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WAGE COLLECTION, MINIMUM WAGE, OVERTIME, AND WORKING CONDITIONS

1.0 COMMISSIONER'S AUTHORITY

1.1 --- Generally; Discretion

❑ At hearing, the forum determined that claimant earned $2,601.90 during the wage claim period and was owed $896.80 instead of the $873.50 in unpaid wages alleged to be due and owing in the agency's amendment to its order of determination. The forum noted that the commissioner has previously awarded unpaid wages exceeding those sought in the order of determination when they are awarded as compensation for statutory wage violations alleged in the charging document. The forum concluded that the unpaid wages owed to claimant case were earned within the wage claim period alleged in the order of determination and were awarded as compensation for violations of ORS 653.025 and ORS 653.261 that were alleged in the order of determination and awarded $896.80, the full amount of unpaid wages proved by the agency at hearing. ***----- In the Matter of Letty Lee Sesher, 31 BOLI 255, 263 (2011).***

❑ The commissioner has the authority to award monetary damages, including penalty wages that exceed those sought in the order of determination when they are awarded as compensation for statutory wage violations alleged in the charging document. Based on this principle, despite denying the agency's motion to amend to increase the amount of unpaid wages sought in its order of determination, the forum awarded all unpaid wages not plead by the agency in its order of determination that fell within the scope of the statutory wage violations alleged in its order of determination. ***----- In the Matter of Petworks LLC, 30 BOLI 35, 44 (2008).***

1.2 --- To Investigate

1.3 --- To Order Payment of Wages/Penalties

❑ In prior cases, the forum has held that the commissioner has the authority to award unpaid wages exceeding those sought in the agency's order of determination when they are awarded as compensation for statutory wage violations alleged in the charging document. The unpaid wages owed to claimant were earned within the wage claim period alleged in the order of determination and were awarded as compensation for a statutory wage violation of ORS 652.140 alleged in the order of determination. The forum awarded claimant the sum of $2,205.75, the full amount of unpaid wages proved by the agency at hearing, and an amount that exceeded the amount of unpaid wages sought in the order of determination. ***----- In the Matter of J & S Moving & Storage, Inc., 31 BOLI 286, 300 (2012).***

1.4 --- To Fashion Remedy

❑ When the agency did not mention ORS 653.261, OAR 839-020-0030, or the word "overtime" in its order of determination, the forum declined to award claimant the $29 in overtime wages that she earned. ***----- In the Matter of Petworks LLC, 30 BOLI 35, 46 (2008).***

2.0 EMPLOYMENT RELATIONSHIP

2.1 --- Generally

❑ When respondent was licensed to operate and operated an adult foster care home in Grants Pass, Oregon, throughout the wage claim period; claimant was referred to respondent's adult foster care home by the Oregon Employment Department Workforce Program for a job opening as a care provider; respondent's grandson, who worked at respondent's adult foster care home, hired claimant, set her work hours, and paid her; and the grandson was not licensed to operate an adult foster care home during claimant's employment, the forum concluded that respondent "suffer[ed] or permit[ted]" claimant to work and was claimant's employer. ***----- In the Matter of Letty Lee Sesher, 31 BOLI 255, 262 (2011).***

❑ Proving the first element of the agency's prima facie case – that respondent employed claimant -- necessarily proves that claimant was not an independent contractor. Likewise, evidence that establishes by a preponderance of the evidence that claimant was an independent contractor necessarily proves that respondent did not employ claimant. Although the burdens of proof for these two propositions respectively rest on the agency and respondent, it is immaterial who presents the evidence on which the forum relies for its conclusion. ***----- In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 243 (2011).***

❑ Proving the first element of the agency's prima facie case – that respondent employed claimant -- necessarily proves that claimant was not an independent contractor. Likewise, evidence that establishes by a preponderance of the evidence that claimant was an independent contractor necessarily proves that respondent did not employ claimant. ***----- In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 243 (2011).***

❑ In prior cases in which a respondent has raised an independent contractor defense, the forum's consistent approach has been to evaluate the merits of the defense and, in the vast majority of cases, reject the defense and then simply conclude that the respondent employed claimant. ***----- In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 240 (2011).***

❑ Prior BOLI Final Orders have relied on the facts in each case to determine whether or not a respondent "employed" a wage claimant as defined in ORS 653.010(2) and have never formulated a specific test to determine if someone has been "suffer[ed] or permit[ted] to work." ***----- In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 240 (2011).***

❑ When the agency sought unpaid wages for a claimant calculated at the state minimum wage in effect in 2007 and 2008, the forum applied the definitions contained in ORS 653.010(2) and (3) to determine if respondent employed claimant. Read together, these two provisions mean that respondent was claimant's employer if it suffered or permitted claimant to work. ***----- In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 239 (2011).***

❑ To be liable as an employer for unpaid hours worked by an individual under Oregon's minimum wage law, the employer must "suffer or permit" that individual to work. While the plain meaning of "to permit" requires a more positive action than "to suffer," both terms imply much less positive action than required by the common

law test for determining an employment relationship. To "permit" something to happen does not require an affirmative act, but only a decision to allow it to happen. To "suffer" something to happen is even broader and means to tolerate or fail to prevent it from happening. Thus, a business may be liable under the provisions of ORS chapter 653 if it knows or has reason to know a worker was performing work in that business and could have prevented it from occurring or continuing. ***----- In the Matter of Computer Products Unlimited, Inc., 31 BOLI 209, 223 (2011).***

❑ When the agency presented credible evidence that respondent operated a kiosk in a shopping mall in Eugene, that respondent's manager hired all four claimants, set their work schedule and unilaterally set their commission rate of pay, that the manager and his supervisor trained claimants and controlled their work and working conditions, that all four claimants performed regular work for respondent at the kiosk, and that respondent fired three of the claimants, this evidence proved that respondent employed claimants. Although one claimant did not appear at hearing to testify, the agency submitted and authenticated his signed and dated wage claim, his application for employment with respondent, a typed interview with the agency compliance specialist in which the claimant described his employment, and a statement from respondent's manager in which he acknowledged retaining claimant's services to work at respondent's kiosk, thereby satisfying the agency's burden of proof that respondent employed that claimant. ***----- In the Matter of Computer Products Unlimited, Inc., 31 BOLI 209, 222 (2011).***

❑ When there was no credible evidence demonstrating that that respondents engaged claimant's services as a truck driver at the agreed rate of $7.50 per hour, as alleged in the agency's order of determination, or at any other wage rate, the forum concluded that there was no basis for claimant's wage claim and dismissed his claim. ***----- In the Matter of Best Concrete and Gravel LLC, 31 BOLI 54, 69 (2010).***

❑ ORS chapter 652 governs claims for unpaid agreed wages. Under that chapter, "employee" means any individual who, other than a co-partner or independent contractor, renders personal services in Oregon to an employer who pays or agrees to pay the individual a fixed pay rate. ***----- In the Matter of Best Concrete and Gravel LLC, 31 BOLI 54, 69 (2010).***

❑ In its answer, respondent alleged that it had never employed claimant but offered no evidence to support that claim. Through claimant's credible testimony, her contemporaneous time records, and the credible testimony of other agency witnesses, the agency proved that claimant was employed by respondent. The forum concluded that claimant was not employed by respondent during the part of the wage claim period that respondent did not exist as a legal entity. ***----- In the Matter of Petworks LLC, 30 BOLI 35, 41-42 (2008).***

2.2 --- Partnerships

2.3 --- Independent Contractors

2.3.1 --- Generally

❑ If respondent pleads the defense of independent contractor and there is evidence in the record that is probative of that defense, the forum has no alternative but to consider that evidence, and it has consistently done so in the past. ***----- In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 243 (2011).***

❑ Proving the first element of the agency's prima facie case – that respondent employed claimant -- necessarily proves that claimant was not an independent contractor. Likewise, evidence that establishes by a preponderance of the evidence that claimant was an independent contractor necessarily proves that respondent did not employ claimant. Although the burdens of proof for these two propositions respectively rest on the agency and respondent, it is immaterial who presents the evidence on which the forum relies for its conclusion. ***----- In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 243 (2011).***

❑ The forum rejected the agency's argument that it should ignore any evidence in a default case not presented by respondent that tended to prove respondent's affirmative defense of independent contractor. ***----- In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 242 (2011).***

❑ A respondent must prove the defense of independent contractor by a preponderance of the evidence in order to prevail. ***----- In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 242 (2011).*** *See also In the Matter of Laura M. Jaap, 30 BOLI 110, 121-22 (2009).*

❑ When respondent did not use the specific term "independent contractor" in its answer but affirmatively alleged that claimant was an "Independent Business Owner selling our GPS devices" and that claimant "bought an independent business distributorship" and "was his own business owner." Relying on ORCP 12, the forum held that respondent had raised the affirmative defense of independent contractor. ***----- In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 241 (2011).***

❑ In prior cases in which a respondent has raised an independent contractor defense, the forum's consistent approach has been to evaluate the merits of the defense and, in the vast majority of cases, reject the defense and then simply conclude that the respondent employed claimant. ***----- In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 240 (2011).***

❑ This forum applies an "economic reality" test to distinguish an employee from an independent contractor under Oregon's minimum wage and wage collection laws. The degree of economic dependency in any given case is determined by analyzing the facts presented in light of the following five factors, with no one factor being dispositive: (1) The degree of control exercised by the alleged employer; (2) The extent of the relative investments of the worker and alleged employer; (3) The degree to which the worker's opportunity for profit and loss is determined by the alleged employer; (4) The skill and initiative required in performing the job; and (5) The permanency of the relationship. ***----- In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 245 (2011).*** *See also In the Matter of Mark A. Frizzell, 31 BOLI 178, 196 (2011); In the Matter of Paul Samuels, 31 BOLI 146,*

155 (2010); In the Matter of Ryan Allen Hite, 31 BOLI 10, 16 (2009); In the Matter of Laura M. Jaap, 30 BOLI 110, 122 (2009); In the Matter of Forestry Action Committee, 30 BOLI 63, 75-76 (2008).

❑ At a default hearing, the agency presented considerable evidence to rebut respondent's claim, made during the investigation, that claimants were independent contractors. The forum did not address this issue because "independent contractor" is an affirmative defense in wage claim cases and respondent did not plead it as a defense in its answers and requests for hearing. Respondent's self-labeled "affirmative defense" that claimants "were never employees of [respondent]" was merely a denial of the first element of the agency's prima facie case, and not an affirmative assertion that claimants were "independent contractors." ***----- In the Matter of Computer Products Unlimited, Inc., 31 BOLI 209, 223-24 (2011).***

❑ When all five elements of the "economic reality" test indicated that claimant was an independent contractor, the forum concluded that claimant was an independent contractor. ***----- In the Matter of Mark A. Frizzell, 31 BOLI 178, 198 (2011).***

❑ Respondents had the burden of proving that claimant was an independent contractor. ***----- In the Matter of Mark A. Frizzell, 31 BOLI 178, 193 (2011).***

❑ In their respective answers, respondents alleged that claimant was self-employed and that they did not owe claimant any wages because he did not earn any wages. The forum treated these pleadings as a denial that respondents employed claimant and an affirmative assertion that claimant was an independent contractor. ***----- In the Matter of Mark A. Frizzell, 31 BOLI 178, 193 (2011).***

❑ Claimant was an employee who was "suffered or permitted to work" and was not an independent contractor when the evidence showed: (1) respondent solicited and hired claimant at the agreed rate of $400 per week for 40 hours of work; (2) respondent set claimant's work hours; (3) claimant made no financial investment in respondent's business; (4) respondent provided all the tools used by claimant in his work; claimant had no opportunity for profit or loss apart from his wages; (5) claimant performed the same kind of work for his previous employer that he performed for respondent; (6) there was no evidence that claimant engaged in any other gainful employment while he worked for respondent, that claimant worked on any vehicles during his work time with respondent that gave him the opportunity to earn any money other than his agreed wage, or as to the expected duration of claimant's employment. ***----- In the Matter of Paul Samuels, 31 BOLI 146, 154-55 (2010).***

❑ Respondent had the burden of proving its affirmative defense that claimants were independent contractors and not respondent's employees. ***----- In the Matter of Ryan Allen Hite, 31 BOLI 10, 16 (2009).***

❑ Claimants were employees, not independent contractors, when there was no evidence as to the degree of control exercised by the respondent or the skill and initiative required of claimants to perform the job; claimants' use of respondent's tools to perform the work; the lack of evidence that claimants had any investment in the job, other than their time and labor; claimants' lack of opportunity make a profit or suffer a loss because of their hourly wage; and the fact that claimants had worked for respondent for at least a year and there was no evidence that they worked for anyone else in that time period. ***----- In the Matter of Ryan Allen Hite, 31 BOLI 10, 16-17 (2009).***

❑ When four of the five factors used by the forum to determine whether an independent contractor relationship exists indicated that an employment relationship, not an independent contractor relationship, existed between three wage claimants and respondent, respondent did not meet her burden of proof and the forum concluded that claimants were not independent contractors. ***----- In the Matter of Laura M. Jaap, 30 BOLI 110, 125 (2009).***

❑ A respondent must prove the defense of independent contractor by a preponderance of the evidence in order to prevail. ***----- In the Matter of Paul Samuels, 31 BOLI 146, 154-55 (2010.***

❑ The forum concluded that claimant was an employee, not an independent contractor, when the totality of the circumstances showed that claimant was economically dependent on respondent, her services were a necessary part of respondent's business, and those services were performed in a manner consistent with an employer-employee relationship. ***----- In the Matter of Forestry Action Committee, 30 BOLI 63, 76 (2008).***

❑ The test for distinguishing an employee from an independent contractor requires a full inquiry into the true "economic reality" of the employment relationship based on a particularized inquiry into the facts of each case. ***----- In the Matter of Forestry Action Committee, 30 BOLI 63, 75 (2008).***

❑ Respondent had the burden of proving its affirmative defense that claimant was an independent contractor during the wage claim period. ***----- In the Matter of Forestry Action Committee, 30 BOLI 63, 74 (2008).***

2.3.2 --- Degree of Control Exercised by Alleged Employer

❑ Claimant conducted internet sales of respondent's GPS units, and respondent set the minimum price for its product, reserved the right to approve the content of claimant's advertising, required claimant to pay $25 a month to maintain a website that respondent hosted on its servers, and controlled the means by which claimant's clients paid for the product. Claimant's clients also paid respondent directly, with respondent promising to then pay a commission to claimant. Claimant determined the hours that he worked, the amount of commission he was supposed to earn on sales of respondent's GPS units, the means and methods by which he marketed respondent's product, the amount he spent on marketing, the location from which he worked, and the equipment he used to market respondent's product. He maintained contact with respondent through weekly emails or telephone calls to a "coach" in Arizona.

This evidence, by itself, did not affirmatively indicate either an employment or independent contractor relationship. ***----- In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 245 (2011).***

❑ When respondent testified that he was the boss and told claimant what to do, claimant credibly testified that respondent set his work hours, respondent testified that he had the right to set claimant's hours and to tell claimant when he could not work as well as when he should work, the forum concluded that this indicated an employment relationship. ***----- In the Matter of Mark A. Frizzell, 31 BOLI 178, 196 (2011).***

❑ When respondent was present to direct work and perform work herself at least three days a week except during one week when her agent directed work in her absence; claimants performed the work that respondent and her agent instructed them to perform; claimants credibly testified that respondent and her agent directed their work and there was no more specific evidence concerning the extent of supervision by respondent; the forum concluded that the degree of control exercised by respondent was indicative of an employer-employee relationship. ***----- In the Matter of Laura M. Jaap, 30 BOLI 110, 122-23 (2009).***

❑ Generally, a worker who is required to comply with another person's instructions about when, where and how to perform services is an employee. ***----- In the Matter of Forestry Action Committee, 30 BOLI 63, 76 (2008).***

2.3.3 --- Extent of Relative Investments of Worker and Alleged Employer

❑ In the first wage claim case to come before the forum in which a claimant actually made a substantial financial investment related to the work performed, claimant testified that he invested $15,000 to $20,000 in the business during the wage claim period. This investment was not to buy stock or any ownership interest in respondent, but to provide claimant the means by which to market respondent's product and earn potential income for claimant. Claimant's investments included a computer and printer, monthly web site expense, cell phone bill, advertising expense to purchase brochures from respondent and advertise through Google, business cards, and a $1,500 startup fee to purchase a "welcome package" and a membership in respondent's "Reseller's" program. There was no evidence that respondent paid for any service or product it provided to claimant to assist him in marketing respondent's product. The forum concluded that these facts indicated an independent contractor relationship. ***----- In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 247-48 (2011).***

❑ When respondent owned the boat upon which claimant worked during the wage claim period and there was no evidence that claimant made any financial investment in respondent's business, claimant's only job-related expense was the gas he bought for his truck so he could drive to work from his home, respondent provided all the tools used by claimant in his work, and all of claimant's work was done at respondent's house, on respondent's boat while it was docked, or at the yard where respondent stored his crab pots, the forum concluded that this indicated an employment relationship. ***----- In the Matter of Mark A. Frizzell, 31 BOLI 178, 196 (2011).***

❑ Three wage claimants performed repair and remodeling work on respondent's daughter's house. When claimants had no investment in the house or in the work performed, other than their time; respondent paid for all the materials and supplies necessary to perform the work; and there was no evidence that claimants had to spend any money related to their performance of the work, the forum concluded that these facts favored the conclusion that claimants were employees, not independent contractors. The forum did not consider one wage claimant's ownership of most of the tools that claimants used on the job as an "investment" because there was no evidence that the claimant had to purchase any of those tools to perform the work or that the tools would not have been provided by respondent if the claimant had not provided them. ***----- In the Matter of Laura M. Jaap, 30 BOLI 110, 123 (2009).***

❑ The fact that a worker is furnished with necessary tools and equipment to perform required job duties tends to support the existence of an employment relationship. ***----- In the Matter of Forestry Action Committee, 30 BOLI 63, 76 (2008).***

2.3.4 --- Degree to Which Worker's Opportunity for Profit and Loss is Determined by Alleged Employer

❑ When there was no agreed-upon rate of pay between claimant and respondent and claimant's potential income was directly dependent upon his investment of time and money; claimant's potential commission profit was the difference between the price at which claimant sold respondent's product and respondent's minimum product price; claimant was required to make an initial capital investment of $1,500 and to pay all of his own marketing expenses, which ultimately amounted to as much as $20,000; and claimant was free to sell respondent's product at any price he chose, so long as it exceeded respondent's minimum pricing schedule, the forum concluded that the only limit on the amount of money that claimant could have made was the number of successful sales he could generate and the prices he charged, less the money he invested in marketing respondent's product. The difference between claimant's investment and the amount of commission he earned and would have received, had Respondent paid him, reflected his profit or loss. Respondent's failure to pay him any commissions to which he was entitled did not lead to the conclusion that respondent controlled his opportunity for profit and loss. The forum concluded that the degree to which claimant determined his own opportunity for profit and loss indicates an independent contractor relationship. ***----- In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 248-49 (2011).***

❑ The forum rejected the agency's argument that respondent's failure to pay claimant anything, when claimant was an independent contractor, meant that the forum's application of the profit and loss element of the economic reality test allowed respondent to unjustly benefit and that the test should therefore not be applied.

The forum rejected this argument, stating it is a forum of law, not a court of equity and, even if it wanted to do so, it is not free to ignore its own legal precedent in order to rectify a "sadly clear and very unfortunate situation" in a particular case. ***----- In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 248-49 (2011).***

❑ When claimant had no investment in respondent's business, he could not suffer a monetary loss. He had no opportunity to earn more money during the crab season by working harder or more skillfully because he was not paid by a percentage of the catch due to his premature termination before the crab harvest started. Although he was hired at an agreed rate of pay, the draws he received bore no relationship to this agreed rate. The forum concluded that this indicated an employment relationship. ***----- In the Matter of Mark A. Frizzell, 31 BOLI 178, 196-97 (2011).***

❑ When claimants were not licensed contractors; did not bid on the remodeling project on which their wage claims were based; were paid based on an agreed hourly rate; had no opportunity to make more money by working more efficiently and finishing the job in fewer hours; made no capital investment and therefore risked no loss of money if the project fell through or was not completed, the forum concluded these facts were indicative of an employment relationship. ***----- In the Matter of Laura M. Jaap, 30 BOLI 110, 123 (2009).***

2.3.5 --- Degree of Skill and Initiative Required to Perform the Work

❑ Respondent marketed a product that integrated GPS and cellular technology and enabled clients to communicate with a vehicle at any time of the day or night, nearly anywhere in the world, using a computer with Internet access and a browser, with the only limitation being the type of service plan purchased by the client. Claimant testified that he was attracted to respondent's business because of his extensive prior experience and skills involving computers and their use in motor vehicles and what he perceived to be a very high income potential. While there was no evidence that a person lacking skills and experience in these areas could not have successfully marketed respondent's product, it is also apparent that claimant believed his technical expertise gave him an edge. As for marketing skills, there was no evidence presented as to whether claimant had any prior marketing education or experience. As to initiative, respondent did not regulate or limit claimant's initiative by requiring him to work a set number of hours or set schedule, and there was no evidence that respondent monitored claimant's work hours or working conditions in any way whatsoever. Respondent imposed no mandatory sales techniques and did not restrict claimant's sales efforts to a specified group of customers. Aside from reserving the right to approve the content, respondent did not limit claimant's advertising in any way. The responsibility of generating and closing sales that would lead to commission income for claimant was completely in his hands. While respondent's Reseller's Handbook contained numerous suggestions about how claimant might successfully market its product, claimant had complete discretion regarding the amount of physical and intellectual energy, financial investment, and time he used in marketing. So long as he sold respondent's product for more than respondent's minimum price, claimant was free to charge whatever price he could negotiate with clients. In sum, his opportunity to earn income was completely dependent on his own initiative. The forum concluded that the initiative required of and exercised by claimant indicated an independent contractor relationship. ***----- In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 250-51 (2011).***

❑ When claimant was an experienced commercial fisherman, but the only work he performed for respondent was sanding and painting respondent's boat, repairing crab pots, drilling baiters, and painting buoys. The only tool he used to repair crab pots was a pair of pliers. Painting buoys required the use of a paint brush and drilling holes in baiters required the use of a drill. There was no evidence that these tasks required any special training or skills. The forum concluded that this indicated an employment relationship. ***----- In the Matter of Mark A. Frizzell, 31 BOLI 178, 197 (2011).***

❑ Three wage claimants, one of whom had previously worked as a construction contractor in Idaho and had spent most of his adult life doing construction work performed work remodeling respondent's daughter's house. They did not bid on the work to be done at the house and were told the work that needed to be done. A hand-drawn floor plan with dimensions and a list of the electrical work to be performed was left on a counter at the house to show claimants the work that respondent wanted completed. There were no blueprint plans. Claimants' work was directed by respondent, who was at the house for one to four hours, at least three days a week, except for one week at the dog races when her agent took her place. There was no specific testimony about how closely respondent supervised the claimants' work, other than that she directed claimants' work. Likewise, there was no testimony about the degree of skill or initiative required to perform the specific work done by the claimants, other than a listing of the tools that they used and the specific rooms they remodeled. Given this paucity of evidence, the forum declined to speculate about the degree of skill, training, or initiative required to perform that work or the specific amount of supervision exercised by respondent, although it inferred that claimants necessarily possessed some skill and exercised some initiative in order to perform the work when respondent was gone. Respondent had the burden of proof to show that the degree of skill and initiative required of claimants to perform the work was that of an independent contractor, and she did not meet that burden. ***----- In the Matter of Laura M. Jaap, 30 BOLI 110, 123-24 (2009).***

❑ When claimant performed forestry work for respondent, had no previous forestry experience and there was no evidence she conducted her own business or possessed special skills that she agreed to provide to respondent for a prescribed amount of money, this tended to indicate an employment relationship. ***----- In the Matter of Forestry Action Committee, 30 BOLI 63, 76 (2008).***

2.3.6 --- Permanency of the Relationship

❑ When the "Terms and Conditions for Business and

Consumer Membership" found in respondent's "Reseller's Handbook" provided that when the stated terms were met, the "Agreement" was to remain in force for one year and would be automatically extended for additional one-year terms unless either party submitted written notice of non-renewal 30 days prior to the expiration date of any annual contract term, respondent retained the right to unilaterally terminate the "Agreement" for failure "to maintain membership in the IBO/Reseller Program, or for failure to remit Web hosting fee, or failure to pay any other outstanding unpaid balance due us for more than thirty days," and the Handbook also stated that the permanency of the relationship could be as brief as 30 days, or a period of years if respondent and claimant continued to renew, the forum concluded that the potential longevity of the relationship between respondent and claimant weighed in favor of employee status. ***----- In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 251-52 (2011).***

❑ The expected duration of claimant's employment with respondent was from September 2009 until the end of the crab season at the end of April 2010. Claimant's work related to respondent's crab harvest would have extended an additional six months had he not been fired. An anticipated end date to employment, in and of itself, does not indicate either an independent contractor or an employment relationship, as the forum focuses on the anticipated duration of the employment. Based on prior final orders, the forum concluded that the anticipated six-month duration of claimant's employment indicated an employment relationship. ***----- In the Matter of Mark A. Frizzell, 31 BOLI 178, 197 (2011).***

❑ When claimants were hired to perform specific repair and remodeling work on respondent's daughter's house, with the option of performing limited repair work on respondent's house when the work on the daughter's house was complete; the work on the daughter's house was nearly completed in a few days less than one month; and the scope of work at respondent's house was even more limited, the forum concluded that the facts were indicative of an independent contractor relationship between respondent and claimants, even though there was no evidence that claimants worked for anyone else while they worked at respondent's daughter's house. ***----- In the Matter of Laura M. Jaap, 30 BOLI 110, 124-25 (2009).***

❑ Although claimant's tenure with respondent was limited by the terms of respondent's contract with a funding agency, impermanence of a particular job alone does not create an independent contractor relationship. ***----- In the Matter of Forestry Action Committee, 30 BOLI 63, 76 (2008).***

2.3.7 --- Independent Contractor Agreement

❑ Even if claimant and respondent had entered into a specific agreement denoting claimant as an independent contractor, this fact alone would not require the forum to conclude that claimant was an independent contractor during the wage claim period. ***----- In the Matter of Mark A. Frizzell, 31 BOLI 178, 199 (2011).***

❑ In a case in which respondent asserted that claimant was an independent contractor, the forum disregarded a document sent to the agency by respondent entitled "Independent Contractor's and Confidential Information Agreement" that bore a printed name and signature purporting to be claimant's because (1) claimant credibly testified that he had never seen and did not sign the document; and (2) claimant's purported signature and hand printed name on the Agreement were substantially dissimilar from claimant's acknowledged signature and hand printed name on the wage claim form and assignment of wages he submitted to the agency when claimant presumably had no idea that the authenticity of his handwriting would be subject to scrutiny by the forum. ***----- In the Matter of Paul Samuels, 31 BOLI 146, 154-55 (2010).***

❑ Even if respondent had produced a contract with claimant's signature, an "independent contractor agreement" is not controlling when determining whether a worker is an independent contractor. Rather, the forum looks at the totality of the circumstances to determine the actual working relationship. ***----- In the Matter of Forestry Action Committee, 30 BOLI 63, 75 (2008).***

❑ It does not matter if a worker agrees, orally or in writing, to work as an independent contractor, as intent does not control whether an employment relationship exists. ***----- In the Matter of Forestry Action Committee, 30 BOLI 63, 75 (2008).***

2.3.8 --- Industry Tradition

❑ The forum examined whether industry tradition made claimant an independent contractor as a matter of law or otherwise exempted respondent from paying claimant the minimum wage and concluded it did not when there was no provision in Oregon law that defines crew members on commercial fishing boats as independent contractors and no exception in Oregon law for industry tradition that exempts owners of commercial fishing boats from paying the statutory minimum wage to crew members on their boats. ***----- In the Matter of Mark A. Frizzell, 31 BOLI 178, 199 (2011).***

2.3.9 --- Other

❑ The forum examined whether IRS rules made claimant an independent contractor as a matter of law and concluded that, even assuming that respondent's representation of IRS rules for crew members was accurate, IRS rules do not preempt the commissioner's authority to determine whether a wage claimant is an independent contractor. Even if they did, the IRS's purported rules would arguably not apply here because (1) claimant received cash draws from respondent that bore no percentage relationship to the share of the catch, and (2) claimant did not receive an actual share of the catch. ***----- In the Matter of Mark A. Frizzell, 31 BOLI 178, 199-200 (2011).***

❑ By itself, an agreed rate of pay consisting of the percentage of the crab harvest between claimant and respondent did not establish an independent contractor relationship. ***----- In the Matter of Mark A. Frizzell, 31 BOLI 178, 199 (2011).***

2.4 --- Termination of Relationship

2.5 --- Volunteers

3.0 RESPONDENTS/EMPLOYERS

3.1 --- Generally

❑ Proving the first element of the agency's prima facie case – that respondent employed claimant -- necessarily proves that claimant was not an independent contractor. Likewise, evidence that establishes by a preponderance of the evidence that claimant was an independent contractor necessarily proves that respondent did not employ claimant. ***----- In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 243 (2011).***

❑ When the evidence showed that the husband of a married couple named as respondents owned the fishing boat on which claimant worked and supervised its operations, the forum concluded this established he was an owner of the business and was potentially liable as an employer. Thus, his wife's potential liability, if any, had to arise from a partnership interest. ***----- In the Matter of Mark A. Frizzell, 31 BOLI 178, 194 (2011).***

❑ To determine whether one or both named respondents, a married couple, potentially liable as claimant's employer, the forum looked at the ownership and operation of the fishing business that employed claimant. There is no evidence that the business was a limited liability company or corporation or another form of business entity created by statute. The business was not registered with the corporation division and there was no assumed business name. This left only two possibilities -- either the business was an individual proprietorship owned by either spouse or they were partners. ***----- In the Matter of Mark A. Frizzell, 31 BOLI 178, 194 (2011).***

❑ When there was no credible evidence demonstrating that that respondents engaged claimant's services as a truck driver at the agreed rate of $7.50 per hour, as alleged in the agency's order of determination, or at any other wage rate, the forum concluded that there was no basis for claimant's wage claim and dismissed his claim. ***----- In the Matter of Best Concrete and Gravel LLC, 31 BOLI 54, 69 (2010).***

❑ ORS chapter 652 governs claims for unpaid agreed wages. Under that chapter, "employer" means any person who engages the personal services of one or more employees. ***----- In the Matter of Best Concrete and Gravel LLC, 31 BOLI 54, 69 (2010).***

❑ The agency has the burden of proof to show a respondent in a wage claim case was claimants' employer and that claimants were employees. ***----- In the Matter of Laura M. Jaap, 30 BOLI 110, 125 (2009).***

❑ ORS chapter 652 governs claims for unpaid agreed wages. Under that chapter, "employer" means any person who engages the personal services of one or more employees and "employee" means any individual who, other than a co-partner or independent contractor, renders personal services in Oregon to an employer who pays or agrees to pay the individual a fixed pay rate. ***----- In the Matter of Kurt E. Freitag, 29 BOLI 164, 197 (2007).***

> Affirmed without opinion, *Freitag v. Bureau of Labor and Industries, 243 Or App 389, 256 P3d 1099 (2011).*

❑ A preponderance of credible evidence showed that the corporate respondent, who shared an interest in a townhouse development property with the individually named respondent, advertised in the newspaper for laborers on the townhouse construction site, maintained an office where claimant and other laborers submitted their time sheets for their work on the site, and controlled, to some extent, how, when, and whether claimant would be paid. Evidence also showed the individually named respondent controlled and directed the work performed by claimant and the other laborers on the construction site and signed their paychecks, which he paid to them as a sole proprietor using an assumed business name. The forum inferred from those facts that claimant was under the simultaneous control of respondents and simultaneously rendered services for both. Also, based on those facts and inferences, the forum found that each named respondent actively participated in the townhouse development, both engaged the personal services of claimant and other laborers to perform work at the construction site, and both benefited from the personal services that claimant and other laborers rendered at the construction site in furtherance of its development. ***----- In the Matter of Kurt E. Freitag, 29 BOLI 164, 299-201 (2007).***

> Affirmed without opinion, *Freitag v. Bureau of Labor and Industries, 243 Or App 389, 256 P3d 1099 (2011).*

❑ In a claim for wages based on ORS 652.140, an employer is "any person who in this state, directly or through an agent, engages personal services of one or more employees * * * so far as such employer has not paid employees in full." ***----- In the Matter of John Steensland, 29 BOLI 235, 262 (2007).***

❑ When the agency established that one of the named respondents was an independent contractor who operated his own business and contracted with the other named respondent to provide labor, equipment, and tools for a yew harvest operation; wrote checks on his personal account to pay wages to the workers on the yew harvest; had ultimate responsibility and authority to hire and fire the workers; told the workers that they worked for him and the workers understood that he was the boss; and provided the workers with equipment to perform the job, the forum concluded that he was an employer of the wage claimants. ***----- In the Matter of John Steensland, 29 BOLI 235, 262 (2007).***

❑ When the evidence established that a named respondent's primary role was as the legal entity that held a permit to harvest yew and that a business relationship existed between both named respondents that was akin to a general contractor/subcontractor relationship, the forum found the evidence supported the named respondent's argument that it did not employ the wage claimants, but was merely the holder of the permit that made the yew harvest possible. ***----- In the Matter of John Steensland, 29 BOLI 235, 262-63 (2007).***

3.2 --- Corporations/Shareholders

3.2.1 --- Generally

❑ When a corporation and an individual were named

as respondents, and the corporation was administratively dissolved prior to claimant's employment, then reinstated retroactively two years after it was dissolved, the forum held that the corporation was claimant's employer and dismissed the wage claims against the individual respondent. ***----- In the Matter of Mass Tram America, Inc., 31 BOLI 42, 49-51 (2010).***

❑ When a respondent corporation was administratively dissolved, then subsequently reinstated and continued to carry on business, it was liable for claimant's unpaid wages because the reinstatement related back to and took effect as of the effective date of the administrative dissolution. ***----- In the Matter of Mass Tram America, Inc., 31 BOLI 42, 50 (2010).***

❑ In Oregon, an administratively dissolved corporation has five years from the date of dissolution to apply to the secretary of state for reinstatement. When a corporation is reinstated, as it was in this case, the reinstatement relates back to and takes effect as of the effective date of the administrative dissolution and the corporation resumes carrying on its business as if the administrative dissolution had never occurred. ***----- In the Matter of Mass Tram America, Inc., 31 BOLI 42, 50 (2010).*** *See also In the Matter of 82nd Street Mall, Inc., 30 BOLI 140, 148-49 (2009).*

❑ When a corporation and an individual were named as respondents, and undisputed facts demonstrated that a respondent corporation was a defunct corporation well before an individual respondent employed claimants and had remained inactive ever since, the forum dismissed the wage claims against the respondent corporation. ***----- In the Matter of Tailor Made Fencing & Decking, Inc., 30 BOLI 151, 156 (2009).***

❑ When a respondent corporation was administratively dissolved, then subsequently reinstated and continued to carry on business, it was liable for claimant's unpaid wages because the reinstatement related back to and took effect as of the effective date of the administrative dissolution. ***----- In the Matter of 82nd Street Mall, Inc., 30 BOLI 140, 148-49 (2009).***

3.2.2 --- Piercing the Corporate Veil

❑ When a corporate respondent was administratively dissolved by the corporation division prior to claimant's employment, and the business was operated by an individual respondent during claimant's employment, then the individual respondent applied for reinstatement as an active corporation after the wage claim was filed, the forum rejected the agency's argument that the application for reinstatement was a sham that should allow the agency to pierce the corporate veil. ***----- In the Matter of Mass Tram America, Inc., 31 BOLI 42, 49-50 (2010).***

❑ Due to a corporate respondent's reinstatement, the individual respondent could only be held individually liable by "piercing the corporate veil." Oregon courts have consistently held that disregarding a legally established corporate entity is an extraordinary measure subject to specific conditions and limitations, including proof that a shareholder acted improperly and that the improper conduct caused the corporation to fail in its obligation to creditors. When the agency neither alleged nor proved any "improper conduct," examples of which include inadequate capitalization, "milking," and misrepresentation, the forum concluded that the corporate respondent was solely liable for claimant's unpaid wages and any penalty wages or civil penalties resulting from the failure to pay wages. ***----- In the Matter of Mass Tram America, Inc., 31 BOLI 42, 50 (2010).***

❑ In its exceptions, the agency contended, as an alternative to establishing the individual respondent's liability by piercing the corporate veil, that the individual respondent was claimant's sole employer in law and in fact, arguing that the only evidence connecting the corporate respondent to claimant's employment was claimant's lone paycheck, on which the words "Mass Tram America, Inc." and Mass Tram's address were imprinted. The agency also highlighted the facts that claimant was interviewed, told she was hired, and negotiated her salary and schedule with the individual respondent, who also paid claimant in cash. Although those facts are undisputed, the record also indicated that claimant interviewed at the office of the corporate respondent and that during her employment, claimant assumed she was working for the corporate respondent and was never told that the corporation had been administratively dissolved. While an employee's impression about the identity of the employer is not dispositive, in this case it was consistent with other indicia of employer identity, such as the name imprinted on the paycheck. ***----- In the Matter of Mass Tram America, Inc., 31 BOLI 42, 51 (2010).***

❑ Under ORS 60.654(3), a corporation is reinstated retroactively and is liable for all acts of the corporation during any period when the corporation was dissolved. There is no exception for liability or debts. ***----- In the Matter of Mass Tram America, Inc., 31 BOLI 42, 51 (2010).***

3.3 --- Agents

3.4 --- Joint Employers

❑ A joint employment relationship cannot exist unless each alleged "joint" employer is also an individual employer. Respondent hired three wage claimants to work on a house owned by her daughter, who was also named as a respondent. The evidence showed that the mother hired claimants; agreed to pay them a fixed hourly wage; that claimants performed the work they were hired to do; and that the mother paid them part of their wages, paid for all the materials involved in the job, provided some tools, and directed their work. In contrast, there was no evidence that the daughter had any involvement whatsoever in any of those actions or any contact with or control over the claimants, other than meeting them at a building supply store at the mother's request. Under those facts, the forum concluded that the mother was the claimants' employer, but the daughter's mere ownership of the house was insufficient to establish that she was claimants' employer. ***----- In the Matter of Laura M. Jaap, 30 BOLI 110, 128 (2009).***

❑ The forum relied on the federal Fair Labor Standards Act ("FLSA"), specifically 29 CFR § 791.2, and three prior final orders, applied to the above facts, to determine whether respondents were joint employers. ***---***

-- In the Matter of Laura M. Jaap, 30 BOLI 110, 126 (2009).

❑ In general, a joint employment relationship exists when two associated employers share control of an employee. Joint or co-employers are responsible, both individually and jointly, for compliance with all applicable provisions of Oregon's wage and hour laws. ***----- In the Matter of Laura M. Jaap, 30 BOLI 110, 126 (2009).***

❑ When the agency alleged joint individual liability by two respondents, the forum assumed that the agency was not pursuing the theory that one respondent was acting as the other respondent's agent, as agency does not create liability in a wage claim, but only requires the imputation of the respondent agent's actions and statements to the other respondent. ***----- In the Matter of Laura M. Jaap, 30 BOLI 110, 125 (2009).***

❑ The forum has long held that joint or co-employers are responsible, both individually and jointly, for compliance with all applicable provisions of Oregon's wage and hour laws, which is consistent with the responsibility of joint employers under the federal Fair Labor Standards Act (FLSA). ***----- In the Matter of Kurt E. Freitag, 29 BOLI 164, 197-98 (2007).***

> Affirmed without opinion, *Freitag v. Bureau of Labor and Industries, 243 Or App 389, 256 P3d 1099 (2011).*

❑ Under the FLSA, specifically, 29 CFR § 791.2, "(a) A single individual may stand in the relation of an employee to two or more employers at the same time under the [FLSA], since there is nothing in the act which prevents an individual employed by one employer from also entering into an employment relationship with a different employer. A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act depends upon all the facts in the particular case. If all the relevant facts establish that two or more employers are acting entirely independent of each other and are completely disassociated with respect to the employment of a particular employee, who during the same workweek performs work for more than one employer, each employer may disregard all work performed by the employee for the other employer (or employers) in determining his own responsibilities under the Act. On the other hand, if the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the Act. In this event, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the Act * * * [and] (b) Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as: (1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; or (2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or (3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer." ***----- In the Matter of Kurt E. Freitag, 29 BOLI 164, 198-99 (2007).***

> Affirmed without opinion, *Freitag v. Bureau of Labor and Industries, 243 Or App 389, 256 P3d 1099 (2011).*

❑ A preponderance of credible evidence showed the corporate respondent, who shared an interest in a townhouse development property with the individually named respondent, advertised in the newspaper for laborers on the townhouse construction site, maintained an office where claimant and other laborers submitted their time sheets for their work on the site, and controlled, to some extent, how, when, and whether claimant would be paid. Evidence also showed the individually named respondent controlled and directed the work performed by claimant and the other laborers on the construction site and signed their paychecks, which he paid to them as a sole proprietor using an assumed business name. The forum inferred from those facts that claimant was under the simultaneous control of respondents and simultaneously performed services for both. Also, based on those facts and inferences, the forum found that each named respondent actively participated in the townhouse development and both engaged the personal services of claimant and other laborers to perform work at the construction site and both benefited from the personal services that claimant and other laborers rendered at the construction site in furtherance of its development. ***----- In the Matter of Kurt E. Freitag, 29 BOLI 164, 299-201 (2007).***

> Affirmed without opinion, *Freitag v. Bureau of Labor and Industries, 243 Or App 389, 256 P3d 1099 (2011).*

❑ When evidence showed that the individually named respondent acted directly or indirectly in the named corporate respondent's interest regarding personal services claimant rendered at the construction site, and rather than being disassociated with respect to claimant's employment, by virtue of individual respondent's control over corporate respondent as its corporate president, respondents shared control of claimant and other laborers hired to perform work at the construction site and, thus, were joint employers. ***----- In the Matter of Kurt E. Freitag, 29 BOLI 164, 201 (2007).***

> Affirmed without opinion, *Freitag v. Bureau of Labor and Industries, 243 Or App 389, 256 P3d 1099 (2011).*

3.5 --- Partners

❑ When the only evidence in the record supporting the conclusion that a partnership existed was the undisputed facts that respondents were married and both of their names appeared on the checks used to pay claimant, the forum concluded this was insufficient to establish a partnership and that the business for which claimant worked was an individual proprietorship. ***----- In the***

Matter of Mark A. Frizzell, 31 BOLI 178, 195 (2011).

❑ A partnership is never presumed and the agency bore the burden of proof to show that co-named respondents were partners. ***----- In the Matter of Mark A. Frizzell, 31 BOLI 178, 194 (2011).*** *See also In the Matter of John Steensland, 29 BOLI 235, 263 (2007)*.

❑ To determine whether one or both named respondents, a married couple, potentially liable as claimant's employer, the forum looked at the ownership and operation of the fishing business that employed claimant. There is no evidence that the business was a limited liability company or corporation or another form of business entity created by statute. The business was not registered with the corporation division and there was no assumed business name. This left only two possibilities -- either the business was an individual proprietorship owned by either spouse or they were partners. ***----- In the Matter of Mark A. Frizzell, 31 BOLI 178, 194 (2011).***

❑ When there was no evidence that two individuals formed a partnership or that the partnership and a corporate respondent jointly employed claimants, the commissioner concluded that the corporate respondent was solely liable for claimants' unpaid wages and any penalty wages or civil penalties resulting from the failure to pay wages. ***----- In the Matter of 82nd Street Mall, Inc., 30 BOLI 140, 148-49 (2009).***

❑ In Oregon, a partnership is "an association of two or more persons to carry on as co-owners a business for profit created under ORS 67.055." ***----- In the Matter of John Steensland, 29 BOLI 235, 263 (2007).***

❑ A partnership may be created whether or not the persons intend to create a partnership. ***----- In the Matter of John Steensland, 29 BOLI 235, 263 (2007).***

❑ Under ORS 67.105, the following criteria are relevant for determining whether a partnership has been created: "(A) Their receipt of or right to receive a share of profits of the business; (B) Their expression of an intent to be partners in the business; (C) Their participation or right to participate in control of the business; (D) Their sharing or agreeing to share losses of the business, or liability for claims by third parties against the business; and (E) Their contributing or agreeing to contribute money or property to the business." ***----- In the Matter of John Steensland, 29 BOLI 235, 263-64 (2007).***

❑ The fact that a partnership may have existed in the past to conduct the same business is not an expression of intent to form a partnership. ***----- In the Matter of John Steensland, 29 BOLI 235, 264 (2007).***

❑ When evidence showed the named respondents were separate businesses that performed different parts of a yew harvest and none of the criteria under ORS 67.055(4) were satisfied by evidence in the record, the forum concluded that the named respondents were not partners in the yew harvest venture. ***----- In the Matter of John Steensland, 29 BOLI 235, 264 (2007).***

3.6 --- Successors in Interest (ORS 652.310) (*see also* Ch. III, sec. 73.13)

3.6.1 --- Generally

❑ When the agency moved for summary judgment that two individual respondents were successors in interest to a corporate respondent and should be liable for unpaid wages owed by the corporate respondent and the only evidence supporting the agency's motion was the similarity of name and identity of the businesses, identical location of the businesses, and a brief lapse in time between the time the corporate respondent closed and one of the individual respondents opened for business in the identical location, but there was no evidence to show that any of the same employees were employed, whether the same product was manufactured or same service offered, or whether the same machinery, equipment, or methods or production was used, the forum denied the agency's motion. ***----- In the Matter of Fraser's Restaurant & Lounge, 31 BOLI 167, 170-74 (2011).***

❑ This forum has consistently held that the test to determine whether an employer is a successor in a wage claim case is whether it conducts essentially the same business as conducted by the predecessor. The elements to consider include: the name or identity of the business; its location; the lapse of time between the previous operation and the new operation; whether the same or substantially the same work force is employed; whether the same product is manufactured or the same service is offered; and whether the same machinery, equipment, or methods of production are used. Not every element needs to be present to find a successor employer. The forum considers all of the facts together to reach a determination. ***----- In the Matter of Fraser's Restaurant & Lounge, 31 BOLI 167, 170-74 (2011).*** *See also In the Matter of Blachana, LLC, 30 BOLI 197, 221 (2009), appeal pending.*

❑ When five of the six elements of the successor test indicated successorship, with the only exception being the identity of the workforce, the forum concluded that respondent conducted respondent conducted essentially the same business as its alleged predecessor and was a successor employer under ORS 652.310(1). ***----- In the Matter of Blachana, LLC, 30 BOLI 197, 225 (2009).***

Appeal pending.

❑ When the agency sought to assess a 25 percent penalty on the specific amounts paid out to each wage claimant in a WSF recovery case and a $200 penalty when that amount was greater than 25 percent, the forum awarded a 25 percent penalty based on the total sum of wages paid out, concluding that this result was consistent with the wording in ORS 652.414(3), which bases its 25 percent penalty assessment on "the amount of wages paid from the Wage Security Fund" and does not provide for a 25 percent or $200 penalty, "whichever amount is the greater," based on the amount of unpaid wages paid out to each individual claimant when the case involves multiple claimants. ***----- In the Matter of Blachana, LLC, 30 BOLI 197, 225-26 (2009).***

Appeal pending.

❑ Successor employers are liable to repay the WSF for all wages paid to claimants by the WSF, plus a 25 percent penalty. ***----- In the Matter of Blachana, LLC,***

30 BOLI 197, 221 (2009).

Appeal pending.

❑ When the commissioner was entitled to recover $5,245 in unpaid wages paid out from the WSF, respondents were liable for a penalty of 25 percent of that sum, or $1,311.25. ***----- In the Matter of Sehat Entertainment, Inc., 30 BOLI 170, 182 (2009).***

❑ The forum rejected respondent's request to abandon its traditional test and to substitute the nine element successor in interest test used by the commissioner in deciding cases alleging violations of anti-discrimination laws contained in ORS Chapter 659A. ***----- In the Matter of Blachana, LLC, 30 BOLI 197, 221 (2009).***

Appeal pending.

❑ Since respondent's alleged predecessor went out of business, respondent operated a club in the same location under two successive assumed business names, "Penner's Portsmouth Club" and "Portsmouth Pizza and Pub." Because the order of determination specifically named "Blachana, LLC dba Penner's Portsmouth Club," the assumed business name under which respondent conducted business for its first year of operation, and "Portsmouth Pizza and Pub" did not exist as a legal entity until a year after respondent commenced operations, the forum focused its inquiry on respondent's conduct of "Penner's Portsmouth Club" in determining whether respondent was a successor employer. ***----- In the Matter of Blachana, LLC, 30 BOLI 197, 222 (2009).***

Appeal pending.

3.6.2 --- Name or Identity of Business

❑ When the alleged predecessor's name was "Fraser's Restaurant & Lounge, Inc. dba Fraser's Restaurant & Quarterdeck Lounge" and the name of the alleged successor was "Frasers" and the alleged successor was vice president and a director of the predecessor corporation, the forum concluded that the name and identity of the two businesses indicated successorship. ***----- In the Matter of Fraser's Restaurant & Lounge, 31 BOLI 167, 172-73 (2011).***

❑ The name of a business, although entitled to substantial weight, is only one factor in determining if the identity of an alleged successor business is the same as its defunct predecessor. Other factors include, but are not limited to, an historical common identity, common ownership, common management, and common vendors and clients. ***----- In the Matter of Blachana, LLC, 30 BOLI 197, 222 (2009).***

Appeal pending.

❑ Respondent and NW, its alleged predecessor, conducted business in the same building that has been used to operate a neighborhood bar and restaurant since 1940 and has been historically known as the "Portsmouth Club." When Respondent took over NW's business, it acquired "all good will" associated with the names "The Portsmouth Club, Mama's BBQ, and Anchor Grill." The good will of "Portsmouth Club" had been originally purchased by NW. After taking over the business, respondent operated for almost an entire year under the assumed business name of "Penner's Portsmouth Club" and commonly answered respondent's business phone with the words "Portsmouth Club" or "P Club." Respondent and NW used the same beer vendors but different food vendors. Both offered live blues music, shared the same address, and had the same telephone number. At the time of hearing, respondent's clientele was drawn from a different demographic than NW's, and there was no reliable evidence that respondent has ever offered hip hop music, one of NW's mainstays. NW and respondent shared no common management or ownership, and respondent had its own liquor, lottery, and city business licenses, as well as its own tax and employer identification number. Considering all of these facts as a whole, the forum found that respondent's name and identity indicated successorship. ***----- In the Matter of Blachana, LLC, 30 BOLI 197, 222-23 (2009).***

Appeal pending.

3.6.3 --- Location of Business

❑ When the corporate predecessor did business in the same location as the alleged successor, the forum found that the location of the business indicated successorship. ***----- In the Matter of Fraser's Restaurant & Lounge, 31 BOLI 167, 173 (2011).***

❑ When the geographical location of respondent's business was identical to the location of NW, its alleged predecessor, with the caveat that respondent initially used the space that NW used for a restaurant as storage space, the forum found that respondent's location indicated successorship. ***----- In the Matter of Blachana, LLC, 30 BOLI 197, 223 (2009).***

Appeal pending.

3.6.4 --- Lapse in Time Between Operations

❑ When only 12 days elapsed between the date respondent's alleged predecessor closed its doors and the date respondent reopened for business, the forum found that this brief lapse of time indicated successorship. ***----- In the Matter of Fraser's Restaurant & Lounge, 31 BOLI 167, 173 (2011).***

❑ When 47 days elapsed between the date respondent's alleged predecessor closed its doors and the date respondent reopened for business, the forum found that this interval fell within the range of lapses of time that the forum has previously found indicative of successorship and found it indicated successorship. ***----- In the Matter of Blachana, LLC, 30 BOLI 197, 223-24 (2009).***

Appeal pending.

3.6.5 --- Same or Substantially the Same Work Force

❑ The "same or substantially the same work force" refers to specific employees, not a generic labor pool. When there was no evidence that respondent ever employed any of the same persons as its alleged predecessor, this indicated a lack of successorship. ***----- In the Matter of Blachana, LLC, 30 BOLI 197, 224***

(2009).

Appeal pending.

3.6.6 --- Manufacture of Same Product or Offer of Same Service

❑ Based on undisputed evidence that the services and products offered by both NW, respondent's alleged predecessor, and respondent consisted of food, drinks, and beer, and live music in a club atmosphere, and in the absence of evidence identifying specific differences between the food, beer, and drinks offered by NW and respondent, the forum concluded that this indicated of successorship. ***----- In the Matter of Blachana, LLC, 30 BOLI 197, 224-25 (2009).***

Appeal pending.

3.6.7 --- Use of Same Machinery, Equipment, or Methods of Production

❑ As of the date of hearing, nearly three years after respondent commenced operations, respondent had stopped using, disposed of, or replaced much of that equipment owned, used, and transferred to respondent by NW , its alleged predecessor, but was also still using a considerable amount of it. Except for three fire extinguishers, some tables and booths, some television sets, and some sound equipment missing when respondent opened for business, there was no evidence as to when respondent stopped using, disposed of, or replaced any of the equipment transferred to respondent. Respondent also conducted business in the same building, although it had been remodeled to an extent to suit respondent's business needs. Taken as a whole, these facts indicated successorship. ***----- In the Matter of Blachana, LLC, 30 BOLI 197, 225 (2009).***

Appeal pending.

4.0 HOURS WORKED

4.1 --- Generally

❑ To determine whether a claimant performed work for which he was not properly compensated, the forum must calculate how much claimant was actually paid and compare that sum with the amount he earned. ***----- In the Matter of Mark A. Frizzell, 31 BOLI 178, 201 (2011).***

❑ Employers are required to keep and maintain proper records of wages, hours and other conditions and practices of employment. ***----- In the Matter of Kurt E. Freitag, 29 BOLI 164, 201 (2007),*** *aff'd without opinion, Freitag v. Bureau of Labor and Industries, 243 Or App 389, 256 P3d 1099 (2011). See also In the Matter of Joseph Francis Sanchez, 29 BOLI 211, 220 (2007)*.

4.2 --- Burden of Proof; Evidence

4.2.1 --- Burden of Proof

❑ A wage claimant always bears the burden of proving he performed work for which he was not properly compensated. ***----- In the Matter of J & S Moving & Storage, Inc., 31 BOLI 286, 299 (2012).***

❑ When the employer produces no records, the forum may rely on evidence produced by the agency from which "a just and reasonable inference may be drawn." A claimant's credible testimony may be sufficient evidence to show the amount of hours worked by the claimant and amount owed. ***----- In the Matter of J & S Moving & Storage, Inc., 31 BOLI 286, 296 (2012).***

❑ To establish claimants' wage claims, the agency must prove the following elements by a preponderance of the evidence: 1) respondent employed claimants; 2) The pay rate upon which respondent and claimants agreed, if other than the minimum wage; 3) claimants performed work for which they were not properly compensated; and 4) The amount and extent of work claimants performed for respondent.***----- In the Matter of Computer Products Unlimited, Inc., 31 BOLI 209, 222 (2011).***

❑ A claimant's credible testimony may be sufficient evidence to show the amount of hours worked by the claimant and amount owed. ***----- In the Matter of Letty Lee Sesher, 31 BOLI 255, 262 (2011).*** *See also In the Matter of Mark A. Frizzell, 31 BOLI 178, 204 (2011).*

❑ When the employer produces no records, the forum may rely on evidence produced by the agency from which "a just and reasonable inference may be drawn." ***----- In the Matter of Letty Lee Sesher, 31 BOLI 255, 262 (2011).*** *See also In the Matter of Mark A. Frizzell, 31 BOLI 178, 204 (2011).*

❑ The agency had the burden of proving that one or respondents were claimant's employer. ***----- In the Matter of Mark A. Frizzell, 31 BOLI 178, 193 (2011).***

❑ The agency's burden of proof can be met by producing sufficient evidence from which a just and reasonable inference may be drawn. A claimant's credible testimony may be sufficient evidence. ***----- In the Matter of Mass Tram America, Inc., 31 BOLI 42, 52 (2010).*** *See also In the Matter of Allen Belcher, 31 BOLI 1, 8 (2009); In the Matter of Petworks LLC, 30 BOLI 35, 43 (2008).*

❑ When the forum concludes an employee was employed and improperly compensated, the burden shifts to the employer to produce evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. ***----- In the Matter of Mass Tram America, Inc., 31 BOLI 42, 52 (2010).*** *See also In the Matter of Allen Belcher, 31 BOLI 1, 8 (2009).*

❑ When the forum concludes an employee performed work for which he or she was not properly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise hours and wages involved. When the employer produces no records, the forum may rely on evidence produced by the agency from which "a just and reasonable inference may be drawn." A claimant's credible testimony may be sufficient evidence. ***----- In the Matter of Paul Samuels, 31 BOLI 146, 157 (2010)****. See also In the Matter of 82nd Street Mall, Inc., 30 BOLI 140, 147-48 (2009); In the Matter of Laura M. Jaap, 30 BOLI 110, 129-30 (2009).*

❑ The agency has the burden of proof to show that a respondent in a wage claim case was claimants' employer and that claimants were employees. ***----- In***

the Matter of Laura M. Jaap, 30 BOLI 110, 125 (2009).

❑ When an employer produces no records of hours or dates worked by the wage claimant, the commissioner may rely on evidence presented by the agency, including credible testimony by a claimant, to show the amount and extent of work performed by the claimant. ***----- In the Matter of Village Café, Inc., 30 BOLI 80, 89 (2008).***

❑ In this forum, a claimant is not penalized by an employer's failure to produce records of hours or dates worked. ***----- In the Matter of J. Guadalupe Campuzano-Cazares, 30 BOLI 48, 59 (2008).***

❑ The forum may rely on credible evidence produced by the agency, including a claimant's credible testimony, to determine the amount and extent of the claimant's work "as a matter of just and reasonable inference" and "may then award damages * * * even though the result may be only approximate." ***----- In the Matter of J. Guadalupe Campuzano-Cazares, 30 BOLI 48, 59 (2008).***

❑ A claimant is not denied recovery on the ground that the claimant is unable to prove the precise extent of uncompensated work when the inability is based on an employer's failure to keep proper records in conformance with the employer's statutory duty. ***----- In the Matter of J. Guadalupe Campuzano-Cazares, 30 BOLI 48, 59-60 (2008).***

❑ When the forum concludes an employee was employed and improperly compensated, the burden shifts to the employer to produce evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. ***----- In the Matter of Petworks LLC, 30 BOLI 35, 43 (2008).***

❑ When the forum concludes an employee performed work for which the employee was not properly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise hours and wages involved. ***----- In the Matter of John Steensland, 29 BOLI 235, 266 (2007).*** *See also In the Matter of Joseph Francis Sanchez, 29 BOLI 211, 220 (2007)*; *In the Matter of Kurt E. Freitag, 29 BOLI 164, 201 (2007), aff'd without opinion, Freitag v. Bureau of Labor and Industries, 243 Or App 389, 256 P3d 1099 (2011).*

❑ The agency has the burden of proving that a respondent was the employer. ***----- In the Matter of John Steensland, 29 BOLI 235, 262 (2007).***

❑ The agency bears the burden of proof to show that co-named respondents are partners. ***----- In the Matter of John Steensland, 29 BOLI 235, 263 (2007).***

4.2.2 --- Evidence

❑ In the past, the forum has declined to speculate or draw inferences about wages owed based on insufficient, unreliable evidence. ***----- In the Matter of J & S Moving & Storage, Inc., 31 BOLI 286, 299 (2012).***

❑ The forum concluded that "claimant worked an undetermined number of hours on April 29-30 and May 1 driving a truck to Washington and back for respondent" based on the lack of reliable evidence in the record that would allow the forum to hazard even an approximate guess as to claimant's work schedule on those three days. The unreliable evidence consisted of claimant's testimony as to the occurrence of an impossible event and his inconsistent and contradictory testimony. ***----- In the Matter of J & S Moving & Storage, Inc., 31 BOLI 286, 297 (2012).***

❑ The forum based its conclusion as to the hours worked by claimant between April 5-23, 2010, based on claimant's credible testimony and the time cards produced by the agency and respondent. ***----- In the Matter of J & S Moving & Storage, Inc., 31 BOLI 286, 296 (2012).***

❑ When claimant earned $100.80 for each 12 hour overtime shift ($8.40 x 12 = $100.80), but was paid $25.00 in cash for each of those shifts, constituting an underpayment of at least $75.80 for each shift, not counting any applicable overtime, this undisputed underpayment established that claimant performed work for which she was not properly compensated. ***----- In the Matter of Letty Lee Sesher, 31 BOLI 255, 263 (2011).***

❑ At hearing, the agency produced claimant's time cards for the wage claim period that showed the hours she worked except for her 12 hour overnight shifts, the shifts for which she claimed unpaid wages. Only three of those overnight shifts, all in May when she first worked those shifts, were written on her time cards. Each was crossed out and the figure "$25" written in next to it. Claimant credibly testified that she did not write down all 11 overnight shifts that she worked on her time cards because her supervisor, told her not to write them down. Claimant also credibly testified that her supervisor did the noted editing on her timecards. The agency produced claimant's handwritten calendar of hours worked that claimant submitted with her wage claim showing the dates she worked all 11 overnight shifts, and claimant credibly testified that this record was accurate. Relying on these records and claimant's credible testimony, the forum concludes that claimant worked a total of 302.25 hours in the wage claim period, including 15 overtime hours. ***----- In the Matter of Letty Lee Sesher, 31 BOLI 255, 262-63 (2011).***

❑ A claimant's credible testimony may be sufficient evidence to show the amount of hours worked by the claimant and amount owed. ***----- In the Matter of Computer Products Unlimited, Inc., 31 BOLI 209, 225 (2011).*** *See also In the Matter of Laura M. Jaap, 30 BOLI 110, 129-30 (2009).*

❑ When the forum concludes an employee performed work for which he or she was not properly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise hours and wages involved. When the employer produces no records, the forum may rely on evidence produced by the agency from which "a just and reasonable inference may be drawn." ***----- In the Matter of Computer Products Unlimited, Inc., 31 BOLI 209, 224-25 (2011).*** *See also In the Matter of Laura M. Jaap, 30 BOLI 110, 129-30 (2009).*

❑ Claimant Hatton was paid $420, which was only

enough to compensate her for 52.8 hours of work, calculated at $7.95 per hour. Claimant Becker was paid $100, which was only enough to compensate him for 12.6 hours of work, again calculated at $7.95 per hour. Claimants VanDyck and Norris were paid nothing. The agency proved by a preponderance of the evidence that Hatton and Becker worked far more than 52.8 and 12.6 hours, and that VanDyck and Norris performed work. This satisfied the third element of the agency's prima facie case with respect to all four claimants. ***----- In the Matter of Computer Products Unlimited, Inc., 31 BOLI 209, 224 (2011).***

❑ Although claimant's testimony was only partly credible, taken as a whole, there was sufficient credible evidence in the record for the forum to formulate a methodology from which "a just and reasonable inference may be drawn" as to the hours worked by claimant. ***----- In the Matter of Mark A. Frizzell, 31 BOLI 178, 204-05 (2011).***

❑ When respondent contended that claimant was paid "probably" $35 by returning cans given to him by respondent and getting a refund on the deposit for those cans but produced no records to support that figure, and claimant testified he received $17, the forum found claimant's testimony to be more credible than respondent's and concluded that the value of the cans was $17. ***----- In the Matter of Mark A. Frizzell, 31 BOLI 178, 202 (2011).***

❑ In a case involving seven wage claims and three respondents, when the second respondent was named as a successor in interest, the forum granted summary judgment to the agency against the first respondent, a corporation, with regard to six wage claimants based on the first respondent's admission that it owed the unpaid wages alleged in the agency's order of determination. The forum denied the agency's motion for summary judgment against the first respondent with regard to the seventh claimant based on undisputed evidence that she did not begin work until 18 days after the first respondent went out of business. The forum granted summary judgment against the second respondent, an individual, for the unpaid wages alleged to be due to the seventh wage claimant based on the second respondent's admission that it employed the seventh wage claimant. The forum denied summary judgment against the third respondent, the spouse of the second respondent, based on evidence that the second respondent was a sole proprietorship. The forum denied summary judgment against the second respondent as to unpaid wages due to the first six wage claimants when the agency's argument that the second respondent was a successor in interest to the first respondent was based solely on conjecture. ***----- In the Matter of Fraser's Restaurant & Lounge, 31 BOLI 167, 170-74 (2011).***

❑ At hearing, claimant credibly testified that he maintained a contemporaneous daily record of the hours and schedule that he worked. Although claimant did not produce that record at hearing, he credibly testified that the calendar of hours worked that he gave the agency during its investigation and that was received into evidence contained the same information as his contemporaneous record. The forum relied on that latter calendar to determine the number of straight time and overtime hours at claimant worked. ***----- In the Matter of Paul Samuels, 31 BOLI 146, 157 (2010)***.

❑ Claimant provided a contemporaneous record of her work hours and credibly testified that it accurately reflected the hours she worked. This evidence, along with her testimony establishing respondent's work week as Saturday through Friday, showed that she worked 211 hours, including 183.5 straight time hours and 27.5 overtime hours. In contrast, respondents provided no records or evidence whatsoever concerning the number of hours worked by claimant. The forum concluded from this evidence that claimant worked a total of 211 hours including 183.5 straight time hours and 27.5 overtime hours. ***----- In the Matter of Mass Tram America, Inc., 31 BOLI 42, 52 (2010).***

❑ Claimant's credible testimony and records prove that claimant performed work for which she was not properly compensated, and respondents' admission corroborated that conclusion. ***----- In the Matter of Mass Tram America, Inc., 31 BOLI 42, 51-52 (2010).***

❑ Claimant's credible testimony and contemporaneous time records established that she worked a total of 54 hours during the wage claim period. She was entitled to be paid at least $7.80 per hour for every hour she worked, but was paid only $75.00, far less than the amount she earned. ***----- In the Matter of Allen Belcher, 31 BOLI 1, 8 (2009).***

❑ When claimant provided a contemporaneous record of her work hours and credibly testified that it accurately reflected the hours that she worked, respondent provided no records or evidence whatsoever concerning the number of hours worked by claimant other than the unsworn, generic statements in his answer that he owed claimant wages and claimant did not work the hours that she claimed, the forum concluded that claimant worked a total of 54 hours. ***----- In the Matter of Allen Belcher, 31 BOLI 1, 8-9 (2009).***

❑ Respondents' unsworn claim in their answer that claimant worked for respondents as an independent contractor was overcome by claimant's credible testimony, corroborated by credible witness testimony, that he was hired to tend bar and do some general maintenance for what he assumed to be the minimum wage rate, and then was later asked to manage the bar for $10 per hour and $400 per month as rent on a house owned by respondent. ***----- In the Matter of Sehat Entertainment, Inc., 30 BOLI 170, 182 (2009).***

❑ When credible evidence controverted respondents' unsworn claim in their answer that they did not employ claimant, several witnesses credibly testified that they regularly frequented respondents' club and observed claimant waiting on tables and bartending, and claimant's credible testimony and documentary evidence established that she maintained an independent record of her work hours showing the amount and extent of the work she performed during that period, the forum concluded that claimant was entitled to receive at least $7.50 per hour for the hours she worked for respondent and the respondents owed her $1,691.25 in unpaid wages when she terminated her employment. ***----- In the Matter of Sehat Entertainment, Inc., 30 BOLI 170, 181***

(2009).

❑ When there was no dispute that an individual respondent, using the unregistered assumed business name of Tailor Made, employed claimants, agreed to pay them the alleged pay rates, and failed to compensate them for some of the hours they worked during the wage claim periods and in the amounts claimed, the forum concluded that the individual respondent was liable to pay claimants' unpaid wages. ***----- In the Matter of Tailor Made Fencing & Decking, Inc., 30 BOLI 151, 156 (2009).***

❑ The forum concluded that two claimants were owed unpaid wages based on their credible testimony, including testimony that they maintained a written record of their hours worked and that respondents had access to those records, as well as respondents' failure to produce independent records that they claimed refuted claimants' allegations and respondent's inadequate explanation for that failure. ***----- In the Matter of 82nd Street Mall, Inc., 30 BOLI 140, 148 (2009).***

❑ When respondent maintained no record of hours worked by three wage claimants and called no supporting witnesses, all three claimants testified credibly that the hours shown on one claimant's contemporaneous calendar were an accurate record of the dates and hours they worked for respondent, and claimants were able to describe the work they had performed, the forum concluded that claimants worked the hours alleged in the agency's order of determination. ***----- In the Matter of Laura M. Jaap, 30 BOLI 110, 130 (2009).***

❑ When three wage claimants were paid in full after their first week of work for the work they performed that week, they continued to work, and two of the claimants were paid nothing more, the forum concluded that those two claimants performed work for which they were not properly compensated. The third claimant worked another 64 hours at $12 per hour, but was only paid another $500. At $12 per hour, $500 only covered 41.67 hours of work. This differential established that the third claimant performed work for which he was not properly compensated. ***----- In the Matter of Laura M. Jaap, 30 BOLI 110, 128-29 (2009).***

❑ In a wage claim case involving four wage claimants, the forum relied on the credible testimony of each claimant, as well as supporting documentation, to determine that claimants were owed wages and the amount owed to each. ***----- In the Matter of Village Café, Inc., 30 BOLI 80, 89 (2008).***

❑ When respondent acknowledged it kept no record of the days or hours claimant worked; claimant credibly testified that she recorded the dates and hours she worked on a calendar she maintained at respondent's behest and produced a calendar on which she had contemporaneously recorded her specific work hours and included notes of some of the activities she performed during that period; and, despite the opportunity to do so, respondent produced no evidence to controvert claimant's credible evidence, the forum relied on claimant's credible evidence showing the hours she worked. ***----- In the Matter of Forestry Action Committee, 30 BOLI 63, 78 (2008).***

❑ Respondent's admission in its answer that claimant worked at least 143 hours for which she was not paid established unequivocally that claimant performed work for which she was not properly compensated. ***----- In the Matter of Forestry Action Committee, 30 BOLI 63, 77-78 (2008).***

❑ If the forum concludes that a claimant was employed and improperly compensated, it becomes the burden of the respondent to come forward with the precise amount of work performed or evidence that negates the reasonableness of the inference to be drawn from the claimant's evidence. ***----- In the Matter of Forestry Action Committee, 30 BOLI 63, 78 (2008).***

❑ When a wage claimant did not appear at the hearing, there was no evidence in the record that the agency's compliance specialist ever interviewed the claimant about his wage claim or employment with respondent, there was a question about whether claimant had actually made the claim or was even aware that a wage claim had been prepared and filed on his behalf, and the only evidence addressing the claim was a second claimant's unreliable testimony, the forum concluded that respondent was not liable for any wages allegedly earned and owed to claimant. ***----- In the Matter of J. Guadalupe Campuzano-Cazares, 30 BOLI 48, 60 (2008).***

❑ Absent any credible evidence showing claimant was improperly compensated or the extent to which he was not paid for approximate hours worked, the forum concluded that respondent was not liable to claimant for any unpaid wages. ***----- In the Matter of J. Guadalupe Campuzano-Cazares, 30 BOLI 48, 60 (2008).***

❑ When claimant's testimony and contemporaneous record he claimed to have maintained were not credible, the forum declined to speculate or draw inferences about wages owed to him. ***----- In the Matter of J. Guadalupe Campuzano-Cazares, 30 BOLI 48, 59-60 (2008).***

❑ Claimant provided a contemporaneous record of her work hours and credibly testified that it accurately reflected the hours she worked. This evidence was supported by the credible testimony of the agency's other witnesses and established that claimant worked a total of 161 hours, including eight hours of overtime. In contrast, respondent provided no records or evidence whatsoever concerning the number of hours worked by claimant other than the unsworn, generic denial in its answer that it never employed claimant. The forum concluded that claimant worked a total of 161 hours, including eight overtime hours. ***----- In the Matter of Petworks LLC, 30 BOLI 35, 43-44 (2008).***

❑ The forum has historically rejected wage claims when claimants do not testify at hearing and no witnesses testify to support their claims of employment and unpaid wages. ***----- In the Matter of John Steensland, 29 BOLI 235, 267 (2007).***

❑ When the agency could not produce complete production records or witnesses to corroborate the existing production records of two wage claimants, the claimant's wage claims were "doomed to failure," and

when three claimants did not appear at hearing and no witness testimony corroborated their presence at the yew harvest, and their names did not appear on respondent's records, the forum was unable to conclude that respondent even employed them. ***----- In the Matter of John Steensland, 29 BOLI 235, 267 (2007).***

❑ When it was undisputed that nine yew harvest workers were employed by respondent and were improperly compensated, and respondent's method of recording the number of pounds harvested by his workers was "extremely vague" and there was no documentary evidence showing how much each claimant was paid, the forum relied on the claimants' testimony and the agency compliance specialist's calculations to determine the approximate amount and extent of work performed by the wage claimants. ***----- In the Matter of John Steensland, 29 BOLI 235, 266-67 (2007).***

❑ The agency's burden of proving the amount and extent of work performed can be met by producing sufficient evidence from which a just and reasonable inference may be drawn and a claimant's credible testimony may be sufficient evidence. ***----- In the Matter of John Steensland, 29 BOLI 235, 265-66 (2007).***

❑ A claimant's credible testimony is sufficient evidence to prove work was performed for which the claimant was not properly compensated. ***----- In the Matter of Kurt E. Freitag, 29 BOLI 164, 201 (2007).***

> Affirmed without opinion, *Freitag v. Bureau of Labor and Industries, 243 Or App 389, 256 P3d 1099 (2011).*

❑ Claimant's credible testimony that he was not paid for construction work he performed during the wage claim period was substantiated by documentary evidence showing the named corporate respondent repeatedly turned down the time records claimant submitted for payment, not because it denied claimant performed work at the construction site, but because it questioned the amount and extent of the work he performed. Based on that evidence, the forum concluded that claimant performed work for which he was improperly compensated. ***----- In the Matter of Kurt E. Freitag, 29 BOLI 164, 201 (2007).***

> Affirmed without opinion, *Freitag v. Bureau of Labor and Industries, 243 Or App 389, 256 P3d 1099 (2011).*

❑ When the employer produces no records, the commissioner may rely on evidence produced by the agency "to show the amount and extent of the employee's work as a matter of just and reasonable inference and then may award damages to the employee, even though the result be only approximate." ***----- In the Matter of Joseph Francis Sanchez, 29 BOLI 211, 220 (2007).***

❑ The forum has previously accepted, and will accept, the credible testimony of a claimant as sufficient evidence to prove work was performed and from which to draw an inference of the extent of that work. ***----- In the Matter of Joseph Francis Sanchez, 29 BOLI 211, 221 (2007).***

❑ The forum relied on claimant's credible testimony and contemporaneous record of the hours he worked to determine the amount and extent of the work claimant performed as a matter of just and reasonable inference when respondent failed to produce persuasive evidence "to negative the reasonableness of the inference to be drawn from [claimant's] evidence." ***----- In the Matter of Joseph Francis Sanchez, 29 BOLI 211, 220 (2007).***

4.3 --- Work Time

❑ To be liable as an employer for hours worked by an individual that are unpaid, the employer must "suffer or permit" that individual to work. While the plain meaning of "to permit" requires a more positive action than "to suffer," both terms imply much less positive action than required by the common law test for determining an employment relationship. To "permit" something to happen does not require an affirmative act, but only a decision to allow it to happen. To "suffer" something to happen is even broader and means to tolerate or fail to prevent it from happening. Thus, a business may be liable under the provisions of ORS chapter 653 if it knows or has reason to know a worker was performing work in that business and could have prevented it from occurring or continuing. When there was no evidence that respondent knew or had reason to know that claimant was performing work after he was fired and could have prevented it from occurring or continuing, respondent was not required to pay claimant for any hours Claimant worked after he was fired. ***----- In the Matter of Mark A. Frizzell, 31 BOLI 178, 203 (2011).***

4.4 --- Waiting Time, Standby Time, Sleep Time, Availability for Recall

4.5 --- Restrictions on Hours for Workers in Certain Industries

5.0 MINIMUM WAGE AND OVERTIME

5.1 --- Minimum Wage

❑ Although respondent only paid claimant $25.00 for each of her 12 hour overnight shifts, claimant was legally entitled to be paid $8.40 per hour, Oregon's minimum wage rate, for her work on those shifts. ***----- In the Matter of Letty Lee Sesher, 31 BOLI 255, 262 (2011).***

❑ When the agency sought unpaid wages for a claimant calculated at the state minimum wage in effect in 2007 and 2008, the forum applied the definitions contained in ORS 653.010(2) and (3) to determine if respondent employed claimant. Read together, these two provisions mean that respondent was claimant's employer if it suffered or permitted Claimant to work. ***----- In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 239 (2011).***

❑ Under ORS 653.035(2), all employees are entitled to receive at least the minimum wage, and employers are entitled to offset the minimum wage by any commissions paid out to claimants. ***----- In the Matter of Computer Products Unlimited, Inc., 31 BOLI 209, 224 (2011).***

❑ When there is an agreed rate of pay between an employer and employee but there is no way of determining that rate because of a failure of proof, the minimum wage becomes the applicable wage rate by

default. By analogy, when there is an undisputed agreed rate of pay between an employer and employee consisting of a set percentage of a future unknown amount contingent upon the employee's participation in a work activity but that contingency is unsatisfied, the minimum wage becomes the applicable wage rate by default. ***----- In the Matter of Mark A. Frizzell, 31 BOLI 178, 200-01 (2011).***

❑ Employers are free to pay employees solely by commission so long as the commission does not result in the employee earning less than the minimum wage for all hours worked. ***----- In the Matter of Allen Belcher, 31 BOLI 1, 8 (2009).***

❑ The agency sought unpaid wages for claimant calculated at the minimum wage, and chose to present evidence focusing on the number of hours that claimant worked instead of trying to prove the amount of commission she earned. Since claimant was entitled to be paid at least the minimum wage no matter how much commission she earned, the forum determined that claimant was entitled to the minimum wage and computed all unpaid wages at the minimum wage rate, which was $7.80 per hour in 2007. ***----- In the Matter of Allen Belcher, 31 BOLI 1, 8 (2009).***

❑ When there is no agreed upon rate of pay, an employer is required to pay at least the minimum wage. ***----- In the Matter of Petworks LLC, 30 BOLI 35, 43 (2008).***

5.2 --- Overtime

5.2.1 --- Generally

❑ In a declaratory ruling proceeding, the forum determined that ORS 653.269(5)(b) does not exempt the City of Grants Pass from complying with ORS 652.070 and 652.080, and the City of Grants Pass is required to include authorized vacation and sick leave time when computing overtime wages for the IAFF firefighters it employs, as set forth in ORS 652.080. ***----- In the Matter of Petition for Declaratory Ruling, International Association of Fire Fighters, Local 3564, Petitioner, and City of Grants Pass, Intervenor, 31 BOLI 267, 285 (2012).***

❑ When claimant did not work for an agreed rate of pay, she was entitled to be paid the minimum wage, including overtime wages for any work she performed in excess of 40 hours in a work week. ***----- In the Matter of Petworks LLC, 30 BOLI 35, 47 (2008).***

❑ When the agency did not mention ORS 653.261, OAR 839-020-0030, or the word "overtime" in its order of determination, the forum declined to award claimant the $29 in overtime wages that she earned. ***----- In the Matter of Petworks LLC, 30 BOLI 35, 46 (2008).***

5.2.2 --- Computation

5.3 --- Posting Requirements

5.4 --- Excluded Employees

5.4.1 --- Generally

5.4.2 --- Agricultural Workers

5.4.3 --- White-Collar Workers

5.4.4 --- Other Specific Categories of Excluded Workers

6.0 DEDUCTIONS FROM WAGES

6.1 --- Generally

6.2 --- Authorization of Deductions

❑ When there was no evidence that a wage claimant made a written authorization for respondent to deduct expenses for lodging and utilities from her wages or that those deductions were recorded in respondent's books, respondent could not legally deduct those expenses from claimant's wages, despite claimant's testimony that she voluntarily deducted $450 from her wage claim for those expenses, and the forum did not subtract the $450 from claimant's award of earned and unpaid wages. ***----- In the Matter of Petworks LLC, 30 BOLI 35, 44 (2008).***

❑ Pursuant to ORS 652.610(3)(b), respondent cannot lawfully deduct money he purportedly paid for gas and food from claimant's wages without claimant's written authorization. ***----- In the Matter of Joseph Francis Sanchez, 29 BOLI 211, 220 (2007).***

❑ Respondent did not dispute that he employed multiple wage claimants for the periods and pay rates claimed, or that they collectively were owed at least $15,346. Instead, he claimed specific deductions for amounts he purportedly paid to claimants or on their behalf. When he did not produce any evidence to support his contentions in response to the agency's motion for partial summary judgment or appear at hearing to controvert the agency's evidence establishing the additional amounts owed each claimant, the forum concluded that, absent any evidence that respondent was entitled to deduct the amounts alleged in his answer, respondent was liable for the additional amount of unpaid wages earned and owed to claimants. ***----- In the Matter of Pavel Bulubenchi, 29 BOLI 222, 233-34 (2007).***

6.3 --- Deductions Required to be for Employee's Benefit

6.4 --- Specific Deductions and Setoffs

6.4.1 --- Draws, Advances, Loans

❑ Based on contradictions in respondent's testimony and respondent's failure to produce records, the forum credited claimant's testimony that he only received $240 in draws by cash or checks. ***----- In the Matter of Mark A. Frizzell, 31 BOLI 178, 202 (2011).***

❑ When respondent did not appear at hearing or otherwise produce any evidence to support his claim in his answer that he paid a wage claimant $1,500 in cash at the wage claimant's request, the forum held respondent liable for the additional unpaid wages. ***----- In the Matter of Pavel Bulubenchi, 29 BOLI 222, 233-34 (2007).***

6.4.2 --- Meals, Lodging, Facilities

6.4.3 --- Tools, Equipment, Uniforms

6.4.4 --- Breakage, Damage

6.4.5 --- Other Deductions, Setoffs, or Counterclaims

❑ Respondent was not entitled to withhold claimant's

wages based on respondent's belief that claimant had stolen from respondent. That belief, even if formed in good faith, was also not a defense as to whether respondent's failure to pay wages was "willful" under ORS 652.150. ***----- In the Matter of J & S Moving & Storage, Inc., 31 BOLI 286, 302 (2012).***

❑ Oregon wage and hour laws severely limit the circumstances under which an employer may deduct money from an employee's wages. An employer may not withhold an employee's wages based on allegations, even if confirmed, that the employee stole money from the employer. ***----- In the Matter of J & S Moving & Storage, Inc., 31 BOLI 286, 302 (2012).***

❑ Claimant received a draw for $240 for his work during the tuna season, requiring the forum to consider whether that "tuna draw" should be considered as an offset in calculating how much claimant was paid during the wage claim period (the crab season). Claimant and respondent agreed that the "tuna draw" represented groceries purchased by respondent for claimant's benefit during the tuna season and that crew members, including claimant, were expected to pay for their own groceries, but disagreed whether it should be considered an offset against any money claimant earned during the wage claim period. Claimant testified that respondent "forgave" the debt at the end of the tuna season, whereas respondent maintained he told claimant that he would take the $240 out of claimant's first crab check. The forum believed respondent's version for two reasons – it was consistent with industry practice and claimant's expectation, and because respondent anticipated giving claimant a crab check from which he could have deducted the $240. Consequently, the forum considered the $240 "tuna draw" as an offset against any wages due from respondent to claimant during the wage claim period. ***----- In the Matter of Mark A. Frizzell, 31 BOLI 178, 202 (2011).***

❑ When respondent did not appear at hearing or otherwise produce any evidence to support his claim in his answer that he paid taxes totaling $2,444 on a wage claimant's behalf, the forum held respondent liable for the additional unpaid wages. ***----- In the Matter of Pavel Bulubenchi, 29 BOLI 222, 233-34 (2007).***

❑ When respondent did not appear at hearing or otherwise produce any evidence to support his claim that a wage claimant requested that respondent deduct $3,500 from his wages as payment for a truck he purportedly purchased from respondent, the forum held respondent liable for the additional unpaid wages. ***----- In the Matter of Pavel Bulubenchi, 29 BOLI 222, 233-34 (2007).***

7.0 PAYMENT OF WAGES

7.1 --- Agreed Rate (*see also* 12.1)

❑ Based on claimant's more credible testimony and the absence of any records to the contrary, the forum concludes that respondent agreed to pay claimant, a driver, $.25 per mile for his trip to California. ***----- In the Matter of J & S Moving & Storage, Inc., 31 BOLI 286, 295 (2012).***

❑ When claimant testified that respondent agreed to pay him 14 percent of the crab catch and respondent testified that the agreement was 12 percent, the exact percentage agreed to was immaterial because the agency was not seeking to recover unpaid wages based on an agreed rate, but on the 2009 Oregon statutory minimum wage of $8.40 per hour. ***----- In the Matter of Mark A. Frizzell, 31 BOLI 178, 200 (2011).***

❑ The forum concluded that respondent agreed to pay claimant $400 a week to work from 8 a.m. to 5:30 p.m., five days a week, based on claimant's credible testimony. Factoring in the 30 minutes a day that claimant was legally entitled to take for a lunch break, this constituted an agreement for claimant to work 40 hours for $400, or an agreed wage rate of $10 per hour. ***----- In the Matter of Paul Samuels, 31 BOLI 146, 156 (2010).***

❑ Oregon employers are free to pay employees solely by commission so long as the commission does not result in an employee earning less than the minimum wage for all hours worked. ***----- In the Matter of 82nd Street Mall, Inc., 30 BOLI 140, 147 (2009).***

❑ Respondent admitted she employed claimant at the agreed upon rate of $9 per hour and acknowledged claimant was improperly compensated. ***----- In the Matter of Linda Marie Morgan, 30 BOLI 133, 138 (2009).***

❑ Three wage claimants credibly testified that respondent made individual agreements with them to pay them $25, $12, and $12 per hour. This testimony was supported by respondent's payment in cash to them after their first week of work that exactly corresponded to the amount of wages they had earned in that first week of work, calculated at $25 and $12 per hour. In contrast, respondent testified that she agreed to pay one claimant $2,500 for the entire job and that she paid him in advance. Respondent's testimony conflicted with (1) her answer, in which she stated that she agreed to pay the same claimant $5,000 for the entire job; (2) her testimony that she paid that claimant in full before the job was done, whereas the evidence showed she only paid claimants $2,268 in total; (3) her payment in cash to each claimant individually; (4) her payment to claimants of the exact wages they had earned after their first week of employment; and (5) her separate payment of a $500 "draw" to another claimant. Based on the above, the forum concluded that respondent agreed to pay claimants the agreed rates alleged by the agency. ***----- In the Matter of Laura M. Jaap, 30 BOLI 110, 128-29 (2009).***

❑ The forum concluded that claimant was employed at the agreed rate of $12 per hour based on her credible testimony, the amount paid to comparable employees, and respondent's unreliable testimony. ***----- In the Matter of Forestry Action Committee, 30 BOLI 63, 77 (2008).***

❑ When evidence showed that claimant had submitted time sheets to the corporate respondent displaying an $8 per wage rate and the corporate respondent questioned the hours claimant reported but not the hourly rate, the forum concluded that claimant rendered his personal services to respondents for the agreed rate of $8 per hour. ***----- In the Matter of Kurt E. Freitag, 29 BOLI***

164, 201 (2007).

Affirmed without opinion, *Freitag v. Bureau of Labor and Industries, 243 Or App 389, 256 P3d 1099 (2011).*

❑ The ALJ found claimant's testimony that his agreement to work for respondent was contingent upon his receiving the same pay he received from his previous employer was more plausible than respondent's assertion that he hired claimant without a wage agreement and wanted to see how well claimant performed before agreeing to a wage rate, and concluded that respondent agreed to pay claimant $18 per hour. ***----- In the Matter of Joseph Francis Sanchez, 29 BOLI 211, 219-20 (2007).***

❑ Claimant's credible testimony that respondent agreed to pay him the same $18 per hour pay rate he earned while working for another construction company was corroborated by another worker employed by respondent who credibly testified that, at the time claimant was hired, he understood from respondent that respondent agreed to match what claimant's former employer had paid claimant prior to his lay-off. ***----- In the Matter of Joseph Francis Sanchez, 29 BOLI 211, 219-20 (2007).***

7.2 --- Reimbursable Expenses

7.3 --- Paydays, Pay Periods

7.4 --- Employers' Duty to Know Law and Amount Due Employee (*see also* 12.2)

7.5 --- Employers' Duty to Pay

7.6 --- Dispute About Wages Due (*see also* 10.0)

❑ When respondent did not dispute the number of hours claimant claimed, but contended she paid claimant $80 that was not reflected on the calendar claimant contemporaneously maintained at respondent's behest, respondent's contention was negated by evidence demonstrating the agency credited respondent with the $80 payment when computing the wages owed, respondent failed to produce evidence showing she paid claimant more wages than claimed, and claimant's 2007 itemized wage statement that corroborated claimant's testimonial and documentary evidence. ***----- In the Matter of Linda Marie Morgan, 30 BOLI 133, 138 (2009).***

❑ When respondent did not dispute that he employed multiple wage claimants for the periods and pay rates claimed, or that they collectively were owed at least $6,942, but claimed that amount was offset by deductions for amounts he purportedly paid to claimants or on their behalf, and did not produce any evidence to support his contentions in response to the agency's motion for partial summary judgment or appear at hearing to controvert the agency's evidence establishing the additional amounts owed each claimant, the forum concluded that, absent any evidence that respondent was entitled to deduct the amounts alleged in his answer, respondent was liable for the additional amount of unpaid wages earned and owed to claimants. ***----- In the Matter of Pavel Bulubenchi, 29 BOLI 222, 233-34 (2007).***

7.7 --- Final Paycheck

7.7.1 --- Generally

7.7.2 --- Seasonal Farmworkers

7.7.3 --- Strikes

7.8 --- Method of Payment, Legal Tender

7.9 --- Vacation Pay

8.0 WORKING CONDITIONS

8.1 --- Meal Periods and Rest Periods

8.2 --- Rest Periods to Express Milk

8.2.1 --- Intentional Failure to Provide Rest Periods to Express Milk

8.2.2 --- Undue Hardship

8.2.3 --- Reasonable Efforts to Provide Private Location to Express Milk

8.2.4 --- Private Location

8.2.5 --- Close Proximity

8.2.6 --- Public Restrooms & Toilet Stalls

9.0 RECORDS

9.1 --- Personnel

9.2 --- Payroll Records, Time Records & Itemized Statements

❑ It is an employer's duty to keep an accurate record of the hours worked by its employees. ***----- In the Matter of Computer Products Unlimited, Inc., 31 BOLI 209, 225 (2011).*** *See also In the Matter of Mark A. Frizzell, 31 BOLI 178, 206 (2011); In the Matter of Paul Samuels, 31 BOLI 146, 158 (2010); In the Matter of Laura M. Jaap, 30 BOLI 110, 131 (2009).*

❑ Employers are required to keep and maintain proper records of wages, hours and other conditions and practices of employment. ***----- In the Matter of 82nd Street Mall, Inc., 30 BOLI 140, 147 (2009).*** *See also In the Matter of Kurt E. Freitag, 29 BOLI 164, 201 (2007), aff'd without opinion, Freitag v. Bureau of Labor and Industries, 243 Or App 389, 256 P3d 1099 (2011); In the Matter of Joseph Francis Sanchez, 29 BOLI 211, 220 (2007).*

10.0 WAGE CLAIMS (*see also* 7.6 and Ch. I - Admin. Proc.)

10.1 --- Generally

10.2 --- Assignment of Wage Claim

10.3 --- Agency's Prima Facie Case

❑ To establish claimant's wage claim, the agency must prove the following elements by a preponderance of the evidence: 1) respondent employed claimant; 2) The pay rate upon which respondent and claimant agreed, if other than the minimum wage; 3) The amount and extent of work claimant performed for respondent; and 4) claimant performed work for which he was not properly compensated. ***----- In the Matter of J & S Moving & Storage, Inc., 31 BOLI 286, 295 (2012).***

❑ The forum changed the traditional order in which it

analyzed the elements of the agency's prima facie case and determined the "amount and extent of work" before deciding whether a claimant "performed work for which she was not properly compensated." This change, which made no difference in the outcome, was based on the forum's recognition that: (1) Logically, it makes more sense to determine how much work someone performed *before* analyzing whether they were properly paid for all work performed; and (2) In terms of judicial efficiency, deciding whether someone was properly paid for all work performed *before* deciding how much work that person performed has often been an unnecessarily time-consuming experience for the forum. ***----- In the Matter of Letty Lee Sesher, 31 BOLI 255, 261 (2011).***

❑ Proving the first element of the agency's prima facie case – that respondent employed claimant -- necessarily proves that claimant was not an independent contractor. Likewise, evidence that establishes by a preponderance of the evidence that claimant was an independent contractor necessarily proves that respondent did not employ claimant. ***----- In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 243 (2011).***

❑ When the agency sought unpaid wages for a claimant calculated at the state minimum wage in effect in 2007 and 2008, the forum applied the definitions contained in ORS 653.010(2) and (3) to determine if respondent employed claimant. Read together, these two provisions mean that respondent was claimant's employer if it suffered or permitted Claimant to work. ***----- In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 239 (2011).***

❑ The agency's prima facie case consists of the following elements: 1) respondent employed claimant; 2) The pay rate upon which respondent and claimant agreed, if other than minimum wage; 3) claimant performed work for which he was not properly compensated; and 4) the amount and extent of work claimant performed for respondent. ***----- In the Matter of Letty Lee Sesher, 31 BOLI 255, 261 (2011).*** *See also In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 239 (2011).*

❑ To prevail on a wage claim, the agency must prove by a preponderance of evidence that: 1) respondents employed claimant; 2) any pay rate upon which respondents and claimant agreed, if it exceeded the minimum wage; 3) claimant performed work for which he was not properly compensated; and 4) the amount and extent of work claimant performed for respondents. ***----- In the Matter of Fraser's Restaurant & Lounge, 31 BOLI 167, 177 (2011).*** *See also In the Matter of Paul Samuels, 31 BOLI 146, 154 (2010); Best Concrete and Gravel LLC, 31 BOLI 54, 69 (2010); See also In the Matter of Mass Tram America, Inc., 31 BOLI 42, 49 (2010); In the Matter of Allen Belcher, 31 BOLI 1, 7 (2009); In the Matter of Tailor Made Fencing & Decking, Inc., 30 BOLI 151, 154 (2009; In the Matter of 82nd Street Mall, Inc., 30 BOLI 140, 142 (2009); In the Matter of Linda Marie Morgan, 30 BOLI 133, 138 (2009); In the Matter of Laura M. Jaap, 30 BOLI 110, 121 (2009); In the Matter of Village Café, Inc., 30 BOLI 80, 88 (2008); In the Matter of Forestry Action Committee, 30 BOLI 63, 74 (2008); In the Matter of J. Guadalupe Campuzano-Cazares LLC, 30 BOLI 48, 59 (2008); In the Matter of Petworks LLC, 30 BOLI 35, 37, 41 (2008); In the Matter of Creative Carpenters Corporation, 29 BOLI 271, 277 (2007); In the Matter of John Steensland, 29 BOLI 235, 261 (2007); In the Matter of Pavel Bulubenchi, 29 BOLI 222, 226-27 (2007); In the Matter of Joseph Francis Sanchez, 29 BOLI 211, 219 (2007); In the Matter of Kurt E. Freitag, 29 BOLI 164, 197 (2007), aff'd without opinion, Freitag v. Bureau of Labor and Industries, 243 Or App 389, 256 P3d 1099 (2011).*

❑ ORS chapter 652 governs claims for unpaid agreed wages. Under that chapter, "employer" means any person who engages the personal services of one or more employees and "employee" means any individual who, other than a co-partner or independent contractor, renders personal services in Oregon to an employer who pays or agrees to pay the individual a fixed pay rate. ***----- In the Matter of Kurt E. Freitag, 29 BOLI 164, 197 (2007).***

> Affirmed without opinion, *Freitag v. Bureau of Labor and Industries, 243 Or App 389, 256 P3d 1099 (2011).*

❑ When the agency alleged respondents jointly employed claimant for an agreed rate of $8 per hour, the agency was required to prove under ORS chapter 652 that 1) respondents jointly engaged claimant's personal services and 2) claimant rendered his personal services to respondents for the agreed rate of $8 per hour. ***----- In the Matter of Kurt E. Freitag, 29 BOLI 164, 197 (2007).***

> Affirmed without opinion, *Freitag v. Bureau of Labor and Industries, 243 Or App 389, 256 P3d 1099 (2011).*

❑ After the agency's motion for partial summary judgment was granted and the sole factual issue remaining was whether respondent owed the wage claimants unpaid wages greater than the amount respondent admitted to owing, the agency was required to establish a prima facie case to support its contention that respondent owed the claimants the additional amount of unpaid wages. ***----- In the Matter of Pavel Bulubenchi, 29 BOLI 222, 233 (2007).***

11.0 AFFIRMATIVE DEFENSES

11.1 --- Claim and Issue Preclusion (*see also* Ch. III, sec. 93.0)

11.2 --- Laches (*see also* Ch. III, sec. 90.0)

11.3 --- Financial Inability to Pay Wages

❑ Respondent waived the defense of financial inability to pay wages at the time they accrue by failing to plead it in his answer and request for hearing. ***----- In the Matter of Robert J. Thomas, 30 BOLI 160, 169 (2009).***

❑ Financial inability to pay wages at the time they accrue is an affirmative defense to liability for penalty wages. ***----- In the Matter of Robert J. Thomas, 30 BOLI 160, 169 (2009).***

❑ Financial inability to pay wages is an affirmative defense for which an employer has the burden of proof. ***---- In the Matter of Tailor Made Fencing & Decking, Inc., 30 BOLI 151, 157 (2009).*** *See also In the Matter of Forestry Action Committee, 30 BOLI 63, 74 (2008).*

❑ An employer who willfully fails to pay wages may

avoid paying penalty wages by proving that the failure to pay was due to the employer's financial inability to pay the wages at the time they accrued. ***----- In the Matter of Tailor Made Fencing & Decking, Inc., 30 BOLI 151, 156 (2009).***

11.4 --- Other

❑ If respondent pleads the defense of independent contractor and there is evidence in the record that is probative of that defense, the forum has no alternative but to consider that evidence, and it has consistently done so in the past. ***----- In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 243 (2011).***

❑ A respondent must prove the defense of independent contractor by a preponderance of the evidence in order to prevail. ***----- In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 242 (2011).*** *See also In the Matter of Laura M. Jaap, 30 BOLI 110, 121-22 (2009).*

❑ When respondent did not use the specific term "independent contractor" in its answer but affirmatively alleged that claimant was an "Independent Business Owner selling our GPS devices" and that claimant "bought an independent business distributorship" and "was his own business owner." Relying on ORCP 12, the forum held that respondent had raised the affirmative defense of independent contractor. ***----- In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 241 (2011).***

❑ Respondents had the burden of proving that claimant was an independent contractor. ***----- In the Matter of Mark A. Frizzell, 31 BOLI 178, 193 (2011).***

❑ In their respective answers, respondents alleged that claimant was self-employed and that they did not owe claimant any wages because he did not earn any wages. The forum treated these pleadings as a denial that respondents employed claimant and an affirmative assertion that claimant was an independent contractor. ***----- In the Matter of Mark A. Frizzell, 31 BOLI 178, 193 (2011).***

❑ When respondent's affirmative defenses of lack of jurisdiction were all predicated on respondent's allegations that claimant was an independent contractor, that claimant owned the business, or that claimant received a commission for work performed and was paid at least the minimum wage for all hours worked, these affirmative defenses failed because respondent did not met his burden of proof regarding the alleged facts that would support these defenses. ***----- In the Matter of Paul Samuels, 31 BOLI 146, 157 (2010)***.

❑ Respondent had the burden of proving its affirmative defense that claimants were independent contractors and not respondent's employees. ***----- In the Matter of Ryan Allen Hite, 31 BOLI 10, 16 (2009).*** *See also In the Matter of Forestry Action Committee, 30 BOLI 63, 74 (2008).*

❑ Respondent waived its independent contractor defense with respect to two wage claimants by not raising it in her answer. ***----- In the Matter of Laura M. Jaap, 30 BOLI 110, 122 (2009).***

12.0 OTHER MATTERS CLAIMED AS DEFENSES

12.1 --- Contract Exempting Employer from Wage and Hour Laws/Agreed Rate Less than Minimum Wage (*see also* 7.1)

❑ Even if respondent had produced a contract with claimant's signature, an "independent contractor agreement" is not controlling when determining whether a worker is an independent contractor. Rather, the forum looks at the totality of the circumstances to determine the actual working relationship. ***----- In the Matter of Forestry Action Committee, 30 BOLI 63, 75 (2008).***

12.2 --- Ignorance or Misunderstanding of the Law (*see also* 7.4)

❑ Respondent's claim that its failure to pay was based on a mistaken, good faith belief that claimant was a contractor and not entitled to any pay if she did not perform as expected was not a defense. Respondent's ignorance or misunderstanding of the law did not exempt it from a determination that it willfully failed to pay wages earned and due. ***----- In the Matter of Forestry Action Committee, 30 BOLI 63, 78-79 (2008).***

❑ Prior to hearing, respondent told the agency that it did not understand the legal distinction between an employee and independent contractor when claimant was hired, but now understands that claimant was an employee and has paid back taxes that it owed to the state and reclassified its workers as employees. The forum held that respondent's argument that its misunderstanding mitigated its failure to pay claimant's wages had no merit, as respondent at all times had a duty to know the laws that regulate employment in this state. Respondent's failure to understand the correct application of the law is not a defense. ***----- In the Matter of Forestry Action Committee, 30 BOLI 63, 76-77 (2008).***

12.3 --- Unconstitutionality

12.3 --- Arbitration Agreements

12.5 --- Other

❑ Respondent's assertion that claimant was not owed any wages because she did not perform well and left before completing the work she was hired to perform was disingenuous and not a defense. If respondent believed claimant was not performing as expected, its recourse was to take disciplinary action or terminate her for poor work performance, if appropriate. ***----- In the Matter of Forestry Action Committee, 30 BOLI 63, 77 (2008).***

13.0 PENALTY WAGES (ORS 652.150)

13.1 --- Generally

❑ An employer is liable for penalty wages when it willfully fails to pay any wages or compensation of any employee whose employment ceases. Willfulness does not imply or require blame, malice, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. ***----- In the Matter of J & S Moving & Storage, Inc., 31***

BOLI 286, 300 (2012). *See also In the Matter of Letty Lee Sesher, 31 BOLI 255, 263-64 (2011); In the Matter of Computer Products Unlimited, Inc., 31 BOLI 209, 225 (2011); In the Matter of Mark A. Frizzell, 31 BOLI 178, 205 (2011); In the Matter of Paul Samuels, 31 BOLI 146, 158 (2010); In the Matter of Mass Tram America, Inc., 31 BOLI 42, 52 (2010); In the Matter of Allen Belcher, 31 BOLI 1, 9 (2009); In the Matter of Sehat Entertainment, Inc., 30 BOLI 170, 183 (2009); In the Matter of Robert J. Thomas, 30 BOLI 160, 168 (2009); In the Matter of 82nd Street Mall, Inc., 30 BOLI 140, 149 (2009); In the Matter of Linda Marie Morgan, 30 BOLI 133, 138 (2009); In the Matter of Laura M. Jaap, 30 BOLI 110, 130 (2009); In the Matter of Village Café, Inc., 30 BOLI 80, 91-92 (2008); In the Matter of Forestry Action Committee, 30 BOLI 63, 78 (2008); In the Matter of Petworks LLC, 30 BOLI 35, 46 (2008); In the Matter of Creative Carpenters Corporation, 29 BOLI 271, 278 (2007); In the Matter of John Steensland, 29 BOLI 235, 267-68 (2007); In the Matter of Joseph Francis Sanchez, 29 BOLI 211, 221 (2007)*.

❑ An award of penalty wages turns on the issue of willfulness. An employer is liable for penalty wages when it willfully fails to pay any wages or compensation of any employee whose employment ceases. ***----- In the Matter of Robert J. Thomas, 30 BOLI 160, 168 (2009).*** *See also In the Matter of Pavel Bulubenchi, 29 BOLI 222, 227 (2007)*.

❑ Absent a valid wage claim, the agency's allegation that respondent is liable for penalty wages under ORS 652.150 must fail. ***----- In the Matter of J. Guadalupe Campuzano-Cazares, 30 BOLI 48, 60 (2008).***

13.2 --- Willful Failure to Pay Wages

❑ Respondent was not entitled to withhold claimant's wages based on respondent's belief that claimant had stolen from respondent. That belief, even if formed in good faith, was also not a defense as to whether respondent's failure to pay wages was "willful" under ORS 652.150. ***----- In the Matter of J & S Moving & Storage, Inc., 31 BOLI 286, 302 (2012).***

❑ The agency established that respondent willfully failed to pay all due and owing wages to claimant through credible evidence that: (1) claimant and respondent agreed that claimant would work for the usual rate of $9 per hour and at the special rate of $.25 per mile on a trip to California; (2) respondent, through its agent and claimant's supervisor, set claimant's driving schedule and was aware of claimant's work; (3) respondent did not pay claimant his earned wages on respondent's mid-April payday or when claimant was fired; and (4) respondent fired claimant after claimant's last trip, claiming he did not have to pay claimant because claimant allegedly stole checks, cash, and equipment from respondent that exceeded the value of claimant's earned and unpaid wages. ***----- In the Matter of J & S Moving & Storage, Inc., 31 BOLI 286, 300-01 (2012).***

❑ When the agency presented credible evidence that: (1) claimant and respondent agreed claimant would work for $8.40 per hour; (2) Respondent, through claimant's supervisor, set claimant's work hours and was aware of them; (3) The supervisor altered three of claimant's time cards to cross out the "12 hrs" she had written and wrote "$25" next to the crossed-out hours; and (4) Claimant quit after her supervisor paid her $25.00 in cash for each of her 12 hour overtime shifts instead of $8.40 per hour, and there was no evidence that claimant's supervisor acted other than voluntarily and as a free agent in underpaying claimant, the forum concluded that respondent acted willfully in failing to pay claimant her wages and was liable for penalty wages under ORS 652.150. ***----- In the Matter of Letty Lee Sesher, 31 BOLI 255, 264 (2011).***

❑ When the agency established by a preponderance of the evidence that claimants were entitled to be paid Oregon's minimum wage, that respondent's manager set claimants' work hours and worked with them some of the time and was thereby aware of the hours that claimants worked, the forum concluded that respondent acted voluntarily and as a free agent in underpaying claimants and willfully failed to pay claimants their wages and was thereby liable for penalty wages under ORS 652.150. ***----- In the Matter of Computer Products Unlimited, Inc., 31 BOLI 209, 226 (2011).***

❑ The fact that respondent may have kept no record of claimants' hours worked because respondent considered that claimants were contractors does not allow respondent to evade its responsibility for penalty wages. ***----- In the Matter of Computer Products Unlimited, Inc., 31 BOLI 209, 226 (2011).***

❑ Under Oregon law, a wage claimant is entitled to penalty wages so long as the respondent willfully failed to pay claimant all wages earned, due, and owing, and an ORS 653.055 civil penalty so long as he worked any hours for Respondent for which he was not paid the minimum wage. ***----- In the Matter of Mark A. Frizzell, 31 BOLI 178, 208 (2011).***

❑ The fact that respondent kept no record of claimant's hours worked does not allow him to evade his responsibility for penalty wages, nor did his failed defense that claimant was an independent contractor. ***----- In the Matter of Mark A. Frizzell, 31 BOLI 178, 206 (2011).***

❑ The agency established by a preponderance of the evidence that claimant was an employee who was entitled to be paid Oregon's statutory minimum wage of $8.40 per hour, that respondent set claimant's work hours and was aware of them, that respondent fired claimant and did not pay him for all hours worked, and that the agency made a written demand for claimant's unpaid wages and respondent made no payment in response. There was no evidence that respondent acted other than voluntarily and as a free agent in underpaying claimant, and the forum concluded that respondent acted willfully in failing to pay claimant his wages and was liable for penalty wages under ORS 652.150. ***----- In the Matter of Mark A. Frizzell, 31 BOLI 178, 205 (2011).***

❑ It is an employer's duty to keep an accurate record of the hours worked by its employees. The fact that respondent kept no record of claimant's hours worked does not allow him to evade his responsibility for penalty wages, nor did his failed defense that claimant was an

independent contractor. ***----- In the Matter of Mark A. Frizzell, 31 BOLI 178, 206 (2011).***

❑ When the agency established by a preponderance of the evidence that: (1) claimant and respondent agreed upon a wage rate of $10 per hr.; (2) respondent set claimant's work hours and was aware of them; and (3) claimant repeatedly requested that respondent pay him his due and owing wages and finally quit after respondent continually failed to pay those wages, the forum concluded that respondent willfully failed to pay claimant all wages due and owing. ***----- In the Matter of Paul Samuels, 31 BOLI 146, 158 (2010)***.

❑ The fact that respondent kept no record of claimant's hours worked did not allow him to evade his responsibility for penalty wages, nor did his failed defense that claimant was an independent contractor. ***----- In the Matter of Paul Samuels, 31 BOLI 146, 158 (2010)***.

❑ Claimant credibly testified that she kept records of her hours worked and gave them to respondent's president during her employment, establishing that respondent, through its agent, was aware of the hours that claimant worked. Despite this awareness, respondent's president made no effort to pay claimant the wages he knew she was entitled to, amounting to a willful failure to pay claimant the wages she was owed. ***----- In the Matter of Mass Tram America, Inc., 31 BOLI 42, 53 (2010).***

❑ Claimant credibly testified that her supervisor telephoned her for status reports every day that claimant worked and respondent admitted that he owed claimant wages, yet made no effort to pay claimant the wages he knew she was entitled to, thereby establishing a willful failure by respondent to pay claimant the wages she was owed. ***----- In the Matter of Allen Belcher, 31 BOLI 1, 9 (2009).***

❑ When respondent knew claimants were working but paid them nothing at all for two weeks of work, and there was no evidence that, in failing to pay claimants, respondent acted other than voluntarily or as a free agent, the forum concluded that respondent's failure to pay claimants their unpaid, due and owing wages was willful. ***----- In the Matter of Robert J. Thomas, 30 BOLI 160, 168-69 (2009).***

❑ When there was sufficient credible evidence from which the forum reasonably inferred that respondents knew claimants were employed by respondents and were both owed wages when each left respondents' employment, and respondent repeatedly assured one claimant that when his purported land sale went through all employees, including claimant, would be paid, the forum concluded that respondents voluntarily and, collectively, as a free agent failed to pay claimants all of the wages they earned for the work they performed during their employment. ***----- In the Matter of Sehat Entertainment, Inc., 30 BOLI 170, 183 (2009).***

❑ When respondent knew claimants were working but paid them nothing at all for two weeks of work, and there was no evidence that, in failing to pay claimants, respondent acted other than voluntarily or as a free agent, the forum concluded that respondent's failure to pay claimants their unpaid, due and owing wages was willful. ***----- In the Matter of Robert J. Thomas, 30 BOLI 160, 168-69 (2009).***

❑ When a respondent employer claimed in his answer that his failure to pay wages was not "negligent" but due to a client's failure to pay for performance on a contract, and there was no dispute that respondent knew the amount of wages due to claimants when the wages accrued and that he intentionally failed to pay those wages based on his client's failure to pay on a contract, respondent acted voluntarily and as a free agent and, therefore, acted willfully. ***----- In the Matter of Tailor Made Fencing & Decking, Inc., 30 BOLI 151, 156 (2009).***

❑ When respondent knew both wage claimants were owed wages when each left respondent's employment, respondent's agents declined each claimant's specific request for payment when each one quit their employment, there was no credible evidence that respondent was unaware of the hours each claimant worked and claimed it kept independent records that were destroyed in a fire, the forum inferred that respondent voluntarily and as a free agent failed to pay claimants all of the wages they earned for the work they performed during their employment and had acted willfully and was liable for penalty wages pursuant to ORS 652.150. ***----- In the Matter of 82nd Street Mall, Inc., 30 BOLI 140, 149 (2009).***

❑ Respondent's failure to pay wages was willful when the agency established that respondent was well aware of the amount and extent of claimant's work hours when claimant quit her employment, that respondent promised to pay claimant when she "had the money," and that after claimant quit respondent continued to rebuff claimant's attempts to collect her wages. ***----- In the Matter of Linda Marie Morgan, 30 BOLI 133, 138-39 (2009).***

❑ Respondent's failure to pay wages was willful when the agency established by a preponderance of the evidence that: (1) respondent knew claimants' agreed rate of pay; (2) respondent paid claimants in full for their first week of work; (3) respondent knew claimants worked additional hours after their first week of work but did not pay two claimants any additional wages; and (4) respondent paid the third claimant additional wages, but those wages were less than what he earned. ***----- In the Matter of Laura M. Jaap, 30 BOLI 110, 131 (2009).***

❑ It is an employer's duty to keep an accurate record of the hours worked by its employees. The fact that respondent kept no record of claimants' hours worked did not allow her to evade her responsibility for penalty wages, nor does her claim that one claimant was an independent contractor, which contains the implication that she was not required to keep track of claimants' hours. ***----- In the Matter of Laura M. Jaap, 30 BOLI 110, 131 (2009).***

❑ A corporate respondent willfully failed to pay wages to four claimants when respondent's agent hired and paid all four claimants, all four claimants filled out timecards provided by respondent and were paid on the basis of those timecards, and there was no credible

evidence that respondent was unaware of the hours that claimants worked, or that respondent's agent acted other than voluntarily or as a free agent in failing to pay all four claimants their unpaid, due, and owing wages when they left respondent's employment. ***----- In the Matter of Village Café, Inc., 30 BOLI 80, 92 (2008).***

❑ Respondent's admission that claimant worked at least 143 hours for which she was not compensated and claim that claimant was not paid because her performance was unsatisfactory demonstrated the knowledge and intent necessary to establish that respondent's failure to pay was willful. ***----- In the Matter of Forestry Action Committee, 30 BOLI 63, 78 (2008).***

❑ Respondent's claim that its failure to pay was based on a good faith belief, albeit erroneous, that claimant was a contractor and not entitled to any pay if she did not perform as expected, was not a defense. Respondent's ignorance or misunderstanding of the law did not exempt it from a determination that it willfully failed to pay wages earned and due. ***----- In the Matter of Forestry Action Committee, 30 BOLI 63, 78-79 (2008).***

❑ The forum concluded that respondent willfully failed to pay claimant the wages she was owed based on her credible testimony that one of the respondent LLC's two members set claimant's work schedule and was aware of the hours that claimant worked but paid claimant nothing. ***----- In the Matter of Petworks LLC, 30 BOLI 35, 46 (2008).***

❑ In its answer, respondent denied any willful failure to pay based on the assertion that claimant was never its employee. The forum rejected this defense because the agency proved that claimant was respondent's employee. ***----- In the Matter of Petworks LLC, 30 BOLI 35, 46 (2008).***

❑ When the record showed respondent admitted certain amounts were due each wage claimant and that he did not pay those amounts, the forum found that respondent acted willfully by withholding the claimants' wages, knowingly, intentionally and as a free agent, and when the undisputed evidence showed that more than 30 days had passed since respondent withheld the wages, the ALJ granted partial summary judgment on the issue of penalty wages because under those circumstances, "as a penalty for such nonpayment," the claimants' wages "shall continue" as a matter of law. ***----- In the Matter of Pavel Bulubenchi, 29 BOLI 222, 227-28 (2007).***

❑ An employer acts "willfully" when it knows what it is doing, intends to do what it is doing, and is a free agent. ***----- In the Matter of Pavel Bulubenchi, 29 BOLI 222, 227 (2007).***

❑ Respondent's initial lie to a BOLI compliance specialist that he had no knowledge of claimant or the construction project on which claimant performed work and subsequent admission that he employed claimant to work on the construction project and purportedly paid claimant cash after the project was completed demonstrated respondent's guilty knowledge of pertinent facts and that he voluntarily and as a free agent failed to pay claimant all of the wages he earned during his employment. ***----- In the Matter of Joseph Francis Sanchez, 29 BOLI 211, 221 (2007).***

❑ Respondent's abdication to a bilingual worker of his responsibility to make sure that accurate records were kept of each worker's earnings and to see that each worker was individually paid was a voluntary decision and made as a free agent. ***----- In the Matter of John Steensland, 29 BOLI 235, 268 (2007).***

13.3 --- Liability of Certain Respondents

❑ When respondents both employed claimant and acted willfully in failing to pay due and owing wages after claimant left respondents' employment, respondents were held jointly and severally liable for penalty wages pursuant to ORS 652.150. ***----- In the Matter of Sehat Entertainment, Inc., 30 BOLI 170, 183 (2009).***

13.4 --- Computation

❑ When respondent failed to pay the full amount of claimant's unpaid wages within 12 days after receiving written notice, the forum assessed penalty wages at the maximum rate set out in ORS 652.150(1) (hourly rate x eight hours per day x 30 days = penalty wages), or $2,016.00 ($8.40 per hour x eight hours x 30 days). ***----- In the Matter of J & S Moving & Storage, Inc., 31 BOLI 286, 301 (2012).*** *See also In the Matter of Letty Lee Sesher, 31 BOLI 255, 264 (2011).*

❑ The forum assessed penalty wages at the maximum rate set out in ORS 652.150(1) (hourly rate x eight hours per day x 30 days = penalty wages). Using this formula, penalty wages for four claimants were $1,908.00; $1,922.40; $1,932.00; and $1,908.00. ***----- In the Matter of Computer Products Unlimited, Inc., 31 BOLI 209, 226 (2011).***

❑ The forum assessed penalty wages at the maximum rate set out in ORS 652.150(1) (hourly rate x eight hours per day x 30 days = penalty wages), totaling $2,016 ($8.40 per hour x eight hours x 30 days). ***---- In the Matter of Mark A. Frizzell, 31 BOLI 178, 206 (2011).***

❑ The forum assessed penalty wages at the maximum rate set out in ORS 652.150(1) (hourly rate x eight hours per day x 30 days = penalty wages), totaling $2,400 ($10 per hour x eight hours x 30 days). ***---- In the Matter of Paul Samuels, 31 BOLI 146, 159 (2010).***

❑ The forum assessed penalty wages in accordance with ORS 652.150 in the amount of $2,400 ($10 per hour x 8 hours per day x 30 days). ***----- In the Matter of Mass Tram America, Inc., 31 BOLI 42, 53 (2010).***

❑ The forum assessed penalty wages in accordance with ORS 652.150 in the amount of $1,872 ($7.80 per hour x 8 hours per day x 30 days). ***----- In the Matter of Allen Belcher, 31 BOLI 1, 9 (2009).***

❑ The forum assessed penalty wages in accordance with ORS 652.150 for two wage claimants in the amount of $3,000.00 ($12.50 per hour x 8 hours per day x 30 days). ***----- In the Matter of Robert J. Thomas, 30 BOLI 160, 169 (2009).***

❑ The forum assessed penalty wages in accordance with ORS 652.150 and OAR 839-001-0470(1) in the amount of $7,200 ($30 per hour x 8 hours per day x 30

days) for one claimant, and in the amount of $2,880 ($12 per hour x 8 hours per day x 30 days) for a second claimant. ***----- In the Matter of Tailor Made Fencing & Decking, Inc., 30 BOLI 151, 157 (2009).***

❑ The forum assessed penalty wages in accordance with ORS 652.150 in the amount of $1,800 ($7.50 per hour x 8 hours per day x 30 days). ***----- In the Matter of 82nd Street Mall, Inc., 30 BOLI 140, 149-50 (2009).***

❑ The forum assessed penalty wages in the manner provided for in ORS 652.150(1) ($9 hourly rate x eight hours per day x 30 days = $2,160 penalty wages). ***----- In the Matter of Linda Marie Morgan, 30 BOLI 133, 139 (2009).***

❑ The forum assessed the penalty wages in the manner provided for in ORS 652.150(1) (hourly rate x eight hours per day x 30 days = penalty wages). Penalty wages for one claimant equaled $6,000 ($25 per hour x eight hours x 30 days). Penalty wages for the other two claimants equaled $2,880 ($12 per hour x eight hours x 30 days). ***----- In the Matter of Laura M. Jaap, 30 BOLI 110, 131 (2009).***

❑ The forum calculated and assessed penalty wages in accordance with ORS 652.150 in the amount of $2,880, computed by multiplying $12 per hour by 8 hours per day multiplied by 30 days. ***----- In the Matter of Forestry Action Committee, 30 BOLI 63, 80 (2008).***

❑ When the agency sent written notice to respondent of nonpayment of claimant's wages, the forum computed penalty wages by multiplying the agreed rate of $7.25 per hour by 8 hours per day multiplied by 30 days, for a total of $1,740. ***----- In the Matter of Petworks LLC, 30 BOLI 35, 47 (2008).***

❑ Penalty wages were computed by multiplying the agreed rate of $18 per hour by 8 hours per day multiplied by 30 days. ***----- In the Matter of Joseph Francis Sanchez, 29 BOLI 211, 221 (2007).***

❑ By serving the order of determination, the agency gave notice to respondent of all the wage claims in the proceeding, and since respondent did not pay any additional wages after receiving that notice, penalty wages were not limited to 100 percent of each wage claimant's unpaid wages. ***----- In the Matter of John Steensland, 29 BOLI 235, 268 (2007).***

❑ Under ORS 652.150(1), penalty wages are calculated based on an employee's hourly wage or rate of compensation. ***----- In the Matter of John Steensland, 29 BOLI 235, 268 (2007).***

❑ When multiple claimants were paid in part by piece rate and there was no way to calculate their average hourly rate of pay because no accurate record of hours worked existed for any of the claimants, the forum computed the wages using the hourly rate respondent was legally required to pay under ORS 653.025. ***----- In the Matter of John Steensland, 29 BOLI 235, 268 (2007).***

13.5 --- Amount Claimed in Order of Determination (*see also* Ch. I, sec. 9.2)

13.6 --- Financial Inability to Pay Wages (*see* 11.3)

❑ Respondent waived the defense of financial inability to pay wages at the time they accrue by failing to plead it in his answer and request for hearing. ***----- In the Matter of Robert J. Thomas, 30 BOLI 160, 169 (2009).***

❑ Financial inability to pay wages at the time they accrue is an affirmative defense to liability for penalty wages. ***----- In the Matter of Robert J. Thomas, 30 BOLI 160, 169 (2009).***

❑ When respondent produced no evidence to support his affirmative defense, there was nothing in the record that showed he was unable to pay claimants their wages at the time the wages accrued; the undisputed evidence established that more than 30 days have passed since he failed to pay claimants' wages, respondent was held liable to pay penalty wages. ***----- In the Matter of Tailor Made Fencing & Decking, Inc., 30 BOLI 151, 157 (2009).***

❑ When a respondent's answer includes the defense of financial inability to pay but the respondent produces no supporting evidence, a claimant's right to penalty wages is not overcome. ***----- In the Matter of Tailor Made Fencing & Decking, Inc., 30 BOLI 151, 157 (2009).***

❑ Financial inability to pay wages is an affirmative defense for which an employer has the burden of proof. ***----- In the Matter of Tailor Made Fencing & Decking, Inc., 30 BOLI 151, 156 (2009).***

❑ An employer who willfully fails to pay wages may avoid paying penalty wages by proving that the failure to pay was due to the employer's financial inability to pay the wages at the time they accrued. ***----- In the Matter of Tailor Made Fencing & Decking, Inc., 30 BOLI 151, 156 (2009).***

❑ Based on credible evidence demonstrating respondent's knowledge that claimant worked during the wage claim period and respondent's admission that claimant was not paid for those hours because of its misguided belief that claimant was not entitled to wages, and by acting as a free agent when it refused to pay claimant the wages she earned even after it was informed that claimant was an employee and not an independent contractor, respondent acted willfully and was liable for penalty wages pursuant to ORS 652.150. ***----- In the Matter of Forestry Action Committee, 30 BOLI 63, 79-80 (2008).***

❑ An employer bears the burden of proving the affirmative defense of financial inability to pay wages at the time they accrue. ***----- In the Matter of Forestry Action Committee, 30 BOLI 63, 79 (2008).***

❑ When respondent admitted it had the money to pay claimant's wages at the time she earned the wages, but chose to hire someone else to finish claimant's work and pay claimant's replacement its available money, and respondent was still operating its business and paid other workers and business expenses when claimant's wages accrued, respondent did not prove its defense of financial inability to pay claimant's wages when they accrued. ***----- In the Matter of Forestry Action***

Committee, 30 BOLI 63, 79 (2008).

❑ Financial inability to pay wages at the time wages accrued does not exist when an employer continues to operate its business and chooses to pay certain debts and obligations rather than an employee's wages. ***----- In the Matter of Forestry Action Committee, 30 BOLI 63, 79 (2008).***

❑ Respondent's apparent mismanagement of grant funds that were allocated to pay claimant's wages was not a valid defense. ***----- In the Matter of Forestry Action Committee, 30 BOLI 63, 79 (2008).***

13.7 --- Notice of Nonpayment of Wages (ORS 652.150(2))

❑ Documentary and testimonial evidence that the agency's investigative staff made the written demand contemplated by ORS 652.150(2) for claimant's wages and the agency's order of determination satisfied the notice requirement of ORS 652.150(2). ***----- In the Matter of J & S Moving & Storage, Inc., 31 BOLI 286, 301 (2012).***

❑ Documentary and testimonial evidence provided by the agency that its investigative staff made the written demand contemplated by ORS 652.150(2) for claimant's wages on two occasions, and the agency's order of determination satisfied the notice requirement of ORS 6523.150(2). ***----- In the Matter of Letty Lee Sesher, 31 BOLI 255, 264 (2011).***

❑ Documentary and testimonial evidence provided by the agency that its investigative staff made written demand for claimants' wages and the agency's order of determination, which repeated this demand for the actual amount of wages found due and owing in the final order, satisfied the notice requirement contemplated by ORS 652.150(2). ***----- In the Matter of Computer Products Unlimited, Inc., 31 BOLI 209, 226 (2011).*** *See also In the Matter of Mark A. Frizzell, 31 BOLI 178, 206 (2011); In the Matter of Paul Samuels, 31 BOLI 146, 159 (2010); In the Matter of Laura M. Jaap, 30 BOLI 110, 131-32 (2009).*

❑ The agency sent written notice of respondent's nonpayment of wages to respondent by sending a "Notice of Wage Claim" to respondent's registered agent, at her correct address, alleging that claimant was owed $958.25 in unpaid wages. By serving its order of determination, the agency also gave written notice to respondent of claimant's wage claim as contemplated by ORS 652.150(2). ***----- In the Matter of Petworks LLC, 30 BOLI 35, 47 (2008).***

❑ By serving the order of determination, the agency gave notice to respondent of all the wage claims in the proceeding, and since respondent did not pay any additional wages after receiving that notice, penalty wages were not limited to 100 percent of each wage claimant's unpaid wages. ***----- In the Matter of John Steensland, 29 BOLI 235, 268 (2007).***

14.0 CIVIL PENALTIES (ORS 653.256, ORS 653.055 & ORS 653.077)

14.1 --- Under ORS 653.256

14.1.1 --- Generally

14.1.2 --- Willful Failure to Make and Keep Records or Make Them Available (ORS 653.045(1)&(2))

14.1.3 --- Willful Failure to Supply Itemized Statement of Deductions (ORS 653.045(3) & OAR 839-020-0012)

14.1.4 --- Willful Failure to Post Summary of Wage and Hour Laws (ORS 653.050)

14.1.5 --- Willful Failure to Provide Meal and Rest Periods (OAR 839-020-0050)

14.1.6 --- Willful Discrimination Based on Wage Claim (ORS 653.060)

14.1.7 --- Willful Failure to Pay the Minimum Wage Rate (ORS 653.025)

14.1.8 --- Willful Failure to Comply with Rest and Meal Period and Overtime Rules (ORS 653.261)

14.2 --- Under ORS 653.055

14.2.1 --- Generally

❑ ORS 653.055 provides that the forum may award civil penalties to an employee when his or her employer pays that employee less than the wages to which he or she is entitled under ORS 653.010 to 653.261. "Willfulness" is not an element. ***----- In the Matter of Letty Lee Sesher, 31 BOLI 255, 264 (2011).*** *See also In the Matter of Computer Products Unlimited, Inc., 31 BOLI 209, 226 (2011); In the Matter of Petworks LLC, 30 BOLI 35, 47 (2008).*

❑ Under Oregon law, a wage claimant is entitled to penalty wages so long as the respondent willfully failed to pay claimant all wages earned, due, and owing, and an ORS 653.055 civil penalty so long as he worked any hours for Respondent for which he was not paid the minimum wage. ***----- In the Matter of Mark A. Frizzell, 31 BOLI 178, 208 (2011).***

❑ If an employer pays an employee less than the wages to which an employee is entitled under ORS 653.010 to 653.261, the forum may award civil penalties to the employee. ***----- In the Matter of Mass Tram America, Inc., 31 BOLI 42, 53 (2010).*** *See also In the Matter of Allen Belcher, 31 BOLI 1, 9 (2009); In the Matter of Sehat Entertainment, Inc., 30 BOLI 170, 183 (2009); In the Matter of Robert J. Thomas, 30 BOLI 160, 169 (2009); In the Matter of Linda Marie Morgan, 30 BOLI 133, 139 (2009); In the Matter of Creative Carpenters Corporation, 29 BOLI 271, 278 (2007); In the Matter of Pavel Bulubenchi, 29 BOLI 222, 228 (2007); In the Matter of Joseph Francis Sanchez, 29 BOLI 211, 221 (2007)*.

❑ Under ORS 653.055(1), an employer who pays an employee less than the minimum wage is liable to the employee for civil penalties that are computed in the same manner as penalty wages under ORS 652.150. ***----- In the Matter of Mass Tram America, Inc., 31 BOLI***

42, 53 (2010). *See also In the Matter of Allen Belcher, 31 BOLI 1, 9 (2009).*

❑ "Willfulness" is not an element of a violation of ORS 653.055. ***----- In the Matter of Mass Tram America, Inc., 31 BOLI 42, 53 (2010).***

❑ Under ORS 653.055(1), an employer who pays an employee less than the minimum wage is liable to the employee for civil penalties that are computed in the same manner as penalty wages under ORS 652.150. ***----- In the Matter of Village Café, Inc., 30 BOLI 80, 92 (2008).***

14.2.2 --- Failure to Pay Minimum Wage

❑ When no statutory exception applies that exempted respondent from the requirement to pay claimant Oregon's minimum wage, and the forum concluded that claimant was not paid the minimum wage for all hours worked and was not paid for her overtime hours, claimant was entitled to ORS 653.055(1)(b) civil penalties based on respondent's failure to pay her the minimum wage and applicable overtime wages for all hours that she worked. ***----- In the Matter of Letty Lee Sesher, 31 BOLI 255, 265 (2011).***

❑ A *per se* violation occurs when an employee's wage rate is the minimum wage, the employee is not paid all wages earned, due, and owing under ORS 652.140(1) or 652.140(2), and no statutory exception applies. ***----- In the Matter of Letty Lee Sesher, 31 BOLI 255, 264 (2011).*** *See also In the Matter of Mark A. Frizzell, 31 BOLI 178, 207 (2011); In the Matter of Allen Belcher, 31 BOLI 1, 10 (2009); In the Matter of 82nd Street Mall, Inc., 30 BOLI 140, 150 (2009); In the Matter of Village Café, Inc., 30 BOLI 80, 92 (2008).*

❑ Under ORS 653.055(1), an employer who pays an employee less than the minimum wage is liable to the employee for civil penalties that are computed in the same manner as penalty wages under ORS 652.150. ***----- In the Matter of 82nd Street Mall, Inc., 30 BOLI 140, 150 (2009).*** *See also In the Matter of Village Café, Inc., 30 BOLI 80, 92 (2008).*

❑ When the wage rate for four claimants was $7.50, the statutory minimum wage in Oregon in 2006, none of the claimants were paid all wages earned, due, and owing under ORS 652.140(1) or 652.140(2), and no statutory exception applied that would excuse respondent from paying the minimum wage to claimants, claimants were entitled to ORS 653.055 civil penalties. ***----- In the Matter of 82nd Street Mall, Inc., 30 BOLI 140, 150 (2009).*** *See also In the Matter of Village Café, Inc., 30 BOLI 80, 92 (2008).*

❑ The statutory requirement to pay the minimum wage is found in ORS 653.025. As this statute falls within the range of statutes set out in ORS 653.055, respondent's failure to pay the minimum wage to claimant entitled claimant to a civil penalty in addition to the penalty wages awarded under ORS 652.150. ***----- In the Matter of Petworks LLC, 30 BOLI 35, 47 (2008).***

14.2.3 --- Failure to Pay Overtime Wages

❑ ORS 653.055 provides that the forum may award civil penalties to an employee when the employer pays less than the wages to which the employee is entitled under ORS 653.010 to 653.261, computed in the same fashion as ORS 652.150 penalty wages. This includes unpaid overtime wages. "Willfulness" is not an element. ***----- In the Matter of Letty Lee Sesher, 31 BOLI 255, 264 (2011).*** *See also In the Matter of Paul Samuels, 31 BOLI 146, 159 (2010).*

❑ The commissioner's rules governing overtime requirements were promulgated pursuant to ORS 653.261 and are within the range of wage entitlements encompassed by ORS 653.055. When the agency presented sufficient evidence to show respondent failed to pay a claimant overtime for the hours he worked in excess of 40 per week, as required under OAR 839-020-0030(1), respondent was held liable for civil penalties under ORS 653.055. ***----- In the Matter of Sehat Entertainment, Inc., 30 BOLI 170, 183 (2009).*** *See also In the Matter of Linda Marie Morgan, 30 BOLI 133, 139 (2009).*

❑ The commissioner's rules governing overtime requirements were promulgated pursuant to ORS 653.261 and are within the range of wage entitlements encompassed by ORS 653.055(1). When the agency proved that claimant worked two hours of overtime, and that respondent paid him nothing, not even straight time, for those two hours of work, respondent was liable for civil penalties under ORS 653.055. ***----- In the Matter of Robert J. Thomas, 30 BOLI 160, 169 (2009).***

❑ The statutory requirement to pay overtime wages is contained in ORS 653.261 and OAR 839-020-0030, the agency rule interpreting ORS 653.261. As this statute falls within the range of statutes set out in ORS 653.055, respondent's failure to pay overtime wages to claimant entitled claimant to a civil penalty in addition to the penalty wages awarded under ORS 652.150. ***----- In the Matter of Petworks LLC, 30 BOLI 35, 47 (2008).***

❑ The Commissioner's rules governing overtime requirements were promulgated pursuant to ORS 653.261 and are within the range of wage entitlements encompassed by ORS 653.055. ***----- In the Matter of Paul Samuels, 31 BOLI 146, 159 (2010)****. See also In the Matter of Joseph Francis Sanchez, 29 BOLI 211, 221 (2007); In the Matter of Pavel Bulubenchi, 29 BOLI 222, 228 (2007); In the Matter of Creative Carpenters Corporation, 29 BOLI 271, 278 (2007)*.

❑ When respondent did not dispute the claims for overtime and admitted claimants collectively were owed at least $15,306, albeit less certain setoffs, for the wage claim period, the forum found that the amount owed necessarily included the overtime amounts alleged in the order of determination and the admission was sufficient to prove respondent failed to pay claimants overtime wages for the hours they worked in excess of 40 hours per week, and on that basis found respondent liable for civil penalties. ***----- In the Matter of Pavel Bulubenchi, 29 BOLI 222, 228 (2007).***

14.2.4 --- Computation

❑ The forum assessed ORS 653.055(1)(b) civil penalties based on the formula set out in ORS 652.150(1) (hourly rate x eight hours per day x 30 days). Using this formula, respondent was liable to pay a civil penalty to claimant in the amount of $2,016.00 ($8.40

per hour x eight hours x 30 days). ***----- In the Matter of Letty Lee Sesher, 31 BOLI 255, 265 (2011).***

❑ The forum assessed civil penalties of $1,908.00; $1,922.40; $1,932.00; and $1,908.00, respectively, for four wage claimants when respondent failed to pay them the minimum wage or overtime wages. ***----- In the Matter of Computer Products Unlimited, Inc., 31 BOLI 209, 226 (2011).***

❑ Respondent's failure to pay the minimum wage to claimant entitled him to a civil penalty under ORS 653.055, calculated as follows: $8.40 per hour x 8 hours x 30 days = $2,016. ***---- In the Matter of Mark A. Frizzell, 31 BOLI 178, 207 (2011).***

❑ Respondent's failure to pay the minimum wage to claimant entitled him to a civil penalty under ORS 653.055, calculated as follows: $10.00 per hour x 8 hours x 30 days = $2,400. ***----- In the Matter of Paul Samuels, 31 BOLI 146, 159 (2010)***.

❑ Respondent's failure to pay the minimum wage to claimant entitled her to a civil penalty under ORS 653.055, calculated as follows: $10.00 per hour x 8 hours x 30 days = $2,400.00. ***----- In the Matter of Mass Tram America, Inc., 31 BOLI 42, 53 (2010).***

❑ The forum assessed a civil penalty for respondent's' failure to pay the minimum wage in the manner provided for in ORS 652.150(1) ($7.80 x 8 hours per day x 30 days = $1,872). ***----- In the Matter of Allen Belcher, 31 BOLI 10 (2009).***

❑ The forum assessed a civil penalty for respondent's' failure to pay overtime wages in the manner provided for in ORS 652.150(1) ($10 x 8 hours per day x 30 days = $2,400). ***----- In the Matter of Sehat Entertainment, Inc., 30 BOLI 170, 183 (2009).***

❑ The forum assessed a civil penalty for respondent's failure to pay overtime wages in the manner provided for in ORS 652.150(1) ($12.50 x 8 hours per day x 30 days = $3,000.00). ***----- In the Matter of Robert J. Thomas, 30 BOLI 160, 169 (2009).***

❑ The forum assessed a civil penalty for respondent's failure to pay overtime wages in the manner provided for in ORS 652.150(1) ($9 hourly rate x eight hours per day x 30 days = $2,160 penalty wages). ***----- In the Matter of Linda Marie Morgan, 30 BOLI 133, 139 (2009).***

❑ The forum computed civil penalties for four claimants at $1,800 each (8 hours x $7.50 x 30 days = $1,800.00). ***----- In the Matter of 82nd Street Mall, Inc., 30 BOLI 140, 150 (2009).*** *See also In the Matter of Village Café, Inc., 30 BOLI 80, 92 (2008).*

❑ The forum computed a civil penalty is computed in the same manner as ORS 652.150 penalty wages ($7.25 per hour x 8 hours x 30 days = $1,740). ***----- In the Matter of Petworks LLC, 30 BOLI 35, 47 (2008).***

❑ Pursuant to agency policy, for the purpose of computing overtime wages and in the absence of a work week determined by the employer, a claimant's work week begins the first day the claimant commences work during the wage claim period at issue. ***----- In the Matter of Creative Carpenters Corporation, 29 BOLI 271, 279 (2007).***

❑ Under the agency's rules, for purposes of computing overtime wages, "work week" is defined as any seven consecutive twenty four hour periods as determined by the employer. ***----- In the Matter of Creative Carpenters Corporation, 29 BOLI 271, 279 (2007).***

❑ When the agency presented no evidence that respondent had an established work week and erroneously computed claimant's overtime hours based on a Monday through Sunday work week, the forum found that evidence showed claimant began working for respondent on a Friday and that his work week for purposes of computing overtime was Friday through Thursday. The forum subsequently found that when computed pursuant to agency policy, claimant's work hours never exceeded 40 in a given work week and concluded that claimant was not owed overtime wages and respondent was not liable for civil penalties under ORS 653.055. ***----- In the Matter of Creative Carpenters Corporation, 29 BOLI 271, 279 (2007).***

❑ Civil penalties awarded pursuant to ORS 653.055 are computed as provided in ORS 652.150 (hourly rate x 8 hours per day x 30 days). ***----- In the Matter of Pavel Bulubenchi, 29 BOLI 222, 228 (2007).*** *See also In the Matter of Joseph Francis Sanchez, 29 BOLI 211, 221 (2007).*

14.3 --- Under ORS 653.077

14.3.1 --- Generally

14.3.2 --- Intentional Failure to Provide Rest Period to Express Milk

15.0 WAGE SECURITY FUND

15.1 --- Generally

❑ This forum's test for determining whether a respondent is a "successor" employer is the same for wage claim and WSF recovery cases. ***----- In the Matter of Blachana, LLC, 30 BOLI 197, 221 (2009).***

Appeal pending.

❑ A respondent named as a successor employer is not liable to repay wages or a penalty related claimants' employment with a prior employer to unless the forum determines that it is a successor in interest. ***----- In the Matter of Blachana, LLC, 30 BOLI 197, 220 (2009).***

Appeal pending.

❑ The forum rejected respondent's argument that it was not a successor employer, and, in the alternative, that even if it was a successor, it was not liable to repay the WSF for the reason that there are no unpaid wages, in that the WSF had already reimbursed claimants in full for the unpaid wages they earned during respondent's predecessor's last 60 days of business. ***----- In the Matter of Blachana, LLC, 30 BOLI 197, 220 (2009).***

Appeal pending.

15.2 --- Prima Facie Case

❑ The agency established a rebuttable presumption that its determination was valid for the sums actually paid out from the WSF through testimony by its compliance specialist that she investigated the claim, concluded it was valid based on the evidence presented to her, and that her recommendation led to the WSF

payout. The presumption was rebutted by the forum's conclusion that the agency did not prove the first element of its prima facie case – that respondent employed claimant. ***----- In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 253 (2011).***

❑ The agency's prima facie case in a WSF case consists of proof of the following elements: (1) respondent employed claimants; (2) an amount was paid to claimants from the WSF as unpaid wages; and (3) respondent is liable for the amounts paid from the WSF. ***----- In the Matter of David W. Lewis, 31 BOLI 160, 162 (2011).***

❑ Respondents did not appear at the hearing to contest the agency's WSF recovery action and the agency presented prima facie evidence showing that it determined the validity of the wage claims filed by claimants based its determination on the information available at the time and paid out money from the WSF to claimants. ***----- In the Matter of Sehat Entertainment, Inc., 30 BOLI 170, 182 (2009).***

15.3 --- Presumptions

❑ In cases involving payouts from the WSF, when (1) there is credible evidence that a determination on the validity of the claim was made; (2) there is credible evidence as to the means by which that determination was made; and (3) the agency has paid out money from the WSF and seeks to recover that money, there is a rebuttable presumption that the agency's determination is valid for the sums actually paid out. ***----- In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 253 (2011).*** *See also In the Matter of David W. Lewis, 31 BOLI 160, 162 (2011); In the Matter of Ryan Allen Hite, 31 BOLI 10, 17 (2009); In the Matter of Blachana, LLC, 30 BOLI 197, 219 (2009), appeal pending; In the Matter of Sehat Entertainment, Inc., 30 BOLI 170, 182 (2009); In the Matter of Robert J. Thomas, 30 BOLI 160, 167 (2009).*

❑ The agency established a rebuttable presumption that its determination was valid for the sums actually paid out from the WSF through testimony by its compliance specialist that she investigated the claim, concluded it was valid based on the evidence presented to her, and that her recommendation led to the WSF payout. The presumption was rebutted by the forum's conclusion that the agency did not prove the first element of its prima facie case – that respondent employed claimant. ***----- In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 253 (2011).***

❑ In a WSF case, the forum granted the agency's motion for summary judgment that it had made a valid determination for the sums paid out of the WSF to seven wage claimants based on the allegations in the order of determination, respondent's admissions, and the presumption that "official duty has been regularly performed. ***----- In the Matter of David W. Lewis, 31 BOLI 160, 163 (2011).***

❑ The agency established a rebuttable presumption that its determination was valid for the sums actually paid out from the WSF through credible documentary evidence and witness testimony showing: (1) It determined that the claimants' wage claims were valid for $3,444 in wages earned within 60 days before the last day claimants were employed, that respondent had ceased doing business on March 23, 2008, and that claimants' wage claims could not otherwise be fully and promptly paid; (2) It based its determination on an investigation that included interviews of all material witnesses and an inspection of available, relevant documents; and (3) It paid out $3,444 from the WSF, an amount equal to claimants' unpaid, due, and owing wages, and seeks to recover that money. Respondent's unsworn assertions in its answer that claimants were subcontractors who were paid in full were insufficient to rebut this presumption, and the forum concluded that respondent is liable to repay the WSF the $3,444 paid out to claimants. ***----- In the Matter of Ryan Allen Hite, 31 BOLI 10, 17 (2009).***

❑ In cases involving payouts from the WSF, when (1) there is credible evidence that a determination on the validity of the claim was made; (2) there is credible evidence as to the means by which that determination was made; and (3) the agency has paid out money from the WSF and seeks to recover that money, there is a rebuttable presumption that the agency's determination is valid for the sums actually paid out. ***----- In the Matter of Ryan Allen Hite, 31 BOLI 10, 17 (2009).***

❑ The agency established a rebuttable presumption that its determination was valid for the sums actually paid out from the WSF through credible documentary evidence and witness testimony showing: (1) It determined that the claimants' wage claims were valid for $7,047.62 in wages earned within 60 days before May 9, 2006, the employer's last day of business, that the employer had ceased doing business, and that claimants' wage claims could not otherwise be fully and promptly paid; (2) It based its determination on an investigation that included claimant interviews, unsuccessful attempts to locate the employer's president, an inspection and evaluation of written statements and calendars showing dates and hours worked that were submitted by the claimants in support of their wage claims, and an unsuccessful effort to obtain the employer's records; and (3) It paid out $7,047.62 from the WSF, an amount equal to claimants' unpaid, due, and owing wages, and seeks to recover that money. Respondent unsuccessfully attempted to rebut this evidence by moving to amend its answer to include the defense that two claimants were independent contractors and not employees, a motion that was denied by the forum. The agency established, by a preponderance of the evidence, that claimants were employees and entitled to the unpaid wages paid out to them by the WSF. ***----- In the Matter of Blachana, LLC, 30 BOLI 197, 219-20 (2009).***

Appeal pending.

❑ The agency established a rebuttable presumption that its determination was valid for the sums actually paid out from the WSF through credible documentary evidence and witness testimony showing: (1) It determined that the claimants' wage claims were valid for $2,037.50 in wages earned within 60 days before the last day claimants were employed, that respondent had ceased doing business, and that claimants' wage claims could not otherwise be fully and promptly paid; (2) It

based its determination on an investigation that included interviews of all material witnesses and an inspection of available, relevant documents; and (3) It paid out $2,037.50 from the WSF, an amount equal to claimants' unpaid, due, and owing wages, and seeks to recover that money. When no evidence was presented to rebut this presumption, the forum concluded that respondent was liable to repay the WSF the $2,037.50 paid out to claimants. ***----- In the Matter of Robert J. Thomas, 30 BOLI 160, 167-68 (2009).***

15.4 --- Liability

❑ When the forum concluded that claimant was not employed by respondent, respondent had no statutory obligation to pay him wages and owed claimant no wages. The WSF exists to compensate eligible "employees[s]" for "earned and unpaid wages" when "the employer against whom the claim was filed has ceased doing business and is without sufficient assets to pay the wage claim and the wage claim cannot otherwise be fully and promptly paid[.]" Claimant did not earn any wages because he was not employed by respondent. Since there are no "earned and unpaid" wages, the forum could not order respondent to repay the WSF the wages paid out to claimant or the 25 per cent penalty sought by the agency. ***----- In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 253 (2011).***

❑ After confirming that respondents had ceased doing business and had no visible means of paying claimants, the agency paid one claimant $1,009.35 and the second claimant $2,918.69 from the WSF, less lawful deductions, creating liability for respondents in the amount of $5,245, plus the greater of an additional 25 percent of the sum paid from the WSF, or $200. ***----- In the Matter of Sehat Entertainment, Inc., 30 BOLI 170, 182 (2009).***

15.5 --- Repayment

❑ When the forum concluded that claimant was not employed by respondent, respondent had no statutory obligation to pay him wages and owed claimant no wages. The WSF exists to compensate eligible "employees[s]" for "earned and unpaid wages" when "the employer against whom the claim was filed has ceased doing business and is without sufficient assets to pay the wage claim and the wage claim cannot otherwise be fully and promptly paid[.]" Claimant did not earn any wages because he was not employed by respondent. Since there are no "earned and unpaid" wages, the forum could not order respondent to repay the WSF the wages paid out to claimant or the 25 per cent penalty sought by the agency. ***----- In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 253 (2011).***

❑ Successor employers are liable to repay the WSF for all wages paid to claimants by the WSF, plus a 25 percent penalty. ***----- In the Matter of Blachana, LLC, 30 BOLI 197, 221 (2009).***

Appeal pending.

❑ The forum rejected respondent's argument that it was not a successor employer, and, in the alternative, that even if it was a successor, it was not liable to repay the WSF for the reason that there are no unpaid wages, in that the WSF had already reimbursed claimants in full for the unpaid wages they earned during respondent's predecessor's last 60 days of business. ***----- In the Matter of Blachana, LLC, 30 BOLI 197, 220 (2009).***

Appeal pending.

15.6 --- Penalty

❑ The agency sought a WSF penalty based on a WSF payout to seven claimants based on a $200 assessment for each claimant who received less than $800 from the WSF and a 25 percent assessment for each claimant who received more than $1,000, then adding the totals together. The forum rejected the agency's calculation, holding that the penalty should be calculated as a 25 percent penalty on the combined amount of wages paid out to all claimants. ***----- In the Matter of David W. Lewis, 31 BOLI 160, 163-64 (2011).***

❑ When respondent denied liability for a WSF penalty in its answer, but he admitted he owed the monies paid out to seven claimants from the WSF, the forum awarded a civil penalty that was 25 percent of the total amount paid out to the claimants. ***----- In the Matter of David W. Lewis, 31 BOLI 160, 163 (2011).***

❑ Pursuant to ORS 652.414(3), the commissioner was entitled to recover a 25 percent penalty on $3,444, the amount of wages paid out by the WSF, or $200, whichever is greater. When 25 percent of the wages paid out equaled $861, respondent was held liable to the commissioner for that amount. ***----- In the Matter of Ryan Allen Hite, 31 BOLI 10, 17 (2009).***

❑ When the agency sought to assess a 25 percent penalty on the specific amounts paid out to each wage claimant in a WSF recovery case and a $200 penalty when that amount was greater than 25 percent, the forum awarded a 25 percent penalty based on the total sum of wages paid out, concluding that this result was consistent with the wording in ORS 652.414(3), which bases its 25 percent penalty assessment on "the amount of wages paid from the Wage Security Fund" and does not provide for a 25 percent or $200 penalty, "whichever amount is the greater," based on the amount of unpaid wages paid out to each individual claimant when the case involves multiple claimants. ***----- In the Matter of Blachana, LLC, 30 BOLI 197, 225-26 (2009).***

Appeal pending.

❑ Successor employers are liable to repay the WSF for all wages paid to claimants by the WSF, plus a 25 percent penalty. ***----- In the Matter of Blachana, LLC, 30 BOLI 197, 221 (2009).***

Appeal pending.

❑ When the commissioner was entitled to recover $5,245 in unpaid wages paid out from the WSF, respondents were liable for a penalty of 25 percent of that sum, or $1,311.25. ***----- In the Matter of Sehat Entertainment, Inc., 30 BOLI 170, 182 (2009).***

❑ Pursuant to ORS 652.414(3), the commissioner is entitled to recover a 25 percent penalty on $2,037.50, the amount of wages paid out, or $200, whichever is greater. When 25 percent of the wages paid out equaled $509.38, respondent was held liable to the commissioner for that amount. ***----- In the Matter of***

Robert J. Thomas, 30 BOLI 160, 168 (2009).

16.0 FEDERAL LAW

16.1 --- Fair Labor Standards Act

❑ The forum relied on the federal Fair Labor Standards Act, specifically 29 CFR § 791.2, and three prior final orders, applied to the above facts, to determine whether respondents were joint employers. ***----- In the Matter of Laura M. Jaap, 30 BOLI 110, 126 (2009).***

❑ The forum has long held that joint or co-employers are responsible, both individually and jointly, for compliance with all applicable provisions of Oregon's wage and hour laws, which is consistent with the responsibility of joint employers under the federal Fair Labor Standards Act (FLSA). ***----- In the Matter of Kurt E. Freitag, 29 BOLI 164, 197-98 (2007).***

> Affirmed without opinion, *Freitag v. Bureau of Labor and Industries, 243 Or App 389, 256 P3d 1099 (2011).*

❑ Under the FLSA, specifically, 29 CFR § 791.2, "(a) A single individual may stand in the relation of an employee to two or more employers at the same time under the [FLSA], since there is nothing in the act which prevents an individual employed by one employer from also entering into an employment relationship with a different employer. A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act depends upon all the facts in the particular case. If all the relevant facts establish that two or more employers are acting entirely independent of each other and are completely disassociated with respect to the employment of a particular employee, who during the same workweek performs work for more than one employer, each employer may disregard all work performed by the employee for the other employer (or employers) in determining his own responsibilities under the Act. On the other hand, if the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the Act. In this event, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the Act * * * [and] (b) Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as: (1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; or (2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or (3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer." ***----- In the Matter of Kurt E. Freitag, 29 BOLI 164, 198-99 (2007).***

> Affirmed without opinion, *Freitag v. Bureau of Labor and Industries, 243 Or App 389, 256 P3d 1099 (2011).*

16.2 --- Other

17.0 STATUTORY INTERPRETATION

❑ In a declaratory ruling proceeding, the intervenor urged the forum to apply a general maxim of statutory construction -- "*cessant ratione legis, cessat lex*" (translated in the City's brief as "[w]hen the reason of the law ceases, the law itself also ceases") -- to bolster its argument that ORS 652.070 and 652.080 have been superseded by the Public Employees Collective Bargaining Act and general overtime rule for public employees found in ORS 653.268. This is an extrinsic canon that looks outside the text and context of the statutes at issue. Because this issue can be resolved by a text and context analysis that leaves no uncertainty, the forum may not and does not resort to using this maxim as an interpretive aid. ***----- In the Matter of Petition for Declaratory Ruling, International Association of Fire Fighters, Local 3564, Petitioner, and City of Grants Pass, Intervenor, 31 BOLI 267, 280 (2012).***

> Appeal pending.

❑ In a declaratory ruling proceeding, the forum followed the analytical framework set out by the Oregon Supreme Court in *PGE* and *Gaines* to determine the meaning of the statutes being considered and which set of statutes the intervenor must rely on in its computation of overtime to its firefighters. Accordingly, the forum first examines the text and context of the statutes and also considers any pertinent legislative history proffered by the participants. A text and context analysis necessarily includes application of rules of statutory construction set out in ORS chapter 174. The extent of the forum's consideration of any legislative history and the evaluative weight the forum gives to it is for the forum to determine. If the legislature's intent remains unclear after examining text, context, and legislative history, the forum may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty. ***----- In the Matter of Petition for Declaratory Ruling, International Association of Fire Fighters, Local 3564, Petitioner, and City of Grants Pass, Intervenor, 31 BOLI 267, 281-82 (2012).***

> Appeal pending.

❑ In a declaratory ruling proceeding, the forum determined that if firefighters are not entitled to overtime under ORS 653.268 based on the exemption in ORS 653.269(3), the forum must then conclude that the IAFF's firefighters have no statutory entitlement to overtime pay if it accepts the City's argument that ORS 652.060, 652.070, and 652.080 do not apply to its firefighters, a conclusion that requires acceptance of the City's premise that the legislature implicitly repealed ORS 652.060, 652.070, and 652.080 by enacting the PECBA, ORS 653.268, and the various exceptions in ORS 653.269. The forum relied on ORS 174.010 and 174.020 to determine if there was an inconsistency

between these two statutory schemes and, if so, how to resolve it. First, the forum conducted an analysis to determine if the two statutory schemes at issue could be interpreted in a way "as will give effect to all" as required by ORS 174.010. ORS 652.080 was enacted in 1959 to require "authorized vacation and sick leave" to be used in the computation of overtime for firefighters. ORS 652.060 and 652.070 were amended in 1969 to establish a 56 hour maximum workweek for firefighters and require overtime pay for additional hours. No legislative history was provided to show what year ORS 653.268 and 653.269 were originally enacted. The forum concluded that if the latter statutes were enacted before 1959 and the legislature intended them to govern overtime pay for firefighters, the legislature's enactment of ORS 652.080 in 1959 and amendment of ORS 652.060 and 652.070 in 1969 shows that it changed its mind. On the contrary, if ORS 653.268 and 653.269 were enacted later, then the legislature could have repealed ORS 652.050 through 652.080, had it intended to abrogate firefighters' statutory entitlement to overtime pay. In either event, the forum concluded that the legislature's choice to leave both statutory schemes in place reflected the legislature's intent to create a statutory entitlement for firefighters that is distinct and separate from the general overtime provisions in ORS 653.268, while at the same time maintaining a general overtime statute and an exceptions statute regulating overtime for other categories of public employees. ***----- In the Matter of Petition for Declaratory Ruling, International Association of Fire Fighters, Local 3564, Petitioner, and City of Grants Pass, Intervenor, 31 BOLI 267, 284-85(2012).***

Appeal pending.

❑ ORS 653.268 is a general overtime statute governing labor employed by public employers. In contrast, ORS 652.050 through 652.080 set working hours and establishes a method of computing overtime pay for a particular group – firefighters. Based on ORS 174.020, the forum concluded that ORS 652.070 and 652.080 control overtime pay for firefighters because it refers to a particular group of employees, as opposed to the general group consisting of "labor employed by public employees" whose overtime is regulated by ORS 653.268 and the exceptions contained in ORS 653.269. ***----- In the Matter of Petition for Declaratory Ruling, International Association of Fire Fighters, Local 3564, Petitioner, and City of Grants Pass, Intervenor, 31 BOLI 267, 284-85 (2012).***

Appeal pending.

18.0 AGENCY RULE INTERPRETATION

19.0 BANKRUPTCY

20.0 CONSTITUTIONALITY