore. App 256, 264-65, 239 P3d 510 (2010)*. "A claim lacks an objectively reasonable basis only if it is entirely devoid of legal or factual support, either at the time it is made or, in light of additional evidence or changes in the law, as litigation proceeds." *Williams, 245 Ore. App at 482* (citation and internal quotation marks omitted).

17 Before the trial [***47] court, plaintiff understood and argued that application of *ORS 20.105* was a matter of law, but, on appeal, it fails to identify the correct standard in its brief and, as noted, formulates its argument in terms of abuse of discretion.

The outcome of that inquiry "is a function of the substantive law governing the claim." *Olson, 237 Ore. App at 269* (internal quotation marks omitted). Here, the parties agree that, under defendants' theory that the FLSA applied to plaintiff through "enterprise liability," defendants had to show that plaintiff was an "[e]nterprise engaged in commerce or in the production of [**403] goods for commerce." *29 USC §§ 203(s)(1), 206(a)*. Specifically, defendants had to prove that plaintiff

> "(i) has employees engaged in commerce or in the production of goods for commerce, or * * * has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and
>
> "(ii) is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level that are separately stated)[.]"

29 USC § 203(s)(1)(A).

Although defendants lacked direct evidence of plaintiff's [***48] annual gross volume of sales, they

presented a series of inferences, based on plaintiff's gross receipts from the 20th and Hawthorne contract and evidence about the cost of materials and plaintiff's payroll, from which they contended that the trial court could determine that plaintiff's annual gross volume of sales exceeded $500,000. They also presented evidence that one of the products with which plaintiff's employees worked was trademarked, from which they argued that the court could conclude that plaintiff had "employees handling * * * goods or materials that have been moved in or produced for commerce by any person." *29 USC § 203(s)(1)(A)(i)*.

[*113] In its letter opinion, the trial court determined that defendants had not proved that the FLSA applied through "enterprise liability." It found that "the inferences and extrapolations on which defendants rely * * * are too attenuated and speculative to support the conclusion they seek." After plaintiff sought attorney fees under *ORS 20.105(1)*, the court concluded that there was no objectively reasonable basis for defendants' argument that the FLSA applied.

The court erred in so concluding. As noted, in determining whether there was a reasonable factual [***49] basis for a claim, the question is whether the record is "entirely devoid of * * * factual support" for the claim. *Williams, 245 Ore. App at 482* (internal quotation marks omitted). Here, although the court ultimately found defendants' evidence unpersuasive, there was some evidence in the record supporting defendants' position. *See, e.g., Morasch v. Hood, 232 Ore. App 392, 404-05, 222 P3d 1125 (2009)* ("Although * * * the evidence relating to damages was not legally sufficient to sustain the claim for fraud, we cannot conclude * * * that plaintiffs' [fraud] claim was without an objectively reasonable basis."). Accordingly, the trial court erred in awarding plaintiff attorney fees under *ORS 20.105*. [18]

> 18 Plaintiff moved for a directed verdict on the applicability of the FLSA, and the trial court took the matter under consideration. It did not rule on the motion for directed verdict but, in the letter opinion, noted that, "[w]hile [defendants'] evidence [on the issue] might survive a motion for directed verdict, I do not find it persuasive."
>
> Later, in evaluating whether there was an objectively reasonable basis for defendants' claims, the court explained that, when it stated that the evidence [***50] might survive a motion for directed verdict, "I was trying to be kind in my language. It was the thinnest of reeds." It noted that the standard for a directed verdict and an attorney fee award are not the same and concluded that there was no objectively reasonable basis for defendants' claim.
>
> As explained above, regardless of the sufficiency of defendants' evidence to survive a directed verdict, the record was not "entirely devoid of * * * factual support" for their claim. Consequently, plaintiff was not entitled to attorney fees under *ORS 20.105(1)*.

Finally, we consider defendants' third assignment of error, in which they challenge the trial court's award of an enhanced prevailing party fee of $5,000 pursuant to *ORS 20.190(3)*. We review such awards for abuse of discretion. *Mantia v. Hanson, 190 Ore. App 412, 431, 79 P3d 404 (2003)*. One of the factors that a court must consider, and that the [*114] trial court did consider, in ordering the enhanced prevailing party fee, is "[t]he objective reasonableness of the claims and defenses asserted by the parties." *ORS 20.190(3)(b)*. In light of our holding that the trial court erred in concluding that there was no objectively reasonable basis for defendants' [***51] FLSA claim, we must remand for the trial court to reconsider its enhanced prevailing party fee award. *See Morasch, 232 Ore. App at 406*; *Mantia, 190 Ore. App at 431*.

[**404] V. CONCLUSION

In sum, we conclude that the trial court did not err in holding that the economic-realities test applies under *ORS 653.010(2)*. The court also did not err in concluding that plaintiff did not employ defendants under *ORS 653.010(2)*, and it properly entered a declaratory judgment for plaintiff and rejected defendants' Oregon minimum-wage and overtime counterclaims on that basis. The trial court did err in concluding that there was no objectively reasonable basis for defendants' FLSA claim; as a result, we reverse the attorney fee award and remand for reconsideration of the enhanced prevailing party fee award.

Award of attorney fees pursuant to *ORS 20.105* reversed; award of enhanced prevailing party fee pursuant to *ORS 20.190(3)* vacated and remanded for reconsideration; otherwise affirmed.

APPENDIX "F"

BRAD AVAKIAN
COMMISSIONER

CHRISTIE HAMMOND
DEPUTY COMMISSIONER

BUREAU OF LABOR AND INDUSTRIES

September 17, 2014

Oregon 2015 Minimum Wage Determination

Pursuant to ORS 653.025(2), I have determined that the Oregon minimum wage for calendar year 2015 is $9.25 per hour.

The law requires an adjustment to the minimum wage to be calculated no later than September 30 of each year based upon any increase in the U.S. City Average Consumer Price Index ("CPI") for All Urban Consumers for All Items from August of the preceding year to August of the year in which the calculation is made. This amount is required to be rounded to the nearest five cents.

The current (2014) minimum wage rate is $9.10. Based on an increase in the CPI of 1.70% from August 2013 to August 2014, the calculation used for determining the minimum wage rate for 2015 is as follows:

$9.10 X .0170 = $.1547, rounded to $.15

Oregon employers are required to post minimum wage posters. Downloadable posters for 2015 reflecting the new minimum wage rate are available on BOLI's website free of charge.

Brad Avakian
Commissioner
Bureau of Labor and Industries

APPENDIX "G"

Independent Contractors

Advocacy
for Unemployed Workers & Employers
Cadillac Place • 3024 W. Grand Blvd., Suite 13-150 • Detroit, MI 48202

What the law says: This issue is covered under Section 42(5) of the *Michigan Employment Security Act*. The law says that if a person performs service under the "direction and control" of another person, then there is an "employer-employee" relationship. Under those circumstances, the worker is "covered" by the Michigan Employment Security Act and will probably be entitled to unemployment benefits chargeable to that employer (if other eligibility factors are met).

On the other hand, if a person is an "independent contractor," he or she will be considered to be self-employed. A self-employed person is not entitled to unemployment benefits.

What court cases have said: The fact that both the employer and the employee state that there is an independent contractor relationship, or the fact that there is actually a written contract, is not binding. The Unemployment Insurance Agency (UIA) must look to the "reality" of the situation and determine if the relationship is really that of independent contractor, or that of an employer-employee.

The courts have developed a test called the "economic reality test" to determine if a person is an independent contractor, or is actually an employee, even though he or she may be considered by the employer to be an independent contractor. Below are the indicators of the economic reality test. The test must result in a preponderance of evidence. No one indicator is weighed more heavily over another.

1. Whether the employer will incur liability if the relationship terminates at will;
2. Whether the work performed is an integral part of the employer's business;
3. Whether the employee depends upon the wages for living expenses;
4. Whether the employee furnishes equipment and materials;
5. Whether the employee holds himself or herself out to the public as able to perform the same tasks;
6. Whether the work involved is customarily performed by an independent contractor;
7. The factors of control, payment of wages, maintenance of discipline, and the right to hire and fire employees;
8. Weighing those factors which will most favorably effectuate the purposes of the Michigan Employment Security Act.

Examples: A worker performs services as a painter. He/she advertises in the local newspaper in order to get jobs; maintains his/her own brushes, ladders, and dropcloths, and buys his/her own paint; and maintains his or her own business hours. He/She is paid by the job. This worker would be an independent contractor and would not be covered for unemployment benefits. The "employer"/contractor would not be taxed for the remuneration paid to the worker.

Another worker, also a painter, comes to work every day at the same company, which maintains a large office building. The company provides the paint, brushes, ladders, and other materials to do the painting. The company also sets the worker's hours, and the worker does not do any painting work for anyone else because the job is full-time. This painter is an employee of the company. This would be true even if the company and the worker consider the worker to be an independent contractor, and even if they have a written "contract."

Proof at the Hearing: The employer will have to show that, based on the economic reality test, the worker satisfies most of the criteria to be regarded as an independent contractor.

For Further Help: The UIA Advocacy Program can provide assistance to employers and/or unemployed workers in preparing for an Administrative Law Judge hearing. Call 1-800-638-3994, Item 2.

APPENDIX "H"

ALICE BUCKLEY and DEPARTMENT OF LABOR AND ECONOMIC GROWTH, Appellants, v PROFESSIONAL PLAZA CLINIC CORPORATION, Appellee.

No. 277028

COURT OF APPEALS OF MICHIGAN

281 Mich. App. 224*; *761 N.W.2d 284*; *2008 Mich. App. LEXIS 1893

October 2, 2008, Decided

SUBSEQUENT HISTORY: Appeal denied by *Buckley v. Prof'l Plaza Clinic Corp., 2009 Mich. LEXIS 690 (Mich., Mar. 23, 2009)*

PRIOR HISTORY: [***1]
Wayne Circuit Court. LC No. 06-630481-AE.

DISPOSITION: Reversed.

JUDGES: Before: Murray, P.J., and Whitbeck and Talbot, JJ.

OPINION

[**286] [*225] PER CURIAM.

This case involves a wage dispute under Michigan's payment of wages and fringe benefits act (payment of wages act). [1] Appellant Alice Buckley, M.D., sought allegedly unpaid wages from appellee Professional Plaza Clinic Corporation (PPCC), which PPCC refused to provide. Appellant Department of Labor and Economic Growth agreed with Dr. Buckley and awarded her $ 15,979.14 in back pay, plus 10 percent annual interest and a $ 1,000 civil penalty. PPCC appealed the department's determination and order to a hearing referee, who affirmed. The trial court reversed, ruling that Dr. Buckley was an independent contractor and was not entitled to any unpaid wages under the payment of wages act. The department and Dr. Buckley now appeal by leave granted. We reverse the judgment of the circuit court and reinstate the decision of the hearing referee.

1 *MCL 408.471 et seq.*

I. Basic Facts and Procedural History

Dr. Buckley is an internal medicine physician. On November 19, 2004, Dr. Buckley entered into an employment [*226] agreement (the agreement) with PPCC to provide medical services to patients at the facility. Under [***2] the agreement, PPCC was to pay Dr. Buckley $ 130,000 for a one-year term, which equaled $ 2,500 a week. The agreement contained references to both "employee" and "independent contractor." More specifically, the agreement contained the following relevant provisions:

EMPLOYEE: In its usual sense employee is a person over whom Employer has control as to time or attendance and the employee is engaged in furtherance of Employer's business. This Employment Agreement (hereinafter Agreement) deals with an agreement between a corporate employer and an Independent Contractor unless otherwise noted.

INDEPENDENT CONTRACTOR: Employee is encouraged to consult IRS code related to an independent contractor, mainly "whose control" and "whose business" tests.

PREAMBLE

Agreement made on November 01, 2004 [2] between Professional Plaza Clinic Corporation, a corporation organized and existing under the laws of the State of Michigan, with its principal office located at 3800 Woodward Avenue, Detroit, Wayne county, Michigan, referred to in this agreement as empolyer, and Dr. Alice Buckley, of 3800 Woodward Avenue, Detroit, Wayne County, Michigan, referred to in this agreement as empolyee:

2 "Section Two" of the agreement, entitled "Term of Employment," stated that the agreement "was effective on November 19, 2004 and shall remain in effect until November 19, 2005 . . . ."

The agreement provided [***3] that the employer would determine the "employee's specific duties" and that the employer had discretion in "setting the days of the week and hours in which employee is to perform employee's [*227] duties[.]" The remaining sections of the agreement also used the term "employee." However, the term "independent contractor" occurred again at the signature line. Dr. Buckley did not sign the agreement itself, but rather an amendment to the agreement.

On November 23, 2004, Dr. Buckley also signed a W-9 (usually supplied to independent contractors and other self-employed workers). Under this arrangement, PPCC did not withhold any money from Dr. Buckley's paycheck, and she was responsible for paying taxes herself. Dr. Buckley paid her state and federal income taxes [**287] using a 1099 form (for independent contractors).

During the time that she worked at PPCC, Dr. Buckley received three checks, each for $ 2,500, and two others for $ 3,300 and $ 1,450, for a total of $ 12,250. However, Dr. Buckley voluntarily stopped working for PPCC [***4] on February 11, 2005, allegedly because PPCC was behind in paying her and she did not want to work without getting paid. Dr. Buckley filed a complaint with the department's Wage and Hour Division, alleging that PPCC failed to pay her wages owed. The department agreed with Dr. Buckley and awarded her $ 15,979.14 in back pay for "wages earned from November 1, 2004 to February 11, 2005." The department also ordered PPCC to pay 10 percent annual interest and a $ 1,000 civil penalty if the amount was not voluntarily paid.

PPCC appealed that determination before a department hearing referee, contending that Dr. Buckley was an independent contractor and had been paid in full. Dr. Buckley maintained that she was an employee entitled to unpaid wages.

During an August 2006 hearing before the hearing referee, Andrea McBride, PPCC's chief executive officer, testified that the employment agreement that Dr. Buckley signed was created as a general document to be [*228] used "for employment of the doctors . . . as they [came] in." As in Dr. Buckley's case, an amendment was then prepared detailing each particular doctor's salary. Contrary to Dr. Buckley's testimony, McBride testified that Dr. Buckley started working [***5] on November 20, 2004, and then worked again on November 23, 29, and 30. In December 2004, McBride testified, Dr. Buckley worked 11 days. McBride further stated that Dr. Buckley worked six days in January 2005, and six days in February 2005. McBride stated that Dr. Buckley worked an average of seven hours a day on the days that she worked in November through February. McBride believed that although Dr. Buckley was not paid the whole monthly salary in November, December, January, or February, PPCC did pay Dr. Buckley in full for the services provided on the days she worked. However, McBride testified that doctors at the clinic are paid the same rate, whether they go over or under a few hours, because it balances out over the long run. McBride stated that she did not dictate what time Dr. Buckley came to work and that Dr. Buckley had full control over her patients. McBride also admitted that she could have fired Dr. Buckley for allegedly unruly conduct (McBride testified that Dr. Buckley "would get upset, fly off the handle, walk out of the clinic, [and] curse"), but she did not because Dr. Buckley told her that "she was going through some issues."

PPCC's office manager, Linda Foster, testified [***6] that Dr. Buckley started working at PPCC during the first week of November 2004. Foster also testified that Dr. Buckley was to be paid on a weekly basis while employed and that she was expected to work 40 hours each week. According to Foster, Dr. Buckley worked 40 hours a week in November and December, and for only a couple of weeks in January and "not that much" in February because Dr. Buckley was not getting paid. [*229] However, Foster noted that no time sheets were kept and that she did not know exactly how many hours Dr. Buckley worked. Foster testified that she believed that Dr. Buckley was a salaried employee.

Dr. Buckley also testified during the hearing. According to Dr. Buckley, she began working for PPCC on November 2, 2004, as a salaried employee. Dr. Buckley confirmed that she signed the W-9 form and that PPCC did not withhold taxes from her paychecks, but she claimed that [**288] PPCC told her that it would start withholding taxes once it got a payroll system in place. She asserted that she controlled her own hours, but she claimed that she was supposed to, and did, work from 9:00 a.m. to 5:00 p.m. for all four weeks in November, excluding the Thanksgiving holiday. She believed that as a salaried [***7] employee she was supposed to be paid for the holiday. She stated that she also worked full time in December, or 4Â½ weeks, with the understanding that she would be paid for the days she took off for personal reasons and holidays. Dr. Buckley explained that she began limiting her hours in January 2005, working only just over 50 hours, because PPCC was behind in paying her and she did not see the sense in working and not getting paid.

In his written decision, the hearing referee determined that Dr. Buckley worked at PPCC from November 2, 2004, through February 11, 2005. Although acknowl-

of the duties as an integral part of the employer's business towards the accomplishment of a common goal." [29]

29 *Clark v United Technologies Automotive, Inc , 459 Mich 681, 688; 594 NW2d 447 (1999)*, quoting *Askew, supra at 217-218* (alteration in *Clark*). See also *Mantei, supra at 78-79.*

Under this test, no one factor is dispositive; indeed, the list of factors is nonexclusive and a court may consider other factors as each individual case requires. [30] However, "[w]eight should be given to those factors that most favorably effectuate the objectives of the statute in question." [31]

30 *Rakowski v Sarb, 269 Mich App 619, 625; 713 NW2d 787 (2006)*; *Mantei, supra at 79.*
31 *Rakowski, supra at 626* (citation and quotation marks omitted).

E. Application of Correct Legal Principle

Here, the hearing referee applied the economic reality test. Again, Michigan courts have consistently applied the economic reality test in the context of social remedial legislation. [32] A "remedial law" is "[a] law providing a means to enforce rights or redress injuries" or "[a] law passed to correct or modify an existing law . . . ." [33] [***16] The payment of wages act is remedial in that it provides a means to enforce rights with respect to wages and fringe benefits and prescribes remedies for violations of these rights. Further, application of the economic reality test, which takes into account the payment of wages, does not conflict with the plain meaning of the statute. [34] Thus, the hearing referee [*236] appropriately applied the test in this case because the test is consistent with the purposes of the payment of wages act.

32 See, e.g., *Renfroe, supra at 264.*
33 Black's Law Dictionary (8th ed).
34 *In re Rovas Complaint, supra at 117-118.*

Conversely, in the present matter, the circuit court did not explicitly articulate any principle of law that aided it in determining that Dr. Buckley was an independent contractor. Rather, the circuit court looked only to the facts that PPCC did not withhold any taxes from Dr. Buckley's paychecks and that PPCC lacked control over Dr. Buckley's duties and hours. Thus, we conclude that the circuit court clearly erred because it failed to apply, or misapplied, the economic reality test.

We note that PPCC attempts to support its position with reliance on the IRS's test for determining [***17] whether an individual is an independent contractor. However, PPCC cites no authority that this test should be applied in place of this jurisdiction's longstanding reliance on the economic reality test. And, more importantly, there is no indication in the record that the circuit court relied on the IRS test in making its determination.

F. Substantial Evidence

As previously stated, a circuit court's review of administrative proceedings is limited to determining whether the decision was authorized by law and supported by competent, material, and substantial [**292] evidence on the whole record. [35] And, here, substantial evidence adequately supported the hearing referee's decision that Dr. Buckley was an employee.

35 *Const 1963, art 6, § 28*; *VanZandt, supra at 588.*

Evidence was presented that PPCC treated Dr. Buckley as an employee. PPCC's office manager testified that Dr. Buckley was a salaried employee paid on a weekly basis and that PPCC expected Dr. Buckley to [*237] work 40 hours each week. PPCC's chief executive officer also testified that she had the authority to fire Dr. Buckley and that Dr. Buckley was to be paid the same rate each week, regardless of whether she worked over or under a few hours. Further, the agreement [***18] between Dr. Buckley and PPCC contained provisions indicating an employee-employer relationship. Specifically, the agreement set a term of employment, gave PPCC the power to determine Dr. Buckley's duties and hours, contained a noncompete clause, granted PPCC the discretion to terminate the relationship "for reasonable cause," and offered a "salary of $ 130,000" for a one-year commitment. This evidence was adequate to support a finding that Dr. Buckley was an employee. [36]

36 See *In re Kurzyniec Estate, supra at 537.*

Nevertheless, the circuit court provided the following reasons for reversing the hearing referee's decision:

I think the judgment of the court below, the administrative law judge . . . must be reversed. I think he was flat out dead wrong on the issue of whether or not this woman was an independent contractor. I think all the evidence points to the fact that she was.

The contract contained language both ways whether she was an independent contractor or an employee. The clinic clearly treated her as an independent contractor by not dictating her professional duties, by not dictating her hours. I assume everybody knew she had to come when the patients were there. Otherwise she [***19] wouldn't be very effective as a doctor. They didn't withhold taxes. That's consistent with being an independent contractor.

In fact, if they did not withhold taxes and she was an employee, there [sic] were in clear violation of . . . the

tax requirements of Michigan law for employers. I don't know why the judge below did what he did. Frankly, he had all the items of evidence in front of him and he simply concluded that wage and hourly applied and he would give [*238] a result. He even compromised his result. I have no idea why he did that except it's a further indication to me that he decided incorrectly.

The judgment below is reversed. I find as a matter of law that the woman was an independent contractor . . . .

These statements reflect several instances of clear error. As already noted, the court failed to apply the economic reality test and focused its analysis primarily on the element of control. Further, the circuit court ignored the substantial evidence on which the hearing referee relied and made no assessment regarding whether that evidence adequately supported his decision. Rather, the circuit court simply concluded that the hearing referee reached the wrong [***20] outcome because all the evidence, in the court's view, indicated that Dr. Buckley was an independent contractor. According to the court, the referee was "flat out dead wrong" on the issue. However, as this Court has stated, "[a] reviewing court may not set aside factual findings supported by the evidence merely because alternative findings could also [**293] have been supported by evidence on the record or because the court might have reached a different result." [37] In this case, the hearing referee noted that while the agreement contained an "independent contractor" reference, the agreement nonetheless set forth Dr. Buckley's duties, hours, rate of compensation, and vacation time. The referee also stated that he relied on other evidence and testimony to conclude that Dr. Buckley was an employee. The fact that some of the evidence supported the finding that Dr. Buckley was an independent contractor does not warrant the circuit court's setting aside the referee's findings.

37 *Risch, supra at 373.*

PPCC also asserts that the testimony of its office manager was inherently unreliable because she was a [*239] disgruntled employee and therefore a biased witness. However, "if the administrative findings [***21] of fact and conclusions of law are based primarily on credibility determinations, such findings generally will not be disturbed because it is not the function of a reviewing court to assess witness credibility or resolve conflicts in the evidence." [38]

38 *Id. at 372.*

III. Conclusion

The circuit court applied an incorrect principle of law when it did not use the correct standard to review the hearing referee's decision. Further, substantial evidence supported the referee's decision that an employee-employer relationship existed between Dr. Buckley and PPCC. Accordingly, we reverse the judgment of the circuit court and reinstate the decision of the hearing referee.

Reversed.

/s/ Christopher M. Murray

/s/ William C. Whitbeck

/s/ Michael J. Talbot

APPENDIX "I"

MIOSHA Required Poster
Wage and Hour Program
General Requirements - Minimum Wage and Overtime

Coverage

The Workforce Opportunity Wage Act, Public Act 138 of 2014, covers employers who employ 2 or more employees 16 years of age and older.

Minimum Hourly Wage Rate

Employees must be paid at least:

Effective Date	Minimum Hourly Wage Rate	Tipped Employee Minimum Hourly Rate	85% Rate
Before September 1, 2014	$7.40	$2.65	$7.25*
September 1, 2014	$8.15	$3.10	$7.25*

*The state 85% rate of $6.29 as of 5/27/2014 – 8/31/14 and $6.93 as of 9/1/14 is lower than the federal minimum wage rate of $7.25.

- Minors 16-17 years of age may be paid 85% of the minimum hourly wage rate.
- Beginning September 1, 2014, tipped employees may be paid a minimum hourly wage rate of 38% of the minimum hourly wage rate, provided tips are received, as documented through a signed, dated tip statement, which combined with the hourly wage paid, equals or exceeds the minimum hourly wage rate.

Training Wage

A training wage of $4.25 per hour may be paid to employees 16 to 19 years of age for the first 90 days of employment.

Overtime

Employees covered by the Workforce Opportunity Wage Act must be paid 1-1/2 times their regular rate of pay for hours worked over 40 in a workweek. The following are exempt from overtime requirements: employees exempt from the minimum wage provisions of the Fair Labor Standards Act of 1938, 29 USC 201 to 219 (except certain domestic service employees), professional, administrative, or executive employees; elected officials and political appointees; employees of amusement and recreational establishments operating less than 7 months of the year; agricultural employees, and any employee not subject to the minimum wage provisions of the act.

Compensatory Time

If an employer meets certain conditions, employees may agree to receive compensatory time of 1-1/2 hours for each hour of overtime worked. The agreement must be voluntary, in writing, and obtained before the compensatory time is earned. All compensatory time earned must be paid to an employee. Accrued compensatory time may not exceed 240 hours. Employers must keep a record of compensatory time earned and paid. Contact the Wage and Hour Program for information on the conditions an employer must meet in order to offer compensatory time off in lieu of overtime compensation.

Equal Pay

An employer shall not discriminate on the basis of sex by paying employees a rate which is less than the rate paid to employees of the opposite sex for equal work on jobs requiring equal skill, effort, and responsibility performed under similar working conditions - except where payment is pursuant to a seniority system, merit system or system measuring earnings on the basis of quantity or quality of production or a differential other than sex.

Enforcement

An employee may either file civil action for recovery of unpaid minimum wages or overtime, or they may file a complaint with the Department of Licensing and Regulatory Affairs. The department may investigate a complaint and file civil action to collect unpaid wages or overtime due the employee and all employees of an establishment. Recovery under this act can include unpaid minimum wages or overtime, plus an equal additional amount as liquidated damages, costs, and reasonable attorney fees. A civil fine of $1,000 can be assessed to an employer who does not pay minimum wage or overtime.

LARA is an equal opportunity employer/program.
Auxiliary aids, services and other reasonable accommodations are available upon request to individuals with disabilities.

Wage and Hour Program
7150 Harris Drive • P.O. BOX 30476 • LANSING, MICHIGAN 48909-7976
www.michigan.gov/wagehour • (517) 322-1825
Toll Free 1-855-4MI-WAGE (1-855-464-9243)
WHD 9904 (Revised • 10/2014)

APPENDIX "J"

pennsylvania
DEPARTMENT OF LABOR & INDUSTRY

BUREAU OF LABOR LAW COMPLIANCE

Minimum Wage Law Summary

Must be Posted in a Conspicuous Place in Every Pennsylvania Business Governed by the Minimum Wage Act

The Pennsylvania Minimum Wage Act establishes a fixed Minimum Wage and Overtime Rate for employees. It also sets forth compliance-related duties for the Department of Labor & Industry and for employers. In addition, the Minimum Wage Act provides penalties for noncompliance. This summary is for general information only and is not an official position formally adopted by the Department of Labor & Industry.

Overtime Rate:

Workers shall be paid 1½ times their regular rate of pay after 40 hours worked in a workweek (Except as Described).

Minimum Wage Rate:

$7.25 per hour
Effective
July 24, 2009
(Except as Described)

Tipped Employees:

An employer may pay a minimum of $2.83 per hour to an employee who makes $30.00 per month in tips. The employer must make up the difference if the tips and $2.83 do not meet the regular Pennsylvania minimum wage.

Keeping Records:

Every employer must maintain accurate records of each employee's earnings and hours worked, and provide access to Labor & Industry.

Penalties:

Failure to pay the legal minimum wage or other violations may result in payment of back wages and other civil or criminal action where warranted.

Exemptions:

Overtime applies to certain employment classifications. (see pages 2 and 3)

Special Allowances For:

Students, learners and people with disabilities, upon application only.

COMMONWEALTH OF PENNSYLVANIA
TOM CORBETT | GOVERNOR

DEPARTMENT OF LABOR & INDUSTRY
JULIA K. HEARTHWAY | SECRETARY

Exemptions from Both Minimum Wage and Overtime Rates

- Labor on a farm
- Domestic service in or about the private home of the employer
- Delivery of newspapers to the consumer
- Publication of weekly, semi-weekly or daily newspaper with a circulation of less than 4,000 when the major portion of circulation is in the county where published or a bordering county
- Bona fide executive, administrative or professional capacity, (including academic administrative personnel or teacher in public schools) or in capacity of outside salesman. However, an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in the employee's work not directly or closely related to the performance of executive, professional or administrative activities, if less than 40% of the employee's hours worked in the workweek are devoted to such activities.
- Educational, charitable, religious, or nonprofit organization where no employer-employee relationship exists and service is rendered gratuitously
- Golf caddy
- In seasonal employment, if the employee is under 18 years of age or if a student under 24 years of age is employed by a nonprofit health or welfare agency engaged in activities dealing with handicapped or exceptional children or by a nonprofit day or resident seasonal recreational camp for campers under the age of 18 years, which operates for a period of less than three months in any one year
- In employment by a public amusement or recreational establishment, organized camp, or religious or nonprofit educational conference center, if (i) it does not operate more than seven months a year or (ii) during the preceding calendar year, the average receipts for any 6 months were not more than 33⅓% of its average receipts for the other 6 months of such year
- Switchboard operator employed by an independently-owned public telephone company which has no more than 750 stations
- Employees not subject to civil service laws who hold elective office or are on the personal staff of such an officeholder, are immediate advisers to the officeholder, or are appointed by the officeholder to serve on a policy making level

Allowances

Wages paid to any employee may include reasonable cost of board, lodging and other facilities. This may be considered as part of the minimum wage if the employee is notified of this condition and accepts it as a usual condition of employment at the time of hire or change of classification. The wages, including food credit plus tips, must equal the current minimum wage.

Board: Food furnished in the form of meals on an established schedule.
Lodging: Housing facility available for the personal use of the employee at all hours.

Reasonable Cost: Actual cost, exclusive of profit, to the employer or to anyone affiliated with the employer.

Exceptions from Minimum Wage Rates

- Learners and students (bona fide high school or college), after obtaining a Special Certificate from the Bureau of Labor Law Compliance, (651 Boas Street, Room 1301, Harrisburg, PA 17121-0750) may be paid 85% of the minimum wage as follows:

  Learners: 40 hours a week. Maximum eight weeks

  Students: Up to 20 hours a week. Up to 40 hours a week during school vacation periods

- Individuals with a physical or mental deficiency or injury may be paid less than the applicable minimum wage if a license specifying a rate commensurate with productive capacity is obtained from the Bureau of Labor Law Compliance, (651 Boas Street, Room 1301, Harrisburg, PA 17121-0750), or a federal certificate is obtained under Section 14(c) of the Fair Labor Standards Act from the U.S. Department of Labor.

Exemptions from Overtime Rates

- A seaman
- Any salesman, partsman or mechanic primarily engaged in selling and servicing automobiles, trailers, trucks, farm implements or aircraft, if employed by a non-manufacturing establishment primarily engaged in the selling of such vehicles to ultimate purchasers. (Example: 51% of business is selling as opposed to 49% in servicing such vehicles)
- Taxicab driver
- Any employee of a motor carrier the Federal Secretary of Transportation has power to establish qualifications and maximum hours of service under 49 U.S.C. Section 3102 (b)(1) and (2) (relating to requirements for qualifications, hours of service, safety and equipment standards)
- Announcer, news editor, chief engineer of a radio or television station, the major studio of which is located in:
  - City or town of 100,000 population or less, if it is not part of a standard metropolitan statistical area having a total population in excess of 100,000; or
  - City or town of 25,000 population or less, which is part of such an area but is at least 40 airline miles from the principal city in the area
- Any employee engaged in the processing of maple sap into sugar (other than refined sugar) or syrup
- Employment by a motion picture theatre

For Questions/Complaints

Contact:	Counties Served:
Bureau of Labor Law Compliance Altoona District Office 1130 12th Avenue Suite 200 Altoona, PA 16601-3486 Phone: **814-940-6224** or **877-792-8198**	Armstrong, Bedford, Blair, Cambria, Cameron, Centre, Clarion, Clearfield, Clinton, Elk, Fayette, Forest, Fulton, Huntingdon, Indiana, Jefferson, McKean, Mifflin, Potter, Somerset, Warren, Westmoreland
Bureau of Labor Law Compliance Harrisburg District Office 651 Boas Street, Room 1301 Harrisburg, PA 17121-0750 Phone: **717-787-4671** or **800-932-0665**	Adams, Columbia, Cumberland, Dauphin, Franklin, Juniata, Lancaster, Lebanon, Montour, Northumberland, Perry, Snyder, Union, York
Bureau of Labor Law Compliance Philadelphia District Office 110 North 8th St. Suite 203 Philadelphia, PA 19107 Phone: **215-560-1858** or **877-817-9497**	Bucks, Chester, Delaware, Montgomery, Philadelphia
Bureau of Labor Law Compliance Pittsburgh District Office 301 5th Avenue Suite 330 Pittsburgh, PA 15222 Phone: **412-565-5300** or **877-504-8354**	Allegheny, Beaver, Butler, Crawford, Erie, Greene, Lawrence, Mercer, Venango, Washington
Bureau of Labor Law Compliance Scranton District Office 201-B State Office Bldg. 100 Lackawanna Avenue Scranton, PA 18503 Phone: **570-963-4577** or **877-214-3962**	Berks, Bradford, Carbon, Lackawanna, Lehigh, Luzerne, Lycoming, Monroe, Northampton, Pike, Schuylkill, Sullivan, Susquehanna, Tioga, Wayne, Wyoming

More Information is Available Online

Additional information about the Minimum Wage Act is available online at: www.state.pa.us, PA Keyword: Minimum Wage. From the Web site **you can submit a complaint form,** find answers to **frequently asked questions** and read more about the Minimum Wage Act.

Auxiliary aids and services are available upon request to individuals with disabilities. Equal Opportunity Employer/Program

APPENDIX "K"

REGULATIONS FOR MINIMUM WAGE

DEPARTMENT OF
LABOR & INDUSTRY
COMMONWEALTH OF PENNSYLVANIA

BUREAU OF LABOR LAW COMPLIANCE

R-4 REV 12-01

CHAPTER 231. MINIMUM WAGE

GENERAL PROVISIONS

MINIMUM WAGE

EMPLOYER RECORDS

OVERTIME PAY

EMPLOYMENT OF LEARNERS

EMPLOYMENT OF STUDENTS

EMPLOYMENT OF HANDICAPPED WORKERS

SPECIAL DEFINITIONS

FOOD-SERVICE EMPLOYEE INCENTIVE PROGRAM

Authority

The provisions of this Chapter 231 issued under The Minimum Wage Act of 1968 (43 P. S. §§333.101–333.115), unless otherwise noted.

Source

The provisions of this Chapter 231 adopted March 18, 1977, effective March 19, 1977, 7 Pa.B. 750, unless otherwise noted.

GENERAL PROVISIONS

§231.1. Definitions.

(a) Terms used in this chapter shall have the same meaning and be defined in the same manner as in the act.

(b) In addition to the provisions of subsection (a), the following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

Act–The Minimum Wage Act of 1967 (43 P. S. §§333.101–333.115).

Board–Food furnished on an established schedule.

Bona fide training program–One which must involve either formal instruction or on-the-job training during a period when the learner is entrusted with limited responsibility and is under supervision or guidance.

Bureau–The Bureau of Labor Standards of the Department.

Department–The Department of Labor and Industry of the Commonwealth.

Domestic services–Work in or about a private dwelling for an employer in his capacity as a householder, as distinguished from work in or about a private dwelling for such employer in the employer's pursuit of a trade, occupation, profession, enterprise or vocation.

Handicapped worker–An individual whose earning capacity for the work to be performed is impaired by physical or mental deficiency or injury.

Hotel or motel–An establishment which as a whole or part of its business activities offers lodging accommodations for hire to the public, and services in connection therewith or incidental thereto.

Hours worked–The term includes time during which an employe is required by the employer to be on the premises of the employer, to be on duty or to be at the prescribed work place, time spent in traveling as part of the duties of the employe during normal working hours and time during which an employe is employed or permitted to work; provided, however, that time allowed for meals shall be excluded unless the employe is required or permitted to work during that time, and provided further, that time spent on the premises of the employer for the convenience of the employe shall be excluded.

Labor on a farm–Labor on a farm shall include the following:

(i) The term farm includes stock, dairy, poultry, fur-bearing animal, fruit and truck farms, plantations, orchards, nurseries, greenhouses or other similar structures used primarily in the raising of agricultural or horticultural commodities.

(ii) The term labor on a farm includes the employment of a person on a farm in connection with one of the following:

(A) Cultivating the soil.

(B) Raising or harvesting an agricultural or horticultural commodity, including the raising or hatching of poultry and the raising, shearing, feeding, caring for, training and management of livestock, bees, fur-bearing animals and wildlife.

(C) Harvesting of maple sap.

(D) The operation, management, conservation, improvement or maintenance of a farm and its tools and equipment.

(E) The operation or maintenance of ditches, canals, reservoirs or waterways used exclusively for removing, supplying and storing water for farming purposes.

Learner–A person who is participating in a bona fide training program for an occupation in which that person is employed, the required training period for which is recognized to be at least 2 weeks; provided however, that no person may be deemed a learner at an establishment in an occupation for which that person has completed the required training, and in no case may a person be deemed a learner in such an occupation at an establishment after 8 weeks of training, except that a person may be deemed a learner for a longer period if the Secretary finds after investigation that for the particular occupation a minimum of proficiency cannot be acquired in 8 weeks.

Lodging–A housing facility available for the personal use of the employe at all hours.

Nonprofit organization–A corporation, unincorporated association, community chest, fund or foundation organized and operated exclusively for religious, charitable or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

Public amusement or recreational establishment–An establishment providing amusement, entertainment or recreation as its primary service to the public. The term also includes owners, lessees and concessionaires whose business is incidental to, connected to or a part of the business of the establishment. Amusement or recreational establishments shall be deemed public for the purpose of the act except for those that require as a condition for the use of the establishment one of the following:

(i) Individual membership.

(ii) Satisfaction of criteria fixed by the establishment other than the payment of a nominal fee.

Residential employe–An employe who resides and works on the premises of the employer.

Secretary–The Secretary of Labor and Industry of the Commonwealth. The term Secretary includes the authorized representative of the Secretary.

Student–An individual who is enrolled in and regularly attends, on a full-time basis during the daytime, an institution of learning offering a course of instruction leading to a degree, certificate or diploma, or who is completing residence requirements for a degree. A person is deemed to be a student during the time that school is not in session if that person was a student during the preceding semester, trisemester or similar term of instruction; provided however, that no person may be deemed a student for a period after the date of receipt of a degree, certificate or diploma.

Taxicab driver–An individual employed to drive an automobile equipped to carry no more than seven passengers which is used in the business of carrying or transporting passengers for hire on a zone or meter fare basis and which is not operated over fixed routes, between fixed terminals or under contract.

Tipped employe–An employe engaged in an operation in which the employe customarily and regularly receives more than $30 a month in tips.

Tips–Voluntary monetary contributions received by an employe from a guest, patron, or customer for services rendered.

Week–A period of 7 consecutive days starting on any day selected by the employer.

Source

The provisions of this §231.1 amended May 4, 1979, effective May 5, 1979, 9 Pa.B. 1467; corrected March 3, 1995, effective March 5, 1994, 25 Pa.B. 765. Immediately preceding text appears at serial pages (184537) to (184541).

Notes of Decisions

Determinations of what constitutes overtime must be decided under a collective bargaining agreement and not on the regulation alone. *Pennsylvania Federation of BMWE v. National RR Passenger Corp.*, 989 F.2d 112 (1993).

§231.11. Scope.

This chapter applies to employes and classes of employment not excluded, excepted or exempted from application of the act under section 3, 4 or 5 of the act (43 P. S. §§333.103–333.105).

§231.12. Penalty.

An employer or his agent or the officer or agent of a corporation who violates this chapter or who interferes with the Secretary in the enforcement of this chapter shall, upon conviction, be punished in accordance with section 12(c) of the act (43 P. S. §333.112(c)).

THE MINIMUM WAGE

§231.21. Rule.

(a) Every employe shall pay the minimum wage rate specified in section 4(a) of the act (43 P. S. §333.104(a)) subject to exclusions and exemptions as provided in the act and in this chapter.

(b) The minimum wage shall be paid for hours worked, regardless of the frequency of payment and regardless of whether the wage is paid on an hourly, salaried, or commissioned, piece rate, or any other basis. Where an employe works off the premises of the employer under circumstances which prevent adequate supervision by the employer, or in the case of a residential employe, the Secretary will approve any reasonable agreement between the employer and employe for determining hours worked.

§231.22. Deductions and allowances.

(a) Wages paid to an employe include the reasonable cost of board, lodging and other facilities if the board, lodging or other facilities are customarily furnished by the employer to the employe; provided however, that in no event shall the cost of the deductions and allowances exceed their actual cost, exclusive of profit, to the employer.

(b) An allowance or deduction for lodging shall be permitted as part payment of the minimum wage only when the facility affords the employe reasonable space, privacy, sanitation, heat, light and ventilation. Facilities shall be open to inspection by an authorized representative of the Secretary at any reasonable time.

(c) Deductions and allowances shall be made known to the employe and agreed to by the employe at the time of hiring. In addition, adjustments to the deductions and allowances shall be made known to the employe prior to the making of the adjustments.

§231.23. Commission.

When an employe is compensated solely on a commission basis, when an employe is paid in accordance with a plan providing for a base rate plus commission, or when the earnings of an employe are derived in whole or in part on the basis of an incentive plan, the wage paid weekly to the employe shall for each hour worked at least equal the applicable minimum rate set forth in section 4(a) of the act (43 P. S. §333.104(a)).

EMPLOYER RECORDS

§231.31. Contents of record.

(a) Every employer shall keep a true, accurate and legible record for each employe. The records shall be preserved for a period of 3 years from date of last entry and shall contain the following information:

(1) Name in full, and on the same record, the identifying symbol of the employe or number, if such is used in place of name on time, work or payroll records.

(2) Home address including zip code.

(3) Regular hourly rate of pay.

(4) Occupation.

(5) Time and day that the workweek begins. If the employe is part of a work force or employed in or by an establishment where all workers have a workweek beginning at the same time on the same day, a single notation of the time of the day and beginning day of the workweek for all workers shall suffice.

(6) The number of hours worked daily and weekly.

(7) Total daily or weekly straight time wages, that is, the total wages due for hours worked during the workweek, including all wages due during any overtime worked but exclusive of overtime excess compensation.

(8) Total overtime excess compensation for the workweek, that is, the excess compensation for overtime worked, which amount is over and above all straight time earnings or wages also earned during overtime worked.

(9) Total additions to or deductions from wages paid each pay period. Every employer making additions to or deductions from wages shall also maintain, in individual employe's accounts, a record of the dates, amounts and nature of the items which make up the total additions and deductions.

(10) Allowances, if any, claimed as part of the minimum wage.

(11) Total wages paid each pay period.

(12) Date of payment and the pay period covered by payment.

(13) Special certificates for students and learners as set forth in section 4(b) of the act (43 P. S. §333.104(b)).

(b) Where microfilm or another method is used for recordkeeping purposes, employers who use the microfilm or another method shall make available to authorized representatives of the Department the equipment which is necessary to facilitate review of the record.

(c) Where records are maintained at a central recordkeeping office other than in the place of employment, the records shall be made available for inspection at the place of employment within 7 calendar days following verbal or written notice from the Secretary or the authorized representative of the Secretary. The records shall be maintained for a period of 3 years from date of last entry.

Cross References

This section cited in 34 Pa. Code §231.32 (relating to exception).

§231.32. Exception.

With respect to persons employed in a bona fide executive, administrative or professional capacity or in the capacity of outside salesman, as defined in this chapter, employers shall maintain and preserve records containing the information and data required by §231.31 (relating to contents of records) except §231.31(a)(3) and (5)–(8) and containing the basis on which wages are paid. This may be shown as "$435 mos.," "$115 wk.," or "on fee."

§231.33. Students.

(a) For each individual for whom student status is claimed the records of an employer shall contain a statement from the school which the student attends indicating one of the following:

(1) The student is a full-time day student and the course of instruction is one leading to a degree, diploma or certificate.

(2) The student is completing residence requirements for a degree.

§231.34. Tipped employes.

Supplementary to the provisions of any section of this chapter pertaining to the payroll records to be kept with respect to employes, every employer shall also maintain and preserve payroll or other records containing the following additional information with respect to each tipped employe whose wages are determined under section 3(d) of the act (43 P. S. §333.103(d)):

(1) A symbol or letter placed on the pay records identifying each employe whose wage is determined in part by tips.

(2) Weekly or monthly amount reported by the employe, to the employer, of tips received. This may consist of reports made by the employes to the employer on IRS Form 4070.

(3) Amount by which the wages of each tipped employe have been deemed to be increased by tips, as determined by the employer, not in excess of 45% of the applicable statutory minimum wage until January 1, 1980 and thereafter 40% of the applicable statutory minimum wage. The amount per hour which the employer takes as a tip credit shall be reported to the employe in writing each time it is changed from the amount per hour taken in the preceding week. An employe failing or refusing to report to the employer the amount of tips received in any workweek shall not be permitted to show that the tips received were less than the amount determined by the employer in the workweek.

(4) Hours worked each workday in any occupation in which the tipped employe does not receive tips and total daily or weekly straight-time payment made by the employer for such hours.

(5) Hours worked each workday in occupations in which the employe received tips and total daily or weekly straight-time earnings for the hours.

Source

The provisions of this §231.34 amended May 4, 1979, effective May 5, 1979, 9 Pa.B. 1467. Immediately preceding text appears at serial page (32186).

§231.35. Inspection.

Payroll records of an employer shall be open to inspection by an authorized representative of the Secretary at a reasonable time. Employers shall permit an authorized representative of the Secretary to interrogate an employe in the place of employment and during work hours, with respect to the wages paid to and the hours worked by the employe or other employes.

§231.36. Statement to employe.

Every employer shall furnish to each employe a statement with every payment of wages, listing hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages.

§231.37. Posting.

Every employer covered by this chapter shall post, in a conspicuous place in the establishment of the employer, a summary of the act and this chapter.

OVERTIME PAY

§231.41. Rate.

Except as otherwise provided in section 5(a)–(c) of the act (43 P. S. §333.105(a)–(c)), each employe

shall be paid for overtime not less than 1½ times the employe's regular rate of pay for all hours in excess of 40 hours in a workweek.

Cross References

This section cited in 34 Pa. Code §231.43 (relating to regular rate).

§231.42. Workweek.

The term workweek shall mean a period of 7 consecutive days starting on any day selected by the employer. Overtime shall be compensated on a workweek basis regardless of whether the employe is compensated on an hourly wage, monthly salary, piece rate or other basis. Overtime hours worked in a workweek may not be offset by compensatory time off in any prior or subsequent workweek.

Cross References

This section cited in 34 Pa. Code §231.43 (relating to regular rate).

§231.43. Regular rate.

For purposes of these §§231.41–231.43 (relating to overtime pay), the regular rate at which an employe is employed shall be deemed to include all remuneration for employment paid to or on behalf of the employe, but it shall not be deemed to include the following:

(1) Sums paid as gifts, payments in the nature of gifts made at Christmas time or on other special occasions as a reward for service, the amounts of which are not measured by or dependent on hours worked, production or efficiency.

(2) Payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work or other similar cause, reasonable payments for traveling expenses or other expenses incurred by an employe in the furtherance of his employer's interests and properly reimbursable by the employer, and other similar payments to an employe which are not made as compensation for the employe's hours of employment.

(3) Sums paid in recognition of services performed during a given period if:

(i) Both the fact that payment is to be made and the amounts of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement or promise causing the employe to expect such payments regularly.

(ii) The payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan without regard to hours of work, production or efficiency.

(iii) The payments are talent fees paid to performers, including announcers on radio and television programs.

(4) Contributions irrevocably made by an employer to a trustee or third person under a bona fide plan for providing old-age, retirement, life, accident or health insurance or similar benefits for employes.

(5) Extra compensation provided by a premium rate for certain hours worked by the employe in any day or workweek because such hours are hours worked in excess of 8 in a day or in excess of the maximum workweek applicable to the employe under §231.41 (relating to rate) or in excess of the normal working hours or regular working hours of the employe, as the case may be.

(6) Extra compensation provided by a premium rate paid for work by the employe on Saturdays, Sundays, holidays or regular days of rest, or on the sixth or seventh day of the workweek, where

such premium rate is not less than 1½ times the rate established in good faith for like work performed in nonovertime hours on other days.

(7) Extra compensation provided by a premium rate paid to the employe in pursuance of an applicable employment contract or collective bargaining agreement for work outside of the hours established in good faith by the contract or agreement as the basic, normal or regular workday not exceeding 8 hours or workweek not exceeding the maximum workweek applicable to the employe under §231.41 (relating to rate), where the premium rate is not less than 1½ times the rate established in good faith by the contract or agreement for like work performed during the workday or workweek.

(b) If the employe is paid a flat sum for a day's work or for doing a particular job without regard to the number of hours worked in the day or at the job and if he receives no other form of compensation for services, his regular rate is determined by totaling all the sums received at the day rates or job rates in the workweek and dividing by the total hours actually worked. He is then entitled to extra half-time pay at this rate for hours worked in excess of 40 in the workweek.

(c) No employer may be deemed to have violated these §§231.41–231.43 (relating to overtime pay) by employing an employe for a workweek in excess of the maximum workweek applicable to the employe under §231.41 (relating to rate) if the employe is employed under a bona fide individual contract or under an agreement made as a result of collective bargaining by representatives of employes, if the duties of the employe necessitate substantially irregular hours of work. For example, where neither the employe nor the employer can either control or anticipate with a degree of certainty the number of hours the employe must work from week to week, where the duties of the employe necessitate significant variations in weekly hours of work both below and above the statutory weekly limit on nonovertime hours, or where the substantially irregular hours of work are not attributable to vacation periods, holidays, illness, failure of the employer to provide sufficient work, or other similar causes, and the contract or agreement:

(1) Specifies a regular rate of pay of not less than the minimum hourly rate and compensation at not less than 1½ times the rate for hours worked in excess of the maximum workweek.

(2) Provides a weekly guaranty of pay for not more than 60 hours based on the rates so specified.

(d) No employer may be deemed to have violated these §§231.41–231.43 by employing an employe for a workweek in excess of the maximum workweek applicable to the employe under §231.41 if, under an agreement or understanding arrived at between the employer and the employe before performance of the work, the amount paid to the employe for the number of hours worked by him in the workweek in excess of the maximum workweek applicable to the employe under §231.41:

(1) In the case of an employe employed at piece rates, is computed at piece rates not less than 1½ times the bona fide piece rates applicable to the same work when performed during nonovertime hours.

(2) In the case of an employe's performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than 1½ times the bona fide rate applicable to the same work when performed during nonovertime hours.

(3) Is computed at a rate not less than 1½ times the rate established by the agreement or understanding as the basic rate to be used in computing overtime compensation thereunder; and if the average hourly earnings of the employe for the workweek, exclusive of payments described in subsection (a)(1)–(7), are not less than the minimum hourly rate required by applicable law and if extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

(e) Extra compensation paid as described in subsection (a)(5)–(7) shall be creditable toward overtime compensation payable under these §§231.41–231.43 (relating to overtime pay).

(f) No employer may be deemed to have violated these §§231.41–231.43 by employing an employe of a retail or service establishment for a workweek in excess of 40 hours if:

(1) The regular rate of pay of the employe is in excess of 1½ times the minimum hourly rate applicable.

(2) More than half of the employe's compensation for a representative period, not less than 1 month, represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

Notes of Decisions

Daily Basis

By its very terms, this regulation applies to those employes whose salaries are quoted on a daily basis. These plaintiffs received a salary computed on a biweekly basis, so the regulation does not apply to them. This regulation simply does not apply to all Pennsylvania employes who receive a fixed annual salary. *Friedrich v. U. S. Computer Systems, Inc.*, # 90-1615, 3 Wage & Hour Cas. 2d (BNA) 181 (January 23, 1996).

Flat Sum

The placement of the disjunctives in subsection (b) of this regulation makes it applicable to two classes of employes. First, it applies to employes "paid a flat sum for a day's work . . . without regard to the number of hours worked in the day . . ." Second, it applies to employes "paid a flat sum . . . for doing a particular job without regard to the number of hours worked . . . at the job." *Friedrich v. U. S. Computer Systems, Inc.*, # 90-1615, 3 Wage & Hour Cas. 2d (BNA) 181 (January 23, 1996).

Hourly Wages

The computer field engineers' argument that they were hourly workers and entitled to overtime compensation failed when they were paid biweekly according to a 2-week pro rata proportion of their annual salaries and, therefore, this section was inapplicable. *Friedrich v. U. S. Computer Services, Inc.*, 833 F.Supp. 470 (E. D. PA 1993).

Particular Job

The term "particular" in this regulation presumably encompasses employes who perform duties as independent contractors, working on specific, discrete projects such as painting, construction or other services. *Friedrich v. U. S. Computer Systems, Inc.*, # 90-1615, 3 Wage & Hour Cas. 2d (BNA) 181 (January 23, 1996).

EMPLOYMENT OF LEARNERS

§231.51. Procedure.

An employer who wishes to employ a learner at less than the prescribed minimum wage must complete an application on a form furnished by the Secretary containing the following information:

(1) Occupation at which learners are to be employed.

(2) Duration of learning period during which the employer proposes to pay a wage less than the prescribed minimum.

(3) The nature and extent of the instruction and supervision.

(4) The number of regular employes employed by the employer in the occupation involved.

(5) Other information as may be required by the Secretary.

§231.52. Special certificate.

If the Secretary finds that the requested employment of learners in a given occupation at less than the minimum wage is necessary in order to prevent curtailment of opportunities for employment, the Secretary may issue a certificate to the employer authorizing employment at less than the prescribed minimum wage; provided however, that the wage may not be less than 85% of the otherwise applicable minimum wage established in section 4 of the act (43 P. S. §333.104). The certificate may limit the number of learners and proportion of learners to nonlearners. The wage specified on the certificate shall constitute the minimum wage for learners in the particular occupation at the establishment named therein.

§231.53. Posting of special certificate.

A copy of the special certificate and evidence that the employe is a learner shall be retained at the place of employment and be made available for inspection by the Secretary for a period of not less than 3 years after termination of employment of learners.

§231.54. Denial of an application for a special certificate.

An application for a special certificate may be denied, or the special certificate may be revoked by the Secretary for misrepresentation of facts in the application, for violation of the act or for other good cause shown. In addition, the certificate may be modified because of changes in conditions or circumstances.

EMPLOYMENT OF STUDENTS

§231.61. Procedure.

(a) An employer who wishes to employ students at less than the prescribed minimum wage shall complete an application on a form furnished by the Secretary.

(b) If the Secretary finds that the requested employment of students at less than the minimum wage is necessary in order to prevent curtailment of opportunities for employment, the Secretary may issue a certificate to the employer authorizing employment at a wage less than the prescribed minimum rate; provided however, that the wage may not be less than 85% of the otherwise applicable minimum wage established in section 4 of the act (43 P. S. §333.104).

(c) The following two types of special certificates for students may be issued:

(1) *Six or less students.* The employment of six or less students at less than the minimum hourly wage may not create a substantial probability of reducing the full-time employment opportunities for other workers nor shall it impair or depress the wage rates or working standards established for other workers engaged in work of the same or comparable nature.

(2) *Seven or more students.* If employment of students at subminimum wages increases to seven or more students, then the employer must file a new application for the appropriate certificate to hire seven or more students. To qualify for the certificate to hire seven or more students, the employer must maintain a ratio of at least three regular employes to each student employed.

(d) Students are permitted to work on a part-time basis, but not in excess of 20 hours in any workweek at the subminimum wage rate during the school term, except that when school is not in session the

weekly limitation on the maximum number of hours which may be worked at the subminimum rate may be increased by 8 hours for each holiday, but in no event for more than 40 hours a week.

(e) A copy of the certificate permitting the employment of students at the student rate shall be retained at the place of employment and be made available for inspection by the Secretary for not less than 3 years after termination of employment of students.

Source

The provisions of this §231.61 amended May 4, 1979, effective May 5, 1979, 9 Pa.B. 1467. Immediately preceding text appears at serial page (32192).

§231.62. Denial of application for special certificate.

An application for a special certificate may be denied or the special certificate may be revoked by the Secretary for misrepresentation of facts in the application, for violation of the act, or for other good cause shown. In addition, the certificate may be modified because of changes in conditions or circumstances.

EMPLOYMENT OF HANDICAPPED WORKERS

§231.71. Procedure.

(a) An employer who wishes to employ handicapped workers at less than the prescribed minimum wage shall complete an application on forms furnished by the Secretary.

(b) The application shall set forth the following information:

(1) The nature of the disability in detail.

(2) A description of the occupation at which the handicapped worker is to be employed.

(3) The wage the employer proposes to pay the handicapped worker per hour.

(4) Other information as may be required by the Secretary.

(c) The application shall be signed jointly by the employer and the handicapped worker for whom such application is being made, except as otherwise authorized by the Secretary.

Cross References

This section cided in 34 Pa. Code §231.73 (relating to special certificate).

§231.72. Conditions for granting certificate.

A certificate may be issued if the application is in proper form and sets forth facts showing that:

(1) The handicap impairs the earning capacity of the worker for the work the employe is to perform.

(2) The proposed minimum wage is commensurate with the production capacity of the employe.

Cross References

This section cited in 34 Pa. Code §231.73 (relating to special certificate).

§231.73. Special certificate.

If the application and other available information indicate that the requirements of these §§231.71–231.76 (relating to employment of handicapped workers) are satisfied, the Secretary will issue a certificate. If issued, copies of the certificate will be mailed to the employer and the handicapped worker, and if the certificate is not issued, the employer and the handicapped worker will be given written notice of the denial.

§231.74. Specifications of the certificate.

(a) A certificate will specify, among other things, the name of the handicapped worker, the name of the employer, the occupation in which the handicapped worker is to be employed, the authorized subminimum wage rate and the period of time during which such wage rate may be paid.

(b) A certificate shall be effective for a period to be designated by the Secretary. The handicapped worker employed under the certificate may be paid subminimum wages only during the effective period of the certificate.

(c) The wage rate set in the certificate will be fixed at a figure designated to reflect adequately the earning capacity of the handicapped worker.

(d) A money received by a handicapped worker by reason of a state or Federal pension or compensation program for handicapped persons may not be considered as offsetting any part of the wage due the handicapped worker by the employer.

(e) Except as otherwise provided in section 5(a)–(c) of the act (43 P. S. §333.105(a)–(c)), the handicapped worker shall be paid not less than 1½ times the regular rate for hours worked in excess of 40 in the workweek.

(f) The terms of a certificate, including the subminimum wage rate specified therein, may be amended by the Secretary upon written notice to the parties concerned if the facts justify the amendment.

Cross References

This section cited in 34 Pa. Code §231.73 (relating to special certificate).

§231.75. Renewal of certificate.

Application for renewal of a certificate shall be filed in the same manner as an original application. If the application has been filed prior to the expiration date of the certificate, the certificate shall remain in effect until the application for renewal has been granted or denied.

Cross References

This section cited in 34 Pa. Code §231.73 (relating to special certificate).

§231.76. Denial of application for a special certificate.

An application for a special certificate may be denied, or the special certificate may be revoked by the Secretary, for misrepresentation of facts in the application, for violation of the act, or for other good cause shown. In addition, the certificate may be modified because of changes in conditions or circumstances.

Cross References

This section cited in 34 Pa. Code §231.73 (relating to special certificate).

SPECIAL DEFINITIONS

§231.81. Definitions.

The term outside salesmen, executive, administrative and professional capacity shall be defined in these §§231.81–231.85 (relating to special definitions), and employment in those classifications shall be exempt from both the minimum wage and overtime provisions of the act.

§231.82. Executive.

Employment in a bona fide executive capacity means work by an individual:

(1) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision.

(2) Who customarily and regularly directs the work of two or more other employes.

(3) Who has the authority to hire or fire other employes or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employes will be given particular weight.

(4) Who customarily and regularly exercises discretionary powers.

(5) Who does not devote more than 20%, or, in the case of an employe of a retail or service establishment, who does not devote as much as 40% of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (1)–(4), provided that this paragraph may not apply in the case of an employe who is in sole charge of an independent establishment or a physically separated branch establishment or who owns at least 20% interest in the enterprise in which he is employed.

(6) Who is compensated for his services on a salary basis at a rate of not less than $155 per week, exclusive of board, lodging or other facilities, provided that an employe who is compensated on a salary basis at a rate of not less than $250 per week, exclusive of board, lodging or other facilities, and whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employes therein shall be deemed to meet all the requirements of this section.

Cross References

This section cited in 34 Pa. Code §231.81 (relating to definitions).

§231.83. Administrative.

Employment in a bona fide administrative capacity means work by an individual:

(1) Whose primary duty consists of the performance of office or nonmanual work directly related to management policies or general operation of his employer or the customers of the employer.

(2) Who customarily and regularly exercises discretion and independent judgment.

(3) Who regularly and directly assists an employer or an employe employed in a bona fide executive or administrative capacity, who performs under only general supervision work along specialized or technical lines requiring special training, experience or knowledge, or who executes under only general supervision special assignments and tasks.

(4) Who does not devote more than 20% of time worked in a workweek, or, in the case of an employe of a retail or service establishment, who does not devote more than 40% of time worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (1)–(3).

(5) Who is paid for his services a salary of not less than $155 per week, exclusive of board, lodging, or other facilities, provided that an employe who is compensated on a salary or fee basis at a rate of not less than $250 per week, exclusive of board, lodging or other facilities and whose primary duty consists of the performance of work described in paragraph (1), which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all of the requirements of this section.

Cross References

This section cited in 34 Pa. Code §231.81 (relating to definitions).

§231.84. Professional.

Employment in a bona fide professional capacity means work by an individual:

(1) Whose primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized instruction and study or the performance of work that is original and creative in character in a recognized field of artistic endeavor.

(2) Whose work requires the consistent exercise of discretion and judgment in its performance.

(3) Whose work is predominately intellectual and varied in character, as opposed to routine mental, manual, mechanical or physical work, and is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

(4) Who does not devote more than 20% of time worked in the workweek to activities which are not an essential part of and necessarily incident to the work described in paragraphs (1)–(3).

(5) Who is compensated for his services on a salary or fee basis at a rate of not less than $170 per week, exclusive of board, lodging or other facilities, provided that an employe who is compensated on a salary or fee basis at a rate of not less than $250 per week, exclusive of board, lodging or other facilities, and whose primary duty consists of the performance of work described in paragraph (1), which includes work requiring the consistent exercise of discretion and judgment, or the performance of work requiring invention, imagination or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section.

Cross References

This section cited in 34 Pa. Code §231.81 (relating to definitions).

§231.85. Outside salesman.

Outside salesman means an employe who is employed for the purpose of and who is customarily and regularly engaged more than 80% of work time away from the employer's place or places of business in the following manner:

(1) Making sales, including any sale, exchange, contract to sell, consignment for sale, or other disposition or selling, and delivering articles or goods.

(2) Obtaining orders or contracts for the use of facilities for which a consideration will be paid by the client or customer. In addition, the employe may not spend more than 20% of the hours worked in

any week in work of a nature not directly related to and in conjunction with the making of sales; provided however, that work performed incidental and in conjunction with the employe's own outside sales or solicitations, including incidental deliveries and collections, shall be not regarded as nonexempt work.

Cross References

This section cited in 34 Pa. Code §231.81 (relating to definitions).

FOOD-SERVICE EMPLOYEE INCENTIVE PROGRAM

§231.91. Authority and effective date.

(a) This section and §§231.92—231.99 set forth the rules governing the Food-Service Incentive Employee Program for participating restaurant and food-service operations employers and their employees in this Commonwealth under section 5.1 of the Minimum Wage Act of 1968 (act) (43 P. S. §333.105a).

(b) This section and §§231.92—231.99 will expire, along with section 5.1 of the act on July 14, 2004, unless section 5.1 is extended by the General Assembly.

(c) Under section 5.1(j) of the act (43 P. S. §333.105a(j)), a claim arising under the Food-Service Employee Incentive Program provisions shall be brought under the Wage Payment and Collection Law (43 P. S. §§260.1—260.12).

(d) Any employee, labor organization or party to whom wages are payable under the Food-Service Employee Incentive Program may request the Secretary, or an authorized representative, to take an assignment in trust and to bring legal action to collect the wages, as provided by section 9.1 of the Wage Payment and Collection Law (43 P. S. §260.9a).

Authority

The provisions of this §231.91 issued under section 3 of the act of December 21, 1998 (P. L. 1290, No. 168) (43 P. S. §333.105a note).

Source

The provisions of this §231.91 adopted July 13, 2001, effective July 14, 2001, 31 Pa.B. 3765.

§231.92. Eligibility.

(a) The Food-Service Employee Incentive Program is a voluntary program open to new employees of employers engaged as restaurant and food-service operations in this Commonwealth.

(b) A participating employee shall work a minimum of 20 hours a week.

Authority

The provisions of this §231.92 issued under section 3 of the act of December 21, 1998 (P. L. 1290, No. 168) (43 P. S. §333.105a note).

Source

The provisions of this §231.92 adopted July 13, 2001, effective July 14, 2001, 31 Pa.B. 3765.

Cross References

This section cited in 34 Pa. Code §231.91 (relating to authority and effective date).

§231.93. Amount of training wage.

(a) The amount of the training wage paid to participants in the Food Service Employee Incentive Program shall be established and agreed to in writing by the employee and the employer.

(b) The training wage cannot be less than the minimum wage established by The Minimum Wage Act of 1968 (43 P. S. §§333.101—33.115).

(c) The employer may use tip credits toward satisfying the minimum wage for tipped employees, as provided for in section 3(d) of The Minimum Wage Act of 1968 (43 P. S. §333.103(d)).

Authority

The provisions of this §231.93 issued under section 3 of the act of December 21, 1998 (P. L. 1290, No. 168) (43 P. S. §333.105a note).

Source

The provisions of this §231.93 adopted July 13, 2001, effective July 14, 2001, 31 Pa.B. 3765.

Cross References

This section cited in 34 Pa. Code §231.91 (relating to authority and effective date).

§231.94. Length of training period.

The training periods shall be at least, but not more than, the following:

Job Title	*Training Period*
Dishwashers	2—4 weeks
Bus Persons	2—4 weeks
Servers	2—12 weeks
Sales Staff	2—6 weeks
Cooks	4—12 weeks
Hostess/Host/Cashier	4—12 weeks

Authority

The provisions of this §231.94 issued under section 3 of the act of December 21, 1998 (P. L. 1290, No. 168) (43 P. S. §333.105a note).

Source

The provisions of this §231.94 adopted July 13, 2001, effective July 14, 2001, 31 Pa.B. 3765.

Cross References

This section cited in 34 Pa. Code §231.91 (relating to authority and effective date).

§231.95. Employee incentive account.

(a) The employer shall maintain at least one escrow or restricted account designated as an Employee Incentive Account (Account) in accordance with section 5.1 of the Minimum Wage Act of 1968 (43 P. S. §333.105a).

(b) The employer shall deposit sums consisting of no less than the difference between the training wage and the entry-level wage into the Account on each regular payday during the training period. The

employer shall credit the deposit in the name of each participating employee.

(c) Funds in the Account shall be the property of the employer until the employer is required to make payments to the employee. Funds in the Account are nontransferable and nonassignable.

(d) The employer shall maintain complete, detailed payroll records. The records shall include a listing of all deposits and withdrawals from the Account.

(e) The employer shall maintain the records at the place of employment or at a central recordkeeping office within or outside this Commonwealth. The employer shall maintain these records for 3 years in accordance with §231.31 (relating to contents of record).

(f) Access to records maintained by the employer under this section shall be provided to the Department's representatives within 7 days following written or verbal notice by the Secretary or an authorized representative.

Authority

The provisions of this §231.95 issued under section 3 of the act of December 21, 1998 (P. L. 1290, No. 168) (43 P. S. §331.105a note).

Source

The provisions of this §231.95 adopted July 13, 2001, effective July 14, 2001, 31 Pa.B. 3765.

Cross References

This section cited in 34 Pa. Code §231.91 (relating to authority and effective date).

§231.96. Writing required.

(a) The employer shall provide written notification to the employee prior to the commencement of the training program of the following:

(1) The training wage and the starting date of training.

(2) The length of the training period and the position for which the employee is being trained.

(3) The entry-level wage which the employee will receive upon completion of the training period.

(4) The financial institution where the employer maintains the Food-Service Employee Incentive Account.

(5) The installment-payment schedule to be following after the employee completes the training period, provided that the employer shall revise this schedule with the employee's written consent when the employee is promoted prior to completion of the training period.

(b) The employer shall obtain a signed acknowledgement that the employee has read and understands the written notification.

(c) The employer shall maintain a copy of the signed acknowledgement for 3 years, along with other records required to be kept under §§231.31—231.35.

(d) The Department will prepare a recommended notification and acknowledgement form that an employer may use. The Department will make these forms available on its Internet website and by electronic mail, facsimile transmission or regular mail, upon request.

Authority

The provisions of this §231.96 issued under section 3 of the act of December 21, 1998 (P. L. 1290, No. 168) (43 P. S. §331.105a note).

Source

The provisions of this §231.96 adopted July 13, 2001, effective July 14, 2001, 31 Pa.B. 3765.

Cross References

This section cited in 34 Pa. Code §231.91 (relating to authority and effective date).

§231.97. Training.

(a) The employer shall provide an employee with the usual and customary training associated with the position for which the employee was hired.

(b) The employer shall be responsible for all training costs, whether incurred by the employer or employee.

Authority

The provisions of this §231.97 issued under section 3 of the act of December 21, 1998 (P. L. 1290, No. 168) (43 P. S. §331.105a note).

Source

The provisions of this §231.97 adopted July 13, 2001, effective July 14, 2001, 31 Pa.B. 3765.

Cross References

This section cited in 34 Pa. Code §231.91 (relating to authority and effective date).

§231.98. Completion of training.

(a) After an employee completes the training period or is promoted, the employer shall pay all funds credited to the employee in the Food-Service Employee Incentive Account (Account). Payment shall be made in equal installments over a period of time equal to the length of the training period. These installment payments shall be paid to the employee, in addition to employee's entry-level wage, until the employee has received the full amount credited to the employee in the Account.

(b) The employer shall pay funds credited to employees in the Account, within 30 days of separation, to employees who are separated from the employer under any of the following conditions:

(1) Involuntary termination prior to completion of the training period for reasons other than willful misconduct.

(2) Voluntary termination of employment after promotion or completion of the training period.

(3) Involuntary separation from employment after promotion or completion of the training period without regard to cause.

Authority

The provisions of this §231.98 issued under section 3 of the act of December 21, 1998 (P. L. 1290, No. 168) (43 P. S. §331.105a note).

Source

The provisions of this §231.98 adopted July 13, 2001, effective July 14, 2001, 31 Pa.B. 3765.

Cross References

This section cited in 34 Pa. Code §231.91 (relating to authority and effective date).

§231.99. Forfeiture of escrowed funds.

(a) An employee who voluntarily terminates employment with the employer prior to completion of the training period forfeits all funds credited to the employee in the Food-Service Employee Incentive Account (Account).

(b) An employee terminated from employment for willful misconduct, as that term is used in the Unemployment Compensation Law (43 P. S. §§751—914), prior to completion of the training period forfeits all funds credited to the employee in the Account.

(c) When investigating claims and complaints regarding payments or forfeitures of funds in the Account, the Department may rely upon any final adjudication issued under the Unemployment Compensation Law regarding the nature of the employee's separation or whether the separation was for willful misconduct.

Authority

The provisions of this §231.99 issued under section 3 of the act of December 21, 1998 (P. L. 1290, No. 168) (43 P. S. §331.105a note).

Source

The provisions of this §231.99 adopted July 13, 2001, effective July 14, 2001, 31 Pa.B. 3765.

Cross References

This section cited in 34 Pa. Code §231.91 (relating to authority and effective date).

APPENDIX "L"

Maine Department of Labor

Employment Standard Defining Employee vs Independent Contractor

Current law establishes a common "employment" definition for workers' compensation, unemployment insurance and wage & hour coverage. This employment standard replaces the multiple tests previously used by these agencies and seeks to eliminate the prior confusion experienced by businesses when they received different determinations as to whether a worker was an employee or independent contractor from state agencies enforcing employment laws.

For More Information

Matrix for determining independent contractor status

The employment standard was developed collaboratively by a broad representation from Maine's business and labor communities working closely with representatives of the Department of Labor, Maine Workers' Compensation Board and the Attorney General's Office. The goal was to develop an "easy to understand" test that would effectively describe employment relationships across all occupations and industries. It was also hoped that this test could serve
as a 'guide' for business owners in deciding the type of business model that best meets their needs as well as in determining whether an individual worker relationship was that of an employee or independent contractor.

The Maine Workers' Compensation Board and the Unemployment Insurance Program will share information about and adopt one another's formal employment determinations to further streamline the audit process for employers. However, this does not include the rebuttable "pre-determination" process used by Workers Compensation (which is a self-declaration process that is fully rebuttable in the event of an injury), as federal law precludes someone from voluntarily giving up their protection under a State's unemployment laws.

Actual Language of the Law (26 M.R.S.A., Chapter 13, 1043, 11, E)

Services performed by an individual for remuneration are considered to be employment subject to this chapter unless it is shown to the satisfaction of the bureau,

that the individual is free from the essential direction and control of the employing unit, both under the individual's contract of service and in fact, the employing unit proves that the individual meets all of the criteria in Number 1 and three (3) of the criteria in Number 2 as listed below.

1. The following criteria must be met:

   a. The individual has the essential right to control the means and progress of the work except as to final results;
   b. The individual is customarily engaged in an independently established trade, occupation, profession or business;
   c. The individual has the opportunity for profit and loss as a result of the services being performed for the other individual or entity;
   d. The individual hires and pays the individual's assistants, if any, and, to the extent such assistants are employees, supervises the details of the assistants' work; and
   e. The individual makes the individual's services available to some client or customer community even if the individual's right to do so is voluntarily not exercised or is temporarily restricted; and

2. At least three (3) of the following criteria must be met:

   a. The individual has a substantive investment in the facilities, tools, instruments, materials, and knowledge used by the individual to complete the work;
   b. The individual is not required to work exclusively for the other individual or entity;
   c. The individual is responsible for satisfactory completion of the work and may be held contractually responsible for failure to complete the work;
   d. The parties have a contract that defines the relationship and gives contractual rights in the event the contract is terminated by the other individual or entity prior to completion of the work;
   e. Payment to the individual is based on factors directly related to the work performed and not solely on the amount of time expended by the individual;
   f. The work is outside the usual course of the business for which the service is performed; or
   g. The individual has been determined to be an independent contractor by the federal Internal Revenue Service. *(an SS-8 determination)

Also included in this new law are clear penalties to deter the intentional misclassification of workers as independent contractors when they are employees per the standard. This practice not only creates a competitive disadvantage for those employers who correctly classify their workers but also increases unemployment tax premiums because fewer employers are paying appropriate taxes. Therefore, penalties ranging up to $10,000 were included in the new law to deter this practice.

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Credits

Maine Department of Labor

How to Determine Independent Contractor Status under the New Employment Standard Effective 01/01/2013

Step 1: Is the individual free from direction or control of the employing unit?

No: Stop. The individual is an *employee*, not an independent contractor.
Yes: Move to step 2.

Step 2: Does the individual have the essential right to control the means and progress of the work except as to final results?

No: Stop. The individual is an *employee*, not an independent contractor.
Yes: Move to step 3.

Step 3: Is the individual customarily engaged in an independently established trade, occupation, profession or business?

No: Stop. The individual is an *employee*, not an independent contractor.
Yes: Move to step 4.

Step 4: Does the individual have the opportunity for profit and loss as a result of the services being performed for the other individual/entity?

No: Stop. The individual is an *employee*, not an independent contractor.
Yes: Move to step 5.

Step 5: Does the individual hire and pay his or her assistants (if any) and to the extent that these assistants are employees, supervise the details of their work?

No: Stop. The individual is an *employee*, not an independent contractor.
Yes: Move to step 6.

Step 6: Does the individual make their services available to some client or customer community even if their right to do so is voluntarily not exercised or is temporarily restricted?

No: The individual is an *employee*, not an independent contractor.
Yes: Move to step 7.

Step 7: Determine if the individual meets any of the 3 of the following elements:

- The individual has a substantive investment in the facilities, tools, instruments, materials, & knowledge used by the individual to complete the work.
- The individual is not required to work exclusively for the other individual/entity.
- The individual is responsible for satisfactory completion of the work and may be held contractually responsible for failure to complete the work.
- The parties have a contract that defines the relationship and gives contractual rights in the event the contract is terminated by the other individual/entity prior to completion of the work.
- Payment to the individual is based on factors directly related to the work performed and not solely on the amount of time expended by the individual.
- Such work is outside the usual course of the business for which the services is performed.
- The individual has an IRS Determination (SS-8) of independent contractor status.

No: the individual meets less than 3 elements, STOP. The individual is an employee, not an independent contractor.
Yes: the individual meets 3 or more elements; the individual *is* an independent contractor.

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APPENDIX "M"

Minimum Wage

MAINE DEPARTMENT OF LABOR
Labor Standards

Labor Laws of the State of Maine provide protection for people who work in Maine. The Maine Department of Labor administers the laws, which all employers must follow. Department representatives inspect workplaces to ensure compliance. Citations and penalties may be issued to employers who do not comply.

This poster describes some important parts of the laws. A copy of the actual laws or formal interpretations may be obtained from the Department of Labor, Bureau of Labor Standards, by calling (207) 623-7900. (The laws are also on the Bureau's web site.)

Maine Law (Title 26 M.R.S.A. § 668) requires every employer to place this poster in the workplace where workers can easily see it.

This poster is provided at no cost by the Maine Department of Labor and may be copied.

October 1, 2009 — Minimum Wage is $7.50 per hour

Service Employees
A service employee is someone who regularly receives more than $30 a month in tips. The employer must pay a cash wage of at least one-half of the regular minimum wage. If the employee's total cash wage combined with the total tips for the week do not average at least the minimum hourly wage, the employer must pay the employee the difference in wages. Tips belong to the employee providing direct service to the customer. Employees may be required to pool their tips to be divided evenly among service employees only.

Exempt From Minimum Wage and Overtime*
- Individuals employed in agriculture, except when employed for or on a farm with over 300,000 laying birds.
- Employees whose earnings are from sales commissions and whose hours and place of employment are not controlled by the employer.
- Taxicab drivers.
- Employees who are counselors, junior counselors or counselors-in-training at camps licensed under Title 22, Sec. 2495 and employees under 18, who are employed at organized camps and similar seasonal recreation programs not requiring such license if they are operated by a non profit organization.
- People who catch fish or work in farming of marine life.
- Switchboard operators in public telephone exchanges with less than 750 stations.
- Home workers not supervised or controlled and who buy raw materials and complete articles for sale.
- Dependent members of the employer's family.
- Executive, administrative or professional employees with a salary of at least $455.00 weekly.

Exempt From Overtime Only*
- Processing of sardines or other perishable food products.
- Public employees, including fire and police departments.
- Automobile salespeople, mechanics, service writers, and parts clerks who are paid on a commission or flat-rate basis.
- Drivers and driver's helpers who are exempt from overtime under Federal law:
  - Are exempt from overtime under Maine law if they are paid by other than an hourly rate of pay and subject to the provision of 49 United States Code, Section 31502.
  - Are exempt from overtime under Maine law if they are covered by a collective bargaining agreement that regulates their rate of pay.
  - Are exempt from overtime under Maine law if they are employed by an entity that has a contract with the Federal Government or an agency of the Federal Government that dictates the minimum hourly rate they will be paid.

Equal Pay
Employees shall be paid the same wages as employees of the opposite sex for work that is of a comparable nature in skill, effort and responsibility. This does not include seniority, merit or shift differentials which do not discriminate based on sex.

Employers may not discriminate against an employee for inquiring about, disclosing, comparing or otherwise discussing the employee's wages with others.

Board and Lodging
Wages may include reasonable costs to the employer furnishing food and lodging. Food and lodging must actually be used by the employee, clearly shown on the employee statement and wage records, and approved by the Bureau of Labor Standards.

Statements to Employees
Every employer shall give to each employee with the payment of wages a statement clearly showing the date of the pay period, hours worked, total earnings and itemized deductions.

Records
Employers shall keep, for three years, accurate records of hours worked and wages paid to all employees.

Unfair Contracts
An employer cannot make a special contract or agreement with an employee to exempt that employee from minimum wage or overtime.

***Note:** Maine employers may also be covered under the Federal Fair Labor Standards Act. For more information, contact the U.S. Department of Labor Wage and Hour Office at 603-666-7716.*

For more information, contact:
Maine Department of Labor
Bureau of Labor Standards
45 State House Station
Augusta, Maine 04333-0045
Telephone: 207-623-7900
TTY users call Maine Relay 711
Web site: www.maine.gov/labor/bls
E-mail: webmaster.bls@maine.gov

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