

Honorable Scott R. Sparks
Noted on Motion Calendar:
Date: Wednesday, December 29, 2010
Time: 9:30 a.m.
Department Two

SUPERIOR COURT OF WASHINGTON
FOR KITTITAS COUNTY

KITTITAS COUNTY FARM BUREAU, INC.,) No. 10-2-00505-9
WASHINGTON STATE FARM BUREAU)
FEDERATION, WASHINGTON RESTAURANT)
ASSOCIATION, WASHINGTON RETAIL)
ASSOCIATION, and WASHINGTON FOOD) **PETITIONERS' AND PLAINTIFFS'**
INDUSTRY ASSOCIATION,) **MOTION FOR SUMMARY**
) **JUDGMENT**
)
Petitioners and Plaintiffs,)
)
v.)
)
JUDY SCHURKE, Director of the Washington)
Department of Labor and Industries,)
WASHINGTON DEPARTMENT OF LABOR)
AND INDUSTRIES, an agency of the State of)
Washington,)
)
Respondents and Defendants.)

INTRODUCTION

This case seeks resolution of the parties' opposite views of the application of the minimum wage statute in circumstances, such as the present economic climate, where the cost of living has increased within the last year, but the cost of living remains less than it was two

1 years ago. RCW 49.46.020 governs adjustments in the minimum wage based on increases in
2 the cost of living. The Department of Labor and Industries (L&I) recently increased the
3 minimum wage even though the cost of living remains less than it was two years ago. While
4 not essential to the resolution of this case, Defendants' decision makes the hopes of economic
5 recovery in Washington even more illusive.

6 **EVIDENCE RELIED UPON**

- 7 1. Declaration of Richard Haberman (Haberman Decl.);
- 8 2. Declaration of Richard Anderson (Anderson Decl.);
- 9 3. Declaration of Mark Charlton (Charlton Decl.); and
- 10 4. Declaration of Richard M. Stephens (Stephens Decl.) and exhibits attached
11 thereto.

12 **STATEMENT OF FACTS**

13 In 1998, the voters of Washington adopted Initiative 688. That measure amended
14 RCW 49.46.020, which now states in full:

15 (1) Until January 1, 1999, every employer shall pay to each of his or
16 her employees who has reached the age of eighteen years wages at a
rate of not less than four dollars and ninety cents per hour.

17 (2) Beginning January 1, 1999, and until January 1, 2000, every
18 employer shall pay to each of his or her employees who has reached
the age of eighteen years wages at a rate of not less than five dollars
and seventy cents per hour.

19 (3) Beginning January 1, 2000, and until January 1, 2001, every
20 employer shall pay to each of his or her employees who has reached
the age of eighteen years wages at a rate of not less than six dollars and
fifty cents per hour.

21 (4)(a) Beginning on January 1, 2001, and each following January 1st
22 as set forth under (b) of this subsection, every employer shall pay to
each of his or her employees who has reached the age of eighteen
years wages at a rate of not less than the amount established under (b)
23 of this subsection.

1 (b) On September 30, 2000, and on each following September
2 30th, the department of labor and industries shall calculate an
3 adjusted minimum wage rate to maintain employee purchasing
4 power by increasing the current year's minimum wage rate by the
5 rate of inflation. The adjusted minimum wage rate shall be
6 calculated to the nearest cent using the consumer price index for
7 urban wage earners and clerical workers, CPI-W, or a successor
8 index, for the twelve months prior to each September 1st as
9 calculated by the United States department of labor. Each adjusted
10 minimum wage rate calculated under this subsection (4)(b) takes effect
11 on the following January 1st.

(5) The director shall by regulation establish the minimum wage for
employees under the age of eighteen years.

8 RCW 49.46.020 (emphasis added).

9 Under this statute, L&I is to use the consumer price index for urban workers (CPI-W)
10 to set the minimum wage throughout the state, including both urban and rural areas.

11 Currently, the minimum wage for the State of Washington is higher than any state and the
12 District of Columbia. *See* Stephens Decl. at Exhibit 1.

13 In the period of August 2008 to August 2010, the CPI-W was as follows:

14 August 2008 215.247

15 August 2009 211.156

16 August 2010 214.205

17 Exhibit 2 to Stephens Decl.

18 Since 1998, the CPI-W has increased every year, **except the CPI-W dropped**
19 **between 2008 and 2009**. Stephens Decl, Exhibit 2. Although there was an increase in the
20 CPI-W between September 2009 and 2010, the CPI-W in August of 2010 was still less than
21 the CPI in August of 2008. *Id.* In other words, the cost of living in 2010 remains less than
22 the cost of living in 2008, based on the CPI-W as the statute directs.

1 Defendant Schurke requested an opinion from the Attorney General to respond to her
2 questions about increasing the minimum wage when there had been an increase in inflation in
3 the last twelve months but that time period had been preceded by a period of greater deflation.
4 On September 15, 2010, the Attorney General issued a formal opinion in response, which is
5 attached hereto as Appendix A. The Attorney General's opinion concludes that "RCW
6 49.46.020(4)(b) requires an increase in the minimum wage rate only where the CPI-W also
7 has increased beyond the earlier peak value." Appendix A, at 10.¹

8 Despite the Attorney General's opinion, on October 15, 2010, L&I announced that it
9 was raising the minimum wage that employers must pay its employees to \$8.67 per hour,
10 beginning on January 1, 2011. This represents an increase of 12 cents in the current minimum
11 hourly wage. A true and correct copy of L&I's announcement is attached to the Stephens
12 Decl. as Exhibit 3. L&I rejected the Attorney General's opinion and recognized that the issue
13 was likely to be settled in court. *Id.*

14 Petitioners and Plaintiffs (Plaintiffs) include organizations whose members pay
15 employees at the minimum wage and are likely to continue to employ persons in their
16 businesses at the minimum wage. *See* Declaration of Richard Haberman, Declaration of
17 Richard Anderson, and Declaration of Mark Charlton. The members of the Plaintiffs'
18 organizations are aggrieved and negatively impacted by L&I's October 15, 2010 decision to
19 increase in the minimum wage effective January 1, 2011.

20 For instance, owner of the Perkins Restaurant and the Bar 14 Ranch House Restaurant,
21 both in Ellensburg, Richard Haberman estimates an additional cost of \$12,900 to each of his
22

23 ¹ All references to the Attorney General Opinion in Appendix A are to the original page numbers as indicated therein.

1 restaurants caused by the increase in the minimum wage. *See* Haberman Decl.; *see also*
2 Anderson Decl.

3 Because the increase goes into effect on January 1, 2011, Plaintiffs seek by summary
4 judgment the resolution of these issues prior to the January 1, 2011 deadline.²

5 STATEMENT OF ISSUES

6 Whether summary judgment should be entered declaring the Defendants' October 15,
7 2010 increase in the minimum wage to be invalid and inconsistent with RCW 49.46.020?³

8 ARGUMENT

9 I 10 RESOLUTION OF THIS CASE BY SUMMARY 11 JUDGMENT IS APPROPRIATE

12 Plaintiffs move for summary judgment under CR 56 because this case depends
13 entirely upon the interpretation of law. CR 56(c) provides in relevant part:

14 The judgment sought shall be rendered forthwith, if the pleadings,
15 depositions, answers to interrogatories, and admissions on file,
16 together with the affidavits, if any, show that there is no genuine issue
17 of material fact and that the moving party is entitled to judgment as a
18 matter of law.

19 Summary judgment is properly granted if there is no genuine issue as to any material fact and
20 the moving party is entitled to judgment as a matter of law. *Ballard Square Condominium
21 Owners' Association v. Dynasty Construction. Co.*, 158 Wn.2d 603, 608-09 (2006). Because
22 this case is primarily one of statutory construction, a pure question of law, *City of Pasco v.*

23 ² CR 56 provides that "a party seeking to recover upon a claim ... may, after the expiration of
the period within which the defendant is required to appear ... move ... for a summary
judgment in his favor." Here, the summons was served on November 8, 2010. *See*
Declarations of Service by S. Treiber. Because the defendants are required to appear within
20 days (CR 4(b)), this motion is filed in compliance with this rule.

³ A proposed order is attached hereto as Appendix B.

1 *Pub. Employment Relations Comm'n*, 119 Wash.2d 504, 507, 833 P.2d 381 (1992), resolution
2 of this case by summary judgment is appropriate. If there is no genuine issue of material fact,
3 summary judgment will be granted if the moving party is entitled to judgment as a matter of
4 law. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

5 As demonstrated below, the limited relevant facts are not subject to dispute and the
6 case depends primarily on the interpretation of a single statute—RCW 49.36.020. For the
7 reasons that follow, judgment should be entered for the Plaintiffs in this matter prior to the
8 January 1, 2011, effective date.

9 **II**
10 **THE CASE PRESENTS APPROPRIATE VEHICLES FOR**
11 **DETERMINING THE ISSUES**

12 The Petition and Complaint in this matter raises four statutory vehicles for raising the
13 issue that needs to be resolved in this case. While these methods may be redundant, Plaintiffs
14 alleged all four out of an abundance of caution because of the importance of these issues and
15 the importance of having them resolved prior to the announced January 1, 2011, effective date
16 for the increase in the minimum wage.

17 Those four vehicles in Plaintiffs' Petition and Complaint are (1) a Petition for Judicial
18 Review under RCW 49.46.080(2); (2) a Petition for Judicial Review under the Administrative
19 Procedures Act (APA), RCW 34.05.570(4); (3) a Petition for a Writ of Mandate under RCW
20 7.16.150, *et seq.*; and (4) a Complaint for Declaratory Relief. *See* Petition and Complaint.

21 **A. RCW 49.46.080(2).**

22 RCW 49.46.080 establishes a special and distinct opportunity for judicial review of
23 changes in regulations by L&I. Subsection 2 of RCW 49.46.080 provides:

1 Any interested party may obtain a review of the director's findings and
2 order in the superior court of county of petitioners' residence by filing
3 in such court within sixty days after the date of publication of such
regulation a written petition praying that the regulation be modified or
set aside.

4 RCW 49.46.080(2). Plaintiffs are interested parties seeking review of the director's decision
5 to increase the minimum wage in the superior court of petitioners' residence. The filing was
6 made on November 8, 2010—less than 30 days from the October 15, 2010 decision. The
7 petition prays that the regulation be set aside.

8 This statute governs changes by L&I to existing regulations and is located within the
9 same chapter as the statute under which the change to the minimum wage was made—RCW
10 49.46.020. It is not entirely clear, however, whether a change under RCW 49.46.020 to the
11 minimum wage is a change to “regulations” because that term is not defined.⁴

12 Although the statute does not define what a “regulation” is, the change in minimum
13 wage can be considered a “regulation” because it regulates the relationship between
14 employees and employers in regard to wages. “Regulation” is commonly defined as “a rule
15 or order having the force of law issued by an executive authority of a government.”
16 Webster's New Collegiate Dictionary 974 (1977). More importantly, however, the
17 establishment and the procedure for changing the minimum wage are located in the same
18 chapter, chapter 49.46 RCW, as this section on judicial review of regulations. The Court may
19 conclude that the change in the minimum wage is a change to the regulation entitling
20 plaintiffs to judicial review under RCW 49.46.080(2).

21 _____
22 ⁴ Subsection 4 provides that the filing of a petition under this statute does not operate as a stay
23 of the director's determination unless requested and supported by an undertaking. However,
the explicit reference to the undertaking being sufficient to cover employee compensation as

1 Under this statute, the Court “shall determine whether the regulation is in accordance
2 with law. If the court determines that such regulation is not in accordance with law, it shall
3 remand the case to the director with directions to modify or revoke such regulation.” RCW
4 49.46.080. As addressed more fully below, Plaintiffs urge the Court to find that the change in
5 the minimum wage is not in accordance with the law and the court should order the director to
6 revoke the decision.

7 **B. The Administrative Procedures Act —RCW 34.05.570(4)**

8 The APA in RCW 34.05.570(4) provides for judicial review of agency rules, agency
9 orders in administrative adjudications and “other agency action.” The change to the minimum
10 wage is “other agency action.”

11 4) Review of other agency action.

12 (a) All agency action not reviewable under subsection (2) or (3) of this
13 section shall be reviewed under this subsection.

14 (b) A person whose rights are violated by an agency’s failure to
15 perform a duty that is required by law to be performed may file a
16 petition for review pursuant to RCW 34.05.514, seeking an order
17 pursuant to this subsection requiring performance. Within twenty days
18 after service of the petition for review, the agency shall file and serve
19 an answer to the petition, made in the same manner as an answer to a
20 complaint in a civil action. The court may hear evidence, pursuant to
21 RCW 34.05.562, on material issues of fact raised by the petition and
22 answer.

19 “Agency action,” as defined in RCW 34.05.010(3), includes “the implementation or
20 enforcement of a statute, the adoption or application of an agency rule or order.” The
21

22
23 allowed by the regulation strongly suggests that this challenge to the minimum wage change
is a regulation that can be challenged under this statute.

1 decision to increase the minimum wage is the direct implementation of a statute—RCW
2 49.46.020.

3 Inasmuch as the decision to increase the minimum wage is “agency action,” whether
4 Defendants’ decision to raise the minimum wage is reviewable under RCW 34.05.70(4)
5 depends upon whether it is **not** reviewable under subsection (2) (for rule-making) or (3) (for
6 orders in adjudicative cases). The minimum wage decision was not the result of rule-making
7 processes, nor was there any adjudicative proceeding. *See* Stephens Decl. Hence, it is “other
8 agency action” reviewable under subsection (4).

9 The standards for relief are found in RCW 34.05.570(4)(c).⁵ The standards include
10 the power of the Court to grant relief if the agency action is unconstitutional, outside the
11 statutory authority of the agency, arbitrary or capricious, or taken by persons not properly
12 authorized. As discussed below, the decision to increase the minimum wage was outside
13 L&I’s statutory authority.

14 **C. Complaint for Declaratory Relief under RCW 7.24.010, *et seq.***

15 A complaint for declaratory relief is a suitable vehicle for determining whether
16 Defendants’ decision to increase the minimum wage is valid. If relief is available by the prior
17 two causes of action, it may be redundant or unnecessary. Nevertheless, the Court’s power to
18 “declare rights, status, and other legal relations” does not depend upon “whether or not further
19 relief is or could be claimed.” RCW 7.24.010.

20 A person ... whose rights, status or other legal relations are affected by
21 a statute ... may have determined any question of construction or
22 validity arising under the ... statute ... and obtain a declaration of
rights, status or other legal relations thereunder.

23 ⁵ Plaintiffs’ Petition and Complaint complies with the content requirements in RCW
34.05.546. *See* Petition and Compliant.

1 RCW 7.24.020.⁶

2 In order to have standing under the declaratory relief statute, a party must establish (1)
3 an actual, present, and existing dispute, (2) between parties having genuine and opposing
4 interests, (3) involving direct and substantial interests, and (4) where a judicial determination
5 will be final and conclusive. *City of Spokane v. County of Spokane*, 158 Wn.2d 661, 678, 146
6 P.3d 893 (2006).

7 Here, it is unmistakable that Plaintiffs and Defendants have genuine and opposing
8 interests. Plaintiffs contend that RCW 49.46.020 does not authorize an increase in the
9 minimum wage and Defendants' decision to increase the minimum wage demonstrates they
10 have the exact opposite position. This decision evidences that Defendants have an interest in
11 increasing the minimum wage while Plaintiffs have an interest in keeping it at its existing
12 level. Parties whose financial interests are affected by the outcome of a declaratory judgment
13 action have standing. *Casey v. Chapman*, 123 Wn.App. 670, 676, 98 P.3d 1246, *as amended*.
14 (2004).

15 The interest that the petitioner seeks to protect must be “arguably within the zone of
16 interests to be protected or regulated by the statute or constitutional guarantee in question.”
17 *Snohomish County Prop. Rights Alliance*, 76 Wn.App. 44, 52, 882 P.2d 807 (1994) (internal
18 quotation marks omitted) (quoting *Trepanier*, 64 Wn.App. 380, 382, 824 P.2d 524 (1992)).
19 The Court in *American Legion Post #149 v. Washington State Dept. of Health*, 164 Wn.2d
20 570, 593, 192 P.3d 306 (2008), explained that the direct regulation of the Post's activities put
21

22 ⁶ RCW 7.24.130 provides that “the word ‘person’ wherever used in this chapter, shall be
23 construed to mean any person, partnership, joint stock company, unincorporated association
or society, or municipal or other corporation of any character whatsoever.” RCW 7.24.130.

1 it within the zone of interest. Clearly, Plaintiffs and their members are employers who
2 employ people at the minimum wage; their actions and interests are directly regulated by the
3 statute. In regard to the last requirement, a judicial determination of what RCW 49.46.020
4 requires in regard to the minimum wage will be final and conclusive.

5 Finally,

6 This chapter is declared to be remedial; its purpose is to settle and to
7 afford relief from uncertainty and insecurity with respect to rights,
8 status and other legal relations; and is to be liberally construed and
administered.

9 RCW 7.24.120. Given the statute's remedial purpose, this Court should enter a declaratory
10 judgment regarding Defendants' implementation of RCW 49.46.020.

11 **D. Petition for Writ of Mandate under RCW 7.16.150, *et seq.***

12 Finally, Plaintiffs' Petition and Complaint seeks a petition for writ of mandate. Such
13 a writ

14 may be issued by any court, except a district or municipal court, to any
15 inferior tribunal, corporation, board or person, to compel the
16 performance of an act which the law especially enjoins as a duty
17 resulting from an office, trust or station, or to compel the admission of
a party to the use and enjoyment of a right or office to which the party
is entitled, and from which the party is unlawfully precluded by such
inferior tribunal, corporation, board or person.

18 RCW 7.16.150. Mandamus is an appropriate means to compel a state official to comply with
19 the law when the claim is clear and there is a duty to act. *Paxton v. City of Bellingham*, 129
20 Wn.App. 439, 446, 119 P.3d 373 (2005).

21 The applicant for a writ of mandamus is required to satisfy three elements before a
22 writ will issue: (1) the party subject to the writ is under a clear duty to act; (2) the applicant
23 has no plain, speedy and adequate remedy in the ordinary course of law; and (3) the applicant

1 is beneficially interested. *Eugster v. City of Spokane*, 118 Wn.App. 383, 402, 76 P.3d 741
2 (2003).

3 The writ must be issued in all cases where there is not a plain, speedy
4 and adequate remedy in the ordinary course of law. It must be issued
upon affidavit on the application of the party beneficially interested.

5 RCW 7.16.170.

6 Here, RCW 49.46.020 expresses a clear duty on the part of Defendants to act. In the
7 event that the other three vehicles for resolving the legal question here is unavailable, then
8 Plaintiffs have no plain, speedy and adequate remedy in the ordinary course of law. Unless
9 these issues are resolved by some means prior to the January 1, 2011, effective date, Plaintiffs
10 and their members will either be forced to pay a wage which is inconsistent with their reading
11 of the statute or run the risk of liability if they pay their entry level workers based on the
12 current minimum wage.

13 Finally, the Plaintiffs include parties who are beneficially interested in that they
14 represent employers who will be forced to pay a higher, and in their view, an illegal minimum
15 wage if the Court does not grant the writ as requested. *See* Charlton Decl., Haberman Decl.,
16 and Anderson Decl. A writ of mandate is an appropriate remedy if no other remedy is
17 available.

18 **III**
19 **AN INCREASE IN THE MINIMUM WAGE AT THIS TIME**
20 **IS NOT CONSISTENT WITH RCW 49.46.020**

21 At the heart of this case is the proper interpretation of RCW 49.46.020(4)(b), which
22 requires an increase in the minimum wage based on increases in a cost of urban living index,
23 CPI-W, to maintain the purchasing power of employees who earn the minimum wage. For

1 the reasons that follow, Plaintiffs contend that the statute is ambiguous and should be
2 interpreted in a manner which results in no increase in the minimum wage for 2011.

3 **A. RCW 49.46.020 is Ambiguous**

4 The statute at issue is RCW 49.46.020(4)(b), which reads as follows:

5 (b) On September 30, 2000, and on each following September 30th,
6 the department of labor and industries shall calculate an adjusted
7 minimum wage rate to maintain employee purchasing power by
8 increasing the current year's minimum wage rate by the rate of
9 inflation. The adjusted minimum wage rate shall be calculated to the
10 nearest cent using the consumer price index for urban wage earners
and clerical workers, CPI-W, or a successor index, for the twelve
months prior to each September 1st as calculated by the United States
department of labor. Each adjusted minimum wage rate calculated
under this subsection (4)(b) takes effect on the following January 1st.

11 RCW 49.46.020(4)(b). In the context of the current circumstances where the CPI-W dropped
12 in 2008 and only partially recovered in the 2009 to 2010 period, does the minimum wage go
13 up simply because the CPI-W increased in the immediately preceding twelve month period?
14 Because the statute includes the designated purpose to "maintain employee purchasing
15 power," the statute is ambiguous in the current economic conditions because an increase in
16 the minimum wage, which follows a decrease in the CPI-W does not maintain employee
17 purchasing power; rather, it increases it.⁷

18 As explained in the formal Attorney General's opinion (attached as Appendix A),
19 RCW 49.46.020 is ambiguous in regard to the Respondent's duties in the present
20 circumstances where the CPI-W has decreased, then increased, but the increase has not been
21

22 ⁷ The reference to employee purchasing power must be the purchasing power only of those
23 employees who are hired at the minimum wage in that increases in the minimum wage may
result in a decrease in the purchasing power of employees who making anything higher than
minimum wage.

1 greater than the prior decrease. The first step in statutory interpretation is to determine the
2 statute's "plain meaning." A statute's plain meaning may be discerned "from **all** that the
3 Legislature has said in the statute and related statutes which disclose legislative intent about
4 the provision in question." *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11,
5 43 P.3d 4 (2002) (emphasis added).

6 Defendants may believe that the statute's reference to "twelve months prior to each
7 September 1st" requires that the minimum wage be increased by looking solely at the increase
8 in the CPI-W over the prior twelve months and ignoring the overall effect on employee
9 purchasing power. But, as explained by the Supreme Court in *Campbell & Gwinn*, the Court
10 is to look at "all" of the statute and what must not be overlooked is the very declaration of
11 purpose within the statute. Here, that purpose is to "maintain employee purchasing power."
12 By looking at the entire statute, it is apparent that there is an ambiguity because to increase
13 the minimum wage based on an increase within the immediately prior 12 months, while
14 ignoring an even greater decrease in the CPI-W, does not **maintain** employee purchasing
15 power, but **increases** it.

16 An ambiguity exists if there is "more than one reasonable interpretation" of the
17 regulation. *Columbia Physical Therapy, Inc. v. Benton Franklin Orthopedic Assocs.*, 168
18 Wn.2d 421, 433, 228 P.3d 1260 (2010). "When statutory language is susceptible to more than
19 one reasonable interpretation, it is considered ambiguous." *Cockle v. Dep't of Labor & Indus.*,
20 142 Wn.2d 801, 808, 16 P.3d 583 (2001).

21 The Attorney General's Opinion, attached hereto as Appendix A, is a reasonable
22 interpretation of the statute which differs from that of the Defendants. Hence, the Attorney
23 General's opinion, in and of itself, demonstrates that RCW 49.46.020 is ambiguous. While

1 there may be several labels to describe the different interpretations of the statute, Plaintiffs
2 will use the labels chosen by the Attorney General.

3 Although RCW 49.46.020(4) directs the Department to use the CPI-W
4 to calculate the adjusted minimum wage rate, but it does not set out the
5 specific mathematical instructions as to how the minimum wage is to
6 be calculated using the CPI-W.

7 Appendix A, at 2.

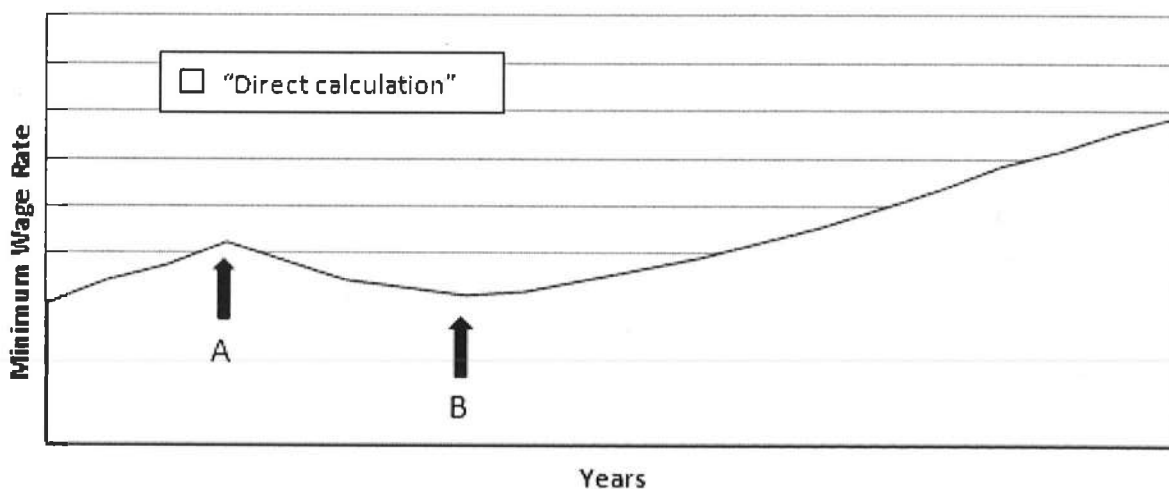
8 As the Attorney General Opinion further explains, there are three ways to interpret the
9 statute's relationship between the CPI-W and the minimum wage. The Attorney General
10 Opinion describes them as:

- 11 1. Direct Calculation Method
- 12 2. Increase-Ratcheted Method, and
- 13 3. Index-Ratcheted Method.

14 Appendix A, at 5-9.

15 1. The Direct Calculation Method

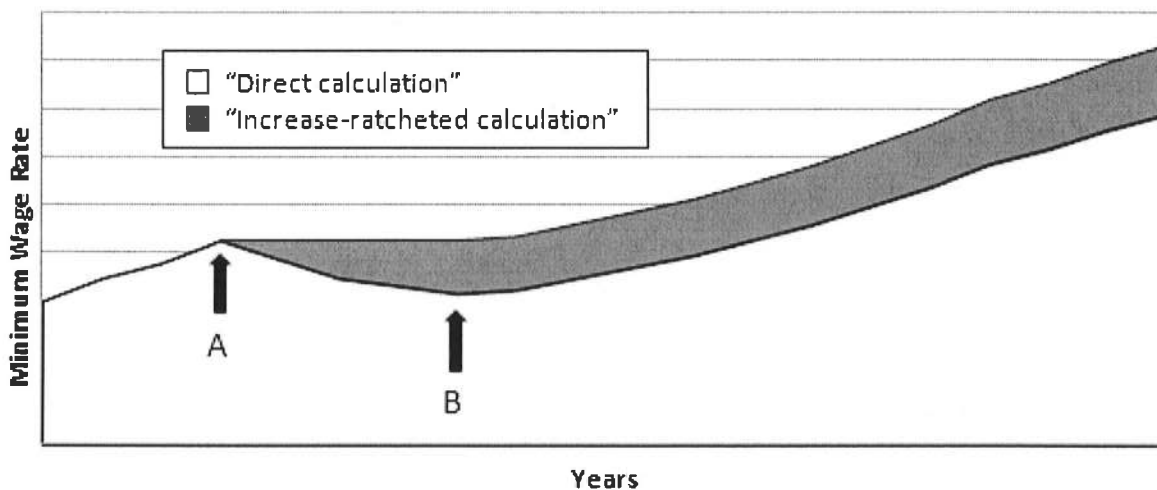
16 The Direct Calculation Method simply ties the minimum wage to fluctuations in the
17 CPI-W. Appendix A, at 5-6. As the CPI-W increases, the minimum wage increases, as
18 illustrated as follows:



1 As the CPI-W decreases, the minimum wage decreases. While this may be the most
2 logical way to use the CPI-W to adjust the minimum wage, one must look at the statute as a
3 whole. The Attorney General concludes that this method is not what the statute contemplates
4 because the statute refers to “increasing” and not a more generic term that would include
5 increases and decreases. Appendix A, at 5.

6 2. The Increase-Ratcheted Method

7 The Increase-Ratcheted Method is essentially the interpretation chosen by Defendants.
8 Under this method, the minimum wage increases whenever there is an increase in the CPI-W
9 over the prior 12 month period without regard to whether the increase is set in the context of
10 an earlier even greater decrease in the CPI-W. Appendix A, at 7. This method is illustrated
11 as follows:

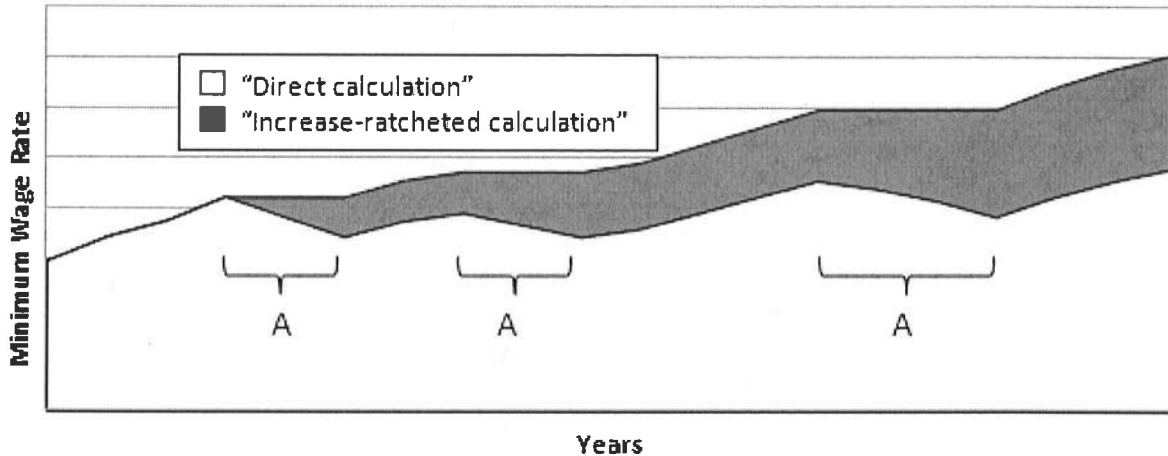


19 By using the Increase-Ratcheted Method, the minimum wage will never go down, and will
20 always go up whenever there is an increase in the CPI-W during the prior 12 months. Over
21 time, the increase in the minimum wage can far outpace any increase in the CPI-W.

22 Increase-ratcheted calculation result in an increase in employee
23 purchasing power during each decline and recovery of the CPI-W,
each time effectively changing the mathematical relationship between

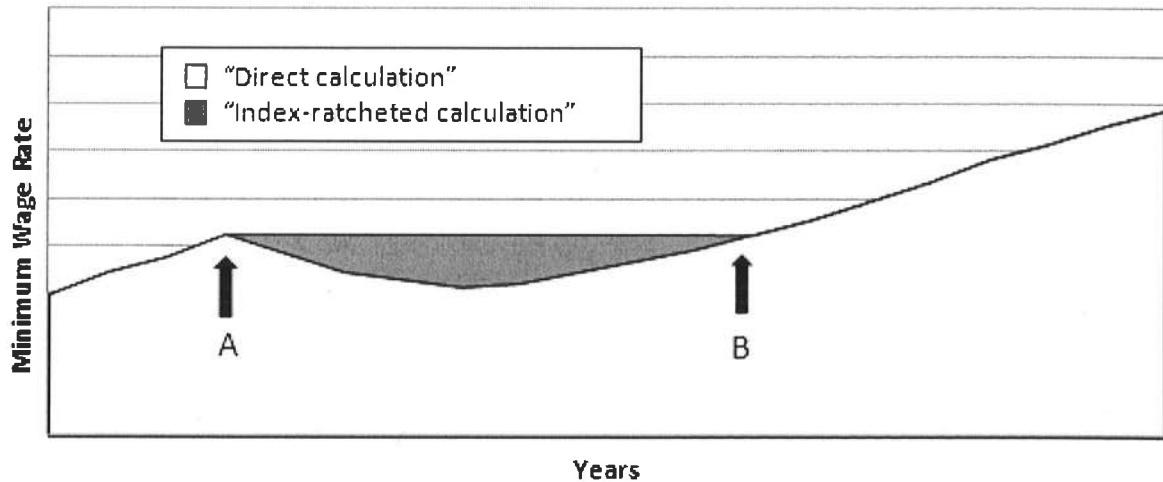
1 minimum wage and CPI-W. Over time employee purchasing power
2 increases faster than the cost of living.

3 Appendix A, at 8. Such a potential scenario is illustrated in the following diagram:



3. The Index-Ratcheted Method

Finally, the Index-Ratcheted Method, which the Attorney General Opinion states as the most logical interpretation of the statute, provides that the minimum wage will increase whenever it is necessary to maintain employee purchasing power based on an increase in the CPI-W over the prior 12 months considering the overall movement of the CPI-W. Appendix A, at 8-9. This method is illustrated as follows:



Under this method, in order to “maintain” employee purchasing power, the minimum wage is not increased until there is an actual increase of the CPI-W from a previously higher level.

The Attorney General Opinion demonstrates that there is at least a reasonable interpretation shared by Plaintiffs and the Attorney General which differs from that of Defendants. The Court should use the standard rules of statutory construction to resolve the ambiguity as addressed below.

B. RCW 49.46.020’s Ambiguity Should Be Resolved in Light of Standard Principles of Statutory Construction

Inasmuch as there is ambiguity, the Court should employ standard principles of statutory construction to resolve the issue.

The goal of statutory construction is to give effect to the intent of the legislature. ... [I]f the plain meaning inquiry shows the existence of an ambiguity, this court may construe the meaning of the statute with the aid of other sources of interpretation, such as legislative history.

Land Title of Walla Walla, Inc. v. Martin, 117 Wn.App. 286, 290, 70 P.3d 978 (2003).

Similarly, words should be read in their normal context and, if necessary standard dictionary definitions should be used. The interpretation must be consistent with the intent and purposes

1 of the statute and in a manner which avoids absurd results. *Vance v. Department of*
2 *Retirement Systems*, 114 Wn.App. 572, 577, 59 P.3d 130 (2002). Standard principles of
3 statutory interpretation indicate that the Defendants' interpretation of RCW 49.46.080 is
4 incorrect.

5 **1. Legislative History.**

6 A standard tool of statutory construction is the legislative history of the statute's
7 enactment. Because initiatives are not accompanied by the usual sources of legislative
8 history, such as committee files and bill reports, courts look to the constitutionally-required
9 voters pamphlet to determine the meaning and purposes of the measures. *Wash. Educ. Ass'n*,
10 156 Wn.2d at 554, 130 P.3d 352; *Wash. State Dep't of Revenue v. Hoppe*, 82 Wn.2d 549, 552,
11 512 P.2d 1094 (1973). The legislative history for an initiative also includes the ballot title—
12 the one brief explanation of the measure presented at the time of casting one's vote. *See State*
13 *v. Belgarde*, 119 Wn.2d 711, 723, 837 P.2d 599 (1992).

14 The ballot title in this case reads as follows:

15 Shall the state minimum wage be increased from \$4.90 to \$5.70 in
16 1999 and to \$6.50 in 2000, and afterwards be annually adjusted for
inflation?

17 Exhibit 4 to Stephens Decl. By using the phrase "adjusted for inflation," there is no inkling
18 that the voters were intending to adopt a statute that would increase the minimum wage
19 regardless of whether there been an overall decrease in the statute's measure of inflation,
20 namely, the CPI-W. In fact by using the phrase "adjusted for inflation," voters may have very
21 well thought they were voting for the direct calculation method because "adjusted for
22 inflation" would result in a downward adjustment if the cost of living decreases.

1 In regard to the voters' pamphlet for this measure, the Statement For, states that "the
2 minimum wage would automatically be adjusted for the rising cost of living." Exhibit 4 to
3 Stephens Decl. Once again, the voter's pamphlet told voters about adjustment, which could
4 go up or down, and not about a one-way ratchet of the minimum wage.

5 Therefore, the legislative history supports even a possibility that the ultimate proper
6 interpretation of the statute is the Direct Calculation method, the first method addressed in
7 AGO 2010 No. 7. Although this method was rejected by the Attorney General because it
8 does not appear to give effect to the word "increasing" in the statute., the Court could read the
9 reference to "increasing" as referring to negative increases in light of the broader "adjusted"
10 language given to the voters. Yet, the Court need not reach that far in this case. In regard to
11 the three methods outlined by the Attorney General, the Court need not decide whether the
12 first or the third methods is the proper interpretation of the statute. Rather, the Court needs to
13 decide whether the second method, essentially chosen by L&I, is correct.

14 In light of what voters were told about the measure, it is too great a stretch to assume
15 that they were intending to impose a system in which the minimum wage would increase in
16 response to increases in the cost of living or inflation without regard to overall decreases in
17 the cost of living as Defendants' decision to increase the cost of living assumes.

18 **2. Language in the Statute Must be Read in Light of the Purpose of the**
19 **Statute.**

20 "Language within a statute must be read in context with the entire statute and
21 construed in a manner consistent with the general purposes of the statute." *Pub. Util. Dist.*
22 *No. 1 of Lewis County v. Wash. Pub. Power Supply Sys.*, 104 Wn.2d 353, 369, 705 P.2d 1195
23 (1985) (quoting *Nationwide Papers, Inc. v. Northwest Egg Sales, Inc.*, 69 Wn.2d 72, 76, 416,

1 P.2d 687 (1966)). Here, the purpose of the statute is no mystery. The statute is quite clear in
2 declaring that the purpose of the statute is to “maintain employee purchasing power,” not to
3 decrease it or expand it. RCW 49.46.020(4)(b). While expansion of employee purchasing
4 power is a laudable goal and one which the Plaintiffs’ share, it is not the purpose of the
5 minimum wage statute. For instance, as indicated in the Declaration of Richard Haberman, an
6 increase in the minimum wage may increase wages for entry-level workers, but decrease the
7 funds available for workers who through experience or training would otherwise be making a
8 living wage higher than the minimum wage.

9 **3. Changes in Statutory Language are Intended to Effect Change.**

10 The statutory change brought about by the voters to declare the purpose of the
11 minimum wage statute must be taken into account.

12 Another fundamental rule of statutory construction is that the
13 legislature is deemed to intend a different meaning when it uses
14 different terms. *State v. Beaver*, 148 Wn.2d 338, 343, 60 P.3d 586
(2002) (“[w]hen the legislature uses different words within the same
statute, we recognize that a different meaning is intended.”)

15 *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005).

16 Here, the legislative body, in this case, the voters acting in their direct legislative
17 capacity, changed how the minimum wage would be determined and expressly stated the
18 purpose, whereas the purpose had only been implied before. The former version of RCW
19 49.46.020 read as follows:

20 (1) Every employer shall pay to each of his or her employees who has
21 reached the age of eighteen years wages at a rate of not less than four
dollars and ninety cents per hour.

22 (2) The director shall by regulation establish the minimum wage for
employees under the age of eighteen years.

23 Exhibit 5 to Stephens Decl.

1 The current version makes several changes. One is to give the Department of Labor
2 and Industries the duty to adjust the minimum wage based on the CPI-W. It identifies the
3 how and when the adjustments are to be made. And, for the first time, it creates a declaration
4 of purpose for the minimum wage statute—to “maintain employee purchasing power.” *Id.*
5 The Court should interpret the statute, not only in light of this expressly declared purpose, but
6 in light of the fact that the statute includes language relating to the purpose for the first time.
7 The Court should not assume that the inclusion of the purpose in the statute itself was an
8 unnecessary or meaningless act. *See State v. McCullum*, 98 Wn.2d 484, 493, 656 P.2d 1064
9 (1983); *Bailey v. Allstate Ins. Co.*, 73 Wn.App. 442, 446-47, 869 P.2d 1110 (1994).

10 **4. The Statute Should be Interpreted to Avoid Absurd Results.**

11 A basic principle of statutory construction is that statutes should be interpreted to
12 avoid absurd results. *Overlake Hosp. Ass'n v. Department of Health of State of Washington*,
13 ___ Wn. ___, 239 P.3d 1095, 1099 (2010); *State v. McDougal*, 120 Wn.2d 334, 350, 841 P.2d
14 1232 (1992). Here, the Defendants' interpretation does lead to absurd results. As explained
15 in the Attorney General Opinion,

16 Increase-ratcheted calculation result in an increase in employee
17 purchasing power during each decline and recovery of the CPI-W,
18 each time effectively changing the mathematical relationship between
19 minimum wage and CPI-W. Over time employee purchasing power
20 increases faster than the cost of living.

19 Appendix A, at 8. An ever increasing minimum wage which outstrips increases in the cost of
20 living is absurd in light of the purpose of the statute.

21 **5. Statutes in Derogation of the Common Law are Construed Narrowly.**

22 While minimum wage laws have been on the books for some time, they are still in
23 derogation of the common law which allows employers and employees to set their own

1 wages. A standard principle of statutory construction calls for narrowly interpreting statutes
2 that are in derogation of the common law narrowly. *Estate of Haselwood v. Bremerton Ice*
3 *Arena, Inc.*, 166 Wn.2d 489, 498, 210 P.3d 308 (2009). Application of this principle calls for
4 a narrow construction of the statute which leads to no increase in the minimum wage for
5 2011.

6 **6. Statutes Creating Criminal Penalties are Construed Narrowly.**

7 A familiar principle of statutory construction in regard to statutes for which criminal
8 penalties apply is to construe the statute strictly against the state. “[W]here two possible
9 statutory constructions are permissible, we construe the statute strictly against the State in
10 favor of a criminal defendant.” *State v. B.E.K.*, 141 Wn.App. 742, 745, 172 P.3d 365 (2007)
11 (citing *State v. Gore*, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984)).

12 Here, RCW 49.46.100(1) declares that one commits a gross misdemeanor if one pays
13 wages less than the rate established under this chapter. While there is no criminal proceeding
14 pending here, the Court should interpret the statute in a way which is consistent with how it
15 must be interpreted in the criminal context. In light of this principle of statutory construction,
16 the Court should construe the statute strictly against Defendant’s position in this case and
17 conclude that an increase in the minimum wage is not authorized merely because there was a
18 slight increase in the context of an overall decrease in inflation.

19 **C. The Attorney General Opinion is Entitled to Great Weight**

20 Ultimately, the interpretation of law, including RCW 49.46.020, is a legal question to
21 be decided by the Court and not by the Attorney General. Nevertheless, official Attorney
22 General Opinions are persuasive authority and are entitled to “great weight.” *Thurston*
23

1 *County ex rel. Bd. of County Comm'rs v. City of Olympia*, 151 Wn.2d 171, 177, 86 P.3d 151
2 (2004); *Bowles v. Dep't of Ret. Sys.*, 121 Wn.2d 52, 63, 847 P.2d 440 (1993).

3 Here, Attorney General Opinion 2010 No. 7 is a reasoned analysis of the statute and
4 its purpose, using standard principles of statutory construction. It should be considered
5 persuasive in the Court's resolution of this case.

6 **D. L&I's Interpretation of RCW 49.46.020 is Not Entitled to Deference**

7 While in some circumstances a state agency's interpretation of law is entitled to some
8 deference, this case is not one of them. An agency does not have discretion to determine the
9 scope or extent of its own authority. *In re Elec. Lightwave, Inc.*, 123 Wn.2d 530, 540, 869
10 P.2d 1045 (1994).

11 Moreover, "[w]hile ... an agency has some discretion in interpreting
12 ambiguous statutes, it may not alter or amend an act, and its
13 interpretation must be within the framework and policy of the statute."
Burlington Northern, Inc. v. Johnston, 89 Wn.2d 321, 326, 572 P.2d
1085 (1977).

14 *Pacific Wire Works, Inc. v. Department of Labor and Industries*, 49 Wn.App. 229, 235, 742 P.2d
15 168 (1987).

16 Just as the Court is not bound to follow the Attorney General Opinion, the Court is not
17 "bound by an agency" interpretation of a statute." *Preserve Our Islands v. Shorelines Hearings*
18 *Bd.*, 133 Wn.App. 503, 515, 137 P.3d 31 (2006). Here, L&I's decision-making did not follow
19 any particular formal process.⁸ The Court should determine the appropriate interpretation of the
20 statute without regard to L&I's interpretation of the statute in this instance.

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22
23 ⁸ This is not a case where an agency has gone through formal rule-making which might entitle it
to more deference. *See Allen v. Employ. Sec. Dep't.* 83 Wn.2d 145, 151, 516 P.2d 1032 (1973).

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III
DEFENDANTS' ANSWER RAISES NO VALID
AFFIRMATIVE DEFENSES

Defendants' Answer raises six affirmative defenses: (1) Failure to state a claim upon which relief may be granted, (2) Lack of personal jurisdiction, (3) Insufficiency of service of process, (4) Lack of standing, (5) Failure to exhaust administrative remedies, (6) Improper venue. *See* Answer to Petition and Complaint at 6, attached to Stephens Decl. as Exhibit 6. None of these are sufficient to prohibit resolution of this case in Plaintiffs' favor by summary judgment.

A. Failure to State a Claim

As the briefing above explains, Plaintiffs have alleged the necessary elements for each of the causes of action asserted.

B. Lack of Personal Jurisdiction and Insufficiency of Service of Process

As demonstrated by the two declarations of service, both an Assistant Attorney General, Charles Clark, and an agent for the Director of L&I, were personally served. *See* Exhibits 7 and 8 to Stephens Declaration. RCW 34.05.542(4) provides that service upon the department is accomplished by "delivery ... to the office of the director." Here, Plaintiffs complied with that requirement. Stephens Decl, Exhibits 7 and 8.

Additionally, courts have not required personal service on the Director and such a requirement makes little sense when the Director has designated an agent for receiving service of process. The Supreme Court found that service on L&I was sufficient to constitute substantial compliance with a statute that required service on the director because it was reasonably calculated to give notice. *In re Saltis*, 94 Wn.2d 889, 895, 621 P.2d 716 (1980); *see also Ruland v. State, Dep't. of Social and Health Services*, 144 Wn.App. 263, 182 P.3d 470 (2008); *See also*