October 2010

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Time is Money:

Properly Paying Non-exempt Employees

Panelists:

Amanda J. Goss

Patrick M. Madden

Steven R. Peltin

Ryan D. Redekopp

Contents

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Recent Developments

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Reasonable Breaks Required For Nursing Mothers

- Patient Protection and Affordable Care Act amends FLSA to require "reasonable" unpaid breaks for nursing mothers to express breast milk for one year after birth
- No guidance regarding number, length or timing of breaks
- Employers must provide a place for breaks – not a bathroom – that is shielded from view and free from intrusion

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Reasonable Breaks Required For Nursing Mothers

- Exceptions
  - Does not cover employers with fewer than 50 employees if compliance would cause "undue hardship" due to "significant difficulty or expense"
  - Does not cover white collar exempt employees
- State laws with greater protections are not preempted; Washington has no law, but almost half of other states do
- Takeaway: Employers must accommodate nursing mothers, but it may be hard to find suitable location in smaller workplaces

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Fitness-for-Duty Examination Did Not Violate ADA

Brownfield v. City of Yakima, 612 F.3d 1140 (9th Cir. 2010)

- City requires police officer to submit to psychological examination after series of incidents caused concerns about volatile personality; officer had suffered head injury four years earlier
- Exam finds him unfit for duty despite satisfactory job performance
- City wins ADA lawsuit; Ninth Circuit affirms

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Fitness-for-Duty Examination Did Not Violate ADA

- ADA allows medical examinations to determine whether employee may perform job duties only if job-related and consistent with business necessity
- Ninth Circuit previously ruled that this standard was met "where heath problems have had a substantial and injurious impact on an employee's job performance," but had not addressed whether employers may require examinations before performance declines

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Fitness-for-Duty Examination Did Not Violate ADA

- OK to require examination if employer has "significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job"
- City had reasonable cause, largely due to stressful and dangerous nature of police work; however, isolated instances of lost temper or merely annoying or inefficient behavior usually will not justify examination
- Takeaway: Employers should tread carefully and seek advice before ordering psychiatric examinations

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Increased Litigation Over Meal and Rest Breaks

- Recent flurry of class actions against Washington employers alleging inadequate meal and/or rest breaks
- Trial court decisions have been inconsistent and provide little reliable guidance for employers
- L&I is in the process of developing new regulations; unclear when they will issue

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Increased Litigation Over Meal and Rest Breaks

- Takeaway: Until new regulations issue, employers should follow existing requirements with extreme care
  - Unpaid meal periods must include at least 30 uninterrupted minutes of break time
  - Where an employer chooses to pay for meal periods, employees must still receive 30 total minutes of break time
  - Consider requiring employees to clock in and out for meal periods
  - Consider how to prove that employees actually receive 10 minute rest periods every four hours

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Time is Money:
Properly Paying Non-exempt Employees

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Scope of Presentation

- Work time issues at the start and end of the work day
- Addressing wage and hour issues and errors
- Responding to the new administrative wage claim process under Washington law

Determining Hours Worked at the Start and End of the Work Day

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Why Should Employers Care?

- Wage and hour issues are based on outdated and arcane laws that are difficult to apply
- Virtually no employer is in compliance all the time
- Violations often give rise to class claims
- The amounts at risk can be substantial

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General Requirements of Wage Laws

- The Fair Labor Standards Act ("FLSA")
  - Minimum wage
  - Overtime for work in excess of 40 hours in a workweek
  - Allows for recovery of unpaid wages, liquidated damages, attorneys fees, and penalties
- Compliance with the FLSA is not enough – must also comply with all state law requirements

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Hours Worked -- Generally

- Work includes activities that are:
  - Primarily for the benefit of the employer
  - Suffered or permitted by the employer
- A matter is suffered or permitted if the employer knew or should have known about the activity
- Work includes activities that involve physical and mental exertion, but exertion is not required

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Continuous Workday Rule

- Activities that are integral and indispensable to principal activities are themselves principal activities for starting the workday
- Preliminary and postliminary activities are not work and do not start the workday

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The *De Minimis* Doctrine

- A few seconds or minutes may be disregarded depending on the realities of the workplace
- Factors include:
  - Administrative difficulty of recording the time
  - Aggregate amount of compensable time involved
  - Regularity of the additional work

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Issues at Start and End of Work Day

- Potential work at home
- Commuting and travel time
- Security screening
- Clothes changing and equipment donning and doffing
- Waiting and walking time
- Pass-down time and employee discussions
- Computers, equipment, and tools

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Potential Work at Home

- Work-related activities at home may be compensable
  - Examples: email, scheduling, paperwork
- Criteria
  - Do activities primarily benefit employer?
  - Are activities integral or indispensable to principal activities?
  - Did the employer know?
  - Are the activities *de minimis*?

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Commuting and Travel Time

- Commuting between home and work generally not compensable
- Impact of: time, transporting equipment, different job sites, traveling with co-workers, discussion of work-related issues, and travel in company vehicles
- Commuting in company cars and the Employee Commuting Flexibility Act of 1996
- Areas of continuing risk: ECFA agreements, travel to another city, and travel between work sites

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Security Screening

- Time spent waiting at and passing through security checkpoints may be compensable
- Three key considerations:
  - Is activity required by employer?
  - Is activity necessary for employee to perform the job?
  - Does activity primarily benefit the employer?
- Area of risk: loss control

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Clothes and Equipment Donning and Doffing

- Is clothing or equipment optional or required by law, employer rules, or nature of the work?
- Is clothing or equipment integral and indispensable to a principal activity?
- Are employees required to change at work?
- Are changing activities excluded from hours worked by 29 U.S.C.§203(o)?
- Is employer paying for this time on a formula basis?

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Waiting and Walking Time

- Employees are working if they are “engaged” to wait
- Employees may not be working if they are “waiting” to be engaged
- Key issues:
  - Are employees completely relieved from duty and free to use time for their own purposes?
  - Do the activities fall within the continuous workday?

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Pass-Down Time and Employee Discussions

- Any required discussions of business operations count as work
- Personal conversations may not count as work depending on:
  - Whether the workday has started under the continuous workday rule
  - How long the personal discussions last

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Computers, Equipment, and Tools

- Time spent setting up, laying out, turning on, preparing, testing, putting away, rolling up, and turning off computers, equipment, or tools generally counts as work time
- These activities typically start or continue the workday for purposes of continuous workday rule
- Key issue: Are employees using restroom, getting coffee, and visiting with friends before or after these work activities occur?

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Timekeeping and Rounding Systems

- Employers have an obligation to keep accurate records of time worked
- Employers can use a system that rounds to the nearest quarter hour or less
- Key issues:
  - Is the system neutral?
  - What impact does your attendance policy have?

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What Can an Employer Do To Reduce Risk?

- Structure jobs to minimize issues
- Adopt appropriate policies
- Establish an ongoing educational campaign
- Have employees verify time entries
- Have employees participate in any corrections
- Randomly check and verify records
- Promptly investigate and resolve complaints
- Discipline employees and managers
- Obtain an opinion?

Addressing Wage and Hour Issues and Errors

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Assess the Problem

- Determine whether the problem is merely a payroll error or a systemic issue
- If a payroll error, promptly pay the employee what is due
- Systemic issues present two issues:
  - How to assure future compliance
  - Whether and how to address past exposure

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Assuring Future Compliance

- Key issue: How to make required changes without inviting a class action lawsuit?
- Look for alternative justifications for changes that need to be made (new legislation or regulations; leveling; restructuring; new compensation system)
- Systemic changes can be mixed with other restructuring and changes
- Develop a communication plan to accompany and explain the changes

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Options for Past Exposure

- Pay employees what you believe is due
  - Waivers and releases are probably not effective
  - Might want employees to certify key facts
- Obtain U.S. Department of Labor involvement
- Wait to see if you get sued

Washington State Wage Payment Act

Amanda J. Goss
Assistant Attorney General
October 27, 2010

Employment Standards

Today we will cover…

- ❑What are the key provisions of the Wage Payment Act (WPA)?
- ❑What is the wage complaint investigation process?
- ❑What happens at the end of an investigation?
- ❑What are Citations and Determinations of Compliance?
- ❑What are your options?

What is the Wage Payment Act?

- The Legislature passed the WPA in 2006.
- The WPA requires L&I to investigate wage complaints.

Did you ever get one of these?

Employment Standards Program
15 West Yakima Ave, Suite 100- Yakima, WA 98902-5789

October 18, 2010

Tommy's Burgers & Brew
1015 Cattlemen Drive
Ellensburg, WA 98926

Subject: **Important: An employee has filed a wage complaint against your company**
Case No. 59253

Dear Mr. James:

I am writing to let you know that we have received a wage complaint from a current or former employee of yours. I hope to hear from you soon so that we can quickly and fairly resolve this complaint with the most complete information you can make available to us.

Name of employee: Angus Roundup
Amount of wage claim: $262.50
For wages earned in the period: September 1, 2010 to September 10, 2010
Description of complaint: Worked 17.5 overtime hours during the Ellensburg Rodeo

If you agree you owe these wages:
- Write a check ***made payable to the above employee*** for the amount shown above, less applicable taxes.
- Prepare a statement of earnings for the time period shown above.
- Send the check and earnings statement to L&I at the address above.
  - L&I will mail you a signed release of complaint from the employee.

If you don't agree you owe these wages:
- Send me a written response and any documentation you have that will help us understand your side of this dispute, including:
  - ✓ Address, telephone number and social security number of employee.
  - ✓ Copies of the employee's time records showing hours worked per day and per week.
  - ✓ Payroll records showing the pay basis, rate or rates of pay, gross wages and all deductions for each pay period for the specified period.
  - ✓ Dates of payment and the dates that each pay period covered.
  - ✓ Agreement, contract, or other document specifying terms for payment of wages.
  - ✓ Copies of checks (front and back) verifying receipt of payment.
  - ✓ Other documents you believe may be appropriate for this investigation.

ER 1-A 12-08

Tommy's Burgers & Brew
October 18, 2010
Page 2

Please send the payment and/or records to my attention at the above address no later than **November 7, 2010.**

Next steps:
- It's very important for you to respond by the above date and provide the records we request.
- If you promptly send us the records we request, and we find that you did *not* violate any wage law, we will issue you a legal document called a *Determination of Compliance.*
- If L&I finds that you owe wages, you will be informed. If you pay the wages, no further action will be taken.
- If you don't agree to pay the wages, L&I will issue a *Citation and Notice of Assessment* that orders you to pay wages found owed plus interest at 1% per month since the date the wages were originally owed. In certain cases, a penalty may also be assessed.
- If you *are* cited for unpaid wages, you will have the right to appeal the citation and request a hearing. Citations always include written appeal instructions.

We have enclosed a fact sheet with more information for you about wage complaint investigations.

Thank you for your patience and cooperation. Please call if you have any questions.

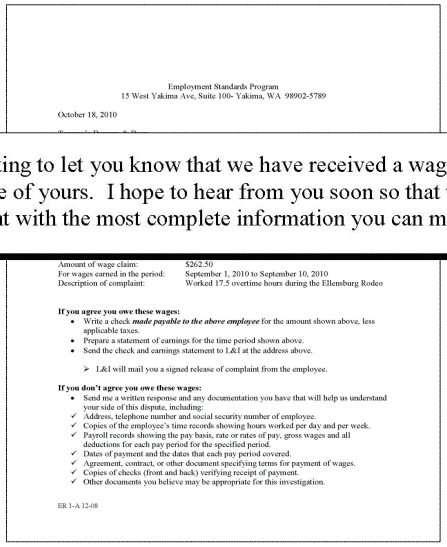
Sincerely,

Nick Hernandez
Industrial Relations Agent

Enc: Wage Payment Act
Employer Fact Sheet
Copy of complaint form
RCW 49.46.130

ER 1-A 12-08

Paragraph from page 1



Employment Standards Program
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ER 1-A 12-08

WPA Wage Complaints

Minimum wages	RCW 49.46.020
Overtime wages	RCW 49.46.130
Final wages	RCW 49.48.010
Agreed wages	RCW 49.52.050
Deductions	RCW 49.48.010 RCW 49.52.060

Who can file wage complaints?

Only current or former employees can file a wage complaint, which must be in writing.

A wage complaint is filed for a specific worker.

Who can't file wage complaints?

L&I will not accept complaints from..

- ✗ "Anonymous"
- ✗ Former spouses
- ✗ Third party groups
- ✗ Independent contractors
- ✗ Owners or partial owners

Complaints not accepted

- A complaint for wages that were due more than three years ago.
- A complaint against an employer when the employee has filed a private civil lawsuit to recover the wages.
- A complaint against an employer that has filed or is in bankruptcy.

Not Covered

- Unpaid vacation
- Unpaid sick leave balance owing upon leaving employment
- Other fringe or agreed-upon benefits such as mileage, per diem, expenses, etc.

Wage Complaint Investigations

- The investigation process includes the exchange of information between the L&I Industrial Relations Agent, the worker, and the business.
- The investigation timeline is 60 days but it can be extended for good cause.
- Employers must permit an inspection of their records within a reasonable time.
- The WPA precludes an employer from using records at a hearing if the employer did not allow an inspection of those records.

Investigation outcomes

- The complaint may be resolved.
- L&I can find that no wage violation occurred. (Determination of Compliance).
- L&I can order an employer to pay wages, penalties, and interest. (Citation and Notice of Assessment).

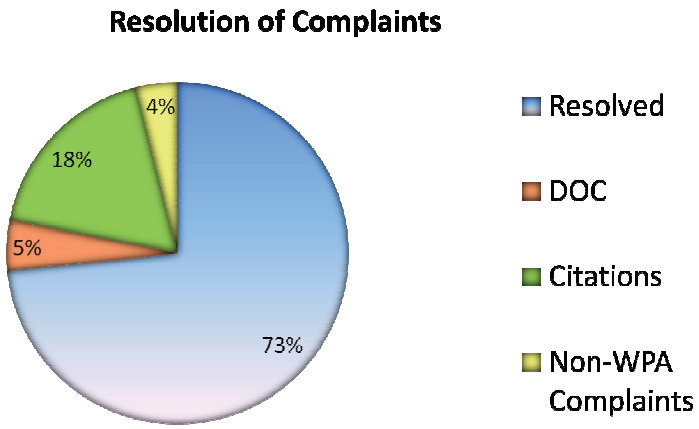
Determination of Compliance

- ✓ If the investigation does not substantiate the wage complaint, L&I will issue a Determination of Compliance ("DOC").
- ✓ A DOC is a written determination by L&I that the wage payment requirements have not been violated by the employer.

Citation and Notice of Assessment

- ✓ L&I will issue a Citation if the result of L&I's investigation is that wages are due and the wage complaint is not otherwise resolved.
- ✓ L&I may order the employer to pay all wages due including interest of 1% per month to the employee.
- ✓ L&I may assess a penalty of $1,000 or 10% of gross wages due (whichever is greater) up to a maximum of $20,000 per Citation for willful violations.

Over 4,400 complaints received in FY 2009 -2010



Options if not resolved

- Either party may appeal a Determination of Compliance or a Citation and Notice of Assessment.
- An employer can choose to pay the Citation amount.
- If the employer pays the Citation amount within 10 days, any penalty is automatically waived (except for repeat willful violators).

Employee Option to "Opt Out" of the Citation

- If the employee opts out within 10 days from receiving the Citation, then L&I must vacate the Citation. The Citation and any payment or offer of payment will not be admissible in a court or administrative action.
- If the employee does not opt out within this time, the employee is stuck with the WPA process and cannot take private legal action.

Successor Liability

- A "successor" can be liable for the Citation amount.
- The successor can be liable if it had actual or constructive knowledge at the time of the business transfer of the prior employer's liability.

QUESTIONS?

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(206) 464-7723

http://www.lni.wa.gov/Main/SiteFeedback.asp
or call Lynne Buchanan,
Industrial Relations Specialist
(360) 902-5552

AMANDA J. GOSS
Attorney General's Office
L&I Division
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AmandaG@atg.wa.gov

Ms. Goss is a Washington State Assistant Attorney General focusing on employment law. Ms. Goss has advised the Department of Labor and Industries Employment Standards and Prevailing Wage programs since 1994 and has served as the lead program advisor since 2000. She supervises a team of seven attorneys who represent Labor and Industries in matters related to the Wage Payment Act, administrative law, minimum wage, overtime, rest and meal breaks, prevailing wages, family care, agricultural employment standards, farm labor contracting, child labor, domestic violence leave protection, among other areas of law.

Over the past 18 years she has represented Labor and Industries in several capacities, including matters related to wage and hour, prevailing wage, workers' compensation, crime victims' compensation, and employer services. She also represented the Washington State Electrical Board, the Governor's Advisory Board of Plumbers, and the Washington State Board of Boiler Rules.

Ms. Goss received her B.A. from Washington University (1988) and her J.D. *cum laude* from the University of Puget Sound (1992).

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Patrick M. Madden

AREAS OF PRACTICE

Mr. Madden focuses his practice on wage and hour and employment law matters. He advises employers on various issues, including wage and hour payment and compliance and compensation plan design; assists employers responding to agency investigations; and represents employers in wage and hour, discrimination, and other lawsuits at state and federal levels. Mr. Madden has worked on over fifty class actions, some involving putative classes of hundreds of thousands of employees and potential damages in excess of a billion dollars, including lawsuits involving wage calculation and payment issues, entitlement to overtime and benefits, off-the-clock claims, challenges to exempt status, and claims to employee status.

Advice and Compliance
Mr. Madden regularly advises employers on wage and hour and wage payment issues, as well as many other employment matters. He reviews and helps clients draft policies, including policies relating to time reporting, payroll, compensation, and classification issues. He also assists clients by conducting friendly audits to identify and correct potential violations that could result in legal liability. In addition, Mr. Madden often works with clients and our business and bankruptcy attorneys to address wage and compensation issues that arise in the context of purchases, sales, mergers, layoffs, and shutdowns. A few examples of his advice practice are:

- Mr. Madden has reviewed and helped draft compensation, incentive compensation, bonus, and commission policies for international, national, regional, and local companies.
- Mr. Madden regularly advises national, regional, and local companies on issues relating to hours worked, calculation of the regular rate, and other issues relating to the calculation of overtime for hourly and salaried non-exempt workers.
- Mr. Madden regularly advises national, regional, and local companies on the proper classification of exempt workers and independent contractors, including issues involving the salary basis and duties requirements.
- Mr. Madden regularly advises national and local companies on wage payment matters, including wage withholding, termination pay, and severance pay issues.
- Mr. Madden has advised international, national, regional, and local companies on transitioning employees from one company, compensation system, set of operational rules, or classification to another, with the goal of avoiding challenges, litigation, and liability.

Government Audits and Investigations
Mr. Madden frequently counsels and represents employers in wage and hour audits and investigations by the United States Department of Labor (DOL) and similar state agencies. He prepares employers for initial agency visits, represents clients during those visits, helps process and respond to follow-up requests, responds to and negotiates over initial agency determinations, and defends employers against improper determinations and excessive civil money penalties. For instance:

- Mr. Madden represented a bank against claims by the DOL that the employer was

Patrick M. Madden

allowing off-the-clock work nationally. Mr. Madden helped isolate the concern and negotiated a resolution focused on a single recently-acquired operation.

- Mr. Madden represented a national client in the retirement home business against challenges to the exempt status of certain classifications of employees. After negotiations, the DOL agreed that the primary groups were properly classified as exempt.
- Mr. Madden helped defend a telecommunications client against a nationwide investigation focused on work time at call centers. Mr. Madden helped broker a favorable settlement for the client with the DOL and coordinated the settlement and consent decree process.
- Mr. Madden assisted a national company with an appeal of an injunction and order of restitution against the client for failing to count certain training time as hours worked. The U.S. Court of Appeals for the Sixth Circuit reversed the judgment and ordered judgment for the client.
- Mr. Madden handled an audit of a temporary work agency by the DOL. Although the investigator found that, among other problems, the regular rate was being improperly calculated, Mr. Madden demonstrated that any impact was de minimis. The investigator thus issued a report with no violations and no penalties.

Wage and Hour Litigation

Mr. Madden has extensive experience defending employers against wage and hour and wage payment claims. In addition to representing employers in wage lawsuits brought by individual employees, Mr. Madden has worked on over fifty wage and hour class actions. Mr. Madden has also been hired to consult with other law firms as to their management and tactics in wage and hour class actions. A few examples of Mr. Madden's litigation experience are:

- Mr. Madden was lead counsel defending a nationwide retailer against overtime claims involving drivers in their distribution centers. The court granted summary judgment in favor of the employer based on the Federal Motor Carrier Act Exemption. The matter is now pending on appeal
- Mr. Madden was lead counsel defending a regional construction and service company against claims that employees must be paid for time commuting in company vehicles and other off-the-clock work issues. After the court granted partial summary judgment and denied a motion to certify a class, the matter was settled for nuisance value.
- Mr. Madden was hired to assist a city attorney's office with defense against claims that the city systemically paid all of its employees three days late and, thus, owed double damages and interest. The court granted summary judgment in favor of the city on these claims.
- Mr. Madden was lead counsel defending a nationwide retailer against claims that employees must be paid for time donning and doffing work uniforms. The court granted summary judgment in favor of the employer and the matter is now pending on appeal.
- Mr. Madden was lead counsel defending a large housecleaning service against commuting and other off-the-clock claims. After the court denied a motion to certify a Rule 23 class or, in the alternative, to give notice under the FLSA, the

Patrick M. Madden

matter was settled for nuisance value.

- After another firm lost a case on summary judgment, Mr. Madden handled the appeal for an automobile dealer. The Ninth Circuit found, as a matter of law, that the employer was exempt under the Retail Sales and Service Exemption. *Gieg v. DRR Inc.*, 407 F.3d 1038 (9th Cir. 2005).
- Mr. Madden was lead counsel representing a multi-state vending company against class allegations that the company failed to pay overtime compensation to route drivers. After minimal discovery, the court granted summary judgment to our client in a decision of first impression interpreting Washington's Retail Sales and Service Exemption. Mr. Madden argued this matter to the Washington Supreme Court, which issued a 9-0 decision affirming the judgment. *Stahl v. Delicor of Puget Sound, Inc*., 148 Wn.2d 876 (2003).

PROFESSIONAL BACKGROUND

Mr. Madden graduated with highest honors from the University of Washington School of Law and clerked for the U.S. Court of Appeals. Mr. Madden is the chairperson of the Association of Washington Business's employment law committee and is listed as a top labor and employment attorney in *The Best Lawyers in America* and *Chambers USA America's Leading Lawyers for Business*.

PRESENTATIONS

In addition to counseling and training sessions with individual clients, Mr. Madden has done more than a hundred presentations on wage and hour and other employment law topics at continuing legal education, human resources, and payroll seminars. He has also spoken on wage and hour issues at national and regional business conferences, including the national Gamer Technology Conference in 2005 and 2006, the Council of School Attorney's meeting in 2004, and the National Council of State Housing Agencies National Conference in 2003.

PUBLICATIONS

Mr. Madden has been quoted on wage and hour matters in Washington papers as well as the Wall Street Journal and Corporate Legal Times. His other formal publications on law-related subjects include:

- "Collective Claims: Learning From the U.S. Experience," *PLC Magazine*, Jan./Feb. 2008 (with Irene Freidel and Clare Tanner).
- Contributing Author, *Defense Practice Notebook* (DRI 1996).
- "Goodbye, Rambo -- Hello, Mr. Rogers?" *For the Defense*, Dec. 1995.
- "Don't Answer That Question," *For the Defense*, March 1995.
- "Federal Labor Law Preemption of State Anti-Takeover Law: A Case of First Impression," 65 Wash. L. Rev. 457 (1990).

COURT ADMISSIONS

- U.S. Court of Appeals for the Ninth Circuit
- U.S. Court of Appeals for the Sixth Circuit
- U.S. Court of Appeals for the Third Circuit
- U.S. District Court for the Eastern District of Washington

Patrick M. Madden

- U.S. District Court for the Western District of Washington

BAR MEMBERSHIPS

Washington

EDUCATION

J.D., University of Washington School of Law, 1991 (with highest honors; Order of the Coif; Order of the Barrister; Managing Editor, *Washington Law Review*; Vice President, Moot Court Honor Board)
Law Clerk: Hon. Joseph F. Weis, Jr., U.S. Court of Appeals for the Third Circuit
B.F.A., Pacific Lutheran University, 1983 (magna cum laude)

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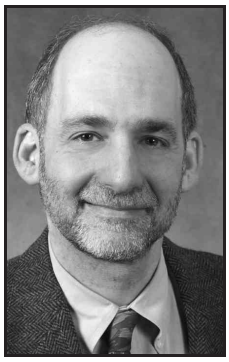

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Steven R. Peltin

AREAS OF PRACTICE

Mr. Peltin is a partner focusing on labor, employment and benefits issues. He helps employers avoid litigation and solve personnel problems such as employee discipline and discharge, leaves of absence, claims of discrimination and harassment, and threats of employee violence. He reviews and revises employee handbooks and prepares employment, confidentiality and non-compete agreements. Mr. Peltin also counsels executives and professionals on employment and separation agreements. He also assists with corporate transactions such as purchases and sales of businesses.

Mr. Peltin represents public and private employers in federal and state courts in class action and individual cases claiming discrimination, harassment, wrongful discharge and violations of wage and hour, employee benefits, trade secrets and non-compete obligations. He also appears before local, state and federal administrative agencies and arbitrators in employment and labor matters.

PROFESSIONAL BACKGROUND

Before joining the firm, Mr. Peltin was employment and labor counsel at Georgia-Pacific Corporation and a partner at Altheimer & Gray in Chicago. Mr. Peltin is a frequent speaker and writer on employment and labor law topics. Mr. Peltin serves on the Board of Directors of Seattle Theatre Group.

PUBLICATIONS

- Hidden Threats: Steps You Can Take To Prevent Violence in the Workplace, *Washington CEO*
- Washington Chapter of MLRC 50-State Survey of Employment Libel and Privacy Law
- Whose Workforce Is It Anyway? The WARN Act in the M & A Context, Preston Gates & Ellis E-Elert
- Telecommuting: Legal and Management Risks For Employers, *Corporate Counsel* (with J. Lane Crowder)
- Bad Acts: Smaller Employers Should Confront Threats of On-The-Job Physical Assaults, *Washington Journal*
- Reducing Telecommuting Management Risks, *National Underwriter* (with J. Lane Crowder)
- How To Reduce Workplace Violence, *National Underwriter*
- Hiring Employees: Disability Questions and Medical Exams, *Realty & Building*
- Workplace Sexual Harassment, *Realty & Building*

SPEAKING ENGAGEMENTS

- "Payroll Management," Lorman Educational Services
- "Time Off: State and Federal Laws on Employee Leave, Vacations and Holidays,",Lorman Educational Services
- "Recent Developments under the Family and Medical Leave Act," National Council of State Housing Agencies
- "New Developments in Employment Law," Seattle CFO Arts Roundtable

Steven R. Peltin

- "Best Practice in FMLA Administration," Council on Education in Management
- "Conducting Effective Investigations Into Employee Complaints," PUD and Municipal Attorneys Association
- "Cyberstalking: The Washington Employer's Perspective," King County Bar Association
- "Blowing the Whistle: Policies & Procures under Sarbanes-Oxley," Preston Gates & Ellis Breakfast Briefing
- "Workplace Investigations," Council on Education in Management
- "Email and the Internet - Legal Challenges for Employers," PUD and Municipal Attorneys Association
- "Minimizing Risks When Upsizing, Downsizing, and Using Alternative Work Arrangements," Preston Gates & Ellis Breakfast Briefing
- "Negligent Hiring Liability, Pre-Hire Investigations and the Fair Credit Reporting Act," Preston Gates & Ellis Breakfast Briefing

BAR MEMBERSHIPS

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EDUCATION

J.D., Cornell Law School, 1983 (cum laude)
Law Clerk to Hon. John C. Shabaz, United States District Court for the Western District of Wisconsin, 1982-83
B.A., University Of Wisconsin, 1978 (with distinction; Phi Beta Kappa)

REPRESENTATIVE EXPERIENCE

COUNSELING AND TRANSACTIONS

- Employment and labor counsel in sales of business, including drafting of purchase agreement language, preparation of offer letters, executive employment agreements and employee communications.
- Assistance to client in reductions in force.
- Counseling of clients facing threat of workplace violence
- Creation of documentation for background investigations, hiring, leaves of absence, requests for disability accommodation, last chance agreement and severance agreements.
- Preparation on policies such as travel pay, use of cell phones, and blogging.
- Management training on employment law topics, including avoiding harassment and discrimination.

ADMINISTRATIVE AND LITIGATION

- Won jury trial for an employer accused of age discrimination by laid-off union employee.
- Prevailed in a hearing before the United States Department of Labor brought by a union business agent who claimed that the company conspired with the union to discharge him.

Steven R. Peltin

- Co-counsel in class action claiming pay for commuting in company vehicle; class certification defeated and individual claim resolved promptly
- Won summary judgment on discrimination / harassment claim for financial services company.
- Obtained temporary restraining orders in two cases in where employees removed and refused to return computerized documents and information.
- Won summary judgment on sex bias claim by male employee of performing arts client.
- Convinced OSHA that a safety whistleblower was not subject to a hostile work environment.
- Obtained anti-harassment orders against former employees.
- Defended company in ERISA case brought by former executive seeking payments under a Supplemental Executive Retirement Plan.

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AREAS OF PRACTICE

Ryan Redekopp's practice focuses on employment and labor law.

Ryan advises and litigates regarding a wide range of employment and labor issues, including hiring, discipline, termination, discrimination, harassment, retaliation, noncompetition, labor/management relations, and wage and hour matters. As a litigator, Ryan represents clients in both state and federal courts and before federal, state and local agencies, including the Equal Employment Opportunity Commission, the Washington State Human Rights Commission and the Seattle Office for Civil Rights. Ryan frequently advises employers with respect to the employment aspects of business transactions, such as mergers and acquisitions, and regularly drafts and reviews employment policies and employment-related documents such as offer letters, employment agreements, restrictive covenant agreements and separation agreements.

Ryan works with both private and public employers, including school districts and nonprofit organizations. He also counsels places of public accommodation and public transportation providers regarding their non-discrimination and accessibility obligations under the Americans with Disabilities Act and other federal and state anti-discrimination laws.

Ryan received the Jim Ellis Pro Bono Award in 2006 for his dedication to providing pro bono legal services.

PRESENTATIONS

- "Title II(A) of the ADA and Public Transit," Washington State Transit Association Leadership Retreat, July 31, 2009

COURT ADMISSIONS

- United States District Court Western District of Washington
- United States Court of Appeals for the Ninth Circuit
- Washington State Supreme Court

BAR ADMISSIONS

Washington

EDUCATION

J.D., Harvard Law School (2005)
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U.S. Department of Labor
Wage and Hour Division

U.S. Wage and Hour Division

(July 2010)

Fact Sheet #73: Break Time for Nursing Mothers under the FLSA

This fact sheet provides general information on the break time requirement for nursing mothers in the Patient Protection and Affordable Care Act ("PPACA"), which took effect when the PPACA was signed into law on March 23, 2010 (P.L. 111-148). This law amended Section 7 of the Fair Labor Standards Act (FLSA).

General Requirements

Employers are required to provide "reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk." Employers are also required to provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk."

The FLSA requirement of break time for nursing mothers to express breast milk does not preempt State laws that provide greater protections to employees (for example, providing compensated break time, providing break time for exempt employees, or providing break time beyond 1 year after the child's birth).

Time and Location of Breaks

Employers are required to provide a reasonable amount of break time to express milk as frequently as needed by the nursing mother. The frequency of breaks needed to express milk as well as the duration of each break will likely vary.

A bathroom, even if private, is not a permissible location under the Act. The location provided must be functional as a space for expressing breast milk. If the space is not dedicated to the nursing mother's use, it must be available when needed in order to meet the statutory requirement. A space temporarily created or converted into a space for expressing milk or made available when needed by the nursing mother is sufficient provided that the space is shielded from view, and free from any intrusion from co-workers and the public.

Coverage and Compensation

Only employees who are not exempt from the FLSA's overtime pay requirements are entitled to breaks to express milk. While employers are not required under the FLSA to provide breaks to nursing mothers who are exempt from the overtime pay requirements of Section 7, they may be obligated to provide such breaks under State laws.

Employers with fewer than 50 employees are not subject to the FLSA break time requirement if compliance with the provision would impose an undue hardship. Whether compliance would be an undue hardship is determined by looking at the difficulty or expense of compliance for a specific employer in comparison to the size, financial resources, nature, and structure of the employer's business. All employees who work for the covered employer, regardless of work site, are counted when determining whether this exemption may apply.

Employers are not required under the FLSA to compensate nursing mothers for breaks taken for the purpose of expressing milk. However, where employers already provide compensated breaks, an employee who uses that break time to express milk must be compensated in the same way that other employees are compensated for

break time. In addition, the FLSA's general requirement that the employee must be completely relieved from duty or else the time must be compensated as work time applies. *See* WHD Fact Sheet #22, Hours Worked under the FLSA.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

The Wage and Hour Division will issue additional guidance on the break time requirement in the near future.

U.S. Department of Labor
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Determining Hours Worked at the Start and End of the Work Day

October 2010

By

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BIOGRAPHY

Patrick Madden (patrick.madden@klgates.com) is a partner and co-chair of the international Labor and Employment Practice Group at K&L Gates LLP. He also oversees the firm's wage and hour class action task force. Mr. Madden advises employers on labor and employment issues, including wage and hour payment and compliance and compensation plan design; assists employers responding to agency investigations; and represents employers in wage and hour, discrimination, and other lawsuits at the state and federal levels. Mr. Madden has worked on scores of state, regional, and national wage and hour class actions, including lawsuits involving wage calculation and payment issues, entitlement to overtime and benefits, off-the-clock claims, challenges to exempt status, and claims to employee status. Mr. Madden is a former chair of the Association of Washington Business's employment law committee; is listed as a top labor and employment attorney in *The Best Lawyers in America*, *Chambers USA America's Leading Lawyers for Business*; and *Seattle Magazine* is listed as a super lawyer in *Washington Law & Politics*; and is AV-rated by Martindale Hubbell. He received his undergraduate degree from Pacific Lutheran University and his law degree, with highest honors, from the University of Washington School of Law. Mr. Madden was the managing editor of the *Washington Law Review* and clerked for the Honorable Joseph F. Weis, Jr. of the United States Court of Appeals for the Third Circuit. He frequently speaks and writes on wage and hour and wage payment issues.

Determining Hours Worked at the Start and End of the Work Day

Patrick M. Madden

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I. General Requirements of Wage Laws

A. Minimum Wage and Overtime

The federal Fair Labor Standards Act ("FLSA") was one of the earliest federal efforts to regulate the work environment and became effective on June 25, 1938. The FLSA is administered and enforced by the Wage and Hour Division of the Employment Standards Administration within the United States Department of Labor. 29 U.S.C. § 204.

Among other things, the FLSA and many parallel state laws require the payment of a minimum wage for all hours worked. 29 U.S.C. § 206. On July 24, 2009, the federal minimum increased to $7.25 per hour. Many states have requirements that exceed this level.

Under the FLSA, employers must also generally pay nonexempt employees overtime at a rate of at least one and one half times the regular rate of pay for all hours work in excess of 40 hours in a work week. 29 U.S.C. § 207. In contrast, the FLSA does not require an employer to provide premium pay for work beyond an employee's normal daily shift, work on holidays, or work on weekends. 29 CFR § 778.102. For adults, there is no limit on overtime hours that employees may work and overtime may be mandatory. 29 CFR § 778.102. Some states have daily or other overtime requirements and other states place limits on mandatory overtime.

Overtime requirements focus on the work week. The work week can be any fixed and recurring 168 hour period. 29 CFR § 778.105. Because overtime requirements focus on the work week, hours cannot be averaged between work weeks. Thus, if an employee works 38 hours one week and 42 hours the next week, the employer must pay overtime for two hours in the second week even though the average number of hours worked during the two-week period is 40. 29 CFR § 778.104.

Employers found liable for violations of the FLSA may be assessed damages for the unpaid overtime or minimum wages, liquidated damages equal to the amount of unpaid overtime or minimum wages, and reasonable attorneys fees and costs. 29 U.S.C. § 216(b). Willful violations may carry criminal penalties upon conviction with fines of not more than $10,000 or

imprisonment for not more than six months, or both. 29 U.S.C. § 216(a). There are also civil money penalties (payable to the Secretary of Labor) for repeated and willful violations of minimum wage and overtime requirements. 29 U.S.C. § 216(e); 29 CFR Part 578.

Employers must use caution when evaluating whether they comply with minimum wage and overtime requirements. Compliance with the FLSA may not be sufficient. Many states have requirements and those requirements do not always mirror FLSA standards. Thus, employers must be certain that they are complying with the FLSA and state-law requirements in every state where they have employees. A review of each state's specific laws and requirements is beyond the scope of these materials.

B. Hours Worked

Under the FLSA, it is an absolute rule that employers must pay their employees for all hours the employees work. The question that has always caused confusion in the work place and that has recently resulted in a spate of class action lawsuits is "What constitutes hours worked?"

The FLSA does not define the term "work." Thus, early Supreme Court cases defined the term broadly. In *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944), the Court found that time spent traveling from the entrance of ore mines to the underground working areas was work time and defined "work" as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." Later in the same year, the Court clarified that "exertion" is not necessary for an activity to count as "work" and that "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen." *Armour & Co. v. Wantock*, 323 U.S. 126 (1944); *see also Alvarez v. IBP, Inc.* 339 F.3d 894, 902 (9th Cir. 2003), *aff'd*, 546 U.S. 21 (2005) ("'exertion' is not the sine qua non of 'work'"). Two years later, in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), the Court defined "workweek" to include "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace" and held that time

employees spent walking from time clocks at a factory entrance to their workstations was compensable work time.

In response to the *Anderson* decision, Congress passed the Portal-to-Portal Act of 1947.[1] The Portal-to-Portal Act was specifically aimed at limiting the liability of employers for certain activities, such as (1) walking, riding and traveling to and from the actual place of work; (2) clothes changing in certain circumstances; and (3) other activities that are preliminary to or postliminary to principal work activities. *E.g.*, *Aiken v. City of Memphis*, 190 F.3d 753, 758 (6th Cir. 1999) (the Act amended the FLSA "'to delineate certain activities which did not constitute work,' and which are therefore non-compensable"); 29 U.S.C. §§ 203(o), 254. However, the Portal-to-Portal Act did not change the Supreme Court's earlier definitions of the term "work." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 28 (2005).

Taking these legal interpretations into account, the U.S. Department of Labor has adopted regulations that help define what does and what does not count as time worked. Essentially, activities that are primarily for the benefit of the employer and that are suffered or permitted by an employer constitute compensable work time. 29 CFR § 785.11. In the litigation context, courts have fashioned a general rule that an employer is liable for off-the-clock work if the employer knew or should have known that the employee was working. *Id.*

In the *IBP* case, the Supreme Court reaffirmed the U.S. Department of Labor's position in relation to two key concepts (integral and indispensable activities, and the continuous workday rule) that impact what counts as work and when work time starts and ends.

Initially, the Court concluded that work includes both an employee's principal activities as well as activities that are "integral and indispensable" to the principal activities. *IBP*, 546 U.S. at 37; *see also Steiner v. Mitchell*, 350 U.S. 247, 256 (1956) (finding that changing into and

[1] Some states have never adopted a similar provision and, thus, activities that are not compensable work under the Portal-to-Portal Act may be compensable in those states. *See, e.g., Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 995 P.2d 139 (2000) (no Portal-to-Portal Act under California law); *Anderson v. Dep't of Soc. & Health Servs.*, 115 Wn. App. 452 (2003) (same under Washington law).

out of old work clothes at a battery plant was an integral and indispensable part of the employees' work and, thus, compensable); *Mitchell v. King Packing Co.*, 350 U.S. 260, 263 (1956) (finding that time spent by workers in a meat packing plant sharpening knives was integral and indispensable and, thus, compensable). It then made clear that activities that are integral and indispensable to principal activities are themselves principal activities under 29 U.S.C. § 254(a) that start the work day. *IBP*, 546 U.S. at 37; USDOL Wage and Hour Advisory Memorandum No. 2006-2 at 2 (May 31, 2006) ("USDOL Memo No. 2006-2").

The Court then fully embraced the U.S. Department of Labor's interpretation of the continuous workday rule, stating: "[C]onsistent with our prior decisions interpreting the FLSA, the Department of Labor has adopted the continuous workday rule, which means that the 'workday' is generally defined as 'the period between the commencement and completion on the same workday of an employee's principal activity or activities.'" *IBP*, 546 U.S. at 29; *see also* 29 CFR § 790.6(b). Note, however, that the Court recognized that preliminary and postliminary activities, such as walking between a time clock and an employee's work area and waiting to punch a clock or receive gear, that occur outside of the continuous workday do not count as compensable work time. *IBP*, 546 U.S. at 37.

C. The *De Minimis* Doctrine

Even if activities constitute work, under some circumstances, the amount of time spent on such activities is so minimal or *de minimis* that they are not compensable. This *de minimis* doctrine was set forth by the Supreme Court in *Anderson*, 328 U.S. at 692:

> The workweek contemplated . . . must be computed in light of the realities of the industrial world. When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved.

See also De Asencio v. Tyson Foods, Inc., 500 F.3d 361, 374 (3d Cir. 2007) (the doctrine "provides a limiting principle to compensation for trivial calculable quantities of work"). The U.S. Court of Appeals for the Ninth Circuit has subsequently set forth a three-pronged test for

when the doctrine should be applied: "we will consider (1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work." *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984). Applying these factors, the Ninth Circuit then held that seven to eight minutes per day spent by employees in pre-shift activities was *de minimis* and not compensable because there was wide variance in the amount of pre-shift time spent on the activities, there were interwoven social activities, and the employer would have difficulty monitoring the pre-shift work. *Id.*; *see also Reich v. New York Transit Auth.*, 45 F.3d 646, 652-53 (2d Cir. 1995) ("time spent by handlers in dog-care duties during the commute" was *de minimis* and non-compensable because they were "neither substantial, nor regularly occurring" and it would be administratively difficult to track); 29 CFR § 785.47 ("[I]nsubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded . . . . [S]uch trifles are de minimis."); USDOL Opinion Letter FLSA2004-8NA at 1 (August 1, 2004).

The *de minimis* doctrine was recognized, but not clarified, in the Supreme Court's *IBP* decision. The Court let stand a holding by the district court and Ninth Circuit in the *Alvarez* case that time spent donning and doffing safety hats and goggles was *de minimis* as it was insubstantial and difficult to monitor. *See Alvarez,* 339 F.3d at 904. Similarly, the Court discussed that the jury in a consolidated case, *Tum v. Barber Foods*, 331 F.3d 1 (1st Cir. 2004), found that time spent donning lab coats, hairnets, earplugs, and safety glasses was *de minimis*, but reversed and remanded that case so that the court (and, presumably, a new jury) could consider whether the time was *de minimis* when combined with post-donning walking and waiting time.

II. Work Time Issues at the Start and End of the Work Day

Although the Department of Labor and the courts have provided general guidance as to what activities constitute work and when the activities must be compensated, the application of

the general concepts is often difficult. Moreover, special rules or interpretations sometimes apply. The following sections discuss a series of activities, often occurring between home and the employee's work station, that present typical work time issues at the start and end of the work day.

A. Potential Work at Home

Employees must be paid for all actions taken on behalf of their employers regardless of the location where the activities actually take place. 29 CFR § 785.12. Thus, if employees engage in work-related activities at home before they leave for work, those activities could be considered compensable work time. Such time could include time checking voicemail or emails; time developing a plan, schedule, or route for the day; time reading or completing required paperwork; or time loading or stocking equipment. *Cf. Karr v. City of Beaumont, Tex.*, 13 Lab. Case. (CCH) ¶ 33,511 (E.D. Tex. 1997) (employees who drive employer cars home have to be paid for all time spent cleaning and maintaining the vehicles). Whether such activities count as compensable work time depends on a number of factors.

First, the activities must be primarily for the benefit of the employer to count as hours worked. 29 CFR § 785.11. For instance, there is a difference between employees who are planning their day (including work) for their personal benefit and employees who are required to prepare detailed driving plans before they leave their homes.

Second, the activities must be principal activities or integral and indispensable to principal activities in order to count as work. They could otherwise be disregarded as preliminary or postliminary time. *Cf. IBP*, 546 U.S. at 37.

Third, even if activities at home could constitute work, such time is only compensable if the employer knew or should have known that an employee was engaged in such activities. *Forrester v. Roth's I.G.A. Foodliner, Inc.*, 646 F.2d 413, 414 (9th Cir. 1981) ("[W]here an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of

the overtime work, the employer's failure to pay for the overtime hours is not a violation of [the FLSA]"); 29 CFR § 785.12. Thus, a key question is whether an employer should have reasonably anticipated that its employees would have to engage in such activities at home.

Finally, if the activities at home are limited, isolated, and sporadic, any time spent on such activities may fall within the *de minimis* doctrine. *See Reich*, 45 F.3d at 652-53; *Lindow* 738 F.2d at 1063.

B. Commuting and Travel Time

Under the Portal-to-Portal Act, 29 U.S.C. § 254(a) was intended to make time spent commuting between an employee's home and the workplace non-compensable. Thus, the U.S. Department of Labor adopted 29 CFR § 785.35, which states:

> An employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work travel which is a normal incident of employment. This is true whether he works at a fixed location or at different job sites. Normal travel from home to work is not worktime.

See Aiken, 190 F.3d at 758 ("The effect of these sections is to make ordinary commute time non-compensable under the FLSA."); *Reich*, 45 F.3d at 650 ("Commuting and similar activities are generally not compensable.").

Federal courts that have considered commuting time claims have emphasized that employees advancing such claims face a heavy burden of proof. *Adams v. United States*, 471 F.3d 1321, 1326 (Fed. Cir. 2006). Thus, the general rule that commuting time is not compensable holds true even though the employees:

- Spend hours each day commuting between their homes and their job sites. *E.g., Smith v. Aztec Well Servicing Co.*, 462 F.3d 1274, 1286 n.3 (10th Cir. 2006) (commute time that lasted as long as seven hours each day not compensable under the FLSA); *Kavanagh v. Grand Union Co.*, 192 F.3d 269, 271-73 (2d Cir. 1999) (mechanic who commuted an average of seven to eight hours per day was not engaged in compensable work).
- Transport equipment from their homes to their job sites. *E.g., Adams*, 471 F.3d at 1327;

Dooley v. Mutual Ins. Co., 307 F. Supp. 2d 234, 246-47 (D. Mass. 2004);

- Travel to different job sites each day. 29 CFR § 785.35 (commute not compensable "whether [employee] works at a fixed location or at different job sites"); *e.g., Kavanagh*, 192 F.3d at 271 (mechanic traveled to more than 50 stores throughout New York and Connecticut); *Imada v. City of Hercules, Cal.*, 138 F.3d 1294 (9th Cir. 1998).
- Travel with other employees to get to and from work. *E.g., Smith*, 462 F.3d at 1291 (drilling rig employees who were encouraged or required to commute together).
- Discuss work-related issues during their commute. *E.g., Smith*, 462 F.3d at 1291.
- Travel to and from work on company buses. *E.g.*, 29 CFR § 790.7(f); *Bonilla v. Baker Concrete Constr., Inc.*, 487 F.3d 1340, 1343 (11th Cir. 2007) (construction workers who were "required to ride authorized transportation after the security gate" at an airport construction project were not engaged in work); *Vega v. Gasper*, 36 F.3d 417 (5th Cir. 1994) (farm workers who took company buses to the fields were not engaged in work).

As the court in *Bolick v. Brevard County Sheriff's Dep't*, 937 F. Supp. 1560, 1565 (M.D. Fla. 1996), held: "[E]mployees should not be compensated for doing what they would have to do anyway – getting themselves to work."

Because employees started to assert claims for time spent commuting in company cars, in 1996, Congress amended the Portal-to-Portal Act to add the following language:

> For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

29 U.S.C. § 254(a); Employee Commuting Flexibility Act of 1996 ("ECF Act"), § 2102 of Pub.L. 104-188, 110 Stat. 1755, 1928 (1996). This amendment made clear that commuting in a company-owned vehicle is not compensable work time unless employees are required to "perform additional legally cognizable work while driving to their workplace in order to compel

compensation for the time spent driving." *Adams*, 471 F.3d at 1325. Thus, as with commuting time in personal vehicles, federal courts have rejected claims for time spent commuting in an employer-provided car, even when employees travel to different work locations, talk about work, or transport equipment. *E.g., Adams,* 471 F.3d at 1327 (travel time in government-issued vehicles was not compensable even though the officers were required to carry their weapons, transport law enforcement equipment, and monitor the vehicles' communication equipment); *Bobo v. United States*, 136 F.3d 1465, 1467 (Fed. Cir. 1998) (travel time in government-issued vehicle was not compensable even though plaintiffs monitored their radios, were on the lookout for suspicious activity, refrained from personal errands or detours, and stopped to walk their dogs); *see also* USDOL Field Operations Handbook §§ 31c01 & 31c02 (March 6, 1981); *id.* § 31c10 (May 22, 1995). In fact, the ECF Act expressly provides that activities "incidental" to use of a company vehicle for commuting are not principal activities that count as hours worked. *E.g.*, *Buzek v. Pepsi Bottling Group, Inc.*, 501 F. Supp. 2d 876, 886 (S.D. Tex. 2007) ("end-of-day reports and transportation of tools are activities incidental to his use of a company vehicle for commuting" and, thus, "[t]ime spent on these activities . . . is . . . not compensable under the FLSA").

Despite the clear presumption against compensation for commuting time, plaintiffs continue to pursue such claims. Three areas of particular concern to employers should be:

- The need for a specific agreement between the employer and the employee (or employee representative) that governs the use of a company car for commuting. *See* 29 U.S.C. § 254(a). Absent such an agreement, the protections of the ECF Act are lost.
- The distinction between commuting time and travel to another city. Even though commuting time is not compensable (even when it takes hours each way), an employee must generally be paid for time traveling to work on special one-day assignments to a city other than where they regularly work. 29 CFR § 785.37 deals with such circumstances. This provision applies when employees regularly work "at a fixed

location in one city" and are "given a special 1-day work assignment in another city." This provision is aimed at "unusual" assignments and does not apply to employees who are regularly asked to travel to different job sites. *See* 29 CFR § 785.35; *e.g.*, *Kavanagh*, 192 F.3d at 271-73.

- The impact of the continuous workday rule on the general commuting time rules. The Supreme Court's *IBP* decision highlights the importance of determining when an employee first engages in a work activity. The Court found that waiting and walking time that occurred *prior* to the first work activity was not compensable. In contrast, the Court held that waiting and walking time that occurred *after* the first work activity counted as hours worked and must be compensated. Following this same analysis, a number of recent cases have focused on the compensability of what would appear to be non-compensable commuting time because the commuting allegedly occurred after employees engaged in their first work activity. *E.g., Wisniewski v. Pacific Maritime Ass'n*, No. BC293134, Settlement Notice (Cal. Super. Ct. Aug. 29, 2006) (claim by casual employees for commuting time between dispatch halls and assigned worksites); *Lenahan v. Sears, Roebuck & Co.*, No. 02-0045, Settlement Approval Order (D.N.J. July 24, 2006) (claim by service technicians for time commuting to first worksite because their first work activity occurred at home when they checked the employer's dispatch system).

C. Security Screening

In order to address security risks and enhance safety, some employers have employees pass through security checkpoints when they first arrive at the work site. In response, some employees have claimed that time spent passing through security checkpoints counts as time worked because the employees are subject to the control of the employer. In *Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 593 (2d Cir. 2007), the Second Circuit rejected such claims, explaining:

> The activities required to enter and exit Indian Point – from waiting in line at the vehicle entrance through the final car-swipe and handprint analysis – are necessary in the sense that they are required and serve essential purposes of security; but they are not integral to principal work activities. These security-related activities are modern paradigms of the preliminary and postliminary activities described in the Portal-to-Portal Act, in particular, travel time.

The Court rejected the idea that the time-consuming nature of security measures makes them compensable. *Id.* at 594. Drawing a parallel to lengthy commuting time, the Court explained that "security measures that are rigorous and that lengthen the trip to the job-site do not thereby become principal activities of the employment." *Id.* (noting that "everyone entering the plant" was subject to such security measures regardless of their job and "including visitors").

When considering a similar claim by construction workers who had to pass through airport security at the Miami International Airport, the Eleventh Circuit applied a three-factor test: "(1) whether the activity is required by the employer, (2) whether the activity is necessary for the employee to perform his or her duties, and (3) whether the activity primarily benefits the employer." *Bonilla*, 487 F.3d at 1344. The court found that the employer did not primarily benefit from the security regime and concluded that "the security screening mandated by the FAA in this case is not compensable work." *Id.* at 1345.

D. Clothes Changing and Equipment Donning and Doffing

Whether clothes changing and donning and doffing of protective equipment count as work time can depend on a number of factors: What are they changing into or donning? Is it necessary or required? Where does the changing or donning and doffing activity occur? Is there a relevant bargaining agreement? Two key questions will help employers determine whether they need to pay for clothes changing or donning and doffing activities. First, is changing into or out of the clothing or protective equipment integral and indispensable to a principal activity so that it would normally fall within the definition of hours worked? Second, if changing would typically count as hours worked, does the activity fall within the scope of 29 U.S.C. § 203(o) so as to exclude it from compensable time?

An example of how changing activities can be integral and indispensable to a principal activities is provided in *Steiner v. Mitchell*, 350 U.S. 247 (1956). In that case, the Supreme Court addressed whether workers in a battery plant were entitled to compensation for time spent changing clothes at the beginning of the shift and showering at the end. The employees were required to "make extensive use of dangerously caustic and toxic materials" and were "compelled by circumstances, including vital considerations of health and hygiene, to change clothes and to shower in facilities which state law require[d] their employer to provide." *Id.* at 248. The employees routinely worked with or near toxic chemicals that "permeated the entire plant and everything and everyone in it;" placed the workers' families in danger; were discovered in the workers' bodies at abnormal levels; and required the workers to engage in changing activities for 30 minutes each day. *Id.* at 249–50, 252. Under these facts, the Court held that the workers' changing activities were an integral and indispensable part of their principal activity, the production of batteries, and therefore compensable work time under the FLSA. *Id.* at 256.

In *Steiner*, 350 U.S. at 249, the Supreme Court drew a distinction between the circumstances in that case and "the question of changing clothes and showering under normal conditions," because the Government acknowledged that such activities "ordinarily constitute 'preliminary' or 'postliminary' activities excluded from compensable work time." Thus, 29 CFR § 790.7(g) expressly states that normal clothes changing is preliminary time that is not compensable. Beyond this general standard, subsequent guidance suggests that changing time does not count as work time if employees have discretion whether to wear particular clothes or equipment and/or have the option to change at home.

Initially, the Department's guidance and the relevant court decisions on changing time assume that any clothing or equipment is required by law, employer rules, or the nature of the work. *See* 29 CFR § 790.8(c). Optional clothing and equipment, which some employees choose to wear and others do not, are not integral and indispensable and, thus, time spent changing into

such clothing does not count as work time. This is ordinary changing activity. *See Steiner*, 350 U.S. at 249; 29 CFR § 790.7(g).

Moreover, even if changing is required by law, rule, or the nature of the work, changing activities that occur at home do not count as work and are not compensable. The USDOL Field Operations Handbook § 31b13 (Sept. 19, 1996) explains:

> Employees who dress to go to work in the morning are not working while dressing even though the uniforms they put on at home are required to be used in the plant during working hours. Similarly, any changing which takes place at home at the end of the day would not be an integral part of the employees' employment and is not working time.

See Reich v. IBP, Inc., 38 F.3d 1123, 1126 n.1 (10th Cir. 1994) ("Requiring employees to show up at their workstations with such standard equipment is no different from having a baseball player show up in uniform, a businessperson with a suit and tie, or a judge with a robe. It is simply a prerequisite for the job, and is purely preliminary in nature."). Similarly, if employees are free to change into required clothes or equipment at home but choose to change at their work site, the changing time still does not count as work: "It is our longstanding position that if employees have the option and the ability to change into the required gear at home, changing into that gear is not a principal activity, even when it takes place at the plant." USDOL Memo No. 2006-2 at 3.

In contrast to situations where employees have flexibility or a choice, 29 CFR § 790.8(c) provides: "where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work," the changing activities are considered integral and indispensable to the employees' principal activities. *See, e.g., De Asencio*, 500 F.3d at 373 ("the donning and doffing activity in this case constitutes 'work' as a matter of law"). Some courts hold that this is true regardless of how simple the equipment or donning and doffing activities are. *E.g., id.*; *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 910-11 (9th Cir. 2004) ("the ease of donning or ubiquity of use did not make the donning of such equipment any less integral and indispensable"). In contrast, other courts have concluded that donning and doffing

of non-unique protective gear (which usually takes a small amount of time) is not integral and indispensable to a principal activity and, thus, is not work time. *E.g., Gorman*, 488 F.3d at 594 ("The donning and doffing of generic protective gear is not rendered integral by being required by the employer or by government regulation."); *Reich*, 38 F.3d at 1126 (donning safety glasses, earplugs, hard hat, and safety shoes, "although essential to the job, and required by the employer" "can easily be carried or worn to and from work and can be placed, removed, or replaced while on the move or while one's attention is focused on other things" and, thus, are preliminary activities that are not compensable).

If an employer has such requirements, the next question is whether the activity falls within the scope of 29 U.S.C. § 203(o) so as to exclude the activity from compensable time. Section 203(o) states in pertinent part:

> Hours Worked – in determining . . . the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week by the express terms of or by custom or practice under a bona fide collective bargaining agreement applicable to the particular employee.

The initial question that arises in relation to section 203(o) is whether the employees are subject to a bargaining agreement. If so, then a more detailed analysis is warranted. If not, then changing time that is integral and indispensable may need to be compensated.

If the employees are subject to a bargaining agreement, the next question is whether the agreement contains express provisions addressing the compensability of clothes changing time or whether the parties have a custom or practice on the subject. The Department of Labor interprets custom or practice to mean:

> Where such clothes changing and washup activities are the only preshift and postshift activities performed by the employees on the premises of the employer, the time spent in these activities has never been paid for or counted as hours worked by the employer, and the employees have never resisted or opposed this policy in any manner although they apparently have been aware of it, there is a custom or practice under the collective bargaining agreement to exclude this time from the measured working time, and FLSA Sec. 3(o) applies to the time.

USDOL Field Operations Handbook § 31b01 (Sept. 19, 1996). For instance, in *Turner v. City of Philadelphia,* 262 F.3d 222, 227 (3d Cir. 2001), the Third Circuit applied this section to affirm the District Court's dismissal of clothes-changing time claims by city correctional officers. The plaintiffs' union had never formally requested collective bargaining over the city's policy, nor had it otherwise challenged the policy by grievance or arbitration demand. *See also Arcadi v. Nestle Food Corp,* 38 F.3d 672 (2d Cir. 1994); *Hoover v. Wyandotte Chems. Corp.,* 455 F.2d 387, 389 (5th Cir. 1972) (bargaining history established custom or practice); *Anderson v. Pilgrim's Pride Corp.,* 147 F. Supp. 2d 556, 564-65 (E.D. Tex. 2001); *Bejil v. Ethicon, Inc.,* 125 F. Supp. 2d 192, 196-97 (N.D. Tex. 2000).

Finally, the most significant dispute that often arises in relation to section 203(o) is what activities are covered by the term "changing clothes." Coveralls, shirts, pants, and common workplace uniforms clearly fall within this concept. *See* USDOL Admin. Interp. No. 2010-2 at 2 (June 16, 2010) (section 203(o) applies to clothes worn by workers in the bakery industry). In a 2010 interpretation, the Department of Labor has once again waffled on the issue of whether heavy protective safety equipment worn in the meat packing industry (such as mesh aprons and sleeves, plastic belly guards, arm guards, and shin guards) is covered by section 203(o). *Id.* at 1-4. That interpretation withdraws USDOL Opinion Letters FLSA2007-10 (May 14, 2007) and FLSA2002-2 (June 6, 2002) and concludes that section 203(o) does not apply to heavy protective equipment. Similarly, in *Alvarez*, 339 F.3d at 904-05, the Ninth Circuit held that section 203(o) must be narrowly construed against employers, and found that the section did not apply to specialized protective gear because that gear was "different in kind from typical clothing."

Interestingly, the Department of Labor's interpretation drew a distinction between heavy protective equipment and "lighter gear" that may fall within section 203(o). USDOL Admin. Interp. No. 2010-2 at 3 n.3. Likewise, many courts have held that lighter gear falls within section 203(o). *E.g., Anderson v. Cagle's, Inc.* 488 F.3d 945, 955-58 (11th Cir. 2007) (finding that smocks, hair/beard nets, and gloves "fit squarely within the commonly understood definition

of 'clothes' as that term is used in § 203(o)"); *Allen v. McWane Inc.*, 593 F.3d 449 (5th Cir. 2010); *Sepulveda v. Allen Family Foods, Inc.*, No. 08-2256 (4th Cir. Dec. 29, 2009). In *Anderson*, 488 F.3d at 957-58, the Eleventh Circuit took issue with the analytic approach used by the Ninth Circuit in its *Alvarez* decision, explaining: "construing § 203(o) narrowly against employers as an FLSA 'exemption' contravenes not only basic tenets of statutory construction but also the readily apparent intent of the legislators who approved the amendment's language."

Because employees continue to pursue compensation claims in relation to clothes changing and donning and doffing time, employers should consider a few steps that may undercut any such claims:

- Can the clothes, uniforms, or equipment be optional rather than required? This may not be possible with safety equipment, which is necessary to protect employees and minimize workplace injuries. Work clothes are another matter. Most employees would opt to use company-provided work clothes rather than having to provide their own work attire, thus the question is whether an employer can tolerate the few employees who decide not to wear company-provided work clothes. To minimize the impact of employee-selected attire, employers can adopt rules specifying what types of clothing are acceptable.
- Can the employees change at home? Again, this may not be possible (or preferable) with expensive safety equipment. Employers may also be concerned about the loss of uniforms and equipment. At the same time, if uniforms and equipment are checked out to employees and the employees are free to change at home or at work, any changing or donning and doffing claim is unlikely to succeed.
- Is the employer willing to provide a designated number of minutes for employees to change? The Department of Labor has endorsed such a formula approach:

> An employer may set up a formula by which employees are allowed given amounts of time to perform clothes changing and washup activities, provided the time set is reasonable in relation to the actual time required to perform such activities. The time allowed will be considered reasonable if a majority of the employees usually perform the activities within the given time.

USDOL Field Operations Handbook § 31b01a (Sept. 19, 1996). If an employer decides to pursue this option, the employer should have a time study or other analysis that supports the reasonableness of the time it allows. Employers should also understand that this provision only applies to "clothes changing." Thus, if donning and doffing protective equipment falls outside of that term (which some courts have held), then a formula approach may not preclude a subsequent lawsuit by employees who take longer to change.

E. Waiting and Walking Time

Whether employees must be paid for waiting and walking time depends on when those activities occur and what level of control employers exercise over the activities. The most basic rule is that employees must be paid for all time during which they are on duty, regardless of whether they are actually engaged in work. 29 CFR §§ 785.14 to .16. Thus, employees who are required to arrive at a location and then wait for assignments must be paid for their waiting time because they are engaged by their employer at that time. *See Preston v. Settle Down Enters., Inc*., 90 F. Supp. 2d 1267 (N.D. Ga. 2000) (material issue of fact precluded summary judgment on issue of whether temporary workers had to be paid for the time they were waiting for job assignments). In contrast, an employer generally does not need to pay employees for waiting time if the employees are completely relieved from duty and are free to use the time for their own personal purposes. *See United Transp. Union Local 1745 v. City of Albuquerque*, 178 F.3d 1109 (10th Cir. 1999). Applying these rules, one court found that police cadets, who were not in class or training but who nevertheless were required to remain at the police academy, were not entitled to waiting time compensation because they were free to engage in personal activities. *Banks v. City of Springfield*, 959 F. Supp. 972 (C.D. Ill. 1997). Similarly, in *Brigham v. Eugene Water & Elec. Bd.*, 357 F.3d 931 (9th Cir. 2004), the court found that electric utility workers who had to reside on their employer's remote premises did not have to be paid for waiting time when they were not performing actual duties. Moreover, another court found that a policy

requiring police officers on sick or disability leave to remain at home unless they obtain permission to go elsewhere did not transform the time at home into hours worked. *Debraska v. City of Milwaukee*, 189 F.3d 650 (7th Cir. 1999).

In *IBP*, 546 U.S. at 39-41, the Supreme Court found that whether waiting and walking time counts as compensable work time depends on whether it falls within the continuous workday. Time employees spent waiting to receive equipment and waiting to put on their work clothes and equipment did not count as hours worked. *Id.* at 40-41; *see also Anderson*, 328 U.S. at 689 (time waiting at the time clock was not hours worked). In contrast, waiting and walking time that occurred after their first principal work activity (donning unique protective gear) did count as hours worked. *IBP*, 546 U.S. at 39-40.

F. Pass-Down Time and Employee Discussions

When they arrive at work, some employees engage in discussions with other employees who are leaving work. Whether these discussions count as time worked depends on the purpose and nature of the discussions. On one extreme, employers do not have to pay for personal conversations between employees (unless, of course, the continuous workday has already started). On the other extreme, required discussions between employees at the end of their shift and their replacements (who are starting their shift) for the purpose of sharing operational information should be counted as time worked. *E.g.*, *Carlsen v. United States*, 521 F.3d 1371 (Fed. Cir. 2008) (finding that "the exchange of pertinent information and equipment" constituted work, but finding the work was *de minimis* because it took an average of less than 10 minutes per day). Between these two extremes, employers must use judgment to assure that employees are properly recording time when they are conversing with other employees about business issues.

A more difficult issue is presented when the continuous workday rule is considered with personal conversations at the start or end of the workday. For instance, if an employee turns on a machine (as discussed below, which is seemingly an initial act of work) and then engages in a personal conversation with a co-worker, does the employer have to pay for the personal

conversation because of the continuous workday rule? The answer is seemingly yes, at least if the discussion is relatively short in duration. If the discussion takes more than twenty minutes and especially if it occurs while the employees are getting coffee or breakfast, it may be possible (depending on the circumstances) to count this time as a meal period or extended non-compensable rest break. 29 CFR § 785.19; USDOL Field Operations Handbook § 31a01(b) (Dec. 15, 2000). Alternatively, if an employer adopts specific rules limiting the amount of time that can be used for such breaks and prohibiting rogue extensions of break time, the employer may be able to exclude such "unauthorized extensions" of breaks from its calculation of hours worked. USDOL Field Operations Handbook § 31a01(c) (Dec. 15, 2000).

G. Computers, Equipment, and Tools

When they arrive at work, employees must often take some preliminary steps with equipment to assure that they can perform their jobs. They might set up, lay out, turn on, prepare, or test computers, equipment, or tools. These activities almost certainly count as time worked. *E.g., Anderson*, 328 U.S. at 692-93 (turning on switches for lights and machinery counts as hours worked); *Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 717-18 (2d Cir. 2001) (powering up and testing an x-ray machine is integral to taking x-rays and counts as work time); 29 CFR § 790.8(b)(1) (lathe workers who frequently oil, grease, clean, or install new parts on their machines are involved in "an integral part of the principal activity"); 29 CFR § 790.8(b)(2) (garment workers who arrive early to distribute clothing to workbenches or to get machines "in readiness for operation" are engaged in work); USDOL Field Operations Handbook § 31b07 (Sept. 19, 1996) ("[k]nife sharpening activities are an integral part of and indispensable to the various butchering activities . . . [and] time so spent is compensable"). Once employees engage in such activities, the workday has started and, under the continuous workday rule, any subsequent walking, waiting, or other time generally must be counted as time worked. *IBP*, 546 U.S. at 29; 29 CFR § 790.6(b).

One area of recent focus by the Department of Labor is time spent by employees turning on computers and pulling up computer applications, especially in call center operations. If employees turn computers on and then spend time getting coffee or visiting with co-workers while computer applications boot up, the Department's position is that all such time is compensable under the continuous workday rule. If employees log into a time recording system after these initial activities, an employer could be systematically missing the first few minutes of its employees work time every day. Employers should thus be certain that their time recording systems are capable of capturing all time worked, including these initial start-up periods. As with time at the start of the day, employers must also be aware of and count work activities at the end of the day. Such activities might include putting away, rolling up, or turning off computers, equipment, or tools.

III. Time Recording Issues That Complicate Class Claims

The Department of Labor has adopted regulations that address recordkeeping requirements. *See* 29 CFR Part 516; 29 CFR §§ 785.46 to .48. When adopting time recording policies and procedures, employers should consider both what is legally permissible and what is necessary to minimize the likelihood and severity of class litigation.

A. The Need for Accurate Records

The types of records that must be maintained by employers are set forth in great detail in 29 CFR Part 516. These records include information regarding the employee, the work week, the hours worked each day, the basis of pay, the regular rate, straight time and overtime compensation, deductions and additions to wages, the applicable pay period, the wages paid each pay period, and the date of payment.

An employer has a duty to assure that these records are detailed and accurate. 29 CFR § 785.13. This duty may not be delegated to employees. Thus, policies regarding time entry, reporting of time, and following posted schedules are helpful but are not a defense to claims for uncompensated hours. Neither are policies that prohibit unauthorized work or overtime.

Likewise, time cards or time records by themselves are not necessarily sufficient evidence of hours actually worked. 29 CFR § 785.48.

Under federal law, employers must maintain most records for three years, 29 CFR § 516.5, although some source documents and other basic information may be discarded after two years, 29 CFR § 516.6. Even though the FLSA allows employers to discard some source materials after two years, employers should maintain all records for three years if this is practicable. Because the statute of limitations may not run after the two-year period, it is important for employers to maintain source materials to defend against possible wage claims. These materials may include records created or signed by the employee that can be used for impeachment purposes.

If employers fail to maintain required (or accurate) records, then courts shift the burden of proof in subsequent litigation. Essentially, courts allow employees to provide generalized and unsubstantiated testimony as to the hours they believe they worked and require that employers disprove the testimony. *E.g.*, *Anderson v. Mt. Clemens Pottery Co*., 328 U.S. 680 (1946). Thus, a court or jury may award damages even though the measure of damages is imprecise. *E.g.*, *Reich v. Stewart*, 121 F.3d 400 (8th Cir. 1997).

B. The Use of Time Rounding Systems

The Department of Labor has adopted a regulation that generally allows time rounding practices. 29 CFR § 785.48(b) provides:

> It has been found that in some industries, particularly where time clocks are used, there has been the practice for many years of recording the employees' starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.

Such rounding is acceptable as long as: the rounding works both ways (both for and against the employer); the rounding increments do not exceed a quarter of an hour (15 minutes); and the

rounding "is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked." *Id.*

Although seemingly allowed, rounding presents certain risks in class action litigation. Initially, the regulation merely states that rounding will be accepted "for enforcement purposes." Nothing suggests that a rounding system automatically satisfies the requirements of the FLSA. Moreover, the design of the rounding system can be attacked. Some systems are set up so that employers obtain the sole or primary benefit. Such systems do not comply with the FLSA. Finally, the regulation makes clear that the final measure as to whether a rounding system is effective is that "over a period of time" the system will fully compensate employees for the time they work. Whether this occurs could presumably be determined by comparing the total work hours using actual punch times with the total work hours using the rounding system. Regardless, this issue is highly factual and could prevent summary judgment in any dispute.

C. The Impact of Attendance Policies

Many employers have strict attendance and tardiness policies. Although these policies may not appear to have any relationship with the measurement of work hours, they can impact the viability of an employer's rounding policies. For instance, if an employer has a seemingly neutral and acceptable rounding policy that rounds to the nearest quarter hour (7:53 through 8:07 counts as 8:00), a strict tardiness policy could render the rounding policy improper and expose the employer to claims for unpaid work. Under this example, if an employee is marked tardy if he or she punches in at any time after 8:00, then the rounding policy is no longer "neutral" because employees can punch in early but are punished if they punch in late. This is the type of systemic flaw that is especially susceptible to class claims. Employers must therefore consider the impact on their time reporting systems when they adopt attendance and tardiness policies.

IV. What Can an Employer Do To Minimize the Risks?

Although there may be nothing an employer can do to eliminate the possibility that some employees will work time that is not compensated, employers should consider a number of steps to minimize the likelihood of uncompensated work and subsequent wage claims.

Initially, employers should attempt to structure employee jobs and the start and end of their workday in light of the guidance provided by the Department of Labor and the courts. For instance, employers should minimize any work-related activities that employees are asked to handle away from their primary work location. In addition, employers should require that employees engage in personal activities (using the restroom, getting coffee, and talking to friends) before they start any potential work activities and prohibit such personal activities after the workday has started. By effectively structuring the workplace, employers can minimize the situations where employees may engage in uncompensated work time.

Moreover, employers should consider adopting broader policies and procedures that will encourage employees to report their time. For example:

- Employers should establish a policy requiring employees to accurately record all time worked and prohibiting any off-the-clock work. As part of that policy, the employer should create a direct avenue for complaints to a human resources or legal department separate and apart from immediate management.
- Employers should then establish an ongoing educational campaign. Employees should be trained as to what should be reported as work time and periodically reminded that federal law and company policy prohibit off-the-clock work.
- Employers should have employees verify their time entries and compensated time on a weekly basis. If employees sign off on the precise times or number of hours that they have reported, they may be estopped from challenging those factual representations in later litigation.

- If any errors or gaps in time records are discovered, employers should be certain to document employee participation in any changes that are made. Despite employer policies requiring the entry of starting and ending times, employees sometimes fail to properly record their time. For instance, employees may not punch out at the end of the day. Although supervisors may be tempted to correct employee time records to accurately reflect the time that they believe the employees worked, supervisors should refrain from doing so. Rather, any adjustments or corrections to time reported by a particular employee should be explicitly requested or acknowledged by that employee. Absent such participation by employees, employers make themselves susceptible to charges that they have improperly altered time records. Moreover, if employees fail to initially record their time accurately, an employer may wish to issue warning letters to the employees about the importance of proper time reporting.
- Employers should establish a procedure for randomly verifying the accuracy of time cards and time records. This is perhaps the most important step that an employer can take. Such random verification demonstrates that the employer is taking affirmative steps to assure full payment of its employees and limit uncompensated off-the-clock work. If necessary, an employer should hire someone to conduct compliance audits.
- Employers should have defined practices and procedures to assure that any claims or complaints of uncompensated work time are promptly investigated and resolved. It is important for employers to create a record of paying valid claims for time worked.
- Employers should discipline employees for working or allowing uncompensated work. There may be a concern about claims of retaliation by employees who are disciplined after they felt compelled to work off the clock; however, a discipline policy that is evenly applied to managers who allow off-the-clock work should avoid this concern.

Finally, if an employer has a unique and particularly difficult work time issue, the employer may want to consider whether to seek an opinion on the subject. Employers can seek

advice from counsel or the Department of Labor. Indeed, in some circumstances, a written request for an opinion from the Department of Labor may be appropriate.[2] Reliance on advice may establish a lack of willfulness and reliance on a written interpretation by the Department may act as a bar to all liability. *E.g.*, *Samson v. Apollo Res., Inc.*, 242 F.3d 629, 641 (5th Cir. 2001) (approving a finding of good faith where the employer consulted with the Department of Labor); *SEIU, Local 102 v. County of San Diego,* 60 F.3d 1346, 1356 (9th Cir. 1994) (reversing an award of liquidated damages where the employer "relied on substantial legal authority" and "consult[ed] experts and the DOL in an attempt to comply with the law"); *Garcia v. Allsup's Convenience Stores, Inc.*, 167 F. Supp. 2d 1308 (D.N.M. 2001) (granting summary judgment on liquidated damages claim because employer relied on the advice of qualified professionals); 29 U.S.C. § 259.

[2] Note, however, that the Department recently announced that it would no longer issue opinion letters. Thus any request may go unanswered.

RCW 49.48.082
Wage complaints — Definitions.

The definitions in this section apply throughout this section and RCW 49.48.083 through 49.48.086:

(1) "Citation" means a written determination by the department that a wage payment requirement has been violated.

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

(3) "Determination of compliance" means a written determination by the department that wage payment requirements have not been violated.

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

(5) "Employee" has the meaning provided in: (a) RCW 49.46.010 for purposes of a wage payment requirement set forth in RCW 49.46.020 or 49.46.130; and (b) RCW 49.12.005 for purposes of a wage payment requirement set forth in RCW 49.48.010, 49.52.050, or 49.52.060.

(6) "Employer" has the meaning provided in RCW 49.46.010 for purposes of a wage payment requirement set forth in RCW 49.46.020, 49.46.130, 49.48.010, 49.52.050, or 49.52.060.

(7) "Notice of assessment" means a written notice by the department that, based on a citation, the employer shall pay the amounts assessed under RCW 49.48.083.

(8) "Repeat willful violator" means any employer that has been the subject of a final and binding citation and notice of assessment for a willful violation of a wage payment requirement within three years of the date of issue of the most recent citation and notice of assessment for a willful violation of a wage payment requirement.

(9) "Successor" means any person to whom an employer quitting, selling out, exchanging, or disposing of a business sells or otherwise conveys in bulk and not in the ordinary course of the employer's business, more than fifty percent of the property, whether real or personal, tangible or intangible, of the employer's business.

(10) "Wage" has the meaning provided in RCW 49.46.010.

(11) "Wage complaint" means a complaint from an employee to the department that asserts that an employer has violated one or more wage payment requirements and that is reduced to writing.

(12) "Wage payment requirement" means a wage payment requirement set forth in RCW 49.46.020, 49.46.130, 49.48.010, 49.52.050, or 49.52.060, and any related rules adopted by the department.

(13) "Willful" means a knowing and intentional action that is neither accidental nor the result of a bona fide dispute, as evaluated under the standards applicable to wage payment violations under RCW 49.52.050(2).

[2010 c 42 § 1; 2006 c 89 § 1.]

Notes:

Reviser's note: The definitions in this section have been alphabetized pursuant to RCW 1.08.015(2)(k).

Captions not law -- 2006 c 89: "Captions used in this act are not any part of the law." [2006 c 89 § 8.]

RCW 49.48.083
Wage complaints — Duty of department to investigate — Citations and notices of assessment — Civil penalties.

(1) If an employee files a wage complaint with the department, the department shall investigate the wage complaint. Unless otherwise resolved, the department shall issue either a citation and notice of assessment or a determination of compliance no later than sixty days after the date on which the department received the wage complaint. The department may extend the time period by providing advance written notice to the employee and the employer setting forth good cause for an extension of the time period and specifying the duration of the extension. The department may not investigate any alleged violation of a wage payment requirement that occurred more than three years before the date that the employee filed the wage complaint. The department shall send the citation and notice of assessment or the determination of compliance to both the employer and the employee by service of process or certified mail to their last known addresses.

(2) If the department determines that an employer has violated a wage payment requirement and issues to the employer a citation and notice of assessment, the department may order the employer to pay employees all wages owed, including interest of one percent per month on all wages owed, to the employee. The wages and interest owed must be calculated from the first date wages were owed to the employee, except that the department may not order the employer to pay any wages and interest that were owed more than three years before the date the wage complaint was filed with the department.

(3) If the department determines that the violation of the wage payment requirement was a willful violation, the department also may order the employer to pay the department a civil penalty as specified in (a) of this subsection.

(a) A civil penalty for a willful violation of a wage payment requirement shall be not less than one thousand dollars or an amount equal to ten percent of the total amount of unpaid wages, whichever is greater. The maximum civil penalty for a willful violation of a wage payment requirement shall be twenty thousand dollars.

(b) The department may not assess a civil penalty if the employer reasonably relied on: (i) A rule related to any wage payment requirement; (ii) a written order, ruling, approval, opinion, advice, determination, or interpretation of the director; or (iii) an interpretive or administrative policy issued by the department and filed with the office of the code reviser. In accordance with the department's retention schedule obligations under chapter 40.14 RCW, the department shall maintain a complete and accurate record of all written orders, rulings, approvals, opinions, advice, determinations, and interpretations for purposes of determining whether an employer is immune from civil penalties under (b)(ii) of this subsection.

(c) The department shall waive any civil penalty assessed against an employer under this section if the employer is not a repeat willful violator, and the director determines that the employer has provided payment to the employee of all wages that the department determined that the employer owed to the employee, including interest, within ten business days of the employer's receipt of the citation and notice of assessment from the department.

(d) The department may waive or reduce at any time a civil penalty assessed under this section if the director determines that the employer paid all wages and interest owed to an employee.

(e) The department shall deposit civil penalties paid under this section in the supplemental pension fund established under RCW 51.44.033.

(4) Upon payment by an employer, and acceptance by an employee, of all wages and interest assessed by the department in a citation and notice of assessment issued to the employer, the fact of such payment by the employer, and of such acceptance by the employee, shall: (a) Constitute a full and complete satisfaction by the employer of all specific wage payment requirements addressed in the citation and notice of assessment; and (b) bar the employee from initiating or pursuing any court action or other judicial or administrative proceeding based on the specific wage payment requirements addressed in the citation and notice of assessment. The citation and notice of assessment shall include a notification and summary of the specific requirements of this subsection.

(5) The applicable statute of limitations for civil actions is tolled during the department's investigation of an employee's wage complaint against an employer. For the purposes of this subsection, the department's investigation begins on the date the employee files the wage complaint with the department and ends when: (a) The wage complaint is finally determined through a final and binding citation and notice of assessment or determination of compliance; (b) the department notifies the employer and the employee in writing that the wage complaint has been otherwise resolved or that the employee has elected to terminate the department's administrative action under RCW 49.48.085.

[2010 c 42 § 2; 2006 c 89 § 2.]

Notes:

Captions not law -- 2006 c 89: See note following RCW 49.48.082.

RCW 49.48.084
Wage complaints — Administrative appeals.

(1) A person, firm, or corporation aggrieved by a citation and notice of assessment or a determination of compliance issued by the department under RCW 49.48.083 or the assessment of civil penalty due to a determination of status as a repeat willful violator may appeal the citation and notice of assessment, the determination of compliance, or the assessment of civil penalty to the director by filing a notice of appeal with the director within thirty days of the department's issuance of the citation and notice of assessment, the determination of compliance, or the assessment of civil penalty. A citation and notice of assessment, a determination of compliance, or an assessment of a civil penalty not appealed within thirty days is final and binding, and not subject to further appeal.

(2) A notice of appeal filed with the director under this section shall stay the effectiveness of the citation and notice of assessment, the determination of compliance, or the assessment of civil penalty pending final review of the appeal by the director as provided for in chapter 34.05 RCW.

(3) Upon receipt of a notice of appeal, the director shall assign the hearing to an administrative law judge of the office of administrative hearings to conduct the hearing and issue an initial order. The hearing and review procedures shall be conducted in accordance with chapter 34.05 RCW, and the standard of review by the administrative law judge of an appealed citation and notice of assessment, an appealed determination of compliance, or an appealed assessment of civil penalty shall be de novo. Any party who seeks to challenge an initial order shall file a petition for administrative review with the director within thirty days after service of the initial order. The director shall conduct administrative review in accordance with chapter 34.05 RCW.

(4) The director shall issue all final orders after appeal of the initial order. The final order of the director is subject to judicial review in accordance with chapter 34.05 RCW.

(5) Orders that are not appealed within the time period specified in this section and chapter 34.05 RCW are final and binding, and not subject to further appeal.

(6) An employer who fails to allow adequate inspection of records in an investigation by the department under this chapter within a reasonable time period may not use such records in any appeal under this section to challenge the correctness of any determination by the department of wages owed or penalty assessed.

[2010 c 42 § 3; 2006 c 89 § 3.]

Notes:

Captions not law -- 2006 c 89: See note following RCW 49.48.082.

RCW 49.48.085
Wage complaints — Employee termination of administrative action.

(1) An employee who has filed a wage complaint with the department may elect to terminate the department's administrative action, thereby preserving any private right of action, by providing written notice to the department within ten business days after the employee's receipt of the department's citation and notice of assessment.

(2) If the employee elects to terminate the department's administrative action: (a) The department shall immediately discontinue its action against the employer; (b) the department shall vacate a citation and notice of assessment already issued by the department to the employer; and (c) the citation and notice of assessment, and any related findings of fact or conclusions of law by the department, and any payment or offer of payment by the employer of the wages, including interest, assessed by the department in the citation and notice of assessment, shall not be admissible in any court action or other judicial or administrative proceeding.

(3) Nothing in this section shall be construed to limit or affect: (a) The right of any employee to pursue any judicial, administrative, or other action available with respect to an employer; (b) the right of the department to pursue any judicial, administrative, or other action available with respect to an employee that is identified as a result of a wage complaint; or (c) the right of the department to pursue any judicial, administrative, or other action available with respect to an employer in the absence of a wage complaint. For purposes of this subsection, "employee" means an employee other than an employee who has filed a wage complaint with the department and who thereafter has elected to terminate the department's administrative action as provided in subsection (1) of this section.

[2006 c 89 § 4.]

Notes:

Captions not law -- 2006 c 89: See note following RCW 49.48.082.

RCW 49.48.086
Collection procedures.

(1) After a final order is issued under RCW 49.48.084, if an employer defaults in the payment of: (a) Any wages determined by the department to be owed to an employee, including interest; or (b) any civil penalty ordered by the department under RCW 49.48.083, the director may file with the clerk of any county within the state a warrant in the amount of the payment plus any filing fees. The clerk of the county in which the warrant is filed shall immediately designate a superior court cause number for the warrant, and the clerk shall cause to be entered in the judgment docket under the superior court cause number assigned to the warrant, the name of the employer mentioned in the warrant, the amount of payment due on it plus any filing fees, and the date when the warrant was filed. The aggregate amount of the warrant as docketed becomes a lien upon the title to, and interest in, all real and personal property of the employer against whom the warrant is issued, the same as a judgment in a civil case docketed in the office of the clerk. The sheriff shall proceed upon the warrant in all respects and with like effect as prescribed by law with respect to execution or other process issued against rights or property upon judgment in a court of competent jurisdiction. The warrant so docketed is sufficient to support the issuance of writs of garnishment in favor of the state in a manner provided by law in case of judgment, wholly or partially unsatisfied. The clerk of the court is entitled to a filing fee which will be added to the amount of the warrant. A copy of the warrant shall be mailed to the employer within three days of filing with the clerk.

(2)(a) The director may issue to any person, firm, corporation, other entity, municipal corporation, political subdivision of the state, a public corporation, or any agency of the state, a notice and order to withhold and deliver property of any kind when he or she has reason to believe that there is in the possession of the person, firm, corporation, other entity, municipal corporation, political subdivision of the state, public corporation, or agency of the state, property that is or will become due, owing, or belonging to an employer upon whom a notice of assessment has been served by the department for payments or civil penalties due to the department. The effect of a notice and order is continuous from the date the notice and order is first made until the liability out of which the notice and order arose is satisfied or becomes unenforceable because of lapse of time. The department shall release the notice and order when the liability out of which the notice and order arose is satisfied or becomes unenforceable by reason of lapse of time and shall notify the person against whom the notice and order was made that the notice and order has been released.

(b) The notice and order to withhold and deliver must be served by the sheriff of the county or by the sheriff's deputy, by certified mail, return receipt requested, or by the director. A person, firm, corporation, other entity, municipal corporation, political subdivision of the state, public corporation, or agency of the state upon whom service has been made shall answer the notice within twenty days exclusive of the day of service, under oath and in writing, and shall make true answers to the matters inquired of in the notice and order. Upon service of the notice and order, if the party served possesses any property that may be subject to the claim of the department, the party shall promptly deliver the property to the director. The director shall hold the property in trust for application on the employer's indebtedness to the department, or for return without interest, in accordance with a final determination of a petition for review. In the alternative, the party shall furnish a good and sufficient surety bond satisfactory to the director conditioned upon final determination of liability. If a party served and named in the notice fails to answer the notice within the time prescribed in this section, the court may render judgment by default against the party for the full amount claimed by the director in the notice, together with costs. If a notice is served upon an employer and the property subject to it is wages, the employer may assert in the answer all exemptions provided for by chapter 6.27 RCW to which the wage earner is entitled.

(3) In addition to the procedure for collection of wages owed, including interest, and civil penalties as set forth in this section, the department may recover wages owed, including interest, and civil penalties assessed under RCW 49.48.083 in a civil action brought in a court of competent jurisdiction of the county where the violation is alleged to have occurred.

(4) Whenever any employer quits business, sells out, exchanges, or otherwise disposes of the employer's business or stock of goods, any person who becomes a successor to the business becomes liable for the full amount of any outstanding citation and notice of assessment or penalty against the employer's business under this chapter if, at the time of the conveyance of the business, the successor has: (a) Actual knowledge of the fact and amount of the outstanding citation and notice of assessment or (b) a prompt, reasonable, and effective means of accessing and verifying the fact and amount of the outstanding citation and notice of assessment from the department. If the citation and notice of assessment or penalty is not paid in full by the employer within ten days of the date of the sale, exchange, or disposal, the successor is liable for the payment of the full amount of the citation and notice of assessment or penalty, and payment thereof by the successor must, to the extent thereof, be deemed a payment upon the purchase price. If the payment is greater in amount than the purchase price, the amount of the difference becomes a debt due the successor from the employer.

(5) This section does not affect other collection remedies that are otherwise provided by law.

[2010 c 42 § 4; 2006 c 89 § 5.]

Notes:

Captions not law -- 2006 c 89: See note following RCW 49.48.082.

RCW 49.48.087
Rules.

The director may adopt rules to carry out the purposes of RCW 49.48.082 through 49.48.086.

[2006 c 89 § 6.]

Notes:

Captions not law -- 2006 c 89: See note following RCW 49.48.082.

STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES

Employment Standards Program
15 West Yakima Ave, Suite 100- Yakima, WA 98902-5789

October 18, 2010

Tommy's Burgers & Brew
1015 Cattlemen Drive
Ellensburg, WA 98926

Subject: **Important: An employee has filed a wage complaint against your company**
Case No. 59253

Dear Mr. James:

I am writing to let you know that we have received a wage complaint from a current or former employee of yours. I hope to hear from you soon so that we can quickly and fairly resolve this complaint with the most complete information you can make available to us.

Name of employee:	Angus Roundup
Amount of wage claim:	$262.50
For wages earned in the period:	September 1, 2010 to September 10, 2010
Description of complaint:	Worked 17.5 overtime hours during the Ellensburg Rodeo

If you agree you owe these wages:

- Write a check ***made payable to the above employee*** for the amount shown above, less applicable taxes.
- Prepare a statement of earnings for the time period shown above.
- Send the check and earnings statement to L&I at the address above.

  ➢ L&I will mail you a signed release of complaint from the employee.

If you don't agree you owe these wages:

- Send me a written response and any documentation you have that will help us understand your side of this dispute, including:

✓ Address, telephone number and social security number of employee.
✓ Copies of the employee's time records showing hours worked per day and per week.
✓ Payroll records showing the pay basis, rate or rates of pay, gross wages and all deductions for each pay period for the specified period.
✓ Dates of payment and the dates that each pay period covered.
✓ Agreement, contract, or other document specifying terms for payment of wages.
✓ Copies of checks (front and back) verifying receipt of payment.
✓ Other documents you believe may be appropriate for this investigation.

Please send the payment and/or records to my attention at the above address no later than **November 7, 2010.**

Next steps:

- It's very important for you to respond by the above date and provide the records we request.
- If you promptly send us the records we request, and we find that you did *not* violate any wage law, we will issue you a legal document called a *Determination of Compliance.*
- If L&I finds that you owe wages, you will be informed. If you pay the wages, no further action will be taken.
- If you don't agree to pay the wages, L&I will issue a *Citation and Notice of Assessment* that orders you to pay wages found owed plus interest at 1% per month since the date the wages were originally owed. In certain cases, a penalty may also be assessed.
- If you *are* cited for unpaid wages, you will have the right to appeal the citation and request a hearing. Citations always include written appeal instructions.

We have enclosed a fact sheet with more information for you about wage complaint investigations.

Thank you for your patience and cooperation. Please call if you have any questions.

Sincerely,

Nick Hernandez
Industrial Relations Agent

Enc: Wage Payment Act
Employer Fact Sheet
Copy of complaint form
RCW 49.46.130

Washington State Department of
Labor & Industries
Employment Standards Program

Employer Information

What are your rights when a current or former employee files a claim for unpaid wages with L&I? What happens next?

You have important responsibilities and rights that will need your attention.

- Please stay in touch with us because we will need information from you about the claim. Please return our phone calls or respond in writing to our letters.
- If you move, be sure to let us know your new address and phone number.
- If you pay the employee directly, be sure to let us know and provide proof of payment so we can close the wage complaint.

What happens when a worker files a wage complaint with L&I against your business?

- When we receive a written wage complaint from a current or former employee, the law requires L&I to investigate and determine whether or not the employer owes wages. Our first step is to let you know that the employee has filed the complaint, the name of the employee, and the reason given for filing it.

What are the next steps in the investigation?

- An L&I investigator will contact you by phone or letter or both because we need to get your side of the complaint. We will need to hear from you.
- If you don't agree with the wages claimed, we will ask you to explain in writing why you don't believe you owe the wages and ask you to send us records or other documents that support your side. The investigation will proceed until the investigator concludes whether the complaint is valid.
- If you believe that you owe the wages, send a check or money order *made out to the employee* to the investigator who is working with you. We will get the payment to the employee. We will also send you a copy of a form signed by the employee that releases you from any further obligation to pay wages for the time period in the complaint.
- If you pay the wages the employee says you owe, the investigation will be closed as otherwise resolved with no further action or formal determination by L&I.

What happens if the evidence shows that you did *not* violate a wage law as the employee alleged?

- We will issue a formal determination to you stating that you did not violate the wage law(s) as alleged and send it to both you and the employee. This document is called a Determination of Compliance.
- The employee has 30 days to appeal. Although employees typically appeal, you also have this right.
- Unlike a citation, the employee will not be able to "opt out" of L&I's administrative process if L&I issues a determination that you did not violate a wage payment requirement.
- Your may use L&I's determination of compliance in a private lawsuit to say that the employer does not owe you any further wages.

What happens if you don't respond or the evidence shows that you do owe the wages?

- If the evidence shows you didn't respond to L&I during the investigation or you owe the wages claimed and you don't agree to pay, the law requires that we issue a formal determination, called a Citation and Notice of Assessment (NOA) to you.
- If you had records or documents that the investigator requested during the investigation that you did not provide within a reasonable time, the law will not allow you to use those records or documents as a defense in an appeal hearing.

What can you do if you receive a Citation and Notice of Assessment?

- **You may appeal**: Either you or the employee may appeal an NOA in writing within 30 days. (Instructions are provided in the NOA.)

  or
- **You may pay**: If you send payment of the wages and interest owed to L&I within 10 days of the date on the NOA, any penalty would automatically be waived. L&I may also waive a penalty if it finds you paid all wages owed to the employee. If the employee accepts your payment, the claim is satisfied and the employee cannot later file a lawsuit for the same wages.

What happens if you don't pay or appeal?

- If you don't pay or appeal, the Citation and Notice of Assessment becomes final and binding after 30 days. The L&I Collection Unit will take over the case.

What happens if an employee withdraws the wage complaint?

- At any time during the investigation until an NOA is issued, an employee can withdraw the complaint by informing L&I of that decision. The wage complaint is considered otherwise resolved and no formal determination is issued.
- If an NOA is issued, an employee may withdraw the complaint or "opt out" of further L&I action. The employee must send written notice to L&I of the decision to opt out within 10 business days of the issuance of the NOA. The NOA is then vacated and the citation, findings or settlement offer by the employer aren't admissible in a court action. If the employee doesn't opt out within this period, the employee can't opt out later to take private legal action.

After a Citation and Notice of Assessment is issued, can you contact L&I to give evidence or information that might have changed the outcome of the investigation?

- No. The law does not allow L&I to reconsider an investigation after it issues an NOA. You need to appeal the NOA.

How long will the investigation take?

- L&I tries to resolve complaints as quickly as possible. It may take up to 60 days, but if we need more time, we will send both you and the employee a letter explaining why.

How far back can employees file wage complaints against my business?

- Generally within three years from the pay day when unpaid wages were owed to the employee. This is known as "statute of limitations". L&I can issue a citation only for wages owed in the last three years from the pay day when the wages were owed. There is no guarantee that L&I will be able to reach a decision before the three-year limitation period expires if a complaint is filed close to the end of this period.

We recommend that you save this document for your records

Employment Standards Program
Department of Labor & Industries
PO Box 44510
Olympia WA 98504-4510
360-902-5316 or 1-866-219-7321

Worker Rights Complaint

For L&I use only

WA Unified Business Identifier (UBI):	
603-258-492	
ESCH #:	NAICS #:
59253	/ 681742

A: Worker Information

Language preference (check one)
■ English ☐ Spanish ☐ Russian ☐ Korean ☐ Chinese ☐ Vietnamese ☐ Laotion ☐ Cambodian ☐ Other _____

Your name (last, first, middle initial) ■ Mr. ☐ Mrs. ☐ Ms.	Social Security #	Home phone #	Your cell phone #
Roundup, Angus	999-00-1234	(509) 987-6543	
Home address	**Complaint is for this period of time:**		**Your pay rate**
698 Cow Patty Place	From: September 1, 2010 To: September 10, 2010		$ 10.00
City State Zip	**Date you began work with this employer:**	**If not still employed with this company, what was your last day?**	
Ellensburg, WA 98926	January 2007	September 10, 2010	
E-mail address	**Are you still employed with this company?**	**Reason for leaving job:**	
roundemup24@yahoo.com	☐ Yes ■ No	■ Fired ☐ Quit ☐ Laid off ☐ Don't know	

What kind of work did you do?
Main grill cook

B: Employer Information

Name of company	Name of company owner, manager, or supervisor	
Tommy's Burgers & Brew	Jesse James	
Company mailing address	**Company phone #**	**Cell phone #**
1015 Cattlemen Drive	(509) 123-4567	( )
City State Zip	**FAX #**	**E-mail, if known**
Ellensburg, WA 98926	( )	
Address where you worked if not at the above address	**Type of company (For example: construction, restaurant, janitorial.)**	
same as above	Restaurant	
City State Zip	**Has the company filed for bankruptcy?**	**Is the company still in business?**
	☐ Yes ☐ No ■ Don't know	■ Yes ☐ No ☐ Don't know

C: Wage Complaint Information (Skip to Section D if your complaint is *not* about wages.)

Important: *If you or your attorney have already filed a complaint about these wages in court, we cannot accept your claim.*

What type of complaint are you filing?
(You may check more than one box below.)

- ☐ Final wages not paid
- ☐ Hours worked not paid
- ☐ Minimum wage not paid
- ■ Overtime not paid
- ☐ Money taken out of my paycheck (not taxes) without my permission*
- ☐ Willful failure to pay agreed wages
- ☐ Paid with NSF check (bounced check).

** If you had a written agreement with your employer to deduct wages from your paycheck that wasn't followed correctly, we will need a copy.*

Tell us in detail why you are filing this complaint. You may attach additional sheets if you need more room.

During the Ellensburg Rodeo, I worked 17.5 overtime hours and I was not paid for any of it. My boss told me that we had to work the extra hours without pay because he couldn't afford to pay overtime.

If you have copies of any records that will help us understand your complaint, please attach them to this form.

What wages do you believe are owed to you?

Rate of pay per. Hour ☑ Day ☐ Week ☐ Month ☐	Other rate of pay per: Piece rate ☐ Commission ☐ Sq ft ☐ Flat rate ☐ Other (Specify) ☐		
$ 10.00	$		
Wages owed.	**For how many hours?**	**Partial payment received?**	**What pay is owed to you before taxes?**
From: 9/1/2010 To: 09/10/2010	17.5	$	$ 262.50

Reason employer gave for not paying you

He said he couldn't afford to pay overtime. When I demanded he pay me, he fired me and told me I would never get paid for that time.

Section C continued on reverse side

C: Wage Complaint Information (Section C continued)

Check the box(es) below to show what records you are attaching to support your claim:

- ☐ Written wage agreement
- ☐ Log books
- ☐ Shift schedules
- ☐ Payroll check stubs
- ■ Personal time records
- ☐ Copies of bad checks
- ☐ Time card or copy
- ☐ Employee handbook
- ☐ Attendance rosters
- ☐ Other _____

Note: We also will be asking your employer for records.

Have you asked your employer for your wages? ■ Yes ☐ No

If yes, on what dates did you ask?

September 10, 2010

When was the scheduled payday for the wages you are claiming?

September 15, 2010

How often are you paid? ☐ Monthly ■ Twice monthly ☐ Every other week ☐ Weekly ☐ Daily

Do you have a written employment agreement? ☐ Yes ■ No If yes, attach a copy.

Do you belong to a union? ☐ Yes ■ No If yes, what is your union's name?

Were you paid straight time for overtime hours? ☐ Yes ■ No

Are overtime hours recorded? ☐ Yes ☑ No

Did you receive pay stubs? ■ Yes ☐ No

Do you have your pay stubs? ☐ Yes ■ No If yes, attach copies.

Do you have an attorney who has filed an action in court to collect these wages? ☐ Yes ■ No
If you checked yes, we cannot accept your complaint.

Were you under 18 when employed? ☐ Yes ☐ No

If under 18 when started work for this employer, date of birth:

Do you owe your employer any money? ☐ Yes ■ No If yes, amount owed. $_____
Why? _____
Written agreement? ☐ Yes ☐ No If yes, attach copy.

Were other workers affected? ■ Yes ☐ No
If so, how many? 6

Do you have any property belonging to the business? ☐ Yes ■ No
If yes, list.

D: Non-Wage Complaint Information

What type of non-wage complaint are you filing?

- ☐ Child labor laws were violated. (For example, employer hired under-aged workers or did not follow working-hours rules for teen workers)
- ☐ Employer did not provide required time for meal periods.
- ☐ Employer did not provide required time for rest periods.
- ☐ Employer didn't pay for work uniform.
- ☐ RN or LPN nurse overtime rules were not followed.
- ☐ Other: _____

Tell us in detail why you are filing this complaint. You may attach additional sheets if you need more room.

If you have copies of any records that will help us understand your complaint, please attach them to this form.

E: If we cannot reach you...

(!) *We need contact information for someone who will always know how to reach you.*
(Please don't write in your own address or phone #.)

Your contact's name: Betsy Bronco		
Address: 1252 Greener Pastures		
City: Ellensburg, WA 98926	State	Zip
Phone number: (509)456-9863	Cell phone #: ( )	Work phone #: ( )

F: Worker Signature (required)

To the best of my knowledge, the information I have entered on this form is true and accurate.

Signature: Angus Randup | Date: 10/18/10

For more information about your workplace rights and responsibilities in Washington, go to:
www.WorkplaceRights.Lni.wa.gov

Washington State Department of Labor & Industries

Worker Rights Complaint Form Instructions

What types of worker rights complaints can L&I accept?

L&I accepts complaints on the *Worker Rights Complaint Form* for...

In Section C of the form:

- Unpaid minimum wages, overtime, final pay, or hours worked.
- Payroll deductions you did not agree to, not including deductions for required taxes.

In Section D of the form:

- Meal or rest periods not given.
- Violations of child labor laws.
- RN or LPN overtime law not followed.

IMPORTANT: *If we find that your employer owes you money, we cannot guarantee that we will be able to collect it for you. Also, in general, we only have* ***three years*** *from the date you claim your wages are owed to make a formal decision. Please keep this in mind when you decide to file your complaint with us.*

On *separate* complaint forms, L&I also accepts the following complaints...

- *Prevailing Wage Complaint form* # F700-146-000 for prevailing wage violations.
- *Protected Leave Complaint form* # F700-144-000 for family leave, family care, leave for victims of domestic violence, sexual assault or stalking, spouse military leave, leave for voluntary firefighters on the scene.
- See L&I Workplace Rights website for filing the various workplace rights complaints: **www.Lni.wa.gov WorkplaceRights/**. See the section titled: "Complaints/Discrimination"

We do *not* accept wage complaints against...

- A business in which you are a part owner (including family-owned).
- Public employers, such as a state, county, city, or school district.
- A business that owes money to a company you own.
- Employers who have filed for bankruptcy. (You may file a "Proof of Claim" with the US Bankruptcy Court.)

Or when it's about:

- Unpaid vacation or sick leave, holiday pay, severance pay, or reimbursement for expenses, including fuel.
- If you are claiming wages for hours worked out-of-state for a non-Washington employer.
- Bank fees you paid because your employer's check bounced.
- A case you have already filed in court.

How to file your wage complaint:

- ☐ Complete and sign the attached form. Use a sheet of paper if you need more space to explain your complaint.
- ☐ Attach any information or records, such as time sheets or cards, calendars, or any personal records you have that show the days and hours you worked and what tasks you did. **This is very important to help us understand your complaint.**
- ☐ Mail or bring the form and records to the L&I office in the county where the business is located. (See back of sheet.)

IMPORTANT: *If you are moving, have a new telephone number, or are hiring an attorney, let us know right away. Call the local office where you filed your complaint, or 1-866-219-7321. If we can't contact you, this may delay the investigation or prevent us from being able to help you.*

If we can accept your complaint, we will:

- Assign an Industrial Relations Agent to investigate your complaint. In most cases, L&I must tell your employer that you filed a complaint and send a copy of your complaint to the employer.
- Make a decision on your complaint within 60 days, OR, if we have good cause, notify you that we require more time.

IMPORTANT: *If we cannot take your complaint, you have the right to either contact a private attorney OR file suit in Small Claims Court for up to $5000. www.courts.wa.gov/newsinfo/resources/brochure_scc/smallclaims.doc*

Where to file your complaint.

In person:

Bring your completed form to the L&I office located in the same county where your employer's business is:

Or By mail:

Mail the original of your completed form to the L&I office located in the same county your employer's business is. Write on the envelope: *Industrial Relations Agent, Dept. of Labor & Industries,* then the address of the office you selected.

L&I Offices in Washington

County where you worked.	Use this L&I office(s).	Address	Phone number
Island **San Juan** **Skagit** **Whatcom**	**Mount Vernon**	525 East College Way, Suite H Mount Vernon, WA 98273-5500	360-416-3000
	Bellingham	1720 Ellis Street, Suite 200 Bellingham, WA 98225-4647	360-647-7300
Snohomish	**Everett**	729 – 100th Street S.E. Everett, WA 98208-3727	425-290-1300
King	**Seattle**	315 5th Avenue S., Suite 200 Seattle, WA 98104-2607	206-515-2800
	Bellevue	616 120th Avenue N.E., Suite C-201 Bellevue, WA 98005-3037	425-990-1400
	Tukwila	P.O. Box 69050, Seattle, WA 98168-1050 Or: 12806 Gateway Drive, Tukwila, WA 98168-3346	206-835-1000
Pierce	**Tacoma**	950 Broadway, Suite 200 Tacoma, WA 98402-4453	253-596-3945
Clallam **Jefferson** **Kitsap**	**Bremerton**	500 Pacific Avenue, Suite 400 Bremerton, WA 98337-1943	360-415-4000
	Port Angeles	1605 East Front Street, Suite C Port Angeles, WA 98362-4628	360-417-2700
Grays Harbor **Lewis** **Mason** **Thurston** **Pacific**	**Olympia**	Or: P.O. Box 44510, Olympia, WA 98504-4510 7273 Linderson Way S.W., Tumwater, WA 98501	360-902-5313
	Aberdeen	Or: 415 Wishkah Street, Suite 1-B, Aberdeen, WA 98520-0013	360-533-8200
Clark **Klickitat** **Skamania**	**Vancouver**	312 S.E. Stonemill Drive, Suite 120 Vancouver, WA 98684-6982	360-896-2300
Cowlitz **Pacific** **Wahkiakum**	**Kelso**	711 Vine Street Kelso, WA 98626-2650	360-575-6900
Adams **Grant** (South of I-90) **Kittitas** **Yakima**	**Yakima**	15 West Yakima Avenue, Suite 100 Yakima, WA 98902-3480	509-454-3700
Benton **Columbia** **Franklin** **Walla Walla**	**Kennewick**	4310 West 24th Avenue Kennewick, WA 99338-1992	509-735-0100
Chelan **Douglas** **Grant** (North of I-90) **Okanogan**	**East Wenatchee**	519 Grant Road East Wenatchee, WA 98802-5459	509-886-6500
	Moses Lake	3001 West Broadway Avenue Moses Lake, WA 98837-2907	509-764-6900
Adams (S.E.) **Asotin** **Ferry** **Garfield** **Lincoln** **Pend Oreille** **Spokane** **Stevens** **Whitman**	**Spokane**	901 North Monroe Street, Suite 100 Spokane, WA 99201-2149	509-324-2600
	Colville	298 South Main, Suite 203 Colville, WA 99114-2416	509-684-7417
	Pullman	Or: P. O. Box 847, Pullman, WA 99163-0847 1250 Bishop Blvd. S.E., Suite G, Pullman WA 99163	509-334-5296

STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES
EMPLOYMENT STANDARDS PROGRAM
15 West Yakima Ave Suite 100 - Yakima, WA 98902-5789

October 18, 2010

Angus Roundup
698 Cow Patty Place
Ellensburg, WA 98926

Re: Complaint for unpaid wages
Tommy's Burgers & Brew
Case No. 59253

Dear Angus Roundup:

We have received the wage complaint you filed with us against your employer and plan to investigate.

Here's what you need to know now:

1. It will take approximately sixty days from today's date for us to investigate your complaint.
We receive many complaints each month and do our best to follow up on each. Some investigations take longer because they are complex or involve more money. If we need more time to investigate your complaint, we will notify you and your employer by letter.

2. You must let us know immediately if:

- **Your employer pays you what is owed.**
- **Your address or phone number changes:**
  If it does, call or write to the address at the top of this page. This is *very* important because:
  - If we collect wages for you, we'll need to know where to send your check.
  - If we have questions during our investigation, you will be responsible for getting the information to us right away. Any delay could jeopardize your claim or cause you to lose legal rights.

  Note: We have enclosed a pre-paid post card that you can send to L&I if your employer paid you, to inform us of a new address or phone number or you have more information you want L&I to have.
- **You take legal action yourself,** either by hiring an attorney or by going to Small Claims Court ($5000 limit). L&I cannot act on your behalf if you are taking other legal action.

SAVE THIS LETTER AND OTHER L&I LETTERS FOR YOUR RECORDS

3. There is a legal time period for when you have to file a wage complaint or a private lawsuit. There is a ***three-year*** time limit, known as "statute of limitations" to file a wage complaint with L&I or file a private lawsuit. This time period does not apply to the date you filed your wage complaint with L&I, but to the *pay day* you claim your wages were owed. If you have filed a wage complaint with L&I that is close to this time limit L&I cannot guarantee that it will be able to reach a formal decision before the three-year limitation period expires.

Depending upon when the wage complaint is received, the number and complexity of the issues and how quickly it receives background information from you and your employer, some or all of your wage claims may expire before L&I is able to issue a decision on your claim.

In this situation, you will lose the chance to file private legal action for the entire amount you believe is owed to you. You might want to consider filing private legal action to preserve all of the wages you believe are owed. At any time during the investigation you have the right to talk to a private attorney (at your cost), dismiss your complaint, and file a private lawsuit. You must let L&I know if this is your choice.

What will happen next:

1. If your employer pays the wages you are owed after being contacted by L&I, we will:
Contact you and require you to sign a "wage release" form agreeing to the wages paid and acknowledging that you were paid. You could either pick up your check at the L&I office or ask us to mail you the wage release forms so that we could mail your check.

2. If L&I finds your wages are due, but the employer does not pay them, we will:
Send a written citation to your employer for failing to pay you your wages and begin taking action to collect the money.

3. If L&I finds that the employer does *not* owe you the wages claimed, we will:
Send a written "Determination of Compliance" to your employer, which means we've found your employer complied with wage laws and does not owe you money.

We have enclosed more information on the wage complaint investigation process for you to read.

Sincerely,

Nick Hernandez

Nick Hernandez
Industrial Relations Agent
509-454-3755

Enclosure: RCW 49.48
Information on L&I's investigation process

SAVE THIS LETTER AND OTHER L&I LETTERS FOR YOUR RECORDS

Washington State Department of
Labor & Industries
Employment Standards Program

Worker Information
Now that you've filed a wage complaint...

You have important responsibilities that will need your attention.

- You must stay in touch with us because we may need more information from you about your complaint. Please return our phone calls or respond to our requests in writing.
- If you move, be sure to let us know your new address and phone number.
- If your employer pays you the wages owed, be sure to let us know so we can close your complaint.

How far back can I file a wage complaint?

- Within three years from the pay day when unpaid wages were owed to you.
- L&I can issue a citation only for wages owed in the last three years from the pay day when the wages were owed.

What happens when I file a complaint with L&I against my employer for not paying wages that I believe are owed to me?

An investigator will first determine if your complaint is valid. If it is, the investigator will begin an investigation. L&I cannot keep your complaint confidential and will send a copy of your complaint to your employer.

How long will L&I's investigation of my wage complaint take?

L&I tries to resolve complaints as quickly as possible. It will take approximately 60 days, but if we need more time, we will send both you and your employer a letter explaining why.

Now that I've filed my complaint, do I need to do anything else?

Yes. You need to give us information we request to prove your case. This may include pay stubs, proof of hours worked, and other documents. We will ask your employer for this information too, but if the employer doesn't give us records, we may need to rely on ***your*** records. If you have any of these records or documents but didn't include them with your complaint form, please bring them or mail them to your L&I Industrial Relations Agent.

What happens if my employer responds to my L&I complaint and agrees to pay the amount I am owed?

If the employer pays you, we will close the investigation without issuing a formal decision.

1.) We will tell your employer to send the wages with required taxes deducted to L&I.
2.) We will notify you that the money has arrived and require you to sign a "wage release" form. By signing the form, this means you have read and agreed with the amount of wages paid, and that you accept the payment. We will send your employer a copy of your signed form. If you have a question about the amount the employer paid, contact your Industrial Relations Agent.

What will L&I do if its investigation finds that I am owed wages but my employer doesn't pay the wages owed?

- If the employer does not pay you, we will issue a formal determination called a Citation and Notice of Assessment to your employer. This will order the employer to pay the wages L&I found owing to you. You will receive a copy.

What are my legal options if L&I cites my employer for not paying me?

- Both you and your employer have the right to appeal the citation by writing to the address listed in the citation within 30 days.
- If the employer doesn't appeal and you don't either, the order becomes final and binding 30 days after it is mailed.
- If the citation order becomes final and binding, and the employer still did not pay the wages, L&I will begin the legal steps to get your wages.

You also have the right to do ***one*** of the following:

- **Allow L&I to follow up on the citation and continue the wage complaint process.** However, we cannot guarantee that we will be successful at recovering the money you believe you are owed.

Or

- **Notify L&I you want to drop the matter all together.** This is known as "opting out" so you can file a private lawsuit or file suit for up to $5000 in the small claims court of the county where the employer is located, or just decide you want to drop your complaint with L&I. You *cannot* sue the employer and keep your wage complaint with L&I at the same time.

> ***Important note about your rights:*** *If you choose to opt out, you are required to notify L&I in writing within 10 days of the date on the citation. If you don't opt out within this 10-day period, you will lose the right withdraw your complaint and file a private lawsuit – even if L&I is unable to collect your money.*

Can L&I give me legal advice if I file a wage complaint?

No. L&I can't give you legal advice or act as your attorney. You can, at your own cost, consult with an attorney of your own at any time. Information about how to obtain an attorney is available through:
Washington State Bar Association: www.wsba.org or 1-800-945-WSBA

What happens if L&I finds that my employer does *not* owe me the wages I claimed? Will it affect my ability to pursue a private lawsuit?

In this case, we will issue a formal order, called a Determination of Compliance - that will show we found your employer ***did*** comply with wage laws and does ***not*** owe you the wages you claimed.

- Unlike a citation, you will not be able to "opt out" of L&I's administrative process if L&I issues a determination that your employer did not violate a wage payment requirement. You will receive a copy.
- Your employer may use L&I's determination of compliance in a private lawsuit to say that the employer does not owe you and further wages.
- If you don't agree with the Determination of Compliance, you may appeal by writing to the address listed on it within 30 days.

Can I decide to withdraw my complaint at any time during L&I's investigation?
Yes, you can stop L&I's administrative process before a formal decision is issued by letting L&I know in writing that you want to withdraw your complaint.

More about Washington's Wage Payment Law:
To read up on Washington wage law: Go to: www.LNI.wa.gov/workplacerights and click on "Find a Law." Or, ask your local librarian to help you look up RCW 49.48.

We recommend that you save this document for your records

Employment Standards Program

Preliminary Determination of Compliance Recommendations

Date: 11/1/2010

To: **Central Office, MS 4510**

From: Nick Hernandez, **Industrial Relations Agent, Region** 5
IRA Phone No: 509-454-3755

Business Name: **Tommy's Burgers & Brew**
Case # 59253

Based on my investigation, I recommend that L&I issue a determination of compliance in the above-referenced case.

ESCH Case #:	59253	ESCH updated?	☒ yes ☐ no
UBI #:	603-258-492	Industry Type:	Restaurant/Food Service
Date complaint filed:	10/16/10	Business Type:	Corporation

Employer Information:

Name:	Tommy's Burgers & Brew
Contact:	Jesse James
Address:	1015 Cattlemen Drive Ellensburg, WA 98926
Phone #:	509-123-4567
E-mail:	
If attorney, put info here	

Employee Information:

Name:	Angus Roundup
Address:	698 Cow Patty Place Ellensburg, WA 98926
Phone #:	509-987-6543
Cell #:	
E-mail:	
Attorney info:	

Alleged wage issue(s): ☐ final paycheck (RCW 49.48.010) ☐ willful agreed wage (RCW 49.52.050) ☐ minimum wage (RCW 49.46.020) ☒ overtime (RCW 49.46.130) ☐ unlawful deductions (RCW 49.48.010, RCW 49.52.060) ☐ WAC _____ ☐ other ____

Describe alleged issue(s) including # of hours @ rate of pay and total amount claimed	Angus Roundup alleged that he had worked 17.5 overtime hours during the Ellensburg Rodeo that he did not received payment for. He alleged he was owed $262.50 for 17.5 hours at the rate of $15.00 an hour (time and a half od $10.00 an hour)
Evidence submitted by employee:	Wage Complaint; personal accounting of overtime hours worked
Dates required EE letters sent:	EE 1-A: 10/18/10 EE 2--Required: 10/25/10

Dates & reason for any other letters or phone calls to/from EE:	10/18/10- Spoke with the claimant regarding the calculations and hours worked. He stated the ER claimed he would not pay him the extra hours he worked.
Dates required ER letters sent	ER 1-A or 1-B : 10/18/10 ER 1-C – 1-E if applicable: n/a ER 3 if applicable:
ER response: phone/letters, evidence, and narrative; including dates	Jesse James wrote in and claimed that there were no overtime hours due. Because of the Rodeo, Mr. Roundup's schedule was adjusted so that he would not end up working overtime although he did work extended hours on those days. The established work week started mid-week so all hours worked were not in the same work week. The ER provided copies of time cards for all employees and a schedule showing that Mr. Roundup only worked 40 hours in the week. The company had a work week that was Wed to Tues.
Employer Response to records requests:	☒ All records provided ☐ Incomplete records ☐ No records
IRA Comments or significant information:	Because of the established work week, it was possible for the EE to work extra hours and not be considered overtime. In this case, Angus worked the 1st thorough the 4th for 40 hours and did not work again during that established work week.
IRA Findings and recommendation:	I recommend a determination of compliance order be issued because the ER had evidence to show that the EE did not work over 40 hours in the established work week.

STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES

EMPLOYMENT STANDARDS PROGRAM
PO Box 44510, Olympia, WA 98504-4510
Ph: 360-902-5316/ Fax: 360-902-5300

DETERMINATION OF COMPLIANCE

THIS DECISION IS APPEALABLE UNDER RCW 49.48.084. FAILURE TO APPEAL WITHIN 30 DAYS OF THE ISSUANCE OF THIS DETERMINATION WILL WAIVE APPEAL RIGHTS.

November 1, 2010

Jesse James
Tommy's Burgers & Brew
1015 Cattlemen Drive
Ellensburg, WA 98926

Angus Roundup
698 Cow Patty Place
Ellensburg, WA 98926

Subject: Determination of Compliance #121-11
Case No: 59253
Wage Complaint filed by: Angus Roundup
Company: Tommy's Burgers & Brew

Dear Mr. James & Mr. Roundup:

The Department of Labor & Industries has concluded its investigation of the wage complaint filed against Tommy's Burgers & Brew by former employee, Angus Roundup alleging that he had worked 17.5 overtime hours during the Ellensburg Rodeo that he did not received payment for. He alleged he was owed $262.50 for 17.5 hours at the rate of $15.00 an hour for the period of September 1, 2010 to September 10, 2010.

Nick Hernandez, Industrial Relations Agent, reviewed time cards and payroll records provided by Tommy's Burgers & Brew and compared them with the documentation included with Angus Roundup's wage complaint. It is the Department's finding that the company, Tommy's Burgers & Brew did not violate the Washington State wage payment law concerning Angus Roundup for the period of time specified above.

Under the Wage Payment Act, RCW 49.48.084, an employer, an employee, or any person aggrieved by the Determination of Compliance may appeal. To appeal, a written notice of appeal must be filed with the Department of Labor and Industries within 30 days of issuance of this Determination of Compliance. A copy of the Wage Payment Act is enclosed – see RCW 49.48.084. To file the written notice of appeal, mail or deliver the notice of appeal to:

Elizabeth E. Smith, Program Manager
Department of Labor & Industries
Employment Standards Program
P O Box 44510
Olympia, WA 98504-4510

In the absence of a notice of appeal received by the Department of Labor and Industries within 30 days of the date of issuance of this Determination, the Determination of Compliance shall become final and binding, and not subject to further appeal.

If there are questions about this Determination of Compliance, please contact Carlena Anderson, Industrial Relations Specialist at 360-902-6250 or by letter to the address above.

Sincerely,

_____ _____

Elizabeth E. Smith
Program Manager of Employment Standards

Issuance Date

cc: Nick Hernandez, Industrial Relations Agent

Certificate of Mailing

I certify that on this day I caused to be mailed this Determination of Compliance issued on this date to the parties listed below. I mailed this by causing this Determination of Compliance to be delivered to Consolidated Mail Services for placement in the United States Postal Service, postage prepaid.

Jesse James
Tommy's Burgers & Brew
1015 Cattlemen Drive
Ellensburg, WA 98926 Article #

Angus Roundup
698 Cow Patty Place
Ellensburg, WA 98926 Article #

Dated at Tumwater, Washington on November 1, 2010.

DEPARTMENT OF LABOR AND INDUSTRIES

By: _____

K&L Gates Wage and Hour Practice

Wage and hour class action lawsuits have become one of the fastest growing and potentially most expensive areas of labor and employment law. With alleged damages in the tens and hundreds of millions of dollars, putative classes of thousands of workers, and a multitude of plaintiff's attorneys searching for windfall profits, every large and small employer needs to ensure it has mastered the shifting landscape of federal and state law, new agency interpretations, and interplay with other employment laws.

Experienced team

At K&L Gates, we have a cross-office national team of employment lawyers who are well versed in the full spectrum of wage and hour issues that arise under the federal Fair Labor Standards Act, Davis-Bacon Act, and Service Contract Act as well as parallel state wage and hour, wage payment, and prevailing wage laws. These attorneys also have extensive class action litigation experience and regularly handle state, multi-state, and national class actions involving off-the-clock work claims; overtime and prevailing wage claims; challenges to exempt status; claims for employee status and benefits by temporary workers, third-party contract workers, independent contractors, and volunteers; and state law claims for violations of meal and rest periods, termination pay, wage payment, and wage deduction requirements.

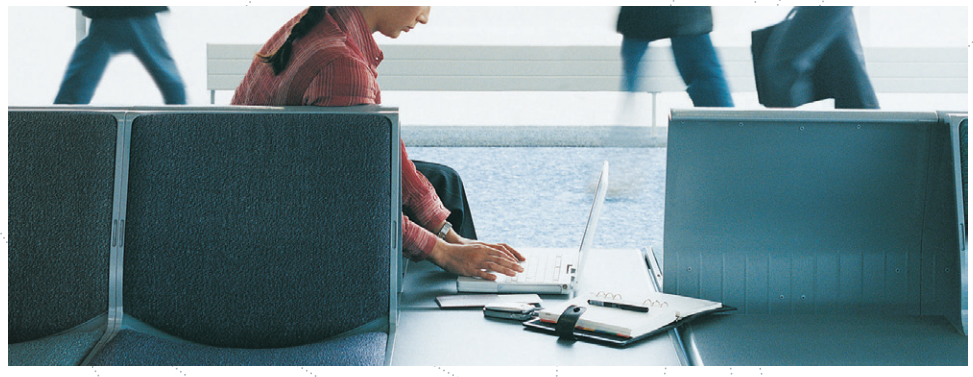
Changing landscape

Federal stimulus money tied to Davis-Bacon compliance, game-changing interpretations from the U.S. Department of Labor, and proposed independent contractor legislation mean that employers need to be alert for and modify policies to address wage and hour developments. With a public policy practice attuned to proposed and pending legislation, as well as an eye on the shifting interpretations of administrative agencies, K&L Gates is positioned to advise clients of these changes and suggest practical steps employers can take to address them.

Audits and investigations

We have extensive experience dealing with audits and investigations by the U.S. Department of Labor and its state counterparts. We conduct pre-audit audits, assist clients in preparing for initial audit meetings, deal with agency investigators, negotiate outcomes, and represent employers in any subsequent litigation that may be necessary.

We also assist clients with self-audits to identify areas of legal risk. Such audits can range from simple reviews of handbooks and policies to detailed interviews with managers and employees, and usually end with discussions about the strategic steps the employer can proactively take to minimize their exposure to wage and hour litigation.



K&L GATES

www.klgates.com

Collective and class actions

Perhaps more than any other area of employment law, wage and hour issues can result in collective and class action litigation. Our lawyers have handled scores of wage and hour class actions, involving potential classes of hundreds of thousands of employees and potential damages of hundreds of millions of dollars. Our extensive class action litigation experience, when combined with our substantive knowledge in the wage and hour and wage payment areas, enables our attorneys to anticipate issues, to identify and raise creative defenses that other counsel may miss, and to think strategically to avoid or minimize the potential problems these actions present.

Our record speaks for itself. For example, so far in 2010:

- We obtained summary judgment on behalf of a national construction company in two California class actions alleging general contractor liability for off-the-clock work, unpaid overtime, missed rest and meal breaks, and other statutory claims brought by its subcontractors employees.
- We obtained summary judgment finding that our government client properly applied the professional exemption to thousands of social workers in a U.S. Department of Labor enforcement action brought on behalf of those employees.
- After developing a Section 7(k) defense and obtaining discovery orders against the U.S. Department of Labor, we negotiated a settlement for less than 3% of the amount that agency initially demanded in another enforcement action.
- The Washington Court of Appeals found that our retail client's activity-based compensation system for its drivers fell within the Washington Motor Carrier Act exemption and affirmed an order granting summary judgment and dismissing overtime claims brought by a national union and its member truckers.
- The Oregon Supreme Court awarded our client costs and denied review of a Court of Appeals decision and trial court summary judgment order rejecting claims by bakery workers for additional pay for time spent donning and doffing their work clothes and gear.

Whether a case is big or small, we use our substantive knowledge and procedural experience with one objective in mind: our client's success.

K&L GATES

www.klgates.com

K&L Gates LLP