



## ADMINISTRATIVE POLICY

### STATE OF WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES EMPLOYMENT STANDARDS

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<b>TITLE:</b>	<b>MINIMUM WAGE ACT - EMPLOYMENT RELATIONSHIPS</b>	<b>NUMBER:</b>	<b>ES.A.14</b>
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<b>CHAPTER:</b>	<a href="#">RCW 49.46</a> <a href="#">WAC 296-128</a>	<b>SEE ALSO:</b>	<a href="#">ES.A.1</a>

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#### ADMINISTRATIVE POLICY DISCLAIMER

This policy is designed to provide general information in regard to the current opinions of the Department of Labor and Industries on the subject matter covered. This policy is intended as a guide in the interpretation and application of the relevant statutes, regulations, and policies, and may not be applicable to all situations. This policy does not replace applicable RCW or WAC standards. If additional clarification is required, the Program Manager for Employment Standards should be consulted.

This document is effective as of the date of print and supersedes all previous interpretations and guidelines. Changes may occur after the date of print due to subsequent legislation, administrative rule, or judicial proceedings. The user is encouraged to notify the Program Manager for Employment Standards to provide or receive updated information. This document will remain in effect until rescinded, modified, or withdrawn by the Director of the Department of Labor and Industries or their designee.

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#### **PURPOSE OF THIS DOCUMENT**

This administrative policy describes when an entity or person is an employer for the purposes of the Minimum Wage Act—including the circumstances where there may be more than one employer—and what employers' responsibilities are under the Act. This policy also provides guidance on the factors the department looks to in analyzing whether a bona fide independent contractor relationship exists for purposes of Minimum Wage Act applicability. For more information on the sources referenced in this policy, please click on the hyperlinks provided.

For additional clarification, please contact the Employment Standards Program at the Department of Labor & Industries at 1-866-219-7321.

#### **1. What are an employer's obligations under the Minimum Wage Act and who is an employer?**

The Washington Minimum Wage Act (MWA) requires all employers to pay their employees the state minimum wage, overtime pay for hours worked in excess of 40 hours per week, and to provide paid sick leave as detailed in the MWA and related rules. See [RCW 49.46](#), [RCW 49.46.020](#), [RCW 49.46.130](#), [RCW 49.46.210](#), and [WAC 296-128](#). The definitions of "employee" and "employer" under the MWA are expansive, as an "employee" is defined as "any individual employed by an employer" and an "employer" includes "any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the

interest of an employer in relation to an employee.” [RCW 49.46.010\(3\), \(4\)](#). See [Administrative Policy ES.A.1](#), Minimum Wage Act Applicability, for more information about certain workers who are exempted or otherwise excluded from the protections of the Minimum Wage Act.

## **2. When is a corporate officer, owner, or manager “an employer” who is jointly liable for Minimum Wage Act obligations?**

A corporate officer, owner, or manager is “an employer” “acting directly or indirectly in the interest of an employer in relation to an employee” who can be personally liable jointly with the company for Minimum Wage Act obligations under certain circumstances. See [RCW 49.46.010](#). Individuals who meet this definition must ensure their employees receive minimum wage, paid sick leave, and overtime pay as required by law or L&I may find them personally liable for the wages and seek to collect from them. To determine whether liability exists, the Department looks at several factors including an individual’s ownership interest, the degree of control over the day-to-day operations including compensation practices, and the control over payment to the workers. Under these general factors, the courts have looked at the following indicators: hiring and firing of employees, control over compensation, benefits, and employment taxes; setting wages or salaries for employees; control over whether or not employees are paid; and whether individuals are responsible for the chain of events that led to the financial situation that caused the failure to meet their obligations.

Inadvertent errors that are promptly corrected, such as payroll corrections, do not typically lead to a corporate officer, owner, or manager being directly liable for Minimum Wage Act violations.

**EXAMPLE 2-1:** Kari owns and manages a daycare. She maintains a small staff of four employees. Kari hires her own employees, establishes rates of pay, sets work schedules, and administers her own payroll on a bi-weekly basis. Kari has set up her daycare as a limited liability corporation.

In addition to the liability held by Kari’s business entity, Kari may also be held personally liable for ensuring her employees receive all of their Minimum Wage Act rights.

**EXAMPLE 2-2:** Noah is the general manager at a restaurant. Noah does not have an ownership interest in the restaurant but maintains full control over the day-to-day operations. The ownership team meets with Noah occasionally to check in on the restaurant but does not substantively engage in on-the-ground management decisions. Noah hires and fires employees in accordance with business needs and determines each employee’s wage. Noah also creates employee schedules and general employment policies. Noah collates employee timesheets each week and submits the information to a third-party payroll processor who issues paychecks to each employee.

Noah is likely to be personally liable for the restaurant’s Minimum Wage Act obligations.

**EXAMPLE 2-3:** Tanya is a shift supervisor at a retail store. As a shift supervisor, Tanya directs other employees while they are working in the store and assists the store’s general manager with some other managerial duties. The general manager and human resources department sometimes ask Tanya for input on scheduling and hiring decisions but Tanya is not directly responsible for these tasks. Tanya’s principal duty is to serve in the place of the general manager and enforce and uphold the employment policies established by the general manager and human resources, when the general manager is not working.

Tanya is not likely to be personally liable for the retail store's Minimum Wage Act obligations.

### **3. When do joint employment relationships exist for purposes of the Minimum Wage Act?**

An employee may have more than one employer under the Minimum Wage Act. Each "employer" is equally responsible for the obligations under the Act because the Washington State Supreme Court has adopted the "joint employer doctrine."

In *Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186, 332 P.3d 415 (2014), the Washington Supreme Court looked to the broad definition of employee in the MWA, as well as cases interpreting the federal Fair Labor Standards Act (FLSA), in ruling that the "joint employer doctrine" is applicable to the Washington MWA. The court adopted the FLSA's economic reality test in order to determine whether a joint employer relationship existed, applying a nonexclusive list of factors articulated in *Torres-Lopez v. May*, 111 F.3d 633 (9th Cir. 1997), which includes:

- a. The nature and degree of control of the workers;
- b. The degree of supervision, direct or indirect, of the work;
- c. The power to determine the pay rates or the methods of payment of the workers;
- d. The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers;
- e. Preparation of payroll and the payment of wages;
- f. Whether the work was a specialty job on the production line;
- g. Whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without material changes;
- h. Whether the premises and equipment of the employer are used for the work;
- i. Whether the employees had a business organization that could or did shift as a unit from one worksite to another;
- j. Whether the work was piecework and not work that required initiative, judgment or foresight;
- k. Whether the employee had an opportunity for profit or loss depending upon the alleged employee's managerial skill;
- l. Whether there was permanence in the working relationship; and,
- m. Whether the service rendered is an integral part of the alleged employer's business.

Depending on the nature of the work performed, some of these factors may be more relevant than others. Therefore, the mere fact that over fifty percent of these factors apply to a particular case is not a definitive determination that a joint employment relationship exists. Rather, whether a particular person or entity jointly employed the worker depends on the circumstances of the whole activity, with the ultimate question being whether the person or entity functioned as an employer of the worker. The department may also consider additional factors that show a connection between multiple employers in relation to the employee. The department will consider all the factors that apply in a given circumstance in evaluating whether a joint employment relationship exists. If an employee works for joint employers, all of the employee's work is considered as one employment for purposes of the MWA. As a result, all employers are responsible both individually and jointly for compliance with all of the applicable provisions of the MWA.

### **4. What are some examples of situations that the department considers rising to the joint employer standard?**

Considering the factors described above, the following examples meet the standard of joint employment under the MWA:

**EXAMPLE 4-1:** Tim accepts employment with a staffing agency. As part of its operations, the staffing company hires workers directly and then leases their labor to other employers on a limited-term basis. The staffing company has a contract with a local technology firm to provide workers who can perform customer service work. Tim is one of the workers the staffing company selects for this assignment. While on this assignment, Tim and the other assigned workers go to an office building owned by the technology company and use computers, telephones, and other office equipment owned by the technology company to perform their labor. When speaking to customers, Tim identifies himself as a representative of the technology company. The technology company directs Tim's labor, provides oversight and supervision over Tim's work, and coaches Tim when he performs poorly. The technology company can request that the staffing agency reassign workers at their discretion. For Tim's services, the technology company pays a fee to the staffing agency and the staffing agency processes payroll checks to pay out to Tim.

Tim is jointly employed by both the staffing agency and the technology company while on assignment.

**EXAMPLE 4-2:** Barbara is hired by a janitorial services company. The janitorial services company contracts with local businesses to provide cleaning services. When Barbara is working for the janitorial services company, she is assigned to work at a specific client location based on the company's contract with the client. Barbara performs her work without supervision by the janitorial services company. Instead, a supervisor from the client's business directs, oversees, and supervises Barbara's labor. Barbara's shift starts at a designated time each day but she may not leave for the day until a manager at the client site signs off on her work. If Barbara provides services that are not to the client's specification, they directly instruct her to clean again. Barbara uses the client's equipment and materials to complete her work. The janitorial service company processes her payroll checks.

Barbara is jointly employed by both her direct employer and the client for whom she performs work.

**EXAMPLE 4-3:** Marco accepts employment with a retail cannabis shop in Wenatchee and another retail cannabis shop in George. These two cannabis shops have different business names and governmental business identifiers, but share common ownership. Marco's job duties are the same at each location and his training applied to both locations. Marco generally reports to different supervisors at each business location, but these supervisors report to the same business owners. Marco's supervisors at each location coordinate when creating schedules to avoid assigning him to overlapping shifts at the separate locations. Marco receives a paycheck from each location for his hours worked, but the same corporate officer signs both paychecks.

Marco is jointly employed by both cannabis retail shops.

## **5. What are some examples of situations that the department does not consider as rising to the joint employer standard?**

Considering the factors described above, the department would conclude that the following situations do not rise to the standard of joint employment for applicability of the MWA provisions.

**EXAMPLE 5-1:** Lucinda accepts employment with a technical services company. The technical services company contracts with other businesses to provide on-site technical support on either an ad-hoc or full-time basis. The technical services company sends Lucinda to a non-profit client site to provide full-time support. While on this assignment, Lucinda goes to an office building owned by the non-profit, but uses computers and other equipment provided by the technical services company to perform her labor. The non-profit client provides periodic feedback on Lucinda's performance and job quality to Lucinda's manager at the technical services company, but cannot discipline or terminate her. Lucinda's off-site manager hired her and trained her for the job. The off-site manager also supervises her labor remotely and coaches her through novel or difficult situations arising in the workplace. For Lucinda's services, the non-profit organization pays a fee to the technology services company and the technology services company processes payroll checks to pay out to Lucinda.

Lucinda is not jointly employed by both the technology services company and the non-profit organization. Lucinda's sole employer is the technology services company.

**EXAMPLE 5-2:** Jimi accepts employment with a specialty carpentry company. The company contracts with general contractors to provide skilled labor on a per-project basis. A general contractor hires the carpentry company to provide labor on a construction project. The carpentry company sends Jimi and three others to the general contractor's worksite to complete the project. A lead carpenter from the specialty carpentry company supervises Jimi's work. The general contractor performs a quality check on the work performed by Jimi and his peers at several key steps of the work process, and reports their feedback to the lead carpenter.

Jimi is not jointly employed by both the carpentry company and the general contractor. Jimi's sole employer is the carpentry company.

**EXAMPLE 5-3:** Dolly accepts employment as a cook with two local restaurants. Separate general managers operate both restaurants independently, but a non-managing investor has a 10% stake in each restaurant. The restaurants do not coordinate on scheduling, payroll, or other operational matters because they are independently managed. Dolly manages her own schedule to ensure there are no scheduling conflicts between her two jobs.

Dolly is not jointly employed by both restaurants. Dolly is separately employed by both restaurants.

## **6. When do "same employment" relationships exist for purposes of the Minimum Wage Act?**

The concept of "same employment" governs liabilities under the Washington MWA. While joint employment indicates that an employee is simultaneously employed by more than one entity, same employment indicates a continuity of employment by one entity over time.

Washington MWA liabilities include obligations to provide minimum wage, paid sick leave, and overtime to employees. When an employee separates from one employer or business entity and is hired by a new employer or business entity, the new employer may be liable for unpaid minimum wage, overtime pay, or paid sick leave balances if the new employer is determined to be the "same employer."

For paid sick leave, when there is a separation from employment and an employee is rehired within one year of separation by the same employer, whether at the same or different business

location of the employer, previously accrued and unused paid sick leave must be reinstated by the employer. See [RCW 49.46.210\(1\)\(k\)](#) and [WAC 296-128-690](#).

The department looks to the following factors in determining whether a “same employer” relationship exists:

- a. Maintaining the same employees by the employer;
- b. Retention of the same supervisors;
- c. Retention of the same production facilities in the same location;
- d. Production of the same product;
- e. Maintaining the businesses’ same name;
- f. Continuity of assets;
- g. Continuity of general operations; and
- h. Whether the buyer holds itself out as a continuation of the divesting corporations.

The department examines each situation on a case-by-case basis using the factors above.

### **7. What are some examples of situations that the department considers to meet the “same employment” standard?**

Considering the factors described above, the department would conclude that the following situations meet the standard of “same employment” under the MWA.

**EXAMPLE 7-1:** Alyx works for a burger restaurant in Spokane. The restaurant’s ownership and management team runs two other locations in the vicinity of Spokane. Alyx decides to relocate to Spokane Valley and asks to be transferred to a location nearer to her new residence. Alyx’s employer agrees to the transfer. The restaurant Alyx transfers to has the same ownership, an overlapping management team, produces the same product, and processes payroll through the same operational procedures as the restaurant Alyx transferred from.

Alyx is considered to be working for the “same employer” in this situation. Alyx retains her accrued paid sick leave balance and it remains available for use after Alyx’s transfer.

**EXAMPLE 7-2:** Evelyn works for a local towing company in Leavenworth. An investment group negotiates the sale of and purchases the towing company. As part of the purchase, the investment group purchases the business name, business assets such as vehicles and computers, and client contracts. The investment group offers employment to all previous staff and Evelyn accepts her same position under the new ownership.

Evelyn is considered to be working for the “same employer” in this situation. Evelyn retains her accrued paid sick leave balance and it remains available for use after the ownership change.

### **8. What are some examples of situations that the department does not consider to meet the “same employment” standard?**

Considering the factors described above, the department would conclude that the following situations do not meet the standard of “same employment” under the MWA.

**EXAMPLE 8-1:** Abel works as a server for a Mexican restaurant in Renton. The owners of the Mexican restaurant decide to close their business and sell their assets to a local entrepreneur. The entrepreneur purchases the building, kitchen supplies, and other restaurant goods from the

previous owner. The entrepreneur reopens the business as an Italian restaurant and conducts interviews to hire new staff. Abel applies, interviews for a new job, and obtains employment as a server in the Italian restaurant.

Abel is not considered to be working for the “same employer” in this situation.

**EXAMPLE 8-2:** Ezekiel works for a health care services company in Yakima. An investment group negotiates the purchase and sale of some of the assets of the health services company, including the building and the company’s fleet of vehicles. The investment group’s purchase does *not* include a purchase of the client contracts, business name, or other assets. The health services company chooses to sell these remaining assets and discontinue their business. The investment group establishes a similar business in the same location. The new management put in place by the investment group establishes completely new procedures and operations. The investment group interviews the staff and supervisors from the original health care services company and makes offers of employment to roughly half of the employees, but hires the remainder from the general labor market.

Ezekiel is not considered to be working for the “same employer” in this situation.

## **9. Which workers are bona fide independent contractors for purposes of the Minimum Wage Act?**

A bona fide independent contractor is exempt from the MWA because that person is not “employed” by an employer. However, an employer cannot avoid complying with the MWA by merely referring to someone as an “independent contractor.” Whether a worker is an independent contractor must be carefully evaluated on a case-by-case basis.

To determine whether an individual is an employee or a true independent contractor for purposes of the MWA, the department looks to the following factors:

- a. The degree of control that the business has over the worker (the more control a business exerts over the worker, the more likely the worker is an employee);
  - Example questions to examine this factor include:
    - To what extent does the business control the worker?
    - To what extent does the worker operate independently?
    - Does the business control when or where the work is performed?
    - To what extent does the business supervise the worker?
    - Can the worker hire helpers?
    - Does the business impose any rules or standards of conduct beyond generally applicable local, state, or federal law?
    - Does the business have the power to hire, fire, or transfer the worker?
- b. The worker’s opportunity for profit or loss is dependent on the worker’s managerial skill (when the worker’s opportunity for profit is not limited by a business, and the worker controls his or her own business expenses, the worker is more likely an independent contractor);
  - Example questions to examine this factor include:
    - Does the worker exercise managerial skill in controlling business expenses?
    - Does the worker have the opportunity to earn more?
    - How is the worker paid?

- Does the worker have the opportunity to increase the amount of work performed?
- c. The worker's investment in equipment or material (where the worker's investment in equipment or materials is substantial, the worker is more likely an independent contractor);
- Example questions to examine this factor include:
    - Whose responsibility is it to supply the equipment or material for the job?
    - Does the worker pay to advertise their own services independently?
    - How significant is the worker's investment in relation to the business' investment?
- d. The degree of skill required for the job (when a worker brings a special skill to a job and employs those skills in an independent manner, the worker is more likely an independent contractor);
- Example questions to examine this factor include:
    - What is the worker's role in the workplace and what skills do they demonstrate when fulfilling this role?
    - Does the worker show self-sufficiency or independence?
    - What level of education, training, and experience is required to complete the work?
- e. The degree of permanence of the working relationship (when a limited term working relationship exists, the worker is more likely an independent contractor);
- Example questions to examine this factor include:
    - How permanent is the working relationship?
    - Is the working relationship continuous or of a limited term?
    - Could the worker remain in business if their relationship with the business ended?
    - Is the worker allowed to work for other businesses in the same industry?
- f. The degree to which the services rendered by the worker are an integral part of the business (when the services performed by a worker are integral to the business, the worker is more likely an employee).
- Example questions to examine this factor include:
    - Does the worker perform the primary type of work that the business performs for its clients or customers?
    - Does the worker perform work similar to that performed by employees of the business?
    - Is the success or continuation of the business dependent on the performance of certain services by the worker?
    - What percentage of the business's revenue depends on services provided by the worker?

All six factors should be considered and weighed in combination with each other in each case.

**EXAMPLE 9-1:** Emily is an accountant who provides services to several local businesses. Her clients hire her to process payroll, file state and federal taxes, and handle other financial matters. Emily usually works from her home office but will occasionally travel to client sites for meetings or to pick up paperwork. Emily sets her own working hours. Emily charges her clients an hourly rate for services performed. Emily negotiates the rate of pay with each client, based on the complexity of their operations and their business needs.

Based on the facts above, Emily is an **independent contractor** rather than an employee.

**EXAMPLE 9-2:** Rachel works as a tow truck driver who is dispatched from a local towing company. The company she works for provided her with a tow truck to use while she performs work for the company on the condition that she does not reject more than 10 dispatch calls per month. Rachel is paid a flat fee for each tow completed. Rachel is not permitted to hire any help when working for the towing company. Rachel does not have any specialized training; Rachel was trained on how to use the tow truck by the company's owner. Rachel has an on-going work contract that can be terminated by either party at any time. Rachel's contract does not prohibit her from working for other companies but she is not permitted to use their tow truck for other jobs. Rachel wears a hat with a company logo when responding to dispatch calls so that customers can identify her.

Based on the facts above, Rachel is an **employee** rather than an independent contractor.

**EXAMPLE 9-3:** Jeffrey delivers milk for a dairy company. Jeffrey has a prescribed delivery route and must pick up his daily delivery at the same time each day. Jeffrey is compensated with an hourly wage and a weekly performance bonus if he meets certain criteria. Jeffrey drives a vehicle provided by the dairy company for his deliveries. The dairy company requires Jeffrey to have a CDL. Jeffrey holds an annual contract with the dairy company to make deliveries at certain times but is otherwise not prevented from working for other employers.

Based on the facts above, Jeffrey is an **employee** rather than an independent contractor.

## **10. What governs “successorship” for Minimum Wage Act liabilities?**

The Minimum Wage Act is primarily enforced through the Department's administration of the Wage Payment Act ([RCW 49.48.082](#) to [RCW 49.48.087](#)). When allegations of Minimum Wage Act non-compliance are adjudicated through the Wage Payment Act, the Department uses the Wage Payment Act's definition of “successor” to determine an employer's liability when there has been a change in business ownership that may also transfer the liability. A “successor” is defined in this context as “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... of the employer's business.” See [RCW 49.48.082](#)(9). In other words, a “successor” is a person who acquires a business that holds current liabilities under the Minimum Wage Act or Wage Payment Act.

“Successors” may be liable for Minimum Wage Act obligations held by the previous owners under certain circumstances. Successors hold this liability when 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.

Successors may not be liable for a final and binding citation if either of the two conditions above do not apply, or if the initial employer pays a final and binding citation or penalty in full within ten days of the transfer of ownership of the business. See [RCW 49.48.086](#)(4).