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WAGE COLLECTION, MINIMUM WAGE, OVERTIME, AND WORKING CONDITIONS

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1.0 COMMISSIONER'S AUTHORITY

1.1 --- Generally; Discretion

❑ When credible evidence establishes a wage claimant is owed wages exceeding those alleged in the charging document, the commissioner has the authority to award the greater amount of unpaid wages. ***----- In the Matter of John M. Sanford, Inc., 26 BOLI 72, 86 (2004), amended 26 BOLI 110 (2004).***

❑ The commissioner has the authority to award monetary damages, including penalty wages, exceeding those sought in the order of determination when they are awarded as compensation for statutory violations alleged in the charging document. ***----- In the Matter of Westland Resources, Inc., 23 BOLI 276, 286 (2002).*** *See also In the Matter of Contractor's Plumbing Service, 20 BOLI 257, 274 (2000).*

❑ The commissioner has jurisdiction over contested case proceedings in which the agency seeks to collect the wages an employer owes an employee under the minimum wage law. ***----- In the Matter of Barbara Coleman, 19 BOLI 230, 264 (2000)***.

1.2 --- To Investigate

❑ ORS 652.330 empowers the commissioner to "investigate and attempt equitably to adjust controversies between employers and employees in respect of wage claims respondent alleged wage claims." This statute, in conjunction with ORS 652.332, also allows the commissioner to take assignments of wage claim and seek collection of such claims through administrative proceedings. However, ORS 652.330 allows, rather than requires, the commissioner to investigate and attempt to equitably adjust a controversy, and there is no requirement that she take either of these actions before she seeks collection through administrative proceedings. Therefore, whether or not the commissioner investigated and attempted to equitably to adjust a controversy between the employer and the claimant is not for this forum to determine in this order. Whether the commissioner performed activities that are discretionary, rather than mandatory, in handling a wage claim is irrelevant to the forum's decision as to the merits of the claim. ***----- In the Matter of Country Auction, 5 BOLI 256, 267-68 (1986).***

1.3 --- To Order Payment of Wages/Penalties

❑ Under Oregon law the Commissioner has the authority to enforce wage claims which are defined in ORS 652.320(9) as "an employee's claim * * * for compensation for the employee's own personal services." ***----- In the Matter of Northwest Civil Processing, 21 BOLI 232, 246 (2001).***

❑ When some of claimant's unpaid wages were earned from an employer who was not a party to the contested case proceeding, the commissioner could not order that employer to pay wages or penalty wages. ***----- In the Matter of Jack Crum Ranches, Inc., 14 BOLI 258, 268 (1995).***

❑ The commissioner may recover amounts paid to claimants from the wage security fund from a successor employer. ***----- In the Matter of Tire Liquidators, 10 BOLI 84, 92-93 (1991).***

1.4 --- To Fashion Remedy

❑ The forum does not have the authority to fashion an equitable remedy. ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 204 (2006).***

❑ The commissioner has the authority to award monetary damages, including penalty wages, exceeding those sought in the order of determination when they are awarded as compensation for statutory wage violations alleged in the charging document. ***----- In the Matter of Westland Resources, Inc., 23 BOLI 276, 286 (2002).*** *See also In the Matter of Contractor's Plumbing Service, 20 BOLI 257, 274 (2000).*

❑ When the agency proves a wage claimant is owed wages exceeding those sought in the order of determination, the commissioner has the authority to award the higher amount of unpaid wages. ***----- In the Matter of John M. Sanford, Inc., 26 BOLI 72, 86 (2004)***. *See also In the Matter of Stan Lynch, 23 BOLI 34, 44 (2002).*

❑ The commissioner awarded a wage claimant wages in excess of those sought in the agency's amended order of determination, holding that he had authority to award monetary damages exceeding those sought in the order of determination when they are awarded as compensation for statutory violations alleged in the charging document. ***----- In the Matter of Francisco Cisneros, 21 BOLI 190, 213 (2001).***

> Affirmed without opinion, *Cisneros v. Bureau of Labor and Industries,* 187 Or App 114, 66 P3d 1030 (2003).

❑ The commissioner has inherent authority to fashion a remedy based on the evidence before the forum. When penalty wages calculations in the proposed order were in error, the commissioner based the final order on the correct calculations. ***----- In the Matter of Mary Stewart-Davis, 13 BOLI 188, 200 (1994).***

> Affirmed without opinion, *Stewart-Davis v. Bureau of Labor and Industries,* 136 Or App 212, 901 P2d 268 (1995).

2.0 EMPLOYMENT RELATIONSHIP

2.1 --- Generally

❑ The agency established that claimant was an employee based on (1) claimant's credible testimony that Bukovina Inc., through Valery Zhiryada, interviewed

him for a truck driving job, and that its corporate president, Valentina Zhiryada, sent him for a drug test and subsequently assigned him to ride with another driver to deliver Hood River pears to New Jersey, pick up a load in New York, and make deliveries in Oregon and Washington upon his return; (2) an admission by Valentina Zhiryada to the agency investigator that she sent claimant for a drug test and that he rode along with another driver in a Bukovina truck on a cross country trip; and (3) Zhiryada's testimony at hearing that the truckers worked for a percentage of the profits that was consistent with claimant's testimony that he understood he would receive a percentage of the gross amount earned for the deliveries. ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 200 (2006).***

❑ When an employment relationship has previously been established, the burden is on the employer to prove any change in the status of that relationship. ***----- In the Matter of Kilmore Enterprises, 26 BOLI 111,120 (2004).*** *See also In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration, 25 BOLI 12, 40 (2003), affirmed without opinion, Ochoa v. Bureau of Labor and Industries, 196 Or App 639, 103 P3d 1212 (2004).*

❑ This forum long ago adopted and has since consistently used the definitions of "employer" and "employee" in ORS 652.310 for the purposes of interpreting ORS 652.140 and ORS 652.150. ***----- In the Matter of Kilmore Enterprises, 26 BOLI 111,119 (2004).***

❑ The agency at all times has the burden of proving respondent was an employer and claimant was an employee as defined by the applicable statute. ***----- In the Matter of Kilmore Enterprises, 26 BOLI 111,119 (2004).***

❑ When respondent was aware of the work claimant performed and there was no evidence respondent ever told claimant to leave respondent's car lot or not to perform a particular job, the forum found that respondent "suffered or permitted" claimant to work and thereby "employed" claimant as defined in ORS 653.010(3). ***----- In the Matter of William Presley, 25 BOLI 56, 69 (2004).***

> Affirmed, *Presley v. Bureau of Labor and Industries,* 200 Or App 113, 112 P3d 485 (2005).

❑ Absent evidence of a specific agreement between respondent and its workers to change the nature of their working relationship, the forum found that respondent failed its burden of showing a change of status in the employment relationship established in the record and concluded that the agency established, by a preponderance of evidence, that the workers were employees for the purpose of ORS chapter 653. ***----- In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration, 25 BOLI 12, 41 (2003).***

> Affirmed without opinion, *Ochoa v. Bureau of Labor and Industries*, 196 Or App 639, 103 P3d 1212 (2004).

❑ When the agency proved by a preponderance of the evidence that respondent's workers performed work encompassed within respondent's overall business that was unskilled, required no capital on the part of the workers, and most of the workers were already on respondent's payroll as hourly or piece rate workers, agreed to harvest cones for use in respondent's business to avoid a summer lay-off, and were expected to return to the nursery following the cone harvest, the forum found that the workers were respondent's employees. ***----- In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration, 25 BOLI 12, 39-40 (2003).***

> Affirmed without opinion, *Ochoa v. Bureau of Labor and Industries*, 196 Or App 639, 103 P3d 1212 (2004).

❑ In determining whether respondent's employees were suffered or permitted to work, the forum adopted an approach suggested by the authors of an article examining the history of the FLSA's suffer or permit to work standard that involved applying the definitions directly and determining first if the work is encompassed within the overall business of the supposed employer. If so, the work is suffered or permitted by the employer unless it is so highly skilled and capital intensive that it forms a completely separate business. When the business owner supplies the capital and the work is unskilled, a business will be determined to have suffered or permitted the work within the meaning of the definition. ***----- In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration, 25 BOLI 12, 39-40 (2003).***

> Affirmed without opinion, *Ochoa v. Bureau of Labor and Industries*, 196 Or App 639, 103 P3d 1212 (2004).

❑ ORS chapter 653 does not include an express definition of "employee." However, by contextual implication and for purposes of chapter 653, a person is an "employee" of another if that other "employs," *i.e.*, "suffer[s] or permit[s]" the person to work. ***----- In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration, 25 BOLI 12, 38 (2003).***

> Affirmed without opinion, *Ochoa v. Bureau of Labor and Industries*, 196 Or App 639, 103 P3d 1212 (2004).

❑ 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 Rodrigo Ayala Ochoa, revised final order on reconsideration, 25 BOLI 12, 38-39 (2003).***

> Affirmed without opinion, *Ochoa v. Bureau of Labor and Industries*, 196 Or App 639, 103 P3d 1212 (2004).

❑ Respondent's claim that claimant was employed by the owner of the home that respondent and claimant worked on was rejected by the forum based on credible

evidence that respondent entered into a construction contract with the homeowner and agreed to provide all labor and materials and the homeowner's testimony that he did not employ anyone and that respondent provided claimant and several other workers to do all the construction work on the contract. ***----- In the Matter of Paul Andrew Flagg, 25 BOLI 1, 9-10 (2003).***

❑ Under ORS 653.025, claimant was respondent's employee when respondent suffered or permitted claimant to render services for her at respondent's business. ***----- In the Matter of Toni Kuchar, 23 BOLI 265, 274 (2002).***

❑ Under ORS 652.310, an employer is "any person who in [Oregon] * * * engages personal services of one or more employees." An employee is "any individual who otherwise than as copartner of the employer or as an independent contractor renders personal services wholly or partly in [Oregon] to an employer who pays or agrees to pay such individual at a fixed rate." ***----- In the Matter of Heiko Thanheiser, 23 BOLI 68, 75 (2002).***

❑ When respondent's' answer raised an affirmative defense that claimant was not an "employee" as defined by ORS 652.210(2) and 652.310(2) because respondent never paid or agreed to pay for claimant's services, the forum held that ORS chapter 653 governs minimum wage claims and, for purposes of chapter 653, a person is an "employee" of another if that other "suffer[s] or permit[s]" the person to work. ***----- In the Matter of Bubbajohn Howard Washington, 21 BOLI 91, 101 (2000).***

❑ ORS chapter 652 governs claims for unpaid agreed wages. Consequently, the definition of employee applicable to that chapter provides that the employer must have agreed to pay the employee at a fixed rate. ORS chapter 653, on the other hand, governs claims for unpaid minimum and overtime wages. For purposes of chapter 653, a person is an "employee" of another if that other "suffer[s] or permit[s]" the person to work. ORS 653.010. No agreement regarding a pay rate is needed. Therefore, when a respondent suffered or permitted claimant to work for her, but they never agreed on a rate of pay, claimant was respondent's employee for purposes of ORS chapter 653, and respondent was required to pay her at least the minimum wage. ***----- In the Matter of Barbara Coleman, 19 BOLI 230, 263-64 (2000)***.

❑ The commissioner has jurisdiction over contested case proceedings in which the agency seeks to collect the wages an employer owes an employee under the minimum wage law. ***----- In the Matter of Barbara Coleman, 19 BOLI 230, 264 (2000)***.

❑ Intent is not a controlling factor in determining whether an employment relationship exists. ***----- In the Matter of Ann L. Swanger, 19 BOLI 42, 55 (1999)***.

❑ The forum concluded that claimant was the employee of an individual respondent, not a corporate respondent, based on claimant's credible testimony that his employment relationship was exclusively with the individual respondent. That testimony was not overcome by Corporation Division records indicating that the corporate respondent incorporated on a date on which claimant still was employed, and the individual respondent was the corporate respondent's registered agent. ***----- In the Matter of Majestic Construction, Inc., 19 BOLI 59, 68 (1999)***.

❑ In a minimum wage claim case in which respondent alleged that claimant was an independent contractor, the commissioner held that "'employee' means any individual who otherwise than as a copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate * * *." ***----- In the Matter of Frances Bristow, 16 BOLI 28, 36-37 (1997).*** *See also In the Matter of Graciela Vargas, 16 BOLI 246, 252 (1998).*

❑ "'Employee' means any individual who otherwise than as a copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate * * *." ***----- In the Matter of Jewel Schmidt, 15 BOLI 236, 242 (1997).***

❑ When an individual who is not an independent contractor or copartner and or a participant in a work training program administered under state or federal assistance laws renders personal service to another who pays or agrees to pay the individual at a fixed rate, that individual is an employee and the one to whom the service is rendered is an employer. ***----- In the Matter of LaVerne Springer, 15 BOLI 47, 67 (1996).***

❑ The fact that a worker is not paid or there is no agreement to pay him a fixed rate does not take him out of the definition of "employee" when a minimum wage law requires he be paid the minimum wage. ***----- In the Matter of LaVerne Springer, 15 BOLI 47, 67 (1996).***

❑ When an individual has no ownership interest in a business, has no right to share in the profits, no liability to share any losses, and no right to exert some control over the business, that individual is an employee, not a company-owner or copartner. ***----- In the Matter of LaVerne Springer, 15 BOLI 47, 67 (1996).***

❑ Respondent argued that a 16-year-old minor was an unpaid intern exchanging his volunteer labor for training and knowledge in the film business and introduced evidence that such intern arrangements were common throughout the film industry. The commissioner found that no matter how widespread that type of "training" might have been in the past or was elsewhere, it is not lawful in Oregon, whether involving adult or minor employees. ***----- In the Matter of LaVerne Springer, 15 BOLI 47, 67 (1996).***

❑ Under ORS 653.310(2),"'employee' means any individual who otherwise than as a copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate * * *." Under the same statute, "an employer who pays or agrees to pay an individual at a fixed rate" includes an employer who is required by law to pay a minimum wage to workers but has failed to do so. The absence of an agreement to pay at a fixed rate or actual payment to a worker will not take the worker out of the definition of "employee" when the minimum wage law

requires that worker to be paid a minimum wage. ***----- In the Matter of Gerald Brown, 14 BOLI 154, 163 (1995).*** *See also In the Matter of U.S. Telecom International, 13 BOLI 114, 121 (1994); In the Matter of Martin's Mercantile, 12 BOLI 262, 273 (1994).*

❑ The law requires employers to pay employees a minimum wage. A wage agreement to work at the rate of five percent of gate receipts, when the actual sums paid resulted in a rate of less than the minimum wage of $4.75 per hour, did not constitute a defense to the application of the minimum wage law to the work performed under the agreement under ORS 653.055(2) and could not be used to take the worker out of the definition of "employee." ***----- In the Matter of Gerald Brown, 14 BOLI 154, 163 (1995).***

❑ The forum used the definitions of "employee" and "employer" in ORS 652.310 to interpret ORS 652.140 and 652.150 and found that respondent was an employer and 51 wage claimants were respondent's employees and not co-partners or independent contractors. ***----- In the Matter of Anna Pache, 13 BOLI 249, 267 (1994).*** *See also In the Matter of Crystal Heart Books Co., 12 BOLI 33, 41 (1993).*

❑ "Employ" includes to suffer or permit to work. ***----- In the Matter of Kenny Anderson, 12 BOLI 275, 280 (1994).*** *See also In the Matter of Box/Office Delivery, 12 BOLI 141, 146 (1994).*

❑ The forum used the definitions of "employee" and "employer" in ORS 652.310 to interpret ORS 652.140 and 652.150. ***----- In the Matter of Box/Office Delivery, 12 BOLI 141, 146 (1994).***

❑ The usual elements of an employment agreement include the term of employment, the amount of compensation, the place of employment, the type of employment, and a general description of the duties to be performed. ***----- In the Matter of Box/Office Delivery, 12 BOLI 141, 148 (1994).***

❑ An offer need not be stated in words. Any conduct from which a reasonable person in the offeree's position would be justified in inferring a promise in return for a requested act amounts to an offer. The most common illustration of this principle is when performance of work or services is requested. If the request is made under such circumstances that a reasonable person would infer intent to pay for the performance, the request amounts to an offer and a contract is created by the performance of the work. ***----- In the Matter of Box/Office Delivery, 12 BOLI 141, 149 (1994).***

❑ Respondent placed a job order with the Employment Division that set out the job title, job description, number of hours per week, job duration, employment location and requirements, and the amount of compensation for job applicants. The forum found these terms sufficiently definite, clear, and complete to meet the requirements that make an offer binding. When claimant performed the duties of the job, he accepted respondent's job offer by his conduct, and the forum found that respondent and claimant had an implied employment agreement and the wage rate was the one offered in the job order. ***----- In the Matter of Box/Office Delivery, 12 BOLI 141, 149 (1994).***

❑ Respondent placed a job order with the Employment Division, claimant responded to the job order, and respondent told claimant to report to work the next day for training. The forum found that claimant accepted respondent's job offer by going to work, and that offer included the wage rate referred to in the job offer. Nothing in the facts or the law permitted respondent to pay only the minimum wage while claimant was training on the job. ***----- In the Matter of Box/Office Delivery, 12 BOLI 141, 148 (1994).***

❑ An employer is free to set the terms and conditions of the work and of the compensation and the employee may accept or reject those conditions. ***----- In the Matter of Box/Office Delivery, 12 BOLI 141, 148 (1994).***

❑ The forum rejected respondent's assertion that she did not hire claimant, who performed work as a part-time delivery driver and that claimant was at all times in training, holding that claimant was an employee as defined in ORS 652.310(2). ***----- In the Matter of Box/Office Delivery, 12 BOLI 141, 146 (1994).***

❑ Respondent's failure to pay or agree to pay claimant at a fixed rate for personal services rendered did not take claimant out of the definition of "employee" under ORS 652.310(2). Otherwise, every employer who mischaracterizes a worker as a volunteer, independent contractor, or partner; who did not have an agreement for payment of a fixed rate; and who failed to pay the worker a fixed rate could claim the worker was not an employee and avoid paying minimum wage. This would defeat the purposes of the wage statutes. For the purposes of the definition of "employee" in ORS 652.310(2), an "employer who pays or agrees to pay an individual at a fixed rate" includes an employer who is required by law to pay a minimum wage to workers, regardless of whether this legal obligation has been met. The absence of an agreement to pay or the absence of actual payment to a worker will not take the worker out of the definition of "employee" when a minimum wage law requires that worker to be paid a minimum wage. ***----- In the Matter of Crystal Heart Books Co., 12 BOLI 33, 44 (1993).***

❑ The commissioner found that a wage claimant was an employee when respondents had the right to and did control and direct the details and methods of claimant's work, claimant provided services that were an integral part of respondents' business, claimant was hired for an indefinite period, claimant worked exclusively for respondents on an hourly basis, claimant used only respondents' equipment and supplies, and claimant derived no benefits other than wages for his work. ***----- In the Matter of Rainbow Auto Parts and Dismantlers, 10 BOLI 66, 74 (1991).***

❑ The commissioner found that a wage claimant was an employee when respondents had the right to control and direct the details and methods of claimant's work, claimant provided services that were an integral part of respondents' business, claimant was hired for an indefinite period of time, claimant worked exclusively for respondents on an hourly basis, claimant used only respondents' equipment and supplies, claimant was carried on respondent's books as an employee, and claimant derived no benefits other than wages for her

work. ***----- In the Matter of Waylon & Willies, Inc., 7 BOLI 68, 70 (1988).***

❑ When a wage claimant has been a regular hourly employee, and an employer seeks to deny liability for wages by asserting that, at a certain point during employment the claimant's status changed from employee to either independent contractor or partner, and the claimant disputes this, the employer has the burden of proving the change in status. ***----- In the Matter of Superior Forest Products, 4 BOLI 223, 231 (1984).***

2.2 --- Partnerships

❑ The forum rejected respondents' argument that if their partnership was not an LLP, then it was a *de facto* limited liability company (LLC), on the basis that an LLC, as a matter of law, cannot exist as a matter of law until the LLC's articles of organization have been executed and delivered to the secretary of state for filing, and respondents never took either action. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 230 (2006).***

❑ In a default case, claimants credibly testified that both respondents owned and operated the business under an assumed business name, that one respondent hired them, and that claimants performed work for the business. When respondents' answer appeared on company letterhead and was signed by both respondents, the forum concluded that respondents were partners and both were claimants' employers. ***----- In the Matter of Barbara and Robert Blair, 24 BOLI 89, 96 (2002).***

❑ When there was insufficient evidence in the record to find that respondents conducted business jointly as partners, the forum concluded that only one respondent employed claimant. ***----- In the Matter of Vidal and Jody Soberon, 24 BOLI 98, 104 (2002)***.

❑ A partnership is never presumed and the agency bears the burden of proof to show that co-named respondents were partners. ***----- In the Matter of Stan Lynch, 23 BOLI 34, 42-43 (2002).*** *See also In the Matter of Diran Barber, 16 BOLI 190, 196 (1997); In the Matter of Crystal Heart Books Co., 12 BOLI 33, 42 (1993).*

❑ When there was no evidence in the record to support the agency's partnership theory, other than a printout showing the registration of an assumed business name with the state of Oregon that listed both respondents as registrants, the forum concluded that the information contained on the printout, standing alone, was insufficient to overcome the credible testimony of the claimants that only one respondent was their employer, as well as statements taken by the agency's investigator from other witnesses indicating that the same respondent was the owner of the business. ***----- In the Matter of Stan Lynch, 23 BOLI 34, 43 (2002).***

❑ Respondent admitted that claimant was not her partner, but argued that claimant provided services to respondent to entice her into a partnership. The forum held that respondent suffered and permitted claimant to work for her and was therefore respondent's employee. ***----- In the Matter of Graciela Vargas, 16 BOLI 246, 259 (1998).***

❑ ORS 68.110(1) defines a partnership as "an association of two or more persons to carry on as company-owners a business for profit[.]" The Oregon supreme court has held that "[t]he essential test in determining the existence of a partnership is whether the parties intended to establish such a relation;" that "in the absence of an express agreement * * * the status may be inferred from the conduct of the parties," and "when faced with intricate transactions that arise, this court looks mainly to the right of a party to share in the profits, his liability to share losses, and the right to exert some control over the business." ***----- In the Matter of Diran Barber, 16 BOLI 190, 195 (1997).*** *See also In the Matter of Crystal Heart Books Co., 12 BOLI 33, 42 (1993).*

❑ A partnership is never presumed and the burden of proving a partnership is upon the party alleging it. When respondent and claimant had no partnership agreement and claimant had no ownership interest in the business, invested no money in it, had no right to share profits from the business and was not liable for any losses from the business, but respondent and claimant had a goal of becoming partners to buy the building that housed the bar that was respondent's business, the commissioner held that claimant was an employee and respondent an employer as defined in ORS 652.310. ***----- In the Matter of Diran Barber, 16 BOLI 190, 195-96 (1997).***

❑ When an individual has no ownership interest in a business, no right to share in the profits, no liability to share any losses, and no right to exert some control over the business, that individual is not a co-owner or copartner, but an employee. ***----- In the Matter of LaVerne Springer, 15 BOLI 47, 67 (1996).*** *See also In the Matter of Crystal Heart Books Co., 12 BOLI 33, 39, 41-45 (1993).*

❑ The forum used the definitions of "employee" and "employer" in ORS 652.310 to interpret ORS 652.140 and 652.150 and found that respondent was an employer and 51 wage claimants were respondent's employees and not co-partners or independent contractors. ***----- In the Matter of Anna Pache, 13 BOLI 249, 267 (1994).*** *See also In the Matter of Crystal Heart Books Co., 12 BOLI 33, 41 (1993).*

❑ A partnership is an association of two or more persons to carry on, as co-owners, a business for profit. ORS 68.110(1). Claimants who had no ownership interest in a business, no right to share in the profits, and no liability to share losses were not co-partners with respondent but employees. ***----- In the Matter of Martin's Mercantile, 12 BOLI 262, 269, 272 (1994).***

❑ When a wage claimant has been a regular hourly employee, and an employer seeks to deny liability for wages by asserting that, at a certain point during employment the claimant's status changed from employee to either independent contractor or partner, and the claimant disputes this, the employer has the burden of proving the change in status. ***----- In the Matter of Superior Forest Products, 4 BOLI 223, 231 (1984).***

2.3 --- Independent Contractors

2.3.1 --- In General

❑ When four of the five factors used by the forum in determining whether or not workers were employees or independent contractors indicated they were employees, the forum concluded that claimants were employees, not independent contractors. ***----- In the Matter of Gary Lee Lucas, 26 BOLI 198, 211-12 (2005).***

❑ Respondent has the burden of proving its affirmative defense that claimant was an independent contractor and not respondent's employee. ***----- In the Matter of Gary Lee Lucas, 26 BOLI 198, 210 (2005).*** *See also In the Matter of Orion Driftboat and Watercraft Company, 26 BOLI 137, 146 (2005); In the Matter of Adesina Adeniji, 25 BOLI 162, 169 (2004); In the Matter of William Presley, 25 BOLI 56, 69 (2004), affirmed, Presley v. Bureau of Labor and Industries, 200 Or App 113, 112 P3d 485 (2005); In the Matter of Rubin Honeycutt, 23 BOLI 224, 232 (2002); In the Matter of Leslie Elmer DeHart, 18 BOLI 199, 206-07(1999).*

❑ This forum applies an "economic reality" test to distinguish an employee from an independent contractor under Oregon's minimum wage and wage collection laws. ***----- In the Matter of Gary Lee Lucas, 26 BOLI 198, 210 (2005).*** *See also In the Matter of Orion Driftboat and Watercraft Company, 26 BOLI 137, 146 (2005); In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration, 25 BOLI 12, 42 (2003), affirmed without opinion, Ochoa v. Bureau of Labor and Industries, 196 Or App 639, 103 P3d 1212 (2004).*

❑ This forum measures the degree of economic dependency in any given case by analyzing the facts presented in light of the following factors and no one factor is 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 Gary Lee Lucas, 26 BOLI 198, 210 (2005).*** *See also In the Matter of Orion Driftboat and Watercraft Company, 26 BOLI 137, 146 (2005); In the Matter of Kilmore Enterprises, 26 BOLI 111,120-21 (2004).*

❑ When respondent directed claimant's work; respondent supplied all the materials and tools necessary to perform his work; claimant had no investment in respondent's business; claimant had no opportunity to earn a profit or suffer a loss, as he was paid a set wage; claimant learned how to build driftboats while working for respondent; claimant was hired for an indefinite period of time; and respondent was claimant's primary employer for the period encompassed by the wage claim, the forum concluded that claimant was an employee, not an independent contractor. ***----- In the Matter of Orion Driftboat and Watercraft Company, 26 BOLI 137, 147 (2005).***

❑ When respondent provided a document entitled "INDEPENDENT CONTRACTOR AGREEMENT" that was not signed by claimant until his next to last day of work, and was not executed by respondent, the forum gave the agreement no weight in determining whether or not claimant was an employee or independent contractor. ***----- In the Matter of Orion Driftboat and Watercraft Company, 26 BOLI 137, 147 (2005).***

❑ The test for distinguishing an employee from an independent contractor requires 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 Kilmore Enterprises, 26 BOLI 111,120 (2004).***

❑ When respondent set claimant's work schedule; claimant had no investment in the business, used only respondent's equipment in performing his duties, and had no opportunity for profit or loss; the skill and initiative required of him to perform his janitorial duties was minimal; there was no fixed date for claimant's employment to cease; and claimant worked for no one else during the wage claim period, the form found those factors indicative of an employer-employee relationship and concluded that claimant was respondent's employee. ***----- In the Matter of Adesina Adeniji, 25 BOLI 162, 170 (2004).***

❑ When respondent controlled the hours claimant could perform his work; claimant had no investment in the business and had no opportunity for profit or loss because of his lack of ownership interest; the skill and initiative required of him was that required of any salesperson; and there was no fixed date for claimant's employment to cease, the forum found those factors indicated an employer-employee relationship. ***----- In the Matter of William Presley, 25 BOLI 56, 69 (2004).***

> Affirmed, *Presley v. Bureau of Labor and Industries,* 200 Or App 113, 112 P3d 485 (2005).

❑ Workers whom respondent employed as cone pickers on a seasonal basis were employees, not independent contractors, when respondent controlled their presence on the work site, payroll and daily working conditions; the workers had no investment in respondent's bus other than their time; respondent determined and exclusively controlled the amount of the workers' piece rate and they could earn no profit or loss; the only skill required was the ability to bend over and pick up cones and the job required no special initiative; and the workers were employed in respondent's nursery before and after cone picking season ended. ***----- In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration, 25 BOLI 12, 42 (2003).***

> Affirmed without opinion, *Ochoa v. Bureau of Labor and Industrie*s, 196 Or App 639, 103 P3d 1212 (2004).

❑ An "independent contractor agreement" signed by a wage claimant does not control the employment relationship between a respondent and claimant, as the forum looks at the totality of the circumstances in determining whether a wage claimant was an employee or an independent contractor. ***----- In the Matter of The Alphabet House, 24 BOLI 262, 278 (2003)****. See also In the Matter of Procom Services, Inc. 24 BOLI 238, 243 (2003).*

❑ This forum uses an "economic reality" test to determine whether a wage claimant is an employee or independent contractor under Oregon's wage and hour laws. The focal point of the test is "whether the alleged employee, as a matter of economic reality, is

economically dependent upon the business to which [she] renders [her] services." The forum uses five factors to gauge the degree of the worker's economic dependency, with no single factor being determinative: (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 Adesina Adeniji, 25 BOLI 162, 169-70 (2004).*** *See also In the Matter of William Presley, 25 BOLI 56, 69 (2004), affirmed, Presley v. Bureau of Labor and Industries, 200 Or App 113, 112 P3d 485 (2005); In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration, 25 BOLI 12, 42 (2003), affirmed without opinion, Ochoa v. Bureau of Labor and Industries, 196 Or App 639, 103 P3d 1212 (2004); In the Matter of Procom Services, Inc. 24 BOLI 238, 243 (2003); In the Matter of Heiko Thanheiser, 23 BOLI 68, 75-76 (2002); In the Matter of Stan Lynch, 23 BOLI 34, 42 (2002; In the Matter of Ann L. Swanger, 19 BOLI 42, 53 (1999); In the Matter of Debbie Frampton*, *19 BOLI 27, 36 (1999); In the Matter of Leslie Elmer DeHart, 18 BOLI 199, 207 (1999); In the Matter of Arabian Riding and Recreation Corp., 16 BOI 79, 92 (1997); In the Matter of Frances Bristow, 16 BOLI 28, 37 (1997).*

❑ When respondent directed claimant's work and supplied all of the equipment necessary to perform the work; claimant had no investment in respondent's business; claimant had no opportunity to earn a profit or suffer a loss, as respondent agreed to pay her a specific salary; claimant learned how to do bookkeeping while working for respondent; claimant was hired for an indefinite period of time; and no one else employed claimant during the relevant period, the forum concluded that claimant was respondent's employee, not an independent contractor. ***----- In the Matter of The Alphabet House, 24 BOLI 262, 278 (2003).***

❑ When respondent directed claimant's work and supplied all of the equipment necessary to perform the work; claimant had no investment in respondent's business; claimant had no opportunity to earn a profit or suffer a loss, as respondent agreed to pay her a specific wage or commission and she had no investment other than her time; the job required no training and claimant was only allowed to call persons on her call list and was provided sales scripts that she was required to use; claimant was hired for an indefinite period of time; and no one else employed claimant during the relevant period, the forum found that credible evidence showing the actual substance of claimant's working conditions outweighed respondent's assertion in its answer that claimant was an independent contractor and the "Independent Contractor Agreement" signed by claimant. ***----- In the Matter of Procom Services, Inc., 24 BOLI 238, 244 (2003).***

❑ When respondent asserted that claimant was an independent contractor, but that assertion was the only proof offered by respondent, the forum found that claimant was employed by respondent. ***----- In the Matter of Rubin Honeycutt, 23 BOLI 224, 232 (2002).*** *See also In the Matter of Leslie Elmer DeHart, 18 BOLI 199, 206-07(1999).*

❑ In order to determine whether claimants were employees or independent contractors under Oregon's minimum wage and wage collection laws, the forum relied on an "economic reality" test. The test, derived from one used by the federal courts when applying the Fair Labor Standards Act, helps to determine "whether the alleged employee, as a matter of economic reality, is economically dependent upon the business to which [he or she] renders [his or her] services." ***----- In the Matter of Triple A Construction, LLC, 23 BOLI 79, 92 (2002).***

❑ The forum is obliged to look at the totality of the circumstances when determining whether a worker is an independent contractor. ***----- In the Matter of Triple A Construction, LLC, 23 BOLI 79, 93 (2002).***

❑ When respondent directed claimant's work and supplied all of the equipment necessary to perform the work; claimant had no investment in respondent's business; claimant had no opportunity to earn a profit or suffer a loss, as respondent agreed to pay him a specific wage; respondent trained claimant to perform all the jobs claimant performed for respondent; claimant was hired for an indefinite period of time; and no one else employed claimant while he worked for respondent, the forum concluded that claimant was respondent's employee, not an independent contractor. ***----- In the Matter of Heiko Thanheiser, 23 BOLI 68, 75-76 (2002).***

❑ Respondent asserted in his answer that claimants were independent contractors, then did not appear at hearing. At hearing, both claimants credibly testified that respondent hired them, that they worked for respondent throughout the wage claim periods, that they worked 40+ hours per week for respondent during the wage claim period, that respondent paid them for their work prior to the wage claim periods, and that respondent fired them. There was no credible evidence that either claimant performed any other gainful work during the wage claim periods, had any investment in respondent's business, or had any control over their opportunity for profit or loss. Based on their testimony about the nature of the work they performed and the lack of evidence of complaints about their work, the forum inferred that one claimant had the skills of a competent auto body repairman/painter and the other was an average unskilled laborer. There was no credible evidence concerning the initiative exercised by either claimant in performing their work. The forum concluded that both claimants were employees, not independent contractors. ***----- In the Matter of Stan Lynch, 23 BOLI 34, 42-43 (2002).***

❑ The forum applied the "economic reality" test to determine whether claimant was an employee or independent contractor under Oregon's minimum wage and wage collection laws. ***----- In the Matter of Ilya Simchuk, 22 BOLI 186, 194-96 (2001).***

❑ The forum considered five factors in applying the "economic reality" test. Those factors were: the degree of control respondent had over claimant; the extent of relative investments of claimant and respondent; the degree to which claimant's opportunity for profit and loss

was determined by respondent; the skill and initiative required in performing the job; and the permanency of the relationship. ***----- In the Matter of Ilya Simchuk, 22 BOLI 186, 194-96 (2001).***

❑ After applying the "economic reality" test, the forum determined that claimant was an employee, not an independent contractor as alleged by respondent, and awarded claimant unpaid wages and penalty wages. ***----- In the Matter of Ilya Simchuk, 22 BOLI 186, 194-96 (2001).***

❑ Intent is not a controlling factor in determining whether an employment relationship exists. ***----- In the Matter of Ann L. Swanger, 19 BOLI 42, 55 (1999)***.

❑ Claimant, who sold cars for respondents, was an employee, not an independent contractor, when claimant had no means of attracting a higher volume of customers to the lot to increase his potential sales commissions; claimant had no investment in respondents' business; the skill and initiative required of claimant was no more than that required of other commission-paying jobs; claimant was selling cars on respondents' lot approximately 60% of the time that the lot was open; and there was no reliable evidence that claimant earned money by any other means from mid-November 1997 through March 7, 1998, except for a few cars he sold for another person. Claimant's "economic reality" in this time period rested on the number of hours he worked and volume of cars he sold at respondents' business. ***----- In the Matter of Ann L. Swanger, 19 BOLI 42, 55 (1999)***.

❑ Claimant, who cleaned horse stalls for respondents, was respondents' employee, not an independent contractor, when claimant reported to work at a time mutually agreeable to her and respondents; claimant used respondents' tools to perform her work; claimant performed only work that respondents directed her to perform; claimant had no investment in the business, while respondents owned the horses and equipment and leased the facilities; the only skills required of claimant were the ability to use a pitchfork and wheelbarrow; and there was no evidence that respondents or claimant, at any time prior to claimant's termination, considered her employment to be limited to a specific duration of time. ***----- In the Matter of Debbie Frampton, 19 BOLI 27, 36-37 (1999)***.

❑ The forum rejected respondents' argument that claimant's practice of submitting invoices showing the money due to her and respondents' intent that claimant perform work as an independent contractor demonstrated that claimant was an independent contractor. The "economic reality" test used by this forum focuses on substance, not form. Mere use of a form entitled "INVOICE" that an independent contractor might use is not an indicator of independent contractor status. Likewise, an employer's intent and what the employer calls a worker do not determine whether the worker is an employee or an independent contractor. ***----- In the Matter of Debbie Frampton, 19 BOLI 27, 37 (1999)***.

❑ When claimant had no financial interest in the business and no opportunity to suffer a profit or loss; respondent exercised extensive control over the claimant's work; respondent supplied the vehicle, telephone and other equipment that the claimant needed to perform his job; and respondent engaged the claimant's services for an indefinite period, the forum concluded that claimant was an employee and not an independent contractor. ***----- In the Matter of Leslie Elmer DeHart, 18 BOLI 199, 207-08 (1999)***.

❑ Respondent's unsworn assertion that claimants were independent contractors was unpersuasive when credible evidence in the record established that claimants were hired as hourly clerical workers, respondent furnished their equipment and materials, and respondent completely controlled their work. ***----- In the Matter of R.L. Chapman Ent. Ltd., 17 BOLI 277, 284 (1999)***.

❑ A commission-only method of compensation is not, by itself, indicative of independent contractor status. Oregon's minimum wage law recognizes that employees who receive commission payments must still earn at least the minimum wage. ORS 653.035(2). In previous cases, the commissioner has arrived at the same conclusion. ***----- In the Matter of Frances Bristow, 16 BOLI 28, 38-39 (1997).***

❑ In a minimum wage claim case in which respondent alleged that claimant was an independent contractor, the commissioner held that "'employee' means any individual who otherwise than as a copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays respondent agrees to pay such individual at a fixed rate * * *." ***----- In the Matter of Frances Bristow, 16 BOLI 28, 36-37 (1997).*** *See also In the Matter of Graciela Vargas, 16 BOLI 246, 252 (1998).*

❑ The forum applied an "economic reality" test and determined that nude dancers at a bar were employees, not independent contractors. ***----- In the Matter of Geoffroy Enterprises, Inc., 15 BOLI 148, 162-65 (1996).***

❑ The forum abandoned the *All Seasons* "retained right to control" test as its means of determining whether a wage claimant was an employee or independent contractor and adopted the "economic reality" test developed by federal courts in FLSA cases. This test considers five factors to gauge the degree of the claimant's economic dependency on the employer, with no single factor being determinative: (1) The degree of control exercised by the alleged employer; (2) The extent of the relative investment of the worker and the 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 requested in performing the job; and (5) The permanency of the relationship. ***----- In the Matter of Geoffroy Enterprises, Inc., 15 BOLI 148, 162-65 (1996).***

❑ When a respondent employer controlled the hours, location, tasks, and the manner in which a wage claimant's tasks were accomplished, and initially offered an hourly rate, claimant was an employee and respondent could not change the employment

relationship by noting "Sub Contract Labor" on a paycheck. ***----- In the Matter of Danny Jones, 15 BOLI 96, 104 (1996).***

❑ When the alleged employer has the right to control how work is performed, furnishes the equipment, materials, and facilities used by the alleged employee, and the alleged employee cannot hire others to assist with the assigned work, the relationship is one of employer-employee and not one involving an independent contractor. ***----- In the Matter of LaVerne Springer, 15 BOLI 47, 67 (1996).***

❑ The forum used the definitions of "employee" and "employer" in ORS 652.310 to interpret ORS 652.140 and 652.150 and found that respondent was an employer and 51 wage claimants were respondent's employees and not co-partners or independent contractors. ***----- In the Matter of Anna Pache, 13 BOLI 249, 267 (1994).*** *See also In the Matter of Crystal Heart Books Co., 12 BOLI 33, 41 (1993).*

❑ Claimant rendered personal services to respondent, who agreed to pay her at a fixed rate, and respondent had the right to control her work, her hours, and the services she provided as an integral part of respondent's business. Claimant was employed for an indefinite period, used only respondent's facilities, equipment and supplies, and sold respondent's products. The forum found that claimant was a subordinate party and an employee, not an independent contractor or coo-partner. ***----- In the Matter of Mary Stewart-Davis, 13 BOLI 188, 198 (1994).***

> Affirmed without opinion, *Stewart-Davis v. Bureau of Labor and Industries,* 136 Or App 212, 901 P2d 268 (1995).

❑ When respondent exercised control over the scope and method of claimant's presentation for the solicitation of sales appointments, as well as other details of claimant's work, and claimant provided services that were an integral part of respondent's business, was hired for an indefinite period of time, worked exclusively for respondent, used only respondent's supplies, and derived no benefits other than the expected wages for her work, the commissioner found that claimant was respondent's employee and not an independent contractor. ***----- In the Matter of U.S. Telecom International, 13 BOLI 114, 121 (1994).***

❑ To ascertain the distinction between an employee and an independent contractor, the primary question is the extent to which the employer has the right to control and direct the details and manner of performance of the worker's work. The inquiry focuses on control over how work will be done rather than the result itself, that is, control over how work will be done rather than just what work will be done. If the evidence establishes that the worker is the subordinate party, depending on the employer's business, the worker is an employee rather than an independent contractor. ***----- In the Matter of U.S. Telecom International, 13 BOLI 114, 120-21 (1994).***

❑ To ascertain the distinction between an employee and an independent contractor, the primary question is the extent to which the employer has the right to control and direct the details and manner of performance of the worker's work. The inquiry focuses on control over the manner and means of accomplishing a result rather than the result itself, that is, control over how work will be done rather than just what work will be done. The inquiry focuses on the existence, rather than the actual exercise of such a right. If the evidence establishes that the worker is the subordinate party, depending on the employer's business, the worker is an employee rather than an independent contractor. ***----- In the Matter of Martin's Mercantile, 12 BOLI 262, 272 (1994).***

❑ Respondent had the right to control the details and methods of claimant's work, supplied the store space and all the materials claimant used in her job, and claimant worked exclusively for respondent, derived no benefit other than expected wages from her work and an option to buy stock, and was a subordinate party, dependent on respondent. Under these circumstances, claimant was not an independent contractor. ***----- In the Matter of Crystal Heart Books Co., 12 BOLI 33, 44 (1993).***

❑ Oregon statutes do not define "independent contractor" for purposes of wage claim law. Oregon case law holds that the primary determinant is the extent to which the employer has the right to control and direct the details and manner of performance of the worker's work. ***----- In the Matter of Rainbow Auto Parts and Dismantlers, 10 BOLI 66, 74 (1991).***

❑ Respondent raised the defense that a wage claimant was an independent contractor. The forum followed previous case law that held that the primary question is the extent to which the employer has the right to control and direct the details and manner of performance of the worker's work. The inquiry focuses on control over how work will be done rather than the result itself, that is, control over how work will be done rather than just what work will be done. If the evidence establishes that the worker is the subordinate party, depending on the employer's business, the worker is an employee rather than an independent contractor. ***----- In the Matter of Kevin McGrew, 8 BOLI 251, 261 (1990).***

❑ The commissioner found that wage claimants were not independent contractors based on evidence establishing that the claimants provided services to respondent's business, respondent had the right to control the details and methods of claimants' work, claimants were hired for an indefinite period of time, claimants worked exclusively for respondent on a salary basis, claimants used only respondent's supplies, and claimants derived no benefit other than expected wages from their work. ***----- In the Matter of Kevin McGrew, 8 BOLI 251, 261 (1990).***

❑ The forum held that minors performing work for respondent were not independent contractors, but commissioned salespersons and employees subject to child labor laws when the minors did not control any aspects of the business operation; they did not procure or purchase in advance any of the goods they sold; they were not engaged in the business of selling goods outside of their work for the employer; they did not furnish any equipment or transportation; they did not control the price structure of goods sold or when they

sold the goods; they bore no risk of failure and were able to turn back any unsold goods; customer's checks were made out to the employer; and the employer covered the minors under the employer's workers' compensation policy. ***----- In the Matter of Northwest Advancement, Inc., 6 BOLI 71, 87, 99 (1987).***

> Affirmed, *Northwest Advancement, Inc. v. Bureau of Labor*, 96 Or App 146, 772 P2d 943 (1989). See also *Northwest Advancement, Inc. v. Bureau of Labor*, 96 Or App 133, 772 P2d 934 (1989).

❑ In a child labor case, when crew chiefs were requested to provide transportation for themselves and their crew of teenagers, but invested no money and took no risk of loss, were not requested to pay in advance for the goods that their teenage crews sold; could return any goods remaining unsold; did not have their own businesses prior to entering into their relationship with the employer; when the employer controlled most aspects of how the crew chiefs conducted business, provided the credit for all the goods and the central accounting system for sales and inventory; and when the crew chiefs turned over all moneys to the employer, which then paid the crew chiefs a share of commission of the goods sold, the forum held that the crew chiefs were acting in the same capacity as any commissioned salesperson who is an employee of a parent company, and were not acting as independent contractors, but were working as commissioned salesmen for the employer. ***----- In the Matter of Northwest Advancement, Inc., 6 BOLI 71, 99 (1987).***

> Affirmed, *Northwest Advancement, Inc. v. Bureau of Labor*, 96 Or App 146, 772 P2d 943 (1989). See also *Northwest Advancement, Inc. v. Bureau of Labor*, 96 Or App 133, 772 P2d 934 (1989).

❑ When a wage claimant has been a regular hourly employee, and an employer seeks to deny liability for wages by asserting that, at a certain point during employment, the claimant's status changed from employee to either independent contractor or partner, and the claimant disputes this, the employer has the burden of proving the change in status. ***----- In the Matter of Superior Forest Products, 4 BOLI 223, 231 (1984).***

❑ Respondent hired claimant as a truck driver but denied claimant was an employee. There was no indication that claimant was working as an outside trucking contractor; he did not provide the truck or control the schedule or fees. Based on the testimony, the forum found that claimant was an employee. ***----- In the Matter of Richard Panek, 4 BOLI 218, 222 (1984).***

❑ Claimant was an employee, not an independent contractor, when a respondent employer had the right to control and direct the details and methods of claimant's work, even though respondent did not have the exclusive right to control several of the circumstances of the performance of that work. ***----- In the Matter of All Season Insulation Company, Inc., 2 BOLI 264, 274 (1982).***

❑ The forum looked to Oregon case law to ascertain the legal distinction between an employee and an independent contractor because Oregon statutory law does not define "independent contractor" for purposes of wage claim law. ***----- In the Matter of All Season Insulation Company, Inc., 2 BOLI 264, 274 (1982).***

❑ Oregon case law, like federal case law, has consistently stated that no pat formula exists to determine whether a worker is an employee or an independent contractor. ***----- In the Matter of All Season Insulation Company, Inc., 2 BOLI 264, 274 (1982).***

❑ Oregon case law has consistently held that the primary question in distinguishing between an employee and an independent contractor is to what extent the employer has the right to control and direct the details and manner of performance of the worker's work. This question focuses upon the existence, rather than the actual exercise, of such a right. It also focuses upon control over the manner and means of accomplishing a result rather than the result itself, *i.e.* control over how work will be done rather than just what work will be done. If the answer to the above question establishes that the worker is the subordinate party, depending upon the employer's business, the worker is an employee rather than an independent contractor. ***----- In the Matter of All Season Insulation Company, Inc., 2 BOLI 264, 274 (1982).***

❑ To determine the amount of control an employer had over a claimant, the forum considered the following questions: (A) Did the employer have the right to detail how the claimant would perform his work, or did the claimant use his own methods, with the employer having no control except as to the ultimate result; (B) Did the employer retain the claimant for a relatively long or indefinite time period or on a job-by-job basis, and did the employer retain the claimant on a fulltime or part-time basis or intermittently; (C) Could the claimant employ workers to perform or help perform the claimant's work for the employer; (D) Could the claimant have performed work for others while working for the employer; (E) Who furnished the equipment, tools and materials that claimant used in his work for the employer; (F) Who determined the claimant's particular hours of work; (G) Was the claimant's former work relationship with the employer that of an employee or an independent contractor; (H) Was the claimant's work the same as or similar to work done by the employer's employees or by the employer's independent contractors; (I) Was it common practice in the employer's industry to retain such workers as independent contractors or as employees; (J) Was the claimant to be paid by the hour or by the unit of work performed; and (K) Was the claimant treated like the employer's employees or independent contractors with regard to the more tangential circumstances of his work, e.g. insurance coverage, taxes withheld? The most determinative of these must be the answers to questions (A), (C), and (E), as they concern the right to control the methods of the claimant's work itself, rather than the right to control a circumstance relating to that work, such as time and frequency/duration of the subject work or the existence of other work. ***----- In the Matter of All Season Insulation Company, Inc., 2 BOLI 264, 274-78 (1982).***

2.3.2 --- Degree of Control Exercised by

Alleged Employer

❑ When claimants and respondent worked almost identical schedules, one claimant rode to and from work with respondent, and respondent told them how he wanted the work performed, the forum found that the degree of control exercised by respondent indicated that claimants were employees, not independent contractors. ***----- In the Matter of Gary Lee Lucas, 26 BOLI 198, 211-12 (2005).***

❑ When claimant agreed to take on a commercial painting job for a flat fee, the forum inferred that claimant was no longer economically dependent on respondent based on evidence that respondent did not supervise or control claimant's work schedule or pay rate on the commercial painting job as it did on previously hourly residential projects; claimant's acknowledgement that he was on his "own time" when he worked on the paint job and that he chose to work full eight hour days rather than the shorter work schedule respondent dictated on the residential projects; claimant's admission that he, not respondent, determined the rate he would "charge" to do the work; and the record as a whole that showed respondent asked for and accepted claimant's "bid" on the commercial painting job. ***----- In the Matter of Kilmore Enterprises, 26 BOLI 111,121 (2004).***

❑ Several unique circumstances suggested that respondent retained or exercised considerable control over the workers who harvested cones for its business. Respondent did not need nor did it seek out persons with specialized skills to harvest cones. Instead, it needed unskilled labor to harvest a product necessary to its annual production of wreaths. Because work in its nursery was slow from May through July, respondent offered its regular employees an alternative to lay-off by paying them to harvest cones for respondent's use in its nursery, *i.e.*, a choice between continuing to receive a pay check or not. Additionally, respondent determined the compensation method, negotiated with private land owners for sites to harvest cones, and purchased the permits necessary to harvest cones on federal land. All the workers had to do was show up at the predetermined sites, and even that was orchestrated by respondent. Because respondent's workers did not own automobiles, respondent provided roundtrip transportation from Washington County to the Deschutes National Forest and provided free lodging for the workers at the work sites. None of the workers spoke English and because they were out in the forest, approximately 140 miles from Bend, the nearest city, the forum inferred they were even more dependent upon respondent's control than workers who speak English. Respondent's foreman tracked and reported the number of bushels harvested, if respondent asked, and monitored the quality of cones collected by the workers. According to respondent, the foreman determined which cones made a "good crop" and rejected those that did not meet respondent's specifications. The forum inferred from the record that the manner and means of cone harvesting is not particularly complex and may not require close supervision, but concluded, based on the totality of the circumstances, that respondent controlled the workers' presence on the work site, the workers' payroll, and the daily working conditions, *i.e.*, lodging and transportation, to an extent indicative of an employer-employee relationship. ***----- In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration, 25 BOLI 12, 42-43 (2003).***

> Affirmed without opinion, *Ochoa v. Bureau of Labor and Industries*, 196 Or App 639, 103 P3d 1212 (2004).

❑ When respondent hired claimants on a per job basis, but claimants had no control over how they approached each assigned project, the forum found they were hired as day laborers to perform work in accordance with respondent's instructions and, as such, were working at the direction and under the total control of respondent. ***----- In the Matter of Triple A Construction, LLC, 23 BOLI 79, 92 (2002).***

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

❑ When claimants had no investment in respondent's construction project, were not licensed contractors, did not bid on the project, had no opportunity to make more money by working more efficiently and finishing the job in fewer hours, and respondent provided most of the tools, the forum found that claimants' lack of investment in respondent's business indicated that claimants were employees, not independent contractors. ***----- In the Matter of Gary Lee Lucas, 26 BOLI 198, 211-12 (2005).***

❑ When workers had no investment in respondent's nursery business other than their physical presence in Central Oregon and the time they expended gathering cones for respondent's use, and respondents invested in vehicles to transport the workers to Central Oregon, invested in camping trailers to house the workers for the duration of their stay, and furnished the $2,500 permits (without which none of the workers could have collected the cones) and equipment the workers used to gather cones, the forum concluded that that the workers could not have performed the work they did for respondent without respondent's vastly greater investment and that the relative investments indicated an employment relationship. ***----- In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration, 25 BOLI 12, 43 (2003).***

> Affirmed without opinion, *Ochoa v. Bureau of Labor and Industries*, 196 Or App 639, 103 P3d 1212 (2004).

❑ When claimants may have brought their own hammer or tape measure to use on the job site, but evidence showed that they were dependent on the equipment respondent provided to get the job done and could not have performed their work without the tools and equipment provided by respondent, this indicated that claimants were respondent's employees, not independent contractors. ***----- In the Matter of Triple A Construction, LLC, 23 BOLI 79, 92-93 (2002).***

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

❑ When claimants were hourly employees and had no opportunity for profit or loss, the forum found that

claimants' lack of investment in respondent's business indicated that claimants were employees, not independent contractors. ***----- In the Matter of Gary Lee Lucas, 26 BOLI 198, 211-12(2005).***

❑ Although claimant regularly performed hourly work for respondent in the months preceding a commercial painting job in which claimant bid on and agreed to perform for respondent, evidence showed that he launched his own contracting business and made his services available to the general public and had ceased working for respondent at the time he performed the commercial painting job. The forum found that claimant was transitioning from wage earner to entrepreneur and was no longer dependent upon respondent for the opportunity to render services. ***----- In the Matter of Kilmore Enterprises, 26 BOLI 111,122 (2004).***

❑ When workers had no investment in respondent's business and respondent determined and exclusively controlled the amount of the workers' piece rate, they could earn no profit and suffer no loss, indicating an employment relationship. ***----- In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration, 25 BOLI 12, 43-44 (2003).***

> Affirmed without opinion, *Ochoa v. Bureau of Labor and Industries*, 196 Or App 639, 103 P3d 1212 (2004).

❑ Compensation by piece rate is not independently indicative of independent contractor status. ***----- In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration, 25 BOLI 12, 44 (2003).***

> Affirmed without opinion, *Ochoa v. Bureau of Labor and Industries*, 196 Or App 639, 103 P3d 1212 (2004).

❑ When respondent determined and exclusively controlled the amount of claimants' hourly rate and respondent produced no evidence that claimants were independent contractors who risked a loss of money if the project fell through or was not completed, this indicated that claimants were "wage earners toiling for a living, [rather] than independent entrepreneurs seeking a return on their risky capital investments." ***----- In the Matter of Triple A Construction, LLC, 23 BOLI 79, 93 (2002).***

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

❑ When the skill and initiative required of claimants was that of an ordinary framer and they worked alongside and took directions from respondent, did not bid on the job, did no design work associated with the job, and there was no evidence that they did any work independently, the forum found these facts indicated that claimants were employees, not independent contractors. ***----- In the Matter of Gary Lee Lucas, 26 BOLI 198, 211-12(2005).***

❑ When the amount of money workers earned somewhat depended upon the efficiency of their work, but the skill required was limited to their ability to bend over and pick up cones and the initiative required for picking cones was no more than that required of any other piecework, the forum found that cone picking did not reach the level of an enterprise for which success depends on the initiative, judgment or foresight of the typical independent contractor. ***----- In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration, 25 BOLI 12, 44 (2003).***

> Affirmed without opinion, *Ochoa v. Bureau of Labor and Industries*, 196 Or App 639, 103 P3d 1212 (2004).

❑ When claimants had the skills necessary to wield hammers and saws and had previous experience working for respondent on similar jobs, but had not attended any trade schools or taken any classes in construction and did not have a CCB license, the forum concluded that claimants possessed no special skills or talents that would have made them likely to be independent contractors while working for respondent. ***----- In the Matter of Triple A Construction, LLC, 23 BOLI 79, 93 (2002).***

2.3.6 --- Permanency of the Relationship

❑ On a construction job, when claimants testified that respondent told them only that there might be other projects in the future, the forum concluded that was insufficient evidence from which to conclude that respondent hired them for an indefinite period of time. ***----- In the Matter of Gary Lee Lucas, 26 BOLI 198, 212(2005).***

❑ When seasonal cone pickers were respondent's "regular" nursery crew who had worked for respondent prior to the cone harvest and who returned to the nursery after the cones were harvested, the crew was on respondent's regular payroll as employees except for cone picking, and respondent presented no evidence to explain the temporary change in its relationship with its workers, other than its acknowledgement, through its president, that maintaining records for workers out in the field would "cause a lot of headaches," respondent's designation of its workers as "cone sellers" or "independent contractors" did not change the employment relationship. ***----- In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration, 25 BOLI 12, 44-45 (2003).***

> Affirmed without opinion, *Ochoa v. Bureau of Labor and Industries*, 196 Or App 639, 103 P3d 1212 (2004).

❑ When claimants were laborers hired for a short term remodeling project to perform a variety of tasks that did not require them to possess a high degree of initiative, judgment, foresight, or any special skills, the forum held that the impermanence of a particular job alone does not create an independent contractor relationship. ***----- In the Matter of Triple A Construction, LLC, 23 BOLI 79, 93 (2002).***

2.4 --- Termination of Relationship

❑ When claimant was employed under a salary agreement for an indefinite period, the agreement was terminated when claimant quit and the employer had no obligation to pay claimant for time beyond the day he quit. ***----- In the Matter of Central Pacific Freight Lines, Inc., 7 BOLI 272, 279 (1989).***

❑ Respondent discharged claimant when respondent

ceased doing business and permanently closed the store. Claimant's earned and unpaid wages became due and payable immediately upon the discharge. ***----- In the Matter of John Cowdrey, 5 BOLI 291, 297-98 (1986).***

❑ An employer discharged her employees when the employer terminated a manager's management agreement and temporarily closed the business. ***----- In the Matter of Lois Short, 5 BOLI 277, 286 (1986).***

❑ When a respondent hired claimants to cut some logs, the employment was terminated by mutual agreement when the claimants finished the work that respondent hired them to do. ***----- In the Matter of Art Farbee, 5 BOLI 268, 274 (1986).***

2.5 --- Volunteers

❑ The forum held that claimant did not perform work for respondent as a volunteer under ORS 653.010(3) when claimant did not provide respondent with voluntary or donated services performed for no compensation or without expectation or contemplation of compensation and respondent ran a for-profit restaurant; was not a public employer or religious, charitable, educational, public service or similar nonprofit corporation, organization or institution for community service; and acknowledged actually paying claimant for some work. ***----- In the Matter of Graciela Vargas, 16 BOLI 246, 259 (1998).***

❑ Work may be voluntary, without expectation of compensation, *only* if the entity for which the services are performed is "a public employer * * * or a religious, charitable, educational, public service or similar nonprofit corporation, organization or institution for community service, religious or humanitarian reasons" or the work is part of a work training program administered under the state or federal assistance laws. ***----- In the Matter of Arabian Riding and Recreation Corp., 16 BOI 79, 92 (1997).***

❑ Respondent operated a ranch for horse rentals and riding and permitted minors to work at the ranch in exchange for "free" horse riding. The commissioner held that the minors were employees, not volunteers, because there was no evidence or attempt to show that respondent was a public employer or a religious, charitable, or educational institution as described or was involved in a federal or state public assistance program. ***----- In the Matter of Arabian Riding and Recreation Corp., 16 BOI 79, 92 (1997).***

❑ Respondent argued that a 16-year-old minor was an unpaid intern exchanging his volunteer labor for training and knowledge in the film business and introduced evidence that such intern arrangements were common throughout the film industry. The commissioner found that no matter how widespread that type of "training" might have been in the past or was elsewhere, it is not lawful in Oregon, whether involving adult or minor employees. ***----- In the Matter of LaVerne Springer, 15 BOLI 47, 67 (1996).***

3.0 RESPONDENTS/EMPLOYERS

3.1 --- Generally

❑ The forum concluded that respondent employed claimant based on claimant's credible testimony and respondent's admissions in the answer and to the agency investigator. ***----- In the Matter of Sue Dana, 28 BOLI 22, 30 (2006).***

❑ The forum rejected respondents' argument that if their partnership was not an LLP, then it was a *de facto* limited liability company (LLC), on the basis that an LLC, as a matter of law, cannot exist as a matter of law until the LLC's articles of organization have been executed and delivered to the secretary of state for filing, and respondents never took either action. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 230 (2006).***

❑ Merely being an FLSA-regulated employer is not a total defense under ORS 652.310(1)(b). ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 278-280 (2001).***

> Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 188 Or App 566, 65 P3d 1132 (2003).

❑ In a contested case hearing, the agency could only proceed against the single respondent identified in the notice of hearing and not against an additional employer identified only in the notice of intent and order of determination. ***----- In the Matter of Sabas Gonzalez, 19 BOLI 1, 3 (1999)***.

❑ The term "employer" in ORS 652.310(1) includes both "any successor to the business of any employer" and "any lessee or purchaser of any employer's business property for the continuation of the same business." ***----- In the Matter of Catalogfinder, Inc., 18 BOLI 242, 256 (1999)***.

❑ When respondent assumed the leases for essential equipment, furniture and office space used by another company and continued that company's business virtually unchanged, respondent was a "lessee" of the other company's business property for the continuation of the same business, and was an "employer" under ORS 652.310(1). ***----- In the Matter of Catalogfinder, Inc., 18 BOLI 242, 256 (1999)***.

❑ The agency submitted Corporation Division documents showing that an individual employer voluntarily canceled his assumed business name one day and formed a corporation bearing a similar name that same day. Claimant testified that, even after the date the corporation was formed, his paychecks had the individual's name and assumed business name on them. Based on these facts, the forum found that the agency had not proved that the corporation, rather than the individual, was claimant's employer after the date the corporation was formed. ***----- In the Matter of Leslie Elmer DeHart, 18 BOLI 199, 203, 205-06 (1999)***.

❑ When part of wage claimant's unpaid wages were earned with an employer who was not a party in the contested case proceeding, the commissioner could not order that employer to pay wages or penalty wages. ***----- In the Matter of Jack Crum Ranches, Inc., 14 BOLI 258, 268 (1995).***

❑ The forum used the definitions of "employee" and "employer" in ORS 652.310 to interpret ORS 652.140 and 652.150 and found that respondent was an employer and 51 wage claimants were respondent's

employees and not co-partners or independent contractors. ***----- In the Matter of Anna Pache, 13 BOLI 249, 267 (1994).*** *See also In the Matter of Crystal Heart Books Co., 12 BOLI 33, 41 (1993).*

❑ The forum amended the order of determination to conform to proof at hearing when the evidence showed that claimant's wage claim arose while the corporate owner was doing business as an individual proprietor before incorporation, and that the individual proprietor was the employer responsible for unpaid wages and penalties. ***----- In the Matter of La Estrellita, Inc., 12 BOLI 232, 234 (1994).***

❑ A father and son asserted that each of them separately employed claimant, and the father requested to be added and was granted party status at hearing. The commissioner held that the father was the son's employee or agent based on evidence that the father and son, along with their wife-mother, operated a service station and logging truck business as a family unit; the service station and truck businesses were intertwined; the son's and father's finances were intermingled; the wife-mother handled the bookkeeping and business matters for the station and the truck; and both the son and father hired claimant and directed his duties around the service station. ***----- In the Matter of Dan's Ukiah Service, 8 BOLI 96, 105 (1989).***

❑ The agency could not raise the statute of frauds as a defense to employers' sale of their business under an oral agreement to a buyer because this defense can only be asserted by parties to a contract or by their privies. The parties to the contract were the employers and the buyer and the agency was a stranger to the sale contract. ***----- In the Matter of Anita's Flowers & Boutique, 6 BOLI 258, 267 (1987).***

> Overruled in part on other grounds, *In the Matter of Central Pacific Freight Lines, Inc.,* 7 BOLI 272, 280 (1972).

❑ An employer who attempted to sell her business to a purchaser who managed the business while the sale was pending was responsible for payment of wages earned during the period of the pending sale. ***----- In the Matter of Lois Short, 5 BOLI 277, 286 (1986).***

3.2 --- Corporations/Shareholders

3.2.1 --- Generally

❑ In the absence of evidence that business registrations with the Corporations Division are a sham or subterfuge to conceal an unlawful purpose, the forum will not disregard a duly registered corporation or assumed business name verifying ownership. ***----- In the Matter of Jorge E. Lopez, 28 BOLI 10, 21 (2006).***

❑ Respondent's statements that he owed two claimants some money did not constitute an admission that he was their employer when he was the manager of the restaurant at which claimant was employed. ***----- In the Matter of Jorge E. Lopez, 28 BOLI 10, 21 (2006).***

❑ Claimants' subjective belief that respondent was the owner and sole proprietor of the restaurant where claimants worked was not determinative when a Corporations Division document showed that the restaurant was owned by someone else. Rather, the forum found that the identity that the owner had disclosed to the Corporations Division in accordance with statutory registration requirements was determinative. ***----- In the Matter of Jorge E. Lopez, 28 BOLI 10, 20 (2006).***

❑ Undisputed evidence in the form of a Corporations Division document showed that P&P Performance, Inc., a duly registered Oregon corporation, was conducting business under the assumed business name of Mi Ranchito Restaurant during the time claimant worked at the restaurant. The same document showed that respondent Lopez was the president and registered agent of P&P Performance, Inc. The evidence also showed that the agency sent a demand letter on claimant's behalf to P&P Performance, Inc. dba Mi Ranchito Restaurant, "Attn: Jorge Lopez" and then, inexplicably, issued order of determination No. 03-2780 that named Jorge Lopez, individually, as a sole proprietor, and alleged respondent was claimant's employer during the wage claim period. However, the agency did not allege, and there was no evidence in the record that showed respondent Lopez was a successor to the corporation. Although the agency maintained that respondent was personally liable for the corporate obligation because he did not observe the "appropriate corporate formalities," it did not allege and or seek to amend its pleading to include that particular theory of recovery. The agency also did not allege that P&P Performance, Inc. was under respondent's actual control or that claimant's inability to recover wages from the corporation resulted from improper conduct on respondent's part. The agency did not plead facts or put on any evidence pertaining to respondent's misconduct or the corporation's failure to observe corporate formalities. Consequently, in light of evidence showing that respondent was acting as an agent for the corporation during times material to claimant's wage claim and not as a sole proprietor, and in the absence of evidence that would relieve respondent of his shareholder immunity, the forum found that the agency failed to establish that respondent employed claimant and dismissed the charges against respondent Lopez. ***----- In the Matter of Jorge E. Lopez, 28 BOLI 10, 18-19 (2006).***

❑ 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. ***----- In the Matter of Jorge E. Lopez, 28 BOLI 10, 18-19 (2006).***

❑ When two wage claimants earned wages before and after a corporation was involuntarily dissolved, respondent, who was the successor to the corporation, was liable for wages earned before the dissolution. Respondent was the employer of claimants on the dates when their employment terminated and was liable for violations of ORS 652.140 and for penalty wages pursuant to ORS 652.150. ***----- In the Matter of Susan Palmer, 15 BOLI 226, 234 (1997).***

❑ When an individual was the sole owner and shareholder of a corporation and evidence indicated that he operated in a corporate capacity, the commissioner

found that, despite some personal assurances to employees that they would be paid, the corporation was the employer. The commissioner noted that "[c]orporate immunity exists to foster legitimate business risk. Unfortunately, it may also form a shield for the unscrupulous." ***----- In the Matter of Blue Ribbon Christmas Trees, Inc., 12 BOLI 209, 222 (1994).***

❑ The agency brought a wage collection action against respondent individually under a purported assumed business name. The available evidence established that the name was that of a corporation, that respondent habitually acted as a representative of that corporation or of other corporations, including written agreements and bank accounts signed as a corporate official, and there was no evidence as to the actual ownership of or respondent's ownership interest in any of the corporations. The commissioner concluded that the agency had not established that respondent acted as an individual proprietor or that the corporate form was a sham. ***----- In the Matter of Microtan Smart Cable, 11 BOLI 128, 137-38 (1992).***

❑ Two employers, a dissolved corporation and its sole owner and president, were named in an order of determination. The sole owner was found liable for penalty wages when he was a successor in interest to the dissolved corporation and, in addition, he failed to pay claimant's wages that were earned both before and after the corporation dissolved. ***----- In the Matter of Waylon & Willies, Inc., 7 BOLI 68, 74-75 (1988).***

❑ The forum held that any recovery for unpaid wages must be made against the corporate entity and not the corporation's president and owner personally when the corporation was delinquent in its registration with the Oregon Corporation commissioner, but was never involuntarily dissolved. The corporation would have ceased to exist only if it had been involuntarily dissolved. Even when involuntarily dissolution occurs, a corporation can be fully reinstated when it cures whatever defect caused the dissolution, as reinstatement relates back to the date of dissolution such that the existence of the corporation is deemed to have continued without interruption from that date. ***----- In the Matter of Superior Forest Products, 4 BOLI 223, 224 (1984).***

3.2.2 --- Piercing the Corporate Veil

❑ In the absence of evidence that business registrations with the Corporations Division were a sham or subterfuge to conceal an unlawful purpose, the forum will not disregard a duly registered corporation or assumed business name verifying ownership. ***----- In the Matter of Jorge E. Lopez, 28 BOLI 10, 21 (2006).***

❑ When the agency did not plead facts or put on any evidence pertaining to an individual respondent's misconduct or his corporation's failure to observe corporate formalities, and evidence showed that he was acting as an agent for the corporation during times material to claimant's wage claim and not as a sole proprietor, and in the absence of evidence that would relieve respondent of his shareholder immunity, the forum found that the agency failed to establish that respondent employed claimant and dismissed the charges against the individual respondent. ***----- In the Matter of Jorge E. Lopez, 28 BOLI 10, 18-19 (2006).***

❑ 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. ***----- In the Matter of Jorge E. Lopez, 28 BOLI 10, 18-19 (2006).***

❑ When an individual was the sole owner and shareholder of a corporation and evidence indicated that he operated in a corporate capacity, the commissioner found that, despite some personal assurances to employees that they would be paid, the corporation was the employer. The commissioner noted that "[c]orporate immunity exists to foster legitimate business risk. Unfortunately, it may also form a shield for the unscrupulous." ***----- In the Matter of Blue Ribbon Christmas Trees, Inc., 12 BOLI 209, 222 (1994).***

❑ The agency brought a wage collection action against respondent individually under a purported assumed business name. The available evidence established that the name was that of a corporation, that respondent habitually acted as a representative of that corporation or of other corporations, including written agreements and bank accounts signed as a corporate official, and there was no evidence as to the actual ownership of or respondent's ownership interest in any of the corporations. The commissioner concluded that the agency had not established that respondent acted as an individual proprietor or that the corporate form was a sham. ***----- In the Matter of Microtan Smart Cable, 11 BOLI 128, 137-38 (1992).***

❑ In order for a creditor to recover from a corporate shareholder personally, disregarding the shareholder's corporate immunity because of the shareholder's control over the debtor corporation, the creditor must allege and prove not only the actual control but also that the creditor's inability to collect resulted from some form of improper conduct on the part of the shareholder. There must be a relationship between the actual control, the improper conduct, and the creditor's injury. Limited examples of such improper conduct include inadequate capitalization for the intended business, milking (payment of excessive dividends or sale of products to shareholders at a grossly reduced price), misrepresentation and commingling or confusion of assets, and evasion of statute through a subsidiary. ***----- In the Matter of Microtan Smart Cable, 11 BOLI 128, 138 (1992).***

❑ The forum held that any recovery for unpaid wages must be made against the corporate entity and not the corporation's president and owner personally when the corporation was delinquent in its registration with the Oregon Corporation commissioner, but was never involuntarily dissolved. The corporation would have ceased to exist only if it had been involuntarily dissolved. Even when involuntarily dissolution occurs, a corporation can be fully reinstated when it cures whatever defect caused the dissolution, as reinstatement relates back to the date of dissolution such that the existence of the corporation is deemed to have continued without interruption from that date. ***----- In the Matter of Superior Forest Products, 4 BOLI 223, 224 (1984).***

3.3 --- Agents

❑ An individual respondent's actions or inactions were properly imputed to a corporate respondent when the individual respondent was a co-owner and president of the corporate respondent. ***----- In the Matter of Crystal Heart Books Co., 12 BOLI 33, 36, 39 (1993).***

❑ A father and son asserted that each of them separately employed claimant, and the father requested to be added and was granted party status at hearing. The commissioner held that the father was the son's employee or agent based on evidence that the father and son, along with their wife-mother, operated a service station and logging truck business as a family unit; the service station and truck businesses were intertwined; the son's and father's finances were intermingled; the wife-mother handled the bookkeeping and business matters for the station and the truck; and both the son and father hired claimant and directed his duties around the service station. ***----- In the Matter of Dan's Ukiah Service, 8 BOLI 96, 105 (1989).***

❑ When respondent's wife and son talked to claimant about the wages due to claimant and gave her a memo acknowledging an amount of wages due, the commissioner found that they did so on respondent's behalf, and that the statements and actions and the knowledge they demonstrated were properly imputed to respondent. ***----- In the Matter of John Cowdrey, 5 BOLI 291, 297 (1986).***

❑ The actions and statements of respondent's manager, as well as the knowledge they indicate, are properly imputed to respondent. ***----- In the Matter of John Cowdrey, 5 BOLI 291, 297 (1986).***

❑ The actions, inactions, and knowledge of employees or agents of an employer are properly imputed to the respondent. ***----- In the Matter of Lois Short, 5 BOLI 277, 288 (1986).***

❑ When the employer's wife acted as the employer's bookkeeper and made representations to claimants about wage calculations and payments, her actions and motivations for those actions were properly imputed to the employer. ***----- In the Matter of Kenneth Cline, 4 BOLI 68, 76 (1983).***

❑ Agency, in general terms, is a consensual, fiduciary relationship between two persons created by law by which one party, the principal, has the right to control the conduct of the other, the agent, and the agent has a power to affect the legal relations of the principal. An agent is deemed to have only such powers as are expressly given by the principal or are reasonably required to perform in accordance with the authority granted by the principal. Once an agency relationship is established, the powers of the agent are, as a general rule, strictly construed. The types of powers given to agents fall into various categories. Express authority is that power that the principal has expressly given to the agent either orally or in writing. This type of power is also known as real authority. Implied authority is the power that is reasonably necessary to carry out express authority. For example, if an agent has the express authority to sell grain, the agent has the implied authority to receive or collect payment for it. Apparent authority is established when, by his conduct, the principal holds another person out to a third party, thus causing the third party to reasonably believe that the person thus held out has the authority to enter into contracts. Finally, inherent authority is that power for which the principal is liable, even though the agent has neither express nor apparent authority and there are no estoppel elements, due to the necessity of protecting third parties with whom the agent may be dealing. ***----- In the Matter of Leisureland Mobile Home Brokerage, Inc., 3 BOLI 3, 6 (1982).***

❑ The forum found that a respondent employer's agent had inherent authority to offer a salary guarantee that was binding on the employer when the agent (1) was in charge of the employer's branch operation; (2) had authority to hire and fire sales staff; and (3) was responsible for placing an advertisement that guaranteed a salary and to which the claimant responded and claimant had no notice that the employer had limited the agent's authority to offer salary guarantees. ***----- In the Matter of Leisureland Mobile Home Brokerage, Inc., 3 BOLI 3, 6-7 (1982).***

3.4 --- Joint Employers

❑ The agency named an individual and an LLC as joint employers in its order of determination. The agency established that the LLC was active during the entire period of claimant's employment, but did not allege or present any evidence to support a conclusion that the individual was a successor to the business of the LLC or a lessee or purchaser of the LLC's business for the continuance of the LLC's business, such that the individual would meet the definition of an "employer" under ORS 652.310. The forum held that the individual was not claimant's "employer" and had no personal liability. ***----- In the Matter of Orion Driftboat and Watercraft Company, 26 BOLI 137, 147-48 (2005).***

❑ When credible evidence established that claimant's work site was in respondent Alphabet House's office; the paychecks she wrote to herself were drawn on Alphabet House's account; her immediate supervisor was an employee of Alphabet House and testified that she was always an employee of Alphabet House; and when claimant never completed any paperwork for respondent Children's Center that a new employee would be asked to complete and she tracked her work time on Alphabet House "Time Billing" sheets and signed a letter as the "Director of Administrative Services, The Alphabet House," the forum found the agency failed to meet its burden of proof in establishing that the Children's Center jointly employed claimant and concluded that the Children's Center was therefore not liable for any of the unpaid wages. ***----- In the Matter of The Alphabet House, 24 BOLI 262, 279 (2003).***

❑ An employee leasing agreement between two respondents, a corporation engaged in reforestation and an employee leasing company, was no defense to an employee leasing company's failure to pay final wages when due to a claimant. Joint employers are responsible, both individually and jointly, for compliance with all the applicable provisions of Oregon's wage and hour laws. This is consistent with the responsibility of joint employers under the federal Fair Labor Standards Act. ***----- In the Matter of Staff, Inc., 16 BOLI 97, 115***

(1997).

❑ In a wage claim case with joint employers, claimant was owed wages based on unpaid work time and unlawful deductions. One respondent, an employee leasing company, argued that it shouldn't be liable for penalty wages because it did not know of problems with claimant's pay, it relied on payroll information from the other joint employer, claimant was silent about the payroll problems, and that silence constituted acquiescence and agreement with her wages. The commissioner found that claimant was not silent but complained regularly to the joint employer, per that employer's direction, and that the joint employer regularly put her off by claiming there were errors by the employee leasing company, and that the joint employer would investigate them. The commissioner held that the employee leasing company was not shielded from liability under these facts, stating that the employee leasing company had a legal responsibility to pay its employees properly and could not hide behind the co-employer, that the employee leasing company had a legal duty to keep appropriate records and to know the amount of wages due its employees, and the delegation by contract of some of those duties to claimant's co-employer did not relieve the employee leasing company from its responsibilities or liabilities. To the extent the joint employer had the contractual duty to maintain payroll records and give payroll information to the employee leasing company, the joint employer was the company's representative and the joint employer's knowledge should be imputed to the company. ***----- In the Matter of Staff, Inc., 16 BOLI 97, 119-20 (1997).***

❑ When two respondents jointly employed a wage claimant pursuant to an employee leasing agreement between them and each respondent retained sufficient control of the terms and conditions of employment to be considered a joint employer, the commissioner held that each joint employer was required to comply with Oregon's wage and hour laws and each employer was liable, both individually and jointly, for any violation of those laws. ***----- In the Matter of Staff, Inc., 16 BOLI 97, 114-16 (1997).***

❑ The agency issued an order of determination jointly against three separate employers who shared work crews and equipment. Each employer was found to have failed to pay all sums due to claimant, and the forum treated the employers as one employer for purposes of penalty wages and assessed penalty wages against them jointly. ***----- In the Matter of Jack Crum Ranches, Inc., 14 BOLI 258, 271 (1995).***

3.5 --- Partners

❑ The forum concluded that a partnership formed by two individuals employed claimant when undisputed evidence established that: (1) claimant was employed by the partnership that registered with the secretary of state under the name Captain Hooks Salvage and Auto Wrecking LLP; (2) the two individuals were the only partners in the business; and (3) one of the individuals interviewed and hired claimant, directed his work, and provided the tools and equipment that he used to perform his work. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 222 (2006).***

❑ Unless an exception exists, a partner is jointly and severally liable for all debts of the partnership. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 226 (2006).***

❑ When two individuals testified as to their right to receive a share of profits generated by Captain Hooks, their business; that they intended to be partners; that they participated and had the right to participate in the control of the business; that they both suffered losses in the business; and that they both intended to and did contribute money or property to the business, the forum concluded that Captain Hooks was a partnership during claimant's employment. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 226 (2006).***

❑ A partnership is never presumed; the burden of proving a partnership is upon the party alleging it. ***----- In the Matter of Bubbajohn Howard Washington, 21 BOLI 91, 100 (2000).*** *See also In the Matter of Crystal Heart Books Co., 12 BOLI 33, 42 (1993).*

❑ When there was no evidence presented that a co-respondent participated in the decision to hire claimant; that she directed claimant's work in any way; that she shared in any profits or liability from respondent's business; or that she controlled the operation of the business, other than taking money from customers, the forum concluded that the co-respondent was not a partner. ***----- In the Matter of Bubbajohn Howard Washington, 21 BOLI 91, 100 (2000).***

❑ A partnership is an association of two or more persons to carry on as co-owners a business for profit. The essential issue in determining the existence of a partnership is whether the parties intended to establish such a relationship. In the absence of an express agreement, the existence of a partnership may be inferred from the conduct of the parties, including a party's right to share in profits, the party's liability for losses, and the party's right to exert some control over the business. ***----- In the Matter of Scott A. Andersson, 17 BOLI 15, 21 (1998)***.

❑ Respondents who are partners are jointly and severally liable for unpaid wages and penalty wages. ***----- In the Matter of Scott A. Andersson, 17 BOLI 15, 20-21, 25 (1998)***. *See also In the Matter of Rainbow Auto Parts and Dismantlers, 10 BOLI 66, 74 (1991).*

❑ Partners are jointly and severally liable for penalty wages under ORS 652.150 for willfully failing to pay all wages or compensation to claimant when due as provided in ORS 652.140. ***----- In the Matter of Sylvia Montes, 11 BOLI 268, 275 (1993).*** *See also In the Matter of William Sarna, 11 BOLI 20, 21 (1992).*

❑ The actions or inactions of one partner are properly imputed to the other partner. ***----- In the Matter of Sylvia Montes, 11 BOLI 268, 274 (1993).***

❑ The commissioner held that two respondents, a father and son, were partners when (1) they filed for an assumed business name together as parties in interest; (2) they operated as a partnership; (3) both had signatory authority on the business bank accounts; and (4) both assigned and supervised the work of the claimants. As such, the act of each partner bound the

other partner; an admission or representation made by one partner was evidence against the partnership; and the partnership was liable for any wrongful act or omission of any partner acting in the ordinary course of business for the partnership. The commissioner properly imputed an admission by one partner that wages were earned, due, and unpaid to claimants in violation of ORS 652.140 to the partnership, and held that both partners were jointly and severally liable for the claims against the partnership. ***----- In the Matter of Richard Ilg, 11 BOLI 230, 233, 237, 239 (1993).***

❑ Two respondents, a husband and wife, were co-registrants of an assumed business name. The public viewed her as a co-owner; the claimants viewed her as a co-owner and operator of the business with her husband; and she had an active role in obtaining applications and other documents, keeping records, and preparing payrolls for the business. The commissioner held that she was a partner and was liable for unpaid wages and penalty wages. ***----- In the Matter of Flavors Northwest, 11 BOLI 215, 224, 228-29 (1993).***

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

3.6.1 --- In General

❑ A successor respondent's status as a foreign entity is not necessarily a factor when determining whether it conducts essentially the same business as its predecessor. Just as a foreign entity that conducts business in Oregon is subject to Oregon's wage and hour laws as to its Oregon employees, a foreign entity that succeeds to an Oregon entity and continues to conduct the identical business in Oregon may be held liable for its predecessor's failure to pay wages. ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 209 (2006).***

❑ When the agency asked the forum to hold a successor respondent jointly liable for ORS 653.055 civil penalties, the forum held that the successor was not liable for civil penalties because the agency failed to establish that the successor was an employer as defined in ORS 653.010(3) and paid claimant, its employee, less than the wages to which claimant was entitled under ORS 653.010 to 653.261. ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 205-06 (2006).***

❑ At hearing, the agency urged the forum to hold a corporate respondent predecessor and its LLC successor jointly liable, contending that the particular circumstances of the case and equity required that both entities be held responsible for penalty wages, contrary to the agency's longstanding policy of not holding successor employers liable for penalty wages. The agency argued that the LLC, through its sole principal, had actual knowledge of the corporation's penalty wage liability when the LLC was created and that the principal's choice to dissolve the corporate entity and establish a new entity that merely continued its predecessor's business was an apparent attempt to evade the wage and hour laws. The agency argued that the only equitable remedy was to hold the LLC jointly liable for penalty wages. The forum declined to find joint liability on the ground that the forum does not have the authority to fashion an equitable remedy. ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 203-04 (2006).***

❑ The forum held that the commissioner was entitled to recover a 25 percent penalty on the amount paid from the wage security fund, or $200, and a respondent predecessor and respondent successor were jointly and severally liable to the commissioner for that amount. ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 202 (2006).***

❑ The forum imposed joint and several liability upon a respondent predecessor and its successor when there was a common principal and claimant's wages were paid out of the wage security fund, taking notice that, although responsibility for full recompense usually falls upon a bona fide successor, in Oregon an administratively dissolved corporation has five years from the date of dissolution to apply to the Secretary of State for reinstatement, during which time it continues its corporate existence and can conduct activities necessary "to wind up and liquidate its business and affairs." Given the common principal and the close timing of the asset transfer, the forum found there was uncertainty about the eventual property or asset distribution between the two respondents. To ensure that the wage security fund was not left without a remedy, the forum imposed joint and several liability upon both respondents for repayment to the wage security fund of claimant's unpaid wages. ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 201-02 (2006).***

❑ As the successor to Bukovina Inc., Bukovina LLC, was held liable for the wages claimant earned in March 2004 before Bukovina Inc. was dissolved and was subject to the agency's wage security fund recovery action. ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 200 (2006).***

❑ This forum has long held that the test to determine whether an employer is a successor 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 Bukovina Express, Inc., 27 BOLI 184, 201 (2006).*** *See also In the Matter of Mermac, Inc., 26 BOLI 218, 225 (2005); In the Matter of Stephanie Nichols, 24 BOLI 107, 121 (2002); In the Matter of SQDL Co., 22 BOLI 223, 240 (2001). See also In the Matter of Fjord, Inc., 21 BOLI 260, 286 (2001), affirmed without opinion, Fjord, Inc. v. Bureau of Labor and Industries, 188 Or App 566, 65 P3d 1132 (2003); In the Matter of Catalogfinder, Inc., 18 BOLI 242, 256 (1999); In the Matter of Susan Palmer, 15 BOLI 226, 234 (1997).*

❑ When a corporate employer ceased doing business in December 2004 and administratively dissolved in

February 2005; the same principal who owned and operated the corporation immediately reorganized as an LLC, retaining the corporate name Bukovina Express after dissolving the corporation; and the LLC continued as a trucking operation, using the same trucks, and servicing the same clientele in Oregon as its predecessor, although the business was relocated to Ridgefield, Washington, the forum found that the LLC continued to conduct essentially the same business as its predecessor and, as a matter of law, was a successor within the meaning of ORS 652.310(1). ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 201 (2006).***

❑ Respondent acquired its predecessor business, a café, with full knowledge of the wages owed to claimant and other employees; continued the business without any interruption or change in operations; was still in possession of the café's property and business assets at the hearing date; and continued to operate the business, which was apparently thriving under respondent's management. In contrast, credible evidence showed respondent's predecessor was not available and had no apparent ability to pay any part of the wage obligation he incurred. The forum found that, under all of the circumstances present in the case, the burden of imposing liability for claimant's wages on respondent was slight when compared to the overriding legislative purpose of protecting claimant from nonpayment of the wages she earned while employed by respondent's predecessor, and that it was an appropriate case to impose full liability upon respondent for wages owed to claimant. ***----- In the Matter of Mermac, Inc., 26 BOLI 218, 226 (2005)***

❑ When respondent argued that its predecessor bore sole responsibility for claimant's wages and that to impose liability on respondent, who did not employ claimant during the wage claim period, was manifestly unjust, the forum noted that the foremost purpose for the application of the successor doctrine in the wage claim context is the protection of employees. ***----- In the Matter of Mermac, Inc., 26 BOLI 218, 226 (2005)***

❑ Respondent's acquisition of its predecessor's business, a café, did not result in a name change, location change, or a change in type of services offered by the business and the café continued to operate without interruption after respondent acquired the business, using the same employees, the same menu, and the same restaurant equipment and furniture its predecessor. Other than alluding to some minor changes in décor and respondent's desire to better manage the café, respondent offered no evidence that remotely suggested any notable change in the business operation. Based on the facts as a whole, the forum concluded, as a matter of law, that respondent was a successor employer and was liable for claimant's unpaid wages.***----- In the Matter of Mermac, Inc., 26 BOLI 218, 225-26 (2005)***

❑ The agency named an individual and an LLC as joint employers in its order of determination. The agency established that the LLC was active during the entire period of claimant's employment, but did not allege or present any evidence to support a conclusion that the individual was a successor to the business of the LLC or a lessee or purchaser of the LLC's business for the continuance of the LLC's business, such that the individual would meet the definition of an "employer" under ORS 652.310. The forum held that the individual was not claimant's "employer" and had no personal liability. ***----- In the Matter of Orion Driftboat and Watercraft Company, 26 BOLI 137, 147-48 (2005).***

❑ The agency bears the burden of proof to establish successorship. ***----- In the Matter of Stephanie Nichols, 24 BOLI 107, 120 (2002).***

❑ When the forum found that four of the six elements that must be evaluated to determine successorship – identity, location of business, lapse in time, and same service – established that respondent Nichols conducted the same business as the respondent LLC, the forum concluded that Nichols, operating as a sole proprietorship, was a successor employer as defined in ORS 652.310 and was individually liable for unpaid wages. ***----- In the Matter of Stephanie Nichols, 24 BOLI 107, 121-122 (2002).***

❑ When the agency presented no evidence concerning the business property used by respondent LLC in the conduct of its business or the business property used by respondent Nichols in the conduct of her sole proprietorship, the forum could not hold respondent Nichols liable as a "lessee or purchaser" for a claimant's unpaid wages under ORS 652.310(1). ***----- In the Matter of Stephanie Nichols, 24 BOLI 107, 121-122 (2002).***

❑ When none of the six elements that must be evaluated for an employer to be a successor were present, the forum found that respondent was not a "successor" employer under ORS 652.310. ***----- In the Matter of SQDL Co., 22 BOLI 223, 241 (2001).***

❑ A respondent successor employer who was covered by the FLSA was not excluded from the ORS 652.310 definition of "employer" pursuant to ORS 652.310 when that employer was not also covered by the Davis-Bacon Act or Service Contract Act. ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 282-86 (2001).***

> Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 188 Or App 566, 65 P3d 1132 (2003).

❑ The liability of a respondent successor employer in a wage security fund matter was dependent on whether it was a "successor to the business" of its alleged predecessor or a "lessee or purchaser" of that predecessor's "business property for the continuance of the same business." ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 286 (2001).***

> Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 188 Or App 566, 65 P3d 1132 (2003).

❑ Under ORS 652.310, whether an employer is a "successor to the business" of its alleged predecessor or a "lessee or purchaser" of that predecessor's "business property for the continuance of the same business" is determined by separate tests. ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 286 (2001).***

> Affirmed without opinion, *Fjord, Inc. v. Bureau of*

Labor and Industries, 188 Or App 566, 65 P3d 1132 (2003).

❑ The analysis for determining whether a person is an "employer" either as a "successor" or "lessee or purchaser" is same for wage claim and wage security fund recovery cases. ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 286 (2001).***

Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 188 Or App 566, 65 P3d 1132 (2003).

❑ When five out of six elements of the forum's successorship test were indicative of successorship, with the sixth being neutral, the forum concluded that respondent was a successor employer and liable to repay the wage security fund for wages owed by its predecessor. ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 293 (2001).***

Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 188 Or App 566, 65 P3d 1132 (2003).

❑ A person must lease or purchase an employer's business property for the purpose of continuing the same business to fit within the definition of an employer "lessee or purchaser" in ORS 652.310(1). A mere repossession of a business by a prior owner, without new acquisition of assets, would not qualify as a lease or purchase, although it would likely meet the "successor" definition in ORS 652.310(1). A person does not have to lease or purchase *all* of an employer's business property so long as the business property is leased or purchased for the purpose of continuing the same business. ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 294 (2001).***

Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 188 Or App 566, 65 P3d 1132 (2003).

❑ The test for determining whether a respondent's purchase of its predecessor was for the "continuation of the same business is whether the purchaser "conducts essentially the same business." ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 295 (2001).***

Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 188 Or App 566, 65 P3d 1132 (2003).

❑ A respondent employer who met both the "successor" and "purchaser" definitions of employer under ORS 652.310(1) was ordered to repay the wage security fund for the wages paid out by the fund to 93 wage claimants who had been employed by respondent's predecessor. ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 297 (2001).***

Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 188 Or App 566, 65 P3d 1132 (2003).

❑ As an admitted successor to the corporation that had employed claimant, respondent fell within the statutory definition of an "employer" who could be held liable for the wages that the corporation failed to pay claimant. ***----- In the Matter of Sabas Gonzalez, 19 BOLI 1, 14 (1999)***.

❑ The forum concluded that the respondent was a successor employer when it used the same website identity, physical location and office equipment as the predecessor business; commenced business operations immediately after the predecessor's operations ceased; retained the same corporate president and person in charge of daily operations as the predecessor; and offered the same service the predecessor had. ***----- In the Matter of Catalogfinder, Inc., 18 BOLI 242, 256 (1999)***.

❑ Persons or entities included in the definition of "employer" under ORS 652.310(1) are any producer-promoter; any successor to the business of any employer, so far as that employer did not pay employees in full; and any lessee or purchaser of any employer's business property for the continuance of the same business, so far as that employer did not pay employees in full. ***----- In the Matter of Susan Palmer, 15 BOLI 226, 233-34 (1997).***

❑ When respondent was the corporate secretary of a corporation that was involuntarily dissolved and thereafter conducted essentially the same business as the corporation had; used the same name, location, and substantially the same workforce; offered the same services and used the same equipment as the corporate had; and there was no lapse in time in the operation of the business after the corporation dissolved, respondent was a "successor" employer within the meaning of ORS 652.310(1) and subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.414, and ORS chapter 653. ***----- In the Matter of Susan Palmer, 15 BOLI 226, 230-31 (1997).*** *See also In the Matter of Tire Liquidators, 10 BOLI 84, 93 (1991).*

❑ When two wage claimants earned wages before and after a corporation was involuntarily dissolved, a respondent who was the successor to the corporation was liable for wages earned before the dissolution. Respondent was the employer of claimants on the dates when their employment terminated and was liable for violations of ORS 652.140 and for penalty wages pursuant to ORS 652.150. ***----- In the Matter of Susan Palmer, 15 BOLI 226, 234 (1997).***

❑ In a wage claim cases when there are questionable transactions between or entanglement of the assets of claimants' actual employer and a successor employer and legal proceedings that might reverse the original transaction or its material terms, or other circumstances giving rise to uncertainty about the actual employer's ultimate ability to fully recompense the wage claimants, furtherance of the legislative emphasis on protection of employees, in relation to the payment of wages, requires that liability for wages owed also be placed upon the successor. In such an instance, imposition of joint and several liability for unpaid wages is appropriate. ***----- In the Matter of Gerald Brown, 14 BOLI 154, 168-69 (1995).***

❑ Cases interpreting and applying the successor doctrine in National Labor Relations Board cases are instructive in interpreting and applying the successor doctrine in wage claim cases. ***----- In the Matter of Gerald Brown, 14 BOLI 154, 168 (1995).***

❑ The foremost purpose for the application of the

successor doctrine in wage claims is protection of employees. The ultimate issue is one of balancing the conflicting legitimate interests of the bona fide successor, the affected employee(s), and the public. By adopting the successor doctrine, the legislature has introduced an emphasis upon protection for victimized employees into the balancing process. In this balancing process, the legislative goal of protection of employees is subverted when the employee is left without a remedy or with an incomplete remedy. ***----- In the Matter of Gerald Brown, 14 BOLI 154, 167 (1995).***

❑ A respondent corporation was a successor employer to an individual respondent when the individual respondent, following the employment of claimants, transferred real property and business assets to the corporation in exchange for a promise to pay $50,000 at some later time and the corporation continued to operate the same business, under the same name, at the same location, using the same equipment, and providing the same services as its individual predecessor. The commissioner found that respondent conducted essentially the same business as its predecessor and, as a matter of law, was a "successor" within the meaning of ORS 652.310(1). ***----- In the Matter of Gerald Brown, 14 BOLI 154, 166-67 (1995).***

❑ Because the successor doctrine is derived from equitable principles, fairness is a prime consideration in its application. When the actual employer is available and has the apparent ability to pay his wage obligation to claimants, and a successor employer was never claimants' employer, fairness dictates that liability for the wages owed rests first with the actual employer. Under those circumstances, there is no reason to reach the liability of a successor employer unless there is a question whether the remedy that can be provided by the actual employer would fully recompense the claimants. ***----- In the Matter of Gerald Brown, 14 BOLI 154, 164-65 (1995).***

❑ A successor employer is liable for claimants' wages paid from the wage security fund. ***----- In the Matter of Tire Liquidators, 10 BOLI 84, 93 (1991).***

❑ Respondent sold his tire business to a company that ran the business at the same location without any lapse of time in the operation of the business, using most of respondent's former employees and offering the same services respondent had offered and using the same equipment respondent had used. After eight months, the company quit the business, but was unable to make its payments and respondent repossessed much of the company's inventory, pursuant to a security agreement. Respondent reentered the business the next day, rehired several of the same employees, remodeled the building for 18 days, and then reopened the business at the same location. Respondent employed the same work force that the company had employed, offered virtually the same services that the company had offered, and used much of the same equipment that the company had used. The commissioner concluded that respondent conducted essentially the same business as his predecessor and that, as a matter of law, respondent was a "successor" within the meaning of ORS 652.310(1). ***----- In the Matter of Tire Liquidators, 10 BOLI 84, 93-94 (1991).***

❑ ORS 652.310(1) defines "any lessee or purchaser of any employer's business property for the continuation of the same business" as an employer. The statute also defines "any successor to the business of any employer" as an employer. In order to give meaning to both parts of the statute, it is reasonable to conclude that no lease or purchase of assets is required to find that "any successor to the business of any employer" is a successor employer. While a sale of assets is a factor that can be considered when determining whether a business is a successor, it is not a required element of the test, under ORS 652.310(1), with regard to "any successor to the business of any employer." ***----- In the Matter of Tire Liquidators, 10 BOLI 84, 94-95 (1991).***

❑ When the seller of a business regains possession of the business when the seller walks away, and the seller then continues to operate essentially the same business, the seller's intention to avoid the liabilities of the buyer will carry little weight with regard to the issue of successorship. ***----- In the Matter of Tire Liquidators, 10 BOLI 84, 95 (1991).***

❑ In ORS 652.310(1), the legislature expressed the public policy of protecting employees and decided to hold successor employers liable for the unpaid wages of a predecessor's employees. ***----- In the Matter of Tire Liquidators, 10 BOLI 84, 95 (1991).***

❑ Two employers, a dissolved corporation and its sole owner and president, were named in an order of determination. The sole owner was found liable for penalty wages when he was a successor in interest to the dissolved corporation and also failed to pay claimant's wages that were earned both before and after the corporation dissolved. ***----- In the Matter of Waylon & Willies, Inc., 7 BOLI 68, 74-75 (1988).***

❑ When respondent employers sold their business to a buyer who employed claimant, then regained possession of the business after claimant was terminated by the buyer, the forum held that employers were "successors" within the meaning of ORS 652.310(1). The forum found that employers reopened the business within three or four days after they regained possession from the buyer, that they operated the business using the same name, at the same location, using the same suppliers, and servicing the same market with the same product as the buyer had. The employers did not employ the employees whom the buyer had employed, but were still operating the business at the time of the contested case hearing. In sum, the forum found that employers were conducting essentially the same business as the predecessor-buyer had conducted. ***----- In the Matter of Anita's Flowers & Boutique, 6 BOLI 258, 267 (1987).***

> Overruled in part on other grounds, *In the Matter of Central Pacific Freight Lines, Inc.,* 7 BOLI 272, 280 (1972).

❑ Persons or entities included in the definition of "employer" under ORS 652.310(1) are any producer-promoter; any successor to the business of any employer, so far as that employer did not pay employees in full; and any lessee or purchaser of any employer's business property for the continuance of the same business, so far as that employer did not pay employees

in full. This is a clear recognition that there are two kinds of successor-employers. To decide whether an employer is a "successor," the test is whether the employer conducts essentially the same business that the predecessor did. The elements to look for 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 facts must be considered together to reach a decision ***----- In the Matter of Anita's Flowers & Boutique, 6 BOLI 258, 267-68 (1987).***

> Overruled in part on other grounds, *In the Matter of Central Pacific Freight Lines, Inc.,* 7 BOLI 272, 280 (1972).

❑ Agency policy is to hold "successor" employers not liable for penalty wages under ORS 652.150. ***----- In the Matter of Anita's Flowers & Boutique, 6 BOLI 258, 267-69 (1987).***

> Overruled in part on other grounds, *In the Matter of Central Pacific Freight Lines, Inc.,* 7 BOLI 272, 280 (1972).

3.6.2 --- Name or Identity of Business

❑ When the name of respondent LLC was the same name used by the LLC's managing member while subsequently operating the business as a sole proprietorship, that was an indication of successorship. ***----- In the Matter of Stephanie Nichols, 24 BOLI 107, 121 (2002).***

❑ When the name of the LLC was Steph's Cleaning Service LLC; the LLC had two members, Nichols and her grandmother; Nichols was the managing member; there was no evidence that her grandmother actually did any work; and Nichols, a sole proprietor and the alleged successor, did business as Steph's Cleaning Service and used the same mailing address as the LLC, this indicated successorship. ***----- In the Matter of Stephanie Nichols, 24 BOLI 107, 121 (2002).***

❑ 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 SQDL Co., 22 BOLI 223, 239 (2001).***

❑ The name of the business changed from The Nordic Group, LLC, to Fjord, Ltd. Fjord kept the same phone number and mailing address, the same computer systems and personnel numbering system as Nordic, and also maintained its equipment and physical plant by the same means as Nordic. Fjord had no identification with Nordic's owner, and the company with whom respondent had by far its largest amount of sales in 2000, told Fjord's owner that it would not do business with Fjord if the prior owner and Nordic were in any way associated with Fjord. Fjord and Nordic shared no corporate officers or directors, Fjord had a different long distance carrier than Nordic, and was assigned a higher unemployment tax rate than Nordic. Under these facts, the forum concluded that the name or identity of the business was neither indicative of successorship or the absence of successorship. ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 286-87 (2001).***

> Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 188 Or App 566, 65 P3d 1132 (2003).

3.6.3 --- Location of Business

❑ When there was no evidence presented as to the location of respondent sole proprietor's principal place of business, the forum found the fact that both respondent LLC and respondent sole proprietor used the same mailing address took on a "heightened significance" and was indicative of successorship. ***----- In the Matter of Stephanie Nichols, 24 BOLI 107, 121 (2002).***

❑ When respondent's alleged predecessor ceased to exist, and respondent did not continue any part of the alleged predecessor's business, other than serving as a convenient payroll service for two of the predecessor's former employees, the forum found that the fact that three of the predecessor's former employees continued to work in the same location did not indicate successorship. ***----- In the Matter of SQDL Co., 22 BOLI 223, 240 (2001).***

❑ Nordic, Fjord's predecessor, operated manufacturing plants in Hubbard, Oregon, and Vancouver, Washington. Although the Vancouver plant employed more persons and used three times as much equipment, fifty-four percent of Nordic's gross sales were generated by the Hubbard plant. Nordic's administrative headquarters were also located at the Hubbard plant. Fjord operated the same manufacturing plant in Hubbard, but did not have and never had any interest in the Vancouver plant. The forum found that these facts indicated successorship. ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 287 (2001).***

> Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 188 Or App 566, 65 P3d 1132 (2003).

3.6.4 --- Lapse in Time Between Operations

❑ When respondent LLC's managing member began operating the same business as a sole proprietor within three or four months after respondent LLC involuntarily dissolved, the forum found this was an indication of successorship. ***----- In the Matter of Stephanie Nichols, 24 BOLI 107, 121 (2002).***

❑ When Nordic, respondent's predecessor, ceased operations on January 6, 2000, respondent officially commenced manufacturing operations on January 31, 2000, and respondent's agents were engaged in work at the Nordic's primary location that involved wrap-up operations for Nordic and start-up operations for respondent between January 6, 2000, and January 31, 2000, the forum concluded that this relatively brief lapse in time indicated successorship. ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 287 (2001).***

> Affirmed without opinion, *Fjord, Inc. v. Bureau of*

Labor and Industries, 188 Or App 566, 65 P3d 1132 (2003).

3.6.5 --- Same or Substantially the Same Work Force

❑ When there was no evidence presented to show whether respondent sole proprietor employed the same persons that the LLC employed, the forum did not find that this element indicated successorship. ***----- In the Matter of Stephanie Nichols, 24 BOLI 107, 121 (2002).***

❑ Respondent's alleged predecessor went on respondent's payroll shortly after the alleged predecessor ceased doing business, and the evidence showed that this was a procedure whereby the alleged predecessor used respondent as a payroll service while two nonmanagerial employees continued to do "wrap-up" work for the predecessor. However, 92 other persons who were employed by the predecessor in 1999 did not go to work for respondent. These facts indicated a lack of successorship. ***----- In the Matter of SQDL Co., 22 BOLI 223, 241 (2001)***

❑ Respondent's first payroll period ended on February 12, 2000. During that period, respondent employed eleven persons, 10 of whom had been employed by its predecessor at the time it ceased operations. Between January 31, 2000, and October 25, 2000, Respondent employed a total of 144 persons, with a maximum of about 90 at any one time. At least 103 of those persons had previously been employed by respondent's predecessor or its predecessor. A minimum of 81 had worked for the predecessor, 68 in the last few weeks of its business operations. At least 11 of these persons were employed as managers at the predecessor's primary location. The forum concluded that there was a substantial similarity between the workforces employed by respondent and its predecessor, indicating successorship. ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 287-88 (2001).***

Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 188 Or App 566, 65 P3d 1132 (2003).

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

❑ When evidence established that respondents LLC and sole proprietor engaged in the same business of cleaning construction sites, the forum found this indicated successorship. ***----- In the Matter of Stephanie Nichols, 24 BOLI 107, 121 (2002).***

❑ When respondent's alleged predecessor performed design and construction and respondent continued to be a retail hardware and lumber store and had never engaged in design and construction, this indicated a lack of successorship. ***----- In the Matter of SQDL Co., 22 BOLI 223, 241 (2001).***

❑ Respondent, like its predecessor, manufactured sporting apparel and equipment for its clients. Although the specific product differed due to client specifications, respondent produced the same general type of product as its predecessor and offered exactly the same service – CMT manufacturing -- indicating successorship. ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 288 (2001).***

Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 188 Or App 566, 65 P3d 1132 (2003).

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

❑ When there was no evidence presented to show what machinery or equipment, or methods of production were used by the predecessor LLC in cleaning construction sites other than evidence that claimant cleaned windows by himself, the forum did not find this element indicative of successorship. ***----- In the Matter of Stephanie Nichols, 24 BOLI 107, 121 (2002).***

❑ When an alleged successor only used a small percentage of its predecessor's equipment and none of its method of production, this indicated a lack of successorship. ***----- In the Matter of SQDL Co., 22 BOLI 223, 241 (2001).***

❑ Respondent, as a CMT manufacturer, used the same method of production as its predecessor. It used the same machinery and equipment that its predecessor used in the plant respondent operated, and at least other four pieces of equipment that its predecessor used in another location. At the time of the hearing, respondent also owned, but did not use, approximately 70 pieces of equipment that its predecessor had used in the plant respondent operated. The forum concluded that these facts indicated successorship. ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 288 (2001).***

Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 188 Or App 566, 65 P3d 1132 (2003).

3.6.8 --- Liability of Successor for Penalty Wages

❑ Although respondent LLC was held liable for penalty wages, respondent Nichols, as a successor employer, could not be held individually liable for penalty wages. ***----- In the Matter of Stephanie Nichols, 24 BOLI 107, 122 (2002).***

❑ In accordance with agency policy, the forum did not hold respondent liable for penalty wages when respondent was liable for claimant's unpaid wages only as a successor to claimant's employer. ***----- In the Matter of Sabas Gonzalez, 19 BOLI 1, 15 (1999)***.

3.6.9 --- Liability of Successor for Civil Penalties

❑ As the definition of employer that applies to ORS 653.045 is "any person who employs another person," and does not incorporate the concept of successor liability, the forum could not hold a successor employer liable for civil penalties. ***----- In the Matter of Stephanie Nichols, 24 BOLI 107, 123 (2002).***

4.0 HOURS WORKED

4.1 --- Generally

❑ The forum relied on respondent's records to determine the total hours that claimants worked. ***----- In the Matter of Gary Lee Lucas, 26 BOLI 198, 212(2005).***

❑ When the order of determination alleged claimant

was not paid for 90 hours of work; respondents did not deny this allegation in their answer; and claimant provided written documentation of the hours alleged and was paid for working similar hours in prior months, the forum concluded claimant performed work for which he was not properly compensated. ***----- In the Matter of Orion Driftboat and Watercraft Company, 26 BOLI 137, 147-48 (2005).***

❑ Respondent kept no record of the days or hours claimant worked. Claimant credibly testified that he recorded the dates and hours he worked on each of respondent's projects and his testimony was bolstered by other credible witnesses. Despite the opportunity to do so, respondent produced no evidence to dispute the reasonableness of the inference to be drawn from claimant's evidence. The forum concluded that claimant performed work for which he was not properly compensated and relied on the credible evidence he produced showing the hours he worked as a matter of just and reasonable inference. ***----- In the Matter of Kilmore Enterprises, 26 BOLI 111,123 (2004).***

❑ 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 Kilmore Enterprises, 26 BOLI 111,123 (2004).***

❑ 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 Kilmore Enterprises, 26 BOLI 111,122 (2004).***

❑ When respondent offered no evidence of any kind to show that claimant did not work the hours he reported on his time sheets, the forum accepted claimant's credible statement and the record he maintained at respondent's behest as the number of hours he worked and awarded claimant unpaid wages. ***----- In the Matter of John M. Sanford, Inc., 26 BOLI 72, 81 (2004), amended 26 BOLI 110 (2004).***

❑ This forum has consistently held that if an employer disputes the number of hours claimed by a wage claimant, then "it is the employer's burden to produce all appropriate records to prove the precise hours and wages involved." ***----- In the Matter of John M. Sanford, Inc., 26 BOLI 72, 81 (2004), amended 26 BOLI 110 (2004).***

❑ When an 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 Larsen Golf Construction, Inc., 25 BOLI 206, 216 (2004).*** *See also In the Matter of Millennium Internet, Inc., 25 BOLI 200, 205 (2004); In the Matter of Adesina Adeniji, 25 BOLI 162, 171 (2004); In the Matter of William Presley, 25 BOLI 56, 70 (2004), affirmed, Presley v. Bureau of Labor and Industries, 200 Or App 113, 112 P3d 485 (2005); In the Matter of Elisha, Inc., 25 BOLI 125, 154 (2004), affirmed without opinion, Elisha, Inc., v. Bureau of Labor and Industries, 198 Or App 285, 108 P3d 1219 (2005); In the Matter of Westland Resources, Inc., 23 BOLI 276, 286 (2002); In the Matter of Toni Kuchar, 23 BOLI 265, 274 (2002); In the Matter of Ilya Simchuk, 22 BOLI 186, 196 (2001); In the Matter of Northwest Civil Processing, 21 BOLI 232, 244-45 (2001); In the Matter of Norma Amezola, 18 BOLI 209, 218 (1999); In the Matter of Harold Zane Block, 17 BOLI 150, 159 (1998).*

❑ It is the employer's duty to maintain an accurate record of an employee's time worked. ***----- In the Matter of Tina Davidson, 16 BOLI 141, 148 (1997).*** *See also In the Matter of Jewel Schmidt, 15 BOLI 236, 242 (1997).*

❑ The forum accepts the 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, when that testimony is credible. ***----- In the Matter of Sunnyside Enterprises of Oregon, 14 BOLI 170, 174 (1995).*** *See also In the Matter of Dan's Ukiah Service, 8 BOLI 96, 106 (1989); In the Matter of Sheila Wood, 5 BOLI 240, 253-54 (1986).*

❑ As a matter of public policy, it must be assumed that an employee should be compensated for all work performed. ***----- In the Matter of Mario Pedroza, 13 BOLI 220, 229 (1994).***

❑ The forum rejected respondent's contention that some hours worked and paid prior to the period of the wage claim should be offset against what was owed for three reasons: (1) the employer had agreed to the system by which claimant kept a record of his work hours; (2) the employer never questioned the hours that claimant turned in and had paid all hours worked to and including the day before the wage claim period; and (3) the time for the employer to have disputed the pre-wage claim hours was before the employer paid the claimant for those hours. ***----- In the Matter of Marion Nixon, 5 BOLI 82, 87 (1986).***

❑ When a dispute existed as to whether an employee was working for free, public policy required that the dispute be resolved in favor of the employee who was performing valuable services for the employer. ***----- In the Matter of Jack Coke, 3 BOLI 238, 242 (1983).***

❑ As a matter of public policy, it must be assumed that an employee should be compensated for all work performed. When there is a dispute as to whether an employee agreed to work for free, that dispute must be resolved in favor of the employee who performed services for the employer. ***----- In the Matter of S.O.S. Towing and Storage, Inc., 3 BOLI 145, 148 (1982).***

4.2 --- Burden of Proof & Evidence

4.2.1 --- Burden of Proof

❑ To establish claimant's wage claim in a default, the agency must present credible evidence of the following: (1) respondent employed claimant; (2) the pay rate upon which respondent and claimant agreed, if it exceeded the minimum wage; (3) claimant performed work for which she was not properly compensated; and (4) the

amount and extent of work claimant performed for respondent. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 188 (2007).***

❑ When a respondent produces no record of dates or hours worked, the forum may rely on a wage claimant's credible testimony to show the amount and extent of the work performed. ***----- In the Matter of Sue Dana, 28 BOLI 22, 30 (2006).***

❑ The final element of the agency's case requires proof of the amount and extent of work performed by the claimants. The agency's burden of proof can be met by producing sufficient evidence from which a just and reasonable inference may be drawn. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 222 (2006).*** *See also In the Matter of Millennium Internet, Inc., 25 BOLI 200, 205 (2004); In the Matter of Sreedhar Thakkun, 22 BOLI 108, 115 (2001); In the Matter of Jo-El, Inc., 22 BOLI 1, 9 (2001); In the Matter of Danny Vong Phuoc Trong, 21 BOLI 217, 230 (2001); In the Matter of Bubbajohn Howard Washington, 21 BOLI 91, 101 (2000); In the Matter of Majestic Construction, Inc., 19 BOLI 59, 68 (1999)*.

❑ A wage claimant bears the burden of proving he or she performed work for which she was not properly compensated. ***----- In the Matter of Rubin Honeycutt, 25 BOLI 91, 103 (2003).*** *See also In the Matter of Paul Andrew Flagg, 25 BOLI 1, 10 (2003); In the Matter of Rubin Honeycutt, 23 BOLI 224, 232 (2002); In the Matter of Debbie Frampton, 19 BOLI 27, 38 (1999); In the Matter of Mario Pedroza, 13 BOLI 220, 229 (1994).*

❑ When the agency sought one month of wages representing vacation pay, it was the agency's burden to establish that claimant was entitled to vacation pay. ***----- In the Matter of The Alphabet House, 24 BOLI 262, 280 (2003).***

❑ When the forum concludes that 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. ***----- In the Matter of TCS Global, 24 BOLI 246, 258 (2003).*** *See also In the Matter of Devon Peterson, 24 BOLI 189, 199 (2003); In the Matter of G and G Gutters, Inc., 23 BOLI 135, 145 (2002); In the Matter of Heiko Thanheiser, 23 BOLI 68, 76 (2002), In the Matter of Stan Lynch, 23 BOLI 34, 44 (2002); In the Matter of Diran Barber, 16 BOLI 190, 196-97 (1997).*

❑ When an employer produces no records of hours or dates worked by the claimant, the commissioner may rely on evidence produced by the agency, including credible testimony by the claimant, "to show the amount and extent of the employee's work as a matter of just and reasonable inference," and "may then award damages to the employee, even though the result be only approximate." ***----- In the Matter of G and G Gutters, Inc., 23 BOLI 135, 145 (2002).*** *See also In the Matter of Ann L. Swanger, 19 BOLI 42, 56 (1999); In the Matter of Debbie Frampton*, 19 BOLI 27, 38-39 (1999); *In the Matter of Sabas Gonzalez*, 19 BOLI 1, 14 (1999).

❑ When an employer produces no records of hours or dates worked by wage claimants, the commissioner may rely on evidence produced by the agency, including credible testimony by the claimants, to show the hours worked by the claimants. ***----- In the Matter of Stan Lynch, 23 BOLI 34, 44 (2002).***

❑ The final element of the agency's prima facie case requires proof of the amount and extent of work performed by claimant. 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 Ilya Simchuk, 22 BOLI 186, 196 (2001).*** *See also In the Matter of Sreedhar Thakkun, 22 BOLI 108, 115 (2001); In the Matter of Jo-El, Inc., 22 BOLI 1,9 (2001); In the Matter of Danny Vong Phuoc Trong, 21 BOLI 217, 230 (2001); In the Matter of Bubbajohn Howard Washington, 21 BOLI 91, 101 (2000); In the Matter of Nova Garbush, 20 BOLI 65, 72 (2000); In the Matter of David Creager, 17 BOLI 102, 109 (1998); In the Matter of Scott A. Andersson, 17 BOLI 15, 23-24 (1998).*

❑ When the forum concludes that 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 David Creager, 17 BOLI 102, 109 (1998)****. See also In the Matter of Scott A. Andersson, 17 BOLI 15, 23-24 (1998).*

❑ In wage claim cases, the employee has the burden of proving that he performed work for which he was not properly compensated. In setting forth the proper standard for the employee to meet in carrying this burden of proof, the forum has long followed policies derived from *Anderson v. Mt. Clemens Pottery Company,* 328 U.S. 680 (1946). The burden of proving the amount and extent of work performed by claimant can be met by producing sufficient evidence from which a just and reasonable inference may be drawn. The forum has previously accepted, and will accept, the testimony of the claimant as sufficient evidence to prove such work was performed and from which to draw an inference of the extent of that work – when that testimony is credible. If the forum concludes that an employee was employed and improperly compensated, it becomes the burden of the employer to come forward with 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 Graciela Vargas, 16 BOLI 246, 253-54 (1998).*** *See also In the Matter of Anna Pache, 13 BOLI 249, 269-71 (1994); In the Matter of Mario Pedroza, 13 BOLI 220, 229 (1994); In the Matter of Sylvia Montes, 11 BOLI 268, 275-76 (1993).*

❑ In wage claim cases, the employee has the burden of proving that he performed work for which he was not properly compensated. When the forum concludes that 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. ORS 653.045 requires an employer to maintain payroll records. When an employer produces inadequate records, the commissioner may rely on the evidence produced by the

agency to show the amount and extent of work performed by claimant as a matter of just and reasonable inference and then may award damages to the employee, even though the result is only approximate. ***----- In the Matter of Staff, Inc., 16 BOLI 97, 116-18 (1997).*** *See also In the Matter of Frances Bristow, 16 BOLI 28, 40 (1997).*

❑ In wage claim cases, the forum has long followed policies derived from *Anderson v. Mt. Clemens Pottery Company,* 328 U.S. 680 (1946). An employee has the burden of proving that he performed work for which he was not properly compensated. The employee's burden is met by proof that he has in fact performed work for which he was not properly compensated and by sufficient evidence to show the amount and extent of work performed by claimant as a matter of just and reasonable inference. The forum will accept an employee's testimony as sufficient evidence when that testimony is credible. Upon this showing, the burden shifts to the employer to produce evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence. ORS 653.045 requires an employer to maintain payroll records. When an employer fails to produce those records, the forum may award damages to the employee, even though the result is only approximate. ***----- In the Matter of Burrito Boy, Inc., 16 BOLI 1, 12 (1997).***

❑ The forum will not speculate or draw inferences about wages owed based on insufficient, unreliable evidence. ***----- In the Matter of Burrito Boy, Inc., 16 BOLI 1, 12 (1997).***

❑ ORS 653.045 requires an employer to maintain payroll records. When the forum concludes that an employee was employed and was improperly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise amounts involved. When an 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 may then award damages to the employee, even though the result is only approximate. ***----- In the Matter of Jewel Schmidt, 15 BOLI 236, 237 (1997).*** *See also In the Matter of Geoffroy Enterprises, Inc., 15 BOLI 148, 165-66 (1996); In the Matter of John Hatcher, 14 BOLI 289, 300 (1996); In the Matter of Sunnyside Enterprises of Oregon, 14 BOLI 170, 182 (1995); In the Matter of Ken Taylor, 11 BOLI 139, 144 (1992); In the Matter of Rainbow Auto Parts and Dismantlers, 10 BOLI 66, 73 (1991); ----- In the Matter of Dan's Ukiah Service, 8 BOLI 96, 106 (1989); In the Matter of Judith Wilson, 5 BOLI 219, 225 (1986).*

❑ 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 Jewel Schmidt, 15 BOLI 236, 243 (1997).*** *See also In the Matter of Sunnyside Enterprises of Oregon, Inc., 14 BOLI 170, 183 (1995); In the Matter of Martin's Mercantile, 12 BOLI 262, 273-74 (1994); In the Matter of Box/Office Delivery, 12 BOLI 141, 148 (1994); In the Matter of Crystal Heart Books Co., 12 BOLI 33, 46 (1993); In the Matter of John Mathioudakis, 12 BOLI 11, 22 (1993); In the Matter of Sylvia Montes, 11 BOLI 268, 276-77 (1993).*

❑ It is the employer's duty to maintain an accurate record of an employee's time worked. When the employer's records are inaccurate or incomplete, the trier of fact may rely upon credible evidence produced by the agency regarding the time worked. ***----- In the Matter of Jack Crum Ranches, Inc., 14 BOLI 258, 270 (1995).***

❑ The forum may rely on the claimant's credible testimony to prove the extent of the uncompensated work performed when an employer produces no records. ***----- In the Matter of Samuel Loshbaugh, 14 BOLI 224, 229 (1995).***

❑ It is the employer's duty to maintain an accurate record of the time worked by an employee. A purported delegation of that duty forms no defense against a failure to pay all sums due to the employee upon termination. The employer has an absolute duty to pay what is really due. ***----- In the Matter of Samuel Loshbaugh, 14 BOLI 224, 229 (1995).***

❑ Oregon law requires that the employer maintain payroll records. When the employer has kept no such records, the employee has the burden of proving that the employee performed work for which he was improperly compensated. The burden of proving the amount and extent of that work can be met by producing sufficient evidence from which a just and reasonable inference may be drawn. 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 Ashlanders Senior Foster Care, Inc., 14 BOLI 54, 79 (1995).***

❑ When an employer has kept no records of an employee's work, the agency has the burden of first proving that the employee performed work for which he was improperly paid. The burden of proving the amount and extent of work performed by claimant can be met by producing sufficient evidence from which a just and reasonable inference may be drawn. The forum will accept the credible testimony of the claimant as sufficient evidence. Upon this showing, the burden shifts to the respondent to produce evidence to negative the reasonableness of the inference to be drawn from the employee's evidence to prove such work was performed and from which to draw an inference of the extent of that work. ***----- In the Matter of Mario Pedroza, 13 BOLI 220, 230 (1994).***

❑ The employee has the burden of proving that he performed work for which he was not properly compensated. The employer has the duty under the minimum wage law to keep proper records of wages, hours and other conditions and practices of employment. When the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, an employee has met his burden if he proves that he in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as

a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence. If an employer fails to produce such evidence, the forum may award damages to the employee, even though the result is only approximate. ***----- In the Matter of Box/Office Delivery, 12 BOLI 141, 147-48 (1994).*** *See also In the Matter of Crystal Heart Books Co., 12 BOLI 33, 45-46 (1993); In the Matter of John Mathioudakis, 12 BOLI 11, 22 (1993); In the Matter of Sylvia Montes, 11 BOLI 268, 275-76 (1993).*

❑ It is incumbent on the employer to maintain payroll records and to produce them to establish the appropriate amounts involved when the forum concludes that the employee was employed and improperly compensated. When there are no such records, the forum may rely on evidence produced by the agency, including the employee's notations and testimony. ***----- In the Matter of Richard Ilg, 11 BOLI 230, 240 (1993).***

> Affirmed without opinion, *Ilg v. Bureau of Labor and Industries,* 132 Or App 552, 890 P2d 454 (1995).

❑ The agency, as assignee of claimant's wage claim, has the burden of proving that claimant performed work for which claimant was not properly compensated. When an employer has failed to keep proper and accurate records, the agency can carry the burden of proof by proving that claimant has in fact performed the work for which claimant was improperly compensated and by producing sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The forum will accept the claimant's credible testimony as sufficient evidence to prove such work was performed and from which to draw an inference of the extent of that work. ***----- In the Matter of Sheila Wood, 5 BOLI 240, 251-54 (1986).***

❑ When a wage claimant has been a regular hourly employee, and an employer seeks to deny liability for wages by asserting that, at a certain point during employment the claimant's status changed from employee to either independent contractor or partner, and the claimant disputes this, the employer has the burden of proving the change in status. ***----- In the Matter of Superior Forest Products, 4 BOLI 223, 231 (1984).***

❑ Federal law firmly places the burden of proof on employers, not wage claimants, to produce accurate and complete work time and pay records once the claimant has proved that he or she performed work for which he or she was not properly compensated, and the forum adopts that policy. This forum will not penalize the claimant for not keeping written payroll records that would allow him to have a current record of pertinent figures and has agreed with the claimant's assertion that his mental records were accurate and complete when made, even if they are not now, absent contrary proof from the employer. ***----- In the Matter of Godfather's Pizzeria, Inc., 2 BOLI 279, 296 (1982).***

4.2.2 --- Evidence

❑ Claimant credibly testified that she kept a written record of her work hours in order to track the amount she owed for childcare while she worked. When she filed her wage claim, she relied on her record to show the dates and hours she worked for respondent. The forum accepted claimant's record that established she worked 73 hours, earning a total of $529.25 when computed at $7.25 per hour. ***----- In the Matter of Sue Dana, 28 BOLI 22, 30 (2006).***

❑ Respondent's admission and evidence in the record showed claimant did not receive all of the wages she earned for the work she performed between April 28 and May 10, 2005. ***----- In the Matter of Sue Dana, 28 BOLI 22, 30 (2006).***

❑ When the agency provided a credible, contemporaneous record of claimant's work hours showing claimant worked 120 straight time hours and 15 hours of overtime for respondents and respondents did not dispute that record, the forum concluded that claimant worked 120 straight time hours and 15 hours of overtime for respondents. Respondents paid claimant nothing for his work and owed claimant $1,800 in straight time wages (120 hours x $15 per hour = $1,800) and $337.50 in overtime wages (15 x $22.50 per hour = $337.50), for a total of $2,137.50. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 222-23 (2006).***

❑ When claimant claimed paid vacation days that he used during the last week that he was employed, the forum found he was entitled to use those vacation days and included that amount when calculating claimant's unpaid wages based on credible evidence, including an excerpt from respondent's company policy, showing that claimant was eligible for paid time off and was not restricted from using it during the time period he claimed. ***----- In the Matter of Troy Melquist dba RedCellX, Inc., 27 BOLI 171, 181-82 (2006).***

❑ When used in accordance with company policy, paid time off is compensation for services performed by an employee for an employer and constitutes "wages" as defined by statute. ***----- In the Matter of Troy Melquist dba RedCellX, Inc., 27 BOLI 171, 182 (2006).***

❑ Respondent's claim that claimant was an unpaid intern who "failed to turn in proper legal documents to establish his internship" was overcome by claimant's credible testimony that respondent hired him as a project manager for 12 months and agreed to pay him $20,000 for 30 to 40 hour workweeks; respondent's announcement, placed through SBA's Career Services Business Internship Program, recruiting business students that clearly stated the conditions and terms of the internship opportunity consistently with claimant's account of how and under what circumstances he was hired by respondent; respondent's admission that claimant performed three weeks of "internship work"; claimant's testimony, and the recruitment announcement that established that claimant's agreed upon rate of pay was $20,000 for 12 months of service, which the agency, by amendment, prorated at $9.62 hourly. ***----- In the Matter of Troy Melquist dba RedCellX, Inc., 27 BOLI 171, 181 (2006).***

❑ When a respondent produces no records or, as in this case, incomplete records of dates and hours worked

by a wage claimant, the forum may rely on the wage claimant's credible testimony to show the amount and extent of the hours worked. ***----- In the Matter of Okechi Village & Health Center, 27 BOLI 156, 166 (2006).***

❑ In determining the hours worked by claimants, the forum relied on claimants' credible testimony about the number of hours they worked during the wage claim periods; the fact the respondent produced few records during the wage claim investigation; on one claimant's credible testimony that he maintained a contemporaneous computer record of his hours and production at hearing of the copies he made of all his time cards before he left his employment; and credible information provided to the agency during the wage claim investigation by the other claimant that enabled the agency to make a reasonable estimate of the number of hours he worked. ***----- In the Matter of Okechi Village & Health Center, 27 BOLI 156, 167 (2006).***

❑ Respondent's unsubstantiated assertions were overcome by claimants' credible testimony that there was no independent contractor agreement and that their overtime hours were an extension of their caregiver duties for respondent and remain unpaid to date. Additionally, the forum inferred from respondent's statements that it knew claimants worked hours that exceeded 40 per week. Based on claimants' credible testimony, the forum concluded that claimants performed work for which they were not properly compensated. ***----- In the Matter of Okechi Village & Health Center, 27 BOLI 156, 166 (2006).***

❑ When an 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 Larsen Golf Construction, Inc., 25 BOLI 206, 216 (2004).*** *See also In the Matter of Millennium Internet, Inc., 25 BOLI 200, 205 (2004); In the Matter of Adesina Adeniji, 25 BOLI 162, 171 (2004); In the Matter of William Presley, 25 BOLI 56, 70 (2004), affirmed, Presley v. Bureau of Labor and Industries, 200 Or App 113, 112 P3d 485 (2005); In the Matter of Elisha, Inc., 25 BOLI 125, 154 (2004), affirmed without opinion, Elisha, Inc., v. Bureau of Labor and Industries, 198 Or App 285, 108 P3d 1219 (2005); In the Matter of TCS Global, 24 BOLI 246, 258 (2003). See also In the Matter of Devon Peterson, 24 BOLI 189, 199 (2003); In the Matter of Barbara and Robert Blair, 24 BOLI 89, 97 (2002); In the Matter of Westland Resources, Inc., 23 BOLI 276, 286 (2002); In the Matter of Toni Kuchar, 23 BOLI 265, 274 (2002); In the Matter of Ilya Simchuk, 22 BOLI 186, 196 (2001); In the Matter of Northwest Civil Processing, 21 BOLI 232, 244-45 (2001); In the Matter of Norma Amezola, 18 BOLI 209, 218 (1999); In the Matter of Harold Zane Block, 17 BOLI 150, 159 (1998).*

❑ This forum will accept 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 – when that testimony is credible. ***----- In the Matter of Adesina Adeniji, 25 BOLI 162, 171 (2004).*** *See also In the Matter of William Presley, 25 BOLI 56, 70 92004), affirmed, Presley v. Bureau of Labor and Industries, 200 Or App 113, 112 P3d 485 (2005); In the Matter of Devon Peterson, 24 BOLI 189, 200 (2003); In the Matter of Jewel Schmidt, 15 BOLI 236, 243 (1997); In the Matter of Sunnyside Enterprises of Oregon, Inc., 14 BOLI 170, 183 (1995); In the Matter of Martin's Mercantile, 12 BOLI 262, 273-74 (1994); In the Matter of Box/Office Delivery, 12 BOLI 141, 148 (1994); In the Matter of Crystal Heart Books Co., 12 BOLI 33, 46 (1993); In the Matter of John Mathioudakis, 12 BOLI 11, 22 (1993); In the Matter of Sylvia Montes, 11 BOLI 268, 276-77 (1993).*

❑ When claimant provided time records that were created after the wage claim period to support her wage claim, respondent produced time sheets claimant admitted were maintained contemporaneously, and claimant failed to prove that respondent's records were inaccurate or inadequate, the forum concluded that claimant was properly compensated for all hours she worked for respondent. ***----- In the Matter of Rubin Honeycutt, 25 BOLI 91, 105 (2003).***

❑ When respondent required claimant to record her daily hours and weekly totals on time sheets and produced those records during the wage claim investigation at the agency's request, the forum held it was the claimant's threshold burden to establish that the records were "inaccurate or inadequate." ***----- In the Matter of Rubin Honeycutt, 25 BOLI 91, 103-04 (2003).***

❑ When respondent admitted that claimant worked 173 hours, claimant credibly testified that respondent agreed to pay him $15 per hour for all hours worked, and claimant acknowledged receiving $2,560 in wages, the forum found that respondent owed claimant $35 in unpaid wages. ***----- In the Matter of Paul Andrew Flagg, 25 BOLI 1, 11 (2003).***

❑ When the agency alleged in its order of determination that "due to the lack of reliable records establishing the dates and hours claimant worked, the [agency] is unable to compute what claimant earned during the wage claim period," but respondent conceded that claimant worked at least .5 hours for each of 31 days during his employment, the forum concluded that claimant worked at least 15.5 hours of work for which he was not compensated. ***----- In the Matter of TCS Global, 24 BOLI 246, 259 (2003)***

❑ When claimant credibly testified her regular work schedule was 8 a.m. to 5 p.m., Monday through Friday, that she occasionally worked evenings and weekends, and claimant provided the agency with a calendar showing she worked a total of 532 hours during the wage claim period and respondent did not challenge the hours claimed, the forum concluded that claimant worked 532 hours. ***----- In the Matter of The Alphabet House, 24 BOLI 262, 280 (2003).***

❑ When respondent's personnel manual contained no reference to vacation pay and claimant did not take any vacation prior to the effective end of her employment, and when there was no evidence of respondent's policy, if any, concerning payment for accrued vacation time upon termination of employment and no evidence that other employees took paid vacation after their last day

on the job, the forum declined to base an award of unpaid wages for accrued vacation leave on speculation. ***----- In the Matter of The Alphabet House, 24 BOLI 262, 280-81 (2003).***

❑ When respondent produced no records and rested its defense on the claim that he never employed claimants, and when claimants credibly testified as to the dates and hours they worked for respondent, and one complainant maintained contemporaneous records of his hours worked, the forum concluded that claimants worked the hours they claimed. ***----- In the Matter of Devon Peterson, 24 BOLI 189, 200 (2003).***

❑ When an employer produces no records of dates or hours worked by claimants, the forum may rely on credible testimony by the claimants to show the amount and extent of the claimants' work. ***----- In the Matter of Barbara and Robert Blair, 24 BOLI 89, 97 (2002).***

❑ Based on the claimants' credible testimony, the forum concluded they had been improperly compensated for the work they performed. ***----- In the Matter of Barbara and Robert Blair, 24 BOLI 89, 97 (2002).***

❑ When the forum's calculations showed respondent overpaid claimant by $349 based on the original time cards and claimant's acknowledgement that wages were paid, the forum concluded that respondent paid claimant all wages earned and owed. ***----- In the Matter of Vidal and Jody Soberon, 24 BOLI 98, 106 (2002).***

❑ Based on the claimant's credible testimony and respondent's admission of the number of hours claimant worked, the forum concluded that claimant performed work for which he was not properly compensated. ***----- In the Matter of Stephanie Nichols, 24 BOLI 107, 120 (2002).***

❑ When respondent did not keep a contemporaneous record of claimant's work hours and claimant kept a daily record of his hours on a timecard, the forum found claimant's records and testimony credible and relied on both to determine the amount and extent of claimant's work. ***----- In the Matter of Stephanie Nichols, 24 BOLI 107, 120 (2002).***

❑ When claimant credibly testified that she worked 67 hours during the wage claim period, basing her testimony on a contemporaneous record of her hours worked that she maintained on her personal calendar, the forum accepted those hours as the amount of work performed by claimant in the wage claim period. ***----- In the Matter of Procom Services, Inc., 24 BOLI 238, 245 (2003).***

❑ The forum concluded that claimant was owed the wages claimed based on respondent's admission in its answer that it owed claimant the amount sought. ***----- In the Matter of Westland Resources, Inc., 23 BOLI 276, 280 (2002).***

❑ The forum drew an adverse inference from respondent's failure to produce its calendar which respondent admitted showed the hours worked by claimant and relied on claimant's testimony and her contemporaneous planner to determine the amount and extent of work she performed for respondent, concluding that she performed 99 hours of work for which she was not properly compensated. ***----- In the Matter of Toni Kuchar, 23 BOLI 265, 275 (2002).***

❑ The forum relied on the credible testimony of claimant, her friend, and her grandfather in concluding that claimant performed work for respondent for which she was not properly paid. ***----- In the Matter of Toni Kuchar, 23 BOLI 265, 274 (2002).***

❑ When claimant alleged she worked 131 overtime hours and respondent admitted she worked 123.5 overtime hours, the forum concluded claimant had worked 123.5 overtime hours because her time sheets for those hours contained respondent's checkmarks, showing he had reviewed and approved them, and the remaining time sheet lacked those checkmarks. ***----- In the Matter of Scott Miller, 23 BOLI 243, 261 (2002.***

❑ When claimant's testimony was contradictory regarding the hours and days he worked, the forum found that the agency did not prove its case by a preponderance of the evidence despite respondent's failure to maintain and keep records of claimant's hours worked and dismissed the agency's order of determination. ***----- In the Matter of Rubin Honeycutt, 23 BOLI 224, 232-33 (2002).***

❑ This forum has repeatedly declined to speculate or draw inferences about wages owed based on insufficient, unreliable evidence. ***----- In the Matter of Rubin Honeycutt, 23 BOLI 224, 233 (2002).***

❑ When respondent defaulted and did not present any evidence at hearing, the forum relied on the credible testimony and reliable contemporaneous records created by two wage claimants to determine the amount and extent of work they performed for respondent. ***----- In the Matter of G and G Gutters, Inc., 23 BOLI 135, 145-46 (2002).***

❑ When respondent did not appear at hearing and produced no records and the agency produced both credible testimony and time records completed by claimants, the forum relied on claimants' testimony and their time records to determine the amount and extent of work performed by claimants. ***----- In the Matter of Stan Lynch, 23 BOLI 34, 44 (2002).***

❑ When respondent's answer denied employing claimant, but respondent did not appear at hearing, and the claimant and a witness credibly testified that claimant had worked for respondent for one day, the forum concluded that claimant had worked for one day with the knowledge and approval of respondent's agent. ***----- In the Matter of Duane Knowlden, 23 BOLI 56, 64 (2002).***

❑ The forum relied on the credible testimony of three wage claimants to determine the total number of hours that they worked for respondent. ***----- In the Matter of Duane Knowlden, 23 BOLI 56, 65 (2002).***

❑ When a wage claimant's testimony and documentary evidence was unreliable and insufficient to determine the amount and extent of work that two wage claimants performed, the forum declined to speculate or draw inferences about wages owed based on insufficient, unreliable evidence. ***----- In the Matter of***

Usra A. Vargas, 22 BOLI 212, 222 (2001).

❑ When a wage claimant's testimony and documentary evidence was unreliable and insufficient to determine the amount and extent of work that two wage claimants performed, the forum relied on respondent's admission that claimants performed a specific number of hours to determine the number of hours claimants worked for respondent. ***----- In the Matter of Usra A. Vargas, 22 BOLI 212, 222 (2001).***

❑ When respondent kept no records of the hours claimant worked, the forum relied on claimant's credible testimony as to the amount and extent of the work he performed, together with his contemporaneous record of hours worked to establish the days and hours that he worked. ***----- In the Matter of Ilya Simchuk, 22 BOLI 186, 196 (2001).***

❑ Claimant's credible testimony that he performed work on three vehicles established that claimant performed work for which he was not properly compensated. ***----- In the Matter of Sreedhar Thakkun, 22 BOLI 108, 115 (2001).***

❑ A claimant's credible testimony, corroborated by the testimony of his supervisor that claimant worked the hours she posted on respondent's work schedule and claimant's written record of hours worked, was sufficient evidence to establish the amount and extent of claimant's work. ***----- In the Matter of Jo-El, Inc., 22 BOLI 1, 9 (2001).***

❑ Respondent, who was not a credible witness, testified that claimant did not perform the work on three vehicles that formed the basis of the wage claim. In contrast, claimant credibly testified that he worked 14.5 hours on those vehicles and testified as to the particular repairs he performed with specificity. Although he kept no contemporaneous records of the hours he worked, the method he used to estimate his hours – an industry guide that states how long it should take to perform specific auto repairs – was a credible means of estimating his time, given that claimant was an experienced auto mechanic and there was no testimony indicating that that he worked at a different speed than the average experienced auto mechanic. The forum accepted this as sufficient evidence to establish the amount and extent of claimant's work. ***----- In the Matter of Sreedhar Thakkun, 22 BOLI 108, 115 (2001).***

❑ The forum relied on claimant's credible testimony and contemporaneous records of his hours worked and the miles he drove to determine the number of hours he worked. ***----- In the Matter of Northwest Civil Processing, 21 BOLI 232, 245 (2001).***

❑ The agency relied on respondent's calendar, the most reliable record of hours worked by claimant, to determine the amount and extent of work performed by claimant. ***----- In the Matter of Danny Vong Phuoc Trong, 21 BOLI 217, 230-31 (2001).***

❑ The forum based its conclusion that claimant performed work for which he was not paid based on the credible testimony of claimant and a witness who testified that respondent told her claimant would be paid as soon as he provided his social security number. ***----- In the Matter of Bubbajohn Howard Washington, 21 BOLI 91, 101 (2000).***

❑ Claimant's credible testimony that he worked 43 hours for respondent and as to the dates he worked those hours, supported by his contemporaneous documentation of his hours, was sufficient evidence to establish the amount and extent of claimant's work. ***----- In the Matter of Bubbajohn Howard Washington, 21 BOLI 91, 101 (2000).***

❑ Claimant's credible testimony established that she worked 66 hours for respondent in April 1999. ***----- In the Matter of Sharon Kaye Price, 21 BOLI 78, 89 (2000).***

❑ The forum determined the amount of work claimant performed for respondent from her time cards that the forum found to be reliable. ***---- In the Matter of Contractor's Plumbing Service, Inc., 20 BOLI 257, 271 (2000)***.

❑ The forum concluded that claimant's good-faith estimate of the hours she worked for respondent was unexaggerated, reasonable, and formed a proper basis for an award of damages. ***----- In the Matter of Barbara Coleman, 19 BOLI 230, 265 (2000)***.

❑ When claimant's testimony regarding the hours he worked was not credible, the forum declined to "speculate or draw inferences about wages owed based on insufficient, unreliable evidence." As a result, despite respondents' failure to create and maintain a record of hours worked by claimant, the agency's case failed because it could not prove a prima facie case. ***----- In the Matter of Ann L. Swanger, 19 BOLI 42, 57 (1999)***.

❑ The forum will rely on a claimant's evidence regarding the number of hours worked even when it is only approximate so as "not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work" when such inability is based on "an employer's failure to keep proper records, in conformity with his statutory duty[.]" ***----- In the Matter of Debbie Frampton, 19 BOLI 27, 38-39 (1999)***.

❑ When respondents did not record the hours worked by claimant, the forum relied on claimant's testimony regarding the amount of time she had spent working for respondents each day that was corroborated by the testimony of other witnesses. ***----- In the Matter of Debbie Frampton, 19 BOLI 27, 40 (1999)***.

❑ In the absence of any payroll records, the forum relied on claimant's credible testimony to determine the number of hours he had worked. ***----- In the Matter of Sabas Gonzalez, 19 BOLI 1, 14 (1999)***.

❑ When respondent did not maintain legally required records of the hours the wage claimant worked, and claimant's testimony on this point was credible, the forum relied on the evidence produced by the agency. ***----- In the Matter of Norma Amezola, 18 BOLI 209, 218 (1999)***.

❑ When the employer does not produce records and an employee provides credible testimony and a record of the number of hours worked, the forum may rely on that evidence as a basis for determining the extent of unpaid

wages. ***----- In the Matter of Troy R. Johnson, 17 BOLI 285, 292 (1999)****. See also In the Matter of Harold Zane Block, 17 BOLI 150, 159 (1998).*

❑ The forum awarded claimants no back wages for a particular week because it could not determine how many hours claimants worked during that week. ***----- In the Matter of Troy R. Johnson, 17 BOLI 285, 292 (1999)****.*

❑ The forum disbelieved the employer's testimony regarding the hours worked by claimants and the wages they were paid when the employer did not provide payroll records to corroborate his testimony; he did not assert that such records were unavailable; and his testimony conflicted with other credible evidence in the record. ***----- In the Matter of Troy R. Johnson, 17 BOLI 285, 289-90, 292 (1999)****.*

❑ When respondents' daily diary of hours worked conflicted with the hours recorded in their appointment books, the forum deemed respondents' records to be unreliable. ***----- In the Matter of David Creager, 17 BOLI 102, 109-10 (1998)****.*

❑ Based on claimant's calendars and credible testimony, the forum concluded that she was employed by respondent and improperly compensated. ***----- In the Matter of Frances Bristow, 16 BOLI 28, 40 (1997).***

❑ Inconsistencies between a wage claimant's time cards, his calendars, and his notations on his check stubs made his calendars and notations unreliable. Because the forum found claimant's testimony and this documentary evidence unreliable, there was no sufficient basis for determining whether he was improperly compensated or the amount and extent of that work as a matter of just and reasonable inference, except for those periods of time covered by the time cards. The forum will not speculate or draw inferences about wages owed based on insufficient, unreliable evidence. ***----- In the Matter of Burrito Boy, Inc., 16 BOLI 1, 12 (1997).***

❑ When neither respondents nor the wage claimants maintained a contemporaneous record of hours or dates worked by the claimants, the forum accepted an independent written record maintained by respondents' disk jockey as an accurate record of dates worked by the claimants. ***----- In the Matter of Geoffroy Enterprises, Inc., 15 BOLI 148, 166 (1996).***

❑ When a wage claimant sometimes took long breaks or left work early, but the forum was unable to determine the extent of those absences because of respondents' failure to maintain records or produce persuasive evidence of the dates and lengths of those absences, claimant was credited with having worked full shifts on all dates that she worked. ***----- In the Matter of Geoffroy Enterprises, Inc., 15 BOLI 148, 166 (1996).***

❑ When each of several sources of information submitted on behalf of respondents resulted in differing amounts alleged as earned by and paid to claimant, the commissioner found the agency's evidence regarding earnings and payment to be more persuasive. ***----- In the Matter of Jack Crum Ranches, Inc., 14 BOLI 258, 270 (1995).***

❑ When respondent's appointment book was a more reliable record of claimant's hours worked than her memory and witnesses commented on the book, the forum properly admitted it even though respondent did not formally offer it into evidence. ***----- In the Matter of Mary Stewart-Davis, 13 BOLI 188, 199-200 (1994).***

> Affirmed without opinion, *Stewart-Davis v. Bureau of Labor and Industries,* 136 Or App 212, 901 P2d 268 (1995).

❑ Respondent had a duty to keep records of the hours claimant worked. Respondent cannot present such records as were kept and then deny their accuracy. ***----- In the Matter of Mary Stewart-Davis, 13 BOLI 188, 200 (1994).***

> Affirmed without opinion, *Stewart-Davis v. Bureau of Labor and Industries,* 136 Or App 212, 901 P2d 268 (1995).

❑ When claimant did not attend the hearing, no evidence was introduced to corroborate the hours he had claimed to the agency, and respondent presented documents tending to refute that claim, the commissioner found that the agency's evidence did not create a preponderance in favor of the claim. ***----- In the Matter of La Estrellita, Inc., 12 BOLI 232, 245 (1994).***

❑ A respondent employer had a duty to maintain payroll records. When respondent produced incomplete or inadequate records, the commissioner found that the forum could rely on the agency's evidence to show the extent of the claim, even though the result was only approximate. Finding that respondent provided at hearing, for the first time, an incomplete printout coupled with only a few original time cards, the commissioner accepted evidence of hours worked provided by the agency. ***----- In the Matter of La Estrellita, Inc., 12 BOLI 232, 244-45 (1994).***

❑ When claimant was on the employer's premises and performing his regular duties during times that respondent designated as not part of claimant's shift and it appeared more likely than not that claimant worked more hours than respondent credited him with, the commissioner found that respondent had suffered or permitted claimant to work and was indebted to claimant for wages earned and not paid. ***----- In the Matter of La Estrellita, Inc., 12 BOLI 232, 244 (1994).***

❑ When the agency proved that 20 wage claimants had filed and assigned wage claims and presented 10 of the claimants plus four other witnesses who collectively gave testimony regarding the employment and wages owed to all 20, the commissioner was able to find the precise amounts owed to each of the 20 claimants. ***----- In the Matter of Blue Ribbon Christmas Trees, Inc., 12 BOLI 209, 218 (1994).***

❑ Claimant's earnings were based upon hours of work time supported by a preponderance of credible evidence and upon rates of pay required by law. ***----- In the Matter of Dan's Ukiah Service, 8 BOLI 96, 107 (1989).***

❑ An acknowledgment of indebtedness, if introduced into the record of the contested case hearing, can be considered as evidence that an employer owes wages to a claimant. However, it is not determinative of the fact that an employer owes wages or how much is owed.

Those issues are decided by the forum based on all the evidence in the record. ***----- In the Matter of Marion Nixon, 5 BOLI 82, 88 (1986).***

❑ The forum relied on hours recorded by claimants in notebooks to calculate actual hours worked because the employer had no records of the hours its employees worked, notwithstanding that it was required to keep such records by ORS 653.045. ***----- In the Matter of Superior Forest Products, 4 BOLI 223, 231 (1984).***

❑ When respondent failed to comply with ORS 652.130, which requires employers to give every employee working on a quantity wage basis with a statement of scale or quantity produced by the employee at least once a month, the forum relied upon the claimant's estimate when (1) it was the only existing estimate and the best estimate; (2) the claimant was qualified to make the estimate; (3) the estimate was made within six months of the work; (4) the claimant's estimate was conservative; and (5) the employer did not dispute the estimate. ***----- In the Matter of Kenneth Cline, 4 BOLI 68, 80 (1983).***

❑ An employer has a duty to know the amount of wages due to an employee at the time of termination of the employee's employment, and such amount becomes due and payable immediately upon termination of employment. Since the employer offered no testimony or evidence of any kind to show the number of hours claimant worked, the forum accepted claimant's statement and record of the number of hours she worked. ***----- In the Matter of Jack Coke, 3 BOLI 238, 242-43 (1983).***

❑ The forum rejected a respondent employer's defense that it did not know the amount of wages owing at the time of claimant's termination and therefore was unable to pay. ***----- In the Matter of S.O.S. Towing and Storage, Inc., 3 BOLI 145, 148 (1982).***

4.3 --- Work Time

❑ Any work that is "suffered" or "permitted" is work time. ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 203 (2006).*** *See also In the Matter of Elisha, Inc., aff'd without opinion, Elisha, Inc. v. Bureau of Labor and Industries,* 198 Or App 285, 108 P3d 1219 (2005).

❑ It is an employer's duty to exercise control and see that work is not performed if it does not want work to be performed. ***----- In the Matter of Elisha, Inc., 25 BOLI 125, 153 (2004).***

> Affirmed without opinion, *Elisha, Inc. v. Bureau of Labor and Industries,* 198 Or App 285, 108 P3d 1219 (2005).

❑ When claimant, at his own request, received training for one day with respondent's full acquiescence, and when the training was directly related to his job duties and claimant performed productive work for respondent during the training, respondent was required to pay claimant at the agreed upon wage rate. ***----- In the Matter of Arnold J. Mitre, 23 BOLI 46, 54-55 (2002).***

❑ When claimant did paperwork at home in preparing and concluding his work day, but kept no records of this time and did not include those hours in his wage claim, the forum did not credit claimant's time spent on those activities as hours worked for wage calculation purposes. ***----- In the Matter of Northwest Civil Processing, 21 BOLI 232, 245-46 (2001).***

❑ When claimant's work as a process server required travel on a route determined by claimant, the forum credited all of claimant's time spent driving and attempting to serve legal documents on individuals and businesses as compensable work time. ***----- In the Matter of Northwest Civil Processing, 21 BOLI 232, 246 (2001).***

❑ Work time includes time spent waiting to perform work for the benefit and at the request of the employer. ***---- In the Matter of Harold Zane Block, 17 BOLI 150, 160 (1998).***

❑ Training time is considered a cost of doing business for an employer and is compensable work time. ***----- In the Matter of Scott A. Andersson, 17 BOLI 15, 22 (1998).*** *See also In the Matter of Box/Office Delivery, 12 BOLI 141, 146 (1994); In the Matter of Dan's Ukiah Service, 8 BOLI 96, 98-106 (1989).*

❑ The time claimant spent training to be a recruiter in a private employment agency was compensable work time. ***----- In the Matter of Frances Bristow, 16 BOLI 28, 40-41 (1997).***

❑ Respondent claimed that one day of a wage claimant's work time was a "ride along," which meant that claimant would learn the route and observe, but not be paid. The commissioner awarded wages for that time and used it in calculation of penalty wages. ***----- In the Matter of Danny Jones, 15 BOLI 96, 99-101 (1996).***

❑ Under ORS 653.010(10), "employ" means to suffer or permit to work. Work time is all time an employee is required to be on the employer's premises, on duty or at a prescribed work place. ***----- In the Matter of Sunnyside Enterprises of Oregon, 14 BOLI 170, 183 (1995).***

❑ When claimant's work shift ended at 5 p.m., but respondent routinely asked her to remain at work, pick up dinner for other employees, and run errands, respondent suffered or permitted claimant to remain at a prescribed work place and the time she spent waiting to work or working was compensable work time. ***----- In the Matter of Sunnyside Enterprises of Oregon, Inc., 14 BOLI 170, 183 (1995).***

❑ Work time is all time an employee is required to be on the employer's premises, on duty or at a prescribed work place. There is no requirement on the part of the employee for mental or physical exertion. Work time includes time spent waiting to perform work for the benefit and at the request of the employer. Unless an employee is specifically relieved from duty for a time period sufficiently long for the employee to use for his or her own purposes, the employer must compensate the employee for time spent waiting. ***----- In the Matter of Sunnyside Enterprises of Oregon, Inc., 14 BOLI 170, 183 (1995).*** *See also In the Matter of Ashlanders Senior Foster Care, Inc., 14 BOLI 54, 78 (1995); In the Matter of Kenny Anderson, 12 BOLI 275, 282 (1994); In the Matter of Martin's Mercantile, 12 BOLI 262, 274 (1994); In the Matter of Box/Office Delivery, 12 BOLI 141, 146 (1994);*

In the Matter of Flavors Northwest, 11 BOLI 215, 227 (1993); In the Matter of Dan's Ukiah Service, 8 BOLI 96, 106) (1989).

❑ Work time is all time an employee is required to be on the employer's premises, on duty. When respondent suffered or permitted claimant to arrive at the office at 7:30, 45 minutes before the morning file review and one hour before the first patient, that was compensable work time. ***----- In the Matter of Mario Pedroza, 13 BOLI 220, 228-29 (1994).***

❑ Work time is all time an employee is required to be on the employer's premises, on duty or at a prescribed work place. There is no requirement on the part of the employee for mental or physical exertion. ***----- In the Matter of Mary Stewart-Davis, 13 BOLI 188, 197 (1994).***

> Affirmed without opinion, *Stewart-Davis v. Bureau of Labor and Industries,* 136 Or App 212, 901 P2d 268 (1995).

❑ When a respondent employer who operated a beauty salon did not tell claimant, a hairdresser, in advance when she could leave, and claimant spent the time between customer's appointments cleaning, making coffee, answering the phone, and being available for walk-in customers, the commissioner held that respondent did not comply with OAR 839-20-041(2), and that these periods between appointments were hours worked and compensable work time. ***----- In the Matter of Mary Stewart-Davis, 13 BOLI 188, 194-95, 197, 200 (1994).***

> Affirmed without opinion, *Stewart-Davis v. Bureau of Labor and Industries,* 136 Or App 212, 901 P2d 268 (1995).

❑ Training time is considered a cost of doing business for an employer. ***----- In the Matter of Kenny Anderson, 12 BOLI 275, 282 (1994).***

❑ The commissioner held that claimants' lunch periods were paid work time when claimants were a cook and a cashier at a café who were permitted to eat lunch when business was slow, but were subject to customer demands for service during their lunch breaks. ***----- In the Matter of Flavors Northwest, 11 BOLI 215, 226-27 (1993).***

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

❑ When claimant worked 24 hour shifts and was never able to sleep for more than two hours without interruption and there was no express or implied agreement between respondent and claimant regarding excluding a bona fide regularly scheduled sleeping period from hours worked, claimant was entitled to be paid the minimum wage for all 24 hours of her 24 hour shifts. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 188-89 (2007).***

❑ When there was no agreement between three night clerks as to what hours would be counted at work time, respondent kept no records showing the time that three night clerks started and stopped their work each day, and the clerks were required to be available at whatever time during the night a guest or potential guest needed help and never had "complete freedom from all duties," they were entitled to be paid for all of their sleeping time. ***----- In the Matter of Elisha, Inc., 25 BOLI 125, 152, 158 (2004).***

❑ It is an employer's duty to exercise control and see that work is not performed if it does not want work to be performed. ***----- In the Matter of Elisha, Inc., 25 BOLI 125, 153 (2004).***

> Affirmed without opinion, *Elisha, Inc. v. Bureau of Labor and Industries,* 198 Or App 285, 108 P3d 1219 (2005).

❑ Any work that is "suffered" or "permitted" is work time. ***----- In the Matter of Elisha, Inc., 25 BOLI 125, 153 (2004).***

> Affirmed without opinion, *Elisha, Inc. v. Bureau of Labor and Industries,* 198 Or App 285, 108 P3d 1219 (2005).

❑ Employers are not required to compensate their employees for sleeping time. However, employees are entitled to compensation for any interruptions of their sleep periods and must be compensated for the entire sleeping period if the interruptions are so frequent that they cannot get at least five continuous hours of sleep. When claimant received two eight-hour uninterrupted sleep periods during 48-hour weekend shifts, respondent was not required to pay claimant for those sleep periods, but was required to pay claimant for the remaining 32 hours. ***----- In the Matter of Sharon Kaye Price, 21 BOLI 78, 88 (2000).***

❑ Work time includes time spent waiting to perform work for the benefit and at the request of the employer. ***----- In the Matter of Harold Zane Block, 17 BOLI 150, 160 (1998)***.

❑ Unless an employee is specifically relieved from duty and the time period is sufficiently long for the employee to use for his or her own purposes, the employer must compensate the employee for time spent waiting. ***----- In the Matter of Harold Zane Block, 17 BOLI 150, 160 (1998)***.

❑ Work time includes time spent waiting to perform work for the benefit and at the request of the employer. Unless an employee is specifically relieved from duty for a time period sufficiently long for the employee to use for his or her own purposes, the employer must compensate the employee for time spent waiting to perform work. ***----- In the Matter of Sunnyside Enterprises of Oregon, Inc., 14 BOLI 170, 183 (1995).*** *See also In the Matter of Ashlanders Senior Foster Care, Inc., 14 BOLI 54, 78 (1995); In the Matter of Mary Stewart-Davis, 13 BOLI 188, 194-95, 197, 200 (1994), affirmed without opinion, Stewart-Davis v. Bureau of Labor and Industries,* 136 Or App 212, 901 P2d 268 (1995); *In the Matter of Kenny Anderson, 12 BOLI 275, 282 (1994); In the Matter of Martin's Mercantile, 12 BOLI 262, 274 (1994); In the Matter of Box/Office Delivery, 12 BOLI 141, 146 (1994); In the Matter of Flavors Northwest, 11 BOLI 215, 227 (1993); In the Matter of Dan's Ukiah Service, 8 BOLI 96, 106 (1989).*

❑ When a respondent employer, who operated a beauty salon, did not tell claimant, a hairdresser, in

advance when she could leave, and claimant spent the time between customer's appointments cleaning, making coffee, answering the phone, and being available for walk-in customers, the commissioner held that respondent did not comply with OAR 839-20-041(2), and that these periods between appointments were hours worked and compensable work time. ***----- In the Matter of Mary Stewart-Davis, 13 BOLI 188, 194-95, 197, 200 (1994).***

> Affirmed without opinion, *Stewart-Davis v. Bureau of Labor and Industries,* 136 Or App 212, 901 P2d 268 (1995).

❑ The time claimant spent waiting for work was compensable work time when respondent suffered or permitted claimant to remain at a prescribed work place, where claimant either waited for work or trained with other employees. ***----- In the Matter of Kenny Anderson, 12 BOLI 275, 282 (1994)***.

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

5.0 MINIMUM WAGE AND OVERTIME

5.1 --- Minimum Wage

❑ When credible evidence showed respondent and claimant agreed on a pay rate - $100 per house cleaned – a rate which, when calculated based on claimant's actual work hours, was less than the 2005 minimum wage rate of $7.25 per hour, respondent was required to pay claimant at least $7.25 per hour for the hours she worked between April 28 and May 10, 2005. ***----- In the Matter of Sue Dana, 28 BOLI 22, 30 (2006).***

❑ An agreement to pay at a fixed rate includes the statutory requirement to pay the minimum wage and an employee's compensation, however calculated, must result in the employee being paid at least the minimum wage for all hours worked. ***----- In the Matter of Adesina Adeniji, 25 BOLI 162, 170 (2004).***

❑ When the forum found there was no evidence showing that the wage claimants agreed to a "package deal" that included a 2.5 percent commission for all of the guests they checked in, plus free use of an apartment adjoining the motel office, paid utilities, including cable television and local telephone calls, and free use of respondent's laundry facilities, the forum concluded that the wages owed to the wage claimants should be computed at the minimum wage rate, including overtime. ***----- In the Matter of Elisha, Inc., 25 BOLI 125, 150 (2004).***

> Affirmed without opinion, *Elisha, Inc. v. Bureau of Labor and Industries,* 198 Or App 285, 108 P3d 1219 (2005).

❑ Employers are free to pay employees solely by commission so long as the commission does not result in an employee earning less than minimum wage for all hours worked. ***----- In the Matter of William Presley, 25 BOLI 56, 70 (2004).***

> Affirmed, *Presley v. Bureau of Labor and Industries,* 200 Or App 113, 112 P3d 485 (2005).

See also In the Matter of TCS Global, 24 BOLI 246, 258 (2003); In the Matter of Procom Services, Inc., 24 BOLI 238, 244 (2003); In the Matter of Ann L. Swanger, 19 BOLI 42, 56 (1999).

❑ When respondent and claimant agreed that claimant would be paid a commission for work that included dispatching flaggers to various job sites, but claimant received no commissions during or after his employment, the forum concluded that claimant was entitled to receive the minimum wage for each hour he worked as a dispatcher. ***----- In the Matter of TCS Global, 24 BOLI 246, 258 (2003).***

❑ When claimant's pay rate was changed to a straight commission of $40 per sale, but the agency provided no evidence of the specific amount of commissions she earned during the wage claim period, the forum had no way to determine whether her earned commissions exceeded her earnings computed at the applicable minimum wage rate and concluded therefore that claimant's pay rate was $6.50 per hour. ***----- In the Matter of Procom Services, Inc., 24 BOLI 238, 244 (2003).***

❑ In the absence of evidence that claimant was entitled to the same pay rate - $10.00 per hour - that respondent agreed to pay him for his flagging and pilot car work, the forum concluded that claimant was entitled to receive the applicable minimum wage rate for each hour he worked as a dispatcher. ***----- In the Matter of TCS Global, 24 BOLI 246, 258 (2003).***

❑ When respondent agreed to pay claimant $6.00 per hour and the minimum wage in Oregon was $6.50 per hour, the forum found that respondent was prohibited from paying the lesser wage. ***----- In the Matter of Devon Peterson, 24 BOLI 189, 197 (2003).***

❑ When a claimant credibly testified that respondent agreed to pay him $1,200 per month, plus commissions, but there was no evidence presented to show the number of hours of work per week the salary was intended to cover, the forum concluded that respondent was required to pay the claimant at least the minimum wage for all hours worked. ***----- In the Matter of Devon Peterson, 24 BOLI 189, 199 (2003).***

❑ ORS 653.025 prohibits employers from paying employees less than $6.50 per hour for each hour of work time. ***----- In the Matter of Toni Kuchar, 23 BOLI 265, 274 (2002).***

❑ Any employer who pays less than the minimum wage is liable to the affected employee for the full amount of wages owed, less any amount paid, and for penalty wages. ***----- In the Matter of Toni Kuchar, 23 BOLI 265, 274 (2002).***

❑ When there is no agreed upon rate of pay, an employer is required to pay at least the minimum wage, which was $6.50 per hour in 1999. ***----- In the Matter of Jo-El, Inc., 22 BOLI 1, 7 (2001).*** *See also In the Matter of Bubbajohn Howard Washington, 21 BOLI 91, 101 (2000); In the Matter of Barbara Coleman, 19 BOLI 230, 263-64 (2000).*

❑ An employer's agreement with an employee to pay the employee less than the minimum wage is not a defense to a wage collection proceeding based on the minimum wage. ***----- In the Matter of Debbie Frampton,***

***19 BOLI 27, 38 (1999)**. See also In the Matter of Leslie Elmer DeHart, 18 BOLI 199, 208-09 (1999).*

❑ Employers are required to pay the minimum wage even when general industry practice is to pay less than that wage. ***----- In the Matter of Debbie Frampton, 19 BOLI 27, 38 (1999)**.*

❑ During 1998, employers were legally obliged to pay employees at least $6.00 per hour worked up to forty per week, plus one and one-half times that wage for all hours worked in excess of forty per week. ***----- In the Matter of Sabas Gonzalez, 19 BOLI 1, 14 (1999)**.*

❑ ORS 653.025 prohibits employers from paying employees less than the minimum wage and sets that wage. ***----- In the Matter of Leslie Elmer DeHart, 18 BOLI 199, 208 (1999)**.*

❑ When respondent and the wage claimant agreed that the claimant would be paid 20% for each load of potato waste that claimant delivered, and that rate did not equal minimum wage and overtime for all hours worked, the forum held that the agreement was no defense to a failure to pay the minimum wage, overtime, or final wages when due. ***----- In the Matter of Harold Zane Block, 17 BOLI 150, 158 (1998)**.*

❑ It is an affirmative defense that an employee is excluded from coverage of Oregon's minimum wage law. Respondent has the duty to raise this defense and present evidence to support it. ***----- In the Matter of Diran Barber, 16 BOLI 190, n. 198 (1997).***

❑ A salary agreement between respondent and claimant is no defense to respondent's failure to pay the minimum wage and overtime. ***----- In the Matter of Diran Barber, 16 BOLI 190, 198 (1997).***

❑ Putting an employee on salary does not, by itself, cause the employee to be excluded from the coverage of Oregon's minimum wage law. A salary is merely one method of compensating an employee; other methods include, for example, hourly wage rates, piece rates, commissions, overrides, spiffs, bonuses, tips, and similar benefits. ***----- In the Matter of Diran Barber, 16 BOLI 190, n. 197 (1997).***

❑ When respondent and claimant had an agreement whereby claimant would be paid on a commission basis, but claimant earned no commissions, the commissioner held that respondent owed claimant the minimum wage for each hour claimant worked. ***----- In the Matter of Frances Bristow, 16 BOLI 28, 35-36 (1997).***

❑ A commission-only method of compensation is not by itself indicative of independent contractor status. Oregon's minimum wage law recognizes that employees who receive commission payments must still earn at least the minimum wage. In previously decided cases, the commissioner has found that workers who were paid on commission were employees, not independent contractors, and were owed the minimum wage. ***----- In the Matter of Frances Bristow, 16 BOLI 28, 38-39 (1997).***

❑ When a minimum wage law requires that a worker be paid the minimum wage, the fact that a worker is not paid or that there is no agreement to pay him at a fixed rate does not take him out of the definition of "employee." ***----- In the Matter of LaVerne Springer, 15 BOLI 47, 50-51 (1996).***

❑ The agreement to pay at a fixed rate includes the statutory requirement to pay a minimum wage. When claimant agreed to work as the resident manager of an adult foster care home for $500 per month, she could not agree to accept less than the minimum wage, whether as a salary or otherwise. ***----- In the Matter of John Hatcher, 14 BOLI 289, 301 (1996).***

❑ A wage agreement between the employer and claimants to work at the rate of five percent of gate receipts, when the actual sums paid to claimants resulted in a payment of less than the applicable minimum wage rate, was not a defense to the application of the minimum wage law to the work performed under the agreement. ***----- In the Matter of Gerald Brown, 14 BOLI 154, 163 (1995).***

❑ Respondent's agreement to pay claimants at a piece rate that was less than minimum wage was no defense to claimants' claim for minimum wages and penalty wages. ***----- In the Matter of Anna Pache, 13 BOLI 249, 269 (1994).***

❑ An agreement to pay at a fixed rate includes the statutory requirement to pay the minimum wage. ***----- In the Matter of Mary Stewart-Davis, 13 BOLI 188, 198 (1994).***

> Affirmed without opinion, *Stewart-Davis v. Bureau of Labor and Industries,* 136 Or App 212, 901 P2d 268 (1995).

❑ Employers are free to pay employees at any rate, or solely by commission, so long as the agreed periodic or commission rate does not result in an employee earning less than minimum wage for all hours worked. ***----- In the Matter of Mary Stewart-Davis, 13 BOLI 188, 198 (1994).***

> Affirmed without opinion, *Stewart-Davis v. Bureau of Labor and Industries,* 136 Or App 212, 901 P2d 268 (1995).

❑ For the purposes of the definition of "employee" in ORS 652.310(2), an "employer who pays or agrees to pay an individual at a fixed rate" includes an employer who is required by law to pay a minimum wage to workers but has failed to do so. The absence of an agreement to pay or actual payment to a worker will not take the worker out of the definition of "employee" when a minimum wage law requires that worker to be paid a minimum wage. ***----- In the Matter of Martin's Mercantile, 12 BOLI 262, 273 (1994).***

❑ Respondent's failure to pay or agree to pay claimant at a fixed rate for personal services rendered did not take claimant out of the definition of "employee" under ORS 652.310(2). Otherwise, every employer who mischaracterizes a worker as a volunteer, independent contractor, or partner; who did not have an agreement for payment of a fixed rate; and who failed to pay the worker a fixed rate could claim the worker was not an employee and avoid paying minimum wage. This would defeat the purposes of the wage statutes. For the purposes of the definition of "employee" in ORS

652.310(2), an "employer who pays or agrees to pay an individual at a fixed rate" includes an employer who is required by law to pay a minimum wage to workers, regardless of whether this legal obligation has been met. The absence of an agreement to pay or the absence of actual payment to a worker will not take the worker out of the definition of "employee" when a minimum wage law requires that worker to be paid a minimum wage. ***----- In the Matter of Crystal Heart Books Co., 12 BOLI 33, 44 (1993).***

5.2 --- Overtime

5.2.1 --- Generally

❑ Although the agency proved that two claimants collectively worked more than 40 hours in a given workweek during 10 separate weeks, the forum rejected the agency's claim for overtime pay because of the insufficiency of the pleadings. Specifically, the agency's order of determination did not cite ORS 653.261 or OAR 839-020-0030, the statute and rule requiring overtime pay, and contained no mention that overtime was a factor in computing wages due to the claimants. ***----- In the Matter of Gary Lee Lucas, 26 BOLI 198, 213 (2005).***

❑ Respondent's argument that claimant had waived her right to any additional compensation, if it were due her, by acknowledging she was paid for all hours worked, is contrary to the law. Respondent was required to pay its employees at the proper rate and a wage claimant's acceptance of straight time pay for her overtime hours worked is not a defense to an administrative action to collect earned, due, and payable wages. ***----- In the Matter of Scott Miller, 23 BOLI 243, 263 (2002.***

❑ This forum has consistently held that an employer may not avoid the mandate to pay overtime by entering into an agreement with an employee and an employee may not on his or her own behalf waive the employer's statutory duty to pay overtime. ***----- In the Matter of Scott Miller, 23 BOLI 243, 250 (2002)***.

❑ When credible evidence based on the whole record established that respondent agreed to pay claimant at a rate that amounted to less than $6.50 per hour, the forum found that respondent's apparent reliance on the agreement to pay claimant at a piece rate as a defense was misplaced. While respondent was free to pay its employees at any rate and by any method, including a piece rate method, the agreed rate or method of compensating an employee must not result in an employee receiving less than the minimum wage for all hours worked. Respondent's agreement to pay claimant at a piece rate, irrespective of the hours claimant actually worked, was not a defense to claimant's claim for minimum wages and civil penalties. ***----- In the Matter of Northwest Civil Processing, 21 BOLI 232, 244 (2001).***

❑ When respondent and the wage claimant agreed that the claimant would be paid 20% for each load of potato waste that claimant delivered, and that rate did not equal minimum wage and overtime for all hours worked, the forum held that the agreement was no defense to a failure to pay the minimum wage, overtime, or final wages when due. ***----- In the Matter of Harold Zane Block, 17 BOLI 150, 158 (1998)***.

❑ Oregon law required respondents to pay claimant at one and one-half her regular hourly rate for all hours worked over 40 in one week. ***----- In the Matter of David Creager, 17 BOLI 102, 110 (1998)***.

❑ When respondent had no agreement with claimants regarding overtime, Oregon law required her to pay them at time and one-half their regular hourly rate for all hours worked over 40 in a workweek. ***----- In the Matter of Graciela Vargas, 16 BOLI 246, 255 (1998).***

❑ A salary agreement between respondent and claimant is no defense to respondent's failure to pay the minimum wage and overtime. ***----- In the Matter of Diran Barber, 16 BOLI 190, 198 (1997).***

❑ Respondent was obligated by ORS 653.261(1) and OAR 839-20-030(1) to pay the wage claimant one and one-half times his regular rate of pay, in this case $8.40 per hour, based on a semimonthly salary of $728 for 40 hours worked per week, for all hours worked in excess of 40 hours in a week. Respondent did not do so and violated OAR 839-20-030(1). ***----- In the Matter of Burrito Boy, Inc., 16 BOLI 1, 7 (1997).***

❑ An agreement between respondent and claimant to waive overtime pay is void as a matter of law. An employer cannot avoid the mandate to pay overtime wages by entering into an agreement with an employee, nor can an employee, on his own behalf, waive the employer's statutory duty to pay overtime. ***----- In the Matter of Danny Jones, 15 BOLI 25, 30-32 (1996).*** *See also In the Matter of Ken Taylor, 11 BOLI 139, 144-45 (1992).*

❑ Respondent claimed that claimant was paid on a fixed salary, that it used the fluctuating workweek method of calculating overtime, and that it used a more generous method of paying overtime by paying the full hourly rate, rather than the extra half time rate for hours over 40 in a week. The forum held that respondent's method of paying claimant did not conform either to its written policy or to the requirements of OAR 839-20-030(3)(f) because claimant was not paid on a salary, one of the requirements for using the fluctuating workweek method, but on an hourly basis and there was no clear, mutual understanding between respondent and claimant about a fixed salary for whatever hours the claimant worked. ***----- In the Matter of Locating, Inc., 14 BOLI 97, 106-08 (1995).***

> Affirmed without opinion, *Locating, Inc. v. Deforest,* 139 Or App 600, 911 P2d 1289 (1996).

❑ The employer and employee must have a clear mutual understanding of the salary arrangement before the employer may utilize the "fixed salary for a fluctuating workweek method. ***----- In the Matter of Locating, Inc., 14 BOLI 97, 108 (1995).***

> Affirmed without opinion, *Locating, Inc. v. Deforest,* 139 Or App 600, 911 P2d 1289 (1996).

❑ When an employer and employee enter into an agreement whereby the employee will receive straight time wages for overtime hours worked, that agreement is no defense to an administrative action to collect earned,

due, and payable wages. ***----- In the Matter of Locating, Inc., 14 BOLI 97, 108 (1995).***

> Affirmed without opinion, *Locating, Inc. v. Deforest,* 139 Or App 600, 911 P2d 1289 (1996).

❑ In determining whether claimant, a salaried employee, was entitled to overtime compensation, the finder of fact must decide whether there was a reasonable agreement between the employer and the employee establishing what was considered "hours worked." ***----- In the Matter of Ashlanders Senior Foster Care, Inc., 14 BOLI 54, 77 (1995).***

❑ For purposes of OAR 839-20-030, when an employee is employed on the basis of a single hourly rate, the hourly rate is the "regular rate," and the employer is obligated by law to pay the employee one and one-half times her regular rate for all hours worked in excess of 40 hours in a week. ***----- In the Matter of Mario Pedroza, 13 BOLI 220, 231 (1994).***

❑ Employers cannot be excused from their obligation to pay overtime for all hours worked in a single workweek due to their ignorance of that legal obligation. ***----- In the Matter of Mario Pedroza, 13 BOLI 220, 232 (1994).***

❑ Even if claimant agreed to work nine hours a day for a flat daily rate, for five days per week, that agreement would have been void. An agreement between an employer and an employee to waive overtime pay is void under Oregon law. ***----- In the Matter of Mario Pedroza, 13 BOLI 220, 233 (1994).***

❑ An agreement between the employer and the claimant, a hair dresser, that claimant would work for commissions only was no defense to the employer's failure to pay claimant minimum wage and overtime, in violation of ORS 653.025(3) and 653.261. ***----- In the Matter of Mary Stewart-Davis, 13 BOLI 188, 194-95 (1994).***

> Affirmed without opinion, *Stewart-Davis v. Bureau of Labor and Industries,* 136 Or App 212, 901 P2d 268 (1995).

❑ Claimant could not accept or agree to accept less than minimum wage and overtime for time worked in excess of 40 hours per week. ***----- In the Matter of La Estrellita, Inc., 12 BOLI 232, 243 (1994).***

❑ In a wage claim case for overtime pay, respondent asserted that claimant was not authorized to work overtime. The commissioner held that, even if true, the assertion was not a defense to respondent's failure to pay all wages earned or his failure to pay claimant at the legally required overtime rate of pay. If an employer has such a problem with an employee, the employer may discipline the employee. The employer may not try to correct the problem by paying an unlawful rate for overtime hours worked. ***----- In the Matter of Ken Taylor, 11 BOLI 139, 145 (1992).***

❑ ORS 653.261 provides that the commissioner may issue rules prescribing minimum conditions of employment, including an overtime rate of pay of one and one-half times the regular rate of pay. OAR 839-20-030 provides that all work performed in excess of 40 hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay. Respondent was obligated by law to pay claimant one and one-half times the regular rate of pay for all hours worked in excess of 40 hours per week and violated ORS 653.261 and OAR 839-20-030 when he failed to do so. ***----- In the Matter of Victor Klinger, 10 BOLI 36, 40 (1991).***

❑ When respondent told claimant his work day was 8 a.m. to 5 p.m. and that claimant should take a one-half hour lunch break, but claimant did not take that break and worked 45 hours per week and respondent was in a position to know that, respondent was liable for five hours of overtime pay per week. ***----- In the Matter of Booker Pannell, 5 BOLI 228, 238 (1986).***

❑ An agreement between an employer and an employee to waive overtime pay is void under Oregon law. ORS 652.360 provides that "no employer may by special contract or any other means exempt himself from any provision of or liability or penalty imposed by ORS 652.31 to 652.405 or by any statute relating to the payment of wages[.]" Thus, employers cannot exempt themselves from the provisions of ORS 653.251. Pursuant to ORS 653.261, the Wage and Hour Commission has adopted OAR 839-21-107, which requires that "all work performed in excess of forty (40) hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay[.]" An employer cannot avoid the mandate to pay overtime wages by entering into an agreement with an employee and an employee, on his own behalf, cannot waive the employer's statutory duty to pay overtime. ORS 653.055(2) explicitly states that an employer cannot use, as a defense to a wage claim, the fact that there was an agreement between the employer and employee to work for less than the wage rate, including the overtime rate, required by ORS 653.261. There are obvious public policy reasons for the statutory prohibition against an employer using the fact that the employee agreed to forego overtime compensation as a defense to an overtime wage claim. If such an agreement were a defense, an employer could require an employee to "agree" to waive overtime as a condition of employment and the purposes of the overtime wage laws would be frustrated. ***----- In the Matter of John Owen, 5 BOLI 121, 125-26 (1986).***

❑ OAR 839-21-107 requires that any hours over 40 worked in any single week must be compensated at a rate of one and one-half times the regular rate. An employer cannot balance hours in excess of 40 worked in one week against fewer than 40 hours worked in another week. The law provides that "for purposes of overtime entitlement compensation, each workweek stands alone." ***----- In the Matter of John Owen, 5 BOLI 121, 125 (1986).***

5.2.2 --- Computation

❑ Because there was no evidence that respondent had an established workweek, the forum computed claimant's overtime pay based on a workweek that began on Monday, the first day of the week that claimant began work and the first day within the scope of her wage claim. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 188-89 (2007).***

❑ When the forum found there was no evidence showing that the wage claimants agreed to a "package deal" that included a 2.5 percent commission for all of the guests they checked in, plus free use of an apartment adjoining the motel office, paid utilities, including cable television and local telephone calls, and free use of respondent's laundry facilities, the forum concluded that the wages owed to the wage claimants should be computed at the minimum wage rate, including overtime. ***----- In the Matter of Elisha, Inc., 25 BOLI 125, 150 (2004).***

> Affirmed without opinion, *Elisha, Inc. v. Bureau of Labor and Industries,* 198 Or App 285, 108 P3d 1219 (2005).

❑ The forum disagreed with the compliance specialist's method of calculating claimant's wages. Respondent and claimant both understood that respondent was paying claimant a weekly salary calculated by multiplying a certain hourly rate by 40 hours per week. The appropriate method of calculating overtime wages for a non-exempt salaried employee under these circumstances is set forth in OAR 839-020-0030(3)(d). Under that rule, the employee is entitled to one and one-half the regular hourly rate of pay *in addition to* the salary he or she is paid weekly. Thus, claimant was entitled to be paid overtime wages for all hours she worked in excess of 40 per week, without any deduction for the weeks during which she worked fewer than 40 hours. Using this calculation method, the forum determined that respondent owed claimant $2407.50 in unpaid wages. ---- ***In the Matter of Contractor's Plumbing Service, Inc., 20 BOLI 257, 273 (2000)***.

❑ For a nonexempt salaried employee, when there is no agreed set number of hours worked each week and when the requirements of the fluctuating workweek method for payment of overtime are not satisfied – that is, when the conditions of OAR 839-20-030(3)(c) through (f) are not met – it is the agency's policy to assume that the employee's salary is intended to compensate the employee for a regular 40 hour workweek. The employee's straight time hourly rate is calculated by dividing 40 into the weekly salary. For example, if the weekly salary is $336, the employee's straight time rate of pay would be $8.40 per hour. If the employee worked 60 hours that week, wages due and owing would be computed as follows: 40 (straight time hours worked) x $8.40 (straight time wage) = $336, plus 20 (overtime hours worked) x $12.60 (straight time wage x 1.5) = $252, for total wages due and owing = $558. ***----- In the Matter of Burrito Boy, Inc., 16 BOLI 1, 14-15 (1997).***

❑ Pursuant to OAR 839-20-030(3)(g), a semimonthly salary is translated into its workweek equivalent by multiplying it by 24 (the number of semimonthly periods in the year) and dividing by 52 (the number of weeks in the year). The regular hourly rate of pay is computed by dividing the weekly wage by the number of hours the salary is intended to compensate. Thus, $728 times 24 equals $17,472, divided by 52 equals $336. This weekly wage, $336, divided by 40 (hours) equals $8.40, the regular hourly rate of pay. The overtime rate of pay equals $8.40 times 1.5, or $12.60 per overtime hour. ***----- In the Matter of Burrito Boy, Inc., 16 BOLI 1, 15-16 (1997).***

❑ When respondent had not established a workweek – a period of seven consecutive 24 hour periods commencing on a particular day – for purposes of computing claimant's overtime, and has failed to establish the beginning day of the employee's work week, the agency's policy is to consider the workweek to begin on the day the individual employee commenced work and to end seven consecutive days after the work began, or to consider the workweek to begin on Sunday and end seven consecutive days later on Saturday -- in other words, the workweek will be the same as a calendar week. ***----- In the Matter of Burrito Boy, Inc., 16 BOLI 1, 13 (1997).***

❑ Under the fluctuating workweek method of calculating overtime, the figured hourly rate of a salaried employee – one who is guaranteed a certain amount of money even if she works fewer than 40 hours in a week – may vary from week to week, depending on how many hours the employee works. To calculate the hourly rate for any given week, the employee's weekly salary is divided by the total number of hours the employee worked that week. The employee's overtime compensation is then figured to be one-half of this rate, multiplied by the number of hours worked in excess of 40. The employee has already been compensated for the straight time pay for the overtime hours when his or her weekly remedy is divided by the total number of weekly hours, and the extra one-half time compensation gives the employee the required time and one-half pay for each hour worked over 40. ***----- In the Matter of Locating, Inc., 14 BOLI 97, 106 (1995).***

> Affirmed without opinion, *Locating, Inc. v. Deforest,* 139 Or App 600, 911 P2d 1289 (1996).

❑ The "fixed salary for a fluctuating workweek" payment method is not an exemption from the requirement that employees be paid one and one-half times their regular rate of pay for all hours worked over 40 in one week. ***----- In the Matter of Locating, Inc., 14 BOLI 97, 108 (1995).***

> Affirmed without opinion, *Locating, Inc. v. Deforest,* 139 Or App 600, 911 P2d 1289 (1996).

5.3 --- Posting Requirements

5.4 --- Excluded Employees

5.4.1 --- Generally

❑ Respondent bears the burden of proving by a preponderance of the evidence that the wage claimants fall within one of the statutory exclusions set forth in ORS 653.020(9). ***----- In the Matter of Elisha, Inc., 25 BOLI 125, 150 (2004).***

> Affirmed without opinion, *Elisha, Inc. v. Bureau of Labor and Industries,* 198 Or App 285, 108 P3d 1219 (2005).

❑ Respondent had the burden of presenting evidence to support the affirmative defense that claimant was a professional who was exempt from statutory overtime requirements. ***----- In the Matter of Scott Miller, 23 BOLI 243, 259 (2002).***

❑ It is an affirmative defense that an employee is excluded from coverage of Oregon's minimum wage law. Respondent has the duty to raise this defense and

present evidence to support it. ***----- In the Matter of Diran Barber, 16 BOLI 190, n.198 (1997).***

❑ In a wage claim case, when respondent did not raise an affirmative defense that claimants were excluded from minimum wage and overtime requirements, and when there was some evidence on the record to suggest a possible exemption for tow truck drivers under federal law, pursuant to OAR 839-20-125(3)(a), the forum held that this exemption must be raised as an affirmative defense, and respondent therefore waived the defense under OAR 839-50-10(2). ***----- In the Matter of Sunnyside Enterprises of Oregon, 14 BOLI 170, 183 (1995).***

5.4.2 --- Agricultural Workers

❑ Under ORS 653.020(1)(d), claimants who were 16 years of age and under were excluded from the requirement to be paid minimum wage because they were hand harvest laborers who harvested berries and were paid on the piece rate basis of 12 cents per pound, the same piece rate paid to employees over 16 years of age on the same farm. ***----- In the Matter of Anna Pache, 13 BOLI 249, 265-66, 268 (1994).***

5.4.3 --- White-Collar Workers

❑ If certain conditions are met in ORS 653.020(3) and OAR 839-020-0005 are met, professional employees may be excluded from overtime requirements. ***----- In the Matter of Scott Miller, 23 BOLI 243, 259 (2002)***.

❑ Accountants who are not certified public accountants may be exempt as professional employees if they actually perform work requiring the consistent exercise of discretion and independent judgment and otherwise meet the tests prescribed in the definition of professional employee in ORS 653.020(3) and OAR 839-020-0005. Accounting clerks, junior accountants, and other accountants, on the other hand, normally perform a great deal of routine work which is not an essential part of and necessarily incident to any professional work which they may do. When these facts are found, the latter accountants are not exempt. ***----- In the Matter of Scott Miller, 23 BOLI 243, 260 (2002)***.

❑ When respondent alleged claimant was exempt from overtime as an accountant or accounting clerk, the forum found claimant was not exempt when the evidence showed that the majority of claimant's actual job duties were routine mental and physical tasks that did not require advanced instruction, and that claimant lacked the advanced specialized instruction or education contemplated by the exemption. ***----- In the Matter of Scott Miller, 23 BOLI 243, 260-61 (2002)***.

❑ When respondent and claimant agreed that claimant would be paid $12.69 per hour for every hour worked and she was paid that hourly rate for every hour worked, claimant was not paid on a salary basis and was not a professional employee who was exempt from Oregon's overtime provisions. ***----- In the Matter of Scott Miller, 23 BOLI 243, 261 (2002)***.

❑ Respondent has the burden of proof of establishing that claimant was exempt as an "executive employee" from the overtime requirements of ORS 653.261 and OAR 839-020-0030(1). Simply giving claimant the title of company foreman and putting him on salary is not enough to automatically exclude him from the requirements of Oregon's minimum wage law regarding payment of overtime wages. ***----- In the Matter of Lane-Douglas Construction, Inc., 21 BOLI 36, 53 (2000).***

❑ Respondent must establish all three elements of ORS 653.020(3) and the five elements contained in OAR 839-020-0005(1)'s definition of "Executive Employee" in order to prevail on the defense that claimant was an exempt executive employee. In this case, those elements are as follows: (1) claimant's primary duty consisted of the management of respondent's field operations; (2) claimant customarily and regularly directed the work of two or more other employees in respondent's field operations; (3) claimant had authority to hire or fire other employees, or his suggestions and recommendations as to the hiring or firing and as to the advancement and promotion of any other change of status of other employees was given particular weight; (4) claimant exercised independent judgment and customarily and regularly exercised discretionary powers; (5) claimant earned a salary and was paid on a salary basis pursuant to ORS 653.025. ***----- In the Matter of Lane-Douglas Construction, Inc., 21 BOLI 36, 54 (2000).***

❑ When claimant was paid his full salary each week during the wage claim period, including 17 weeks when he worked fewer than 40 hours, the forum concluded that claimant earned a salary and was paid on a salary basis during the wage claim period. ***----- In the Matter of Lane-Douglas Construction, Inc., 21 BOLI 36, 54 (2000).***

❑ Undisputed evidence showed that respondent hired every person recommended by claimant, and there was no evidence anyone was hired whom claimant had not recommended; that claimant recommended that two employees be terminated and discussed another's performance problems with respondent, and respondent instructed claimant to terminate two of the employees, but not the third because he would be leaving soon anyway; and that claimant recommended that two employees be given raises and those employees were given raises, although not as much as claimant recommended. This evidence, coupled with respondent's credible testimony that he listened to claimant's recommendations and gave them weight, overcame claimant's unsupported opinion that respondent did not give claimant's recommendations any particular weight, and led the forum to conclude exactly the opposite. ***----- In the Matter of Lane-Douglas Construction, Inc., 21 BOLI 36, 55-56 (2000).***

❑ When the evidence established that claimant independently exercised a number of discretionary powers, including determining when temporary help was needed; determining if work was being done correctly and in a timely manner; disciplining employees; deciding his own work schedule, the particular job sites he visited, the times he visited them, and the work he did on those job sites; assigning applicators to specific jobs; reassigning applicators to other tasks on a particular job site; and reassigning applicators to another job site, the forum concluded that claimant exercised independent judgment and customarily and regularly exercised

discretionary powers. ***----- In the Matter of Lane-Douglas Construction, Inc., 21 BOLI 36, 56 (2000).***

❑ Based on the relative importance that both claimant and respondent ascribed to claimant's "foreman" duties and the actual amount of time claimant spent performing those duties, the forum concluded that claimant's managerial duties were of greater relative importance than his non-managerial duties. ***----- In the Matter of Lane-Douglas Construction, Inc., 21 BOLI 36, 59 (2000).***

❑ Evidence that claimant received a significant raise when promoted to foreman and his pay was lowered when he was demoted, and the fact that employees supervised by claimant were paid considerably less than claimant supported a conclusion that claimant's primary duty was management. ***----- In the Matter of Lane-Douglas Construction, Inc., 21 BOLI 36, 60 (2000).***

❑ Evidence that claimant's only supervisor was respondent, his daily contacts with respondent were minimal, and claimant supervised the employees he spent the bulk of his time with each day supported a conclusion that claimant's primary duty was management. ***----- In the Matter of Lane-Douglas Construction, Inc., 21 BOLI 36, 5-609 (2000).***

❑ A person may be an "administrative employee" exempt from the overtime wage requirements if the person meets each of several criteria set forth in ORS 653.020(3) and OAR 839-020-0005(2). Two of those criteria were central to the case, and required the forum to examine whether claimant's "primary duty" consisted of the "performance of office or non-manual work directly related to management policies or general business operations of his/her employer or his/her employer's customers, and whether claimant "customarily and regularly exercise[d] discretion and independent judgment[.]" ---- ***In the Matter of Contractor's Plumbing Service, Inc., 20 BOLI 257, 271-72 (2000)***.

❑ Claimant's primary duties were taking care of bookkeeping and payroll and she spent the majority of the remainder of her time engaged in various clerical tasks. In keeping with the guidance provided by the federal regulations, the forum concluded that claimant's primary duties were not sufficiently related to "management policies or general business operations" to make claimant an exempt administrative employee. ---- ***In the Matter of Contractor's Plumbing Service, Inc., 20 BOLI 257, 272 (2000)***.

❑ Respondent failed to prove that claimant "customarily and regularly exercise[d] discretion and independent judgment," as required by OAR 839-020-0005(2)(b). "Independent Judgment and Discretion" is defined as "the selection of a course of action from a number of possible alternatives after consideration of each, made freely without direction or supervision with respect to matters of significance." OAR 839-020-0005(5). Importantly, the phrase "does not include skill exercised in the application of prescribed procedures." The only decisions claimant made as part of her job involved choosing the particular way in which she would carry out procedures prescribed by respondent's president. For example, the president told claimant to file documents, and she determined how the documents were to be filed. Claimant seldom, if ever, made independent choices among alternative courses of action. For this reason, too, claimant was not an exempt administrative employee. ---- ***In the Matter of Contractor's Plumbing Service, Inc., 20 BOLI 257, 272 (2000)***.

❑ For purposes of determining whether an employee is an "executive employee" excluded from coverage of the minimum wage law under ORS 653.020(3), an executive employee means an employee (a) whose primary duty – which generally means over 50 percent of the employee's time – consists of management of the enterprise; (b) who customarily and regularly directs the work of two or more other employees; (c) who has authority to hire or fire other employees, or whose recommendations on such issues are given particular weight; (4) who customarily and regularly exercises discretionary powers; and (5) who earns a salary and is paid on a salary basis pursuant to ORS 653.025. A salary is defined as "no less than the [minimum] wage set pursuant to ORS 653.025, multiplied by 2,080 hours per year, then divided by 12 months." ORS 653.010(10). Under this formula, a salary must be no less than $823.33 per month ($4.75 x 2,080 hours = $9,880 ÷ 12 months = $823.33 per month). ***----- In the Matter of Diran Barber, 16 BOLI 190, 197 (1997).***

❑ Giving an employee the title of manager does not automatically exclude the employee from coverage of the minimum wage law. ***----- In the Matter of Diran Barber, 16 BOLI 190, n.197 (1997).***

❑ When no evidence suggested that claimant's primary duty consisted of management of the bar, that he customarily and regularly directed the work of two respondent more other employees, or that he had the authority to hire or fire other employees, respondent failed to prove that claimant was an executive employee excluded from the requirements of the minimum wage law. ***----- In the Matter of Diran Barber, 16 BOLI 190, 197-98 (1997).***

❑ When a wage claimant's primary duty was to cook; he did not perform office or non-manual work directly related to management policies or the general business operations of his employer; management of the enterprise in which he was employed or of a customarily recognized department or subdivision of that enterprise was not a primary duty; and he did not customarily and regularly exercise discretion and independent judgment, the forum concluded that claimant was not excluded from the requirements of ORS 653.010 to 653.261 as either an executive or an administrative employee. ***----- In the Matter of Burrito Boy, Inc., 16 BOLI 1, 16-19 (1997).***

❑ One factor to consider in evaluating whether management is an employee's primary duty is the relationship between the employee's salary and the wages paid other workers for the kind of nonexempt work performed by the employee. ***----- In the Matter of Burrito Boy, Inc., 16 BOLI 1, 18 (1997).***

❑ Simply putting a head cook on salary and giving him the title of manager is not enough to exclude him from

the requirements of the minimum wage law. ***----- In the Matter of Burrito Boy, Inc., 16 BOLI 1, 19 (1997).***

❑ When claimant worked as a salaried cook and was called the kitchen manager, but did not manage the employer's restaurant or any department or subdivision thereof, did not customarily and regularly direct the work of two or more other employees, did not have the authority to hire or fire employees, and his suggestions or recommendations as to the hiring and firing or any other change of status of other employees was not given any particular weight, the forum held that claimant was not an executive employee and not excluded from the requirements of ORS 653.010 to 653.261. ***----- In the Matter of John Mathioudakis, 12 BOLI 11, 15, 17 (1993).***

5.4.4 --- Other Specific Categories of Excluded Workers

❑ When the agency and respondent stipulated that wage claimants were individuals "domiciled at multiunit accommodations designed to provide other people with temporary or permanent lodging, but the forum found that their domicile was not "for the purpose of maintenance, management or assisting in the management," the forum concluded that wage claimants were not excluded from Oregon's minimum wage and overtime laws. ***----- In the Matter of Elisha, Inc., 25 BOLI 125, 148 (2004).***

> Affirmed without opinion, *Elisha, Inc. v. Bureau of Labor and Industries,* 198 Or App 285, 108 P3d 1219 (2005).

❑ ORS 653.010(7) specifically provides that the minimum wage law and the rules adopted by the Wage and Hour Commission on payment of overtime "do not apply to any of the following employees: * * * (7) Any person regulated under the Federal Fair Labor Standards Act." Persons employed in logging operations are regulated by that Act. Section 213 of the Act (Exemptions) provides in paragraph (b)(28) that Section 207 (Maximum Hours) does not apply to: "any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight." There was testimony at hearing that the employer did not employ more than eight persons. Therefore, since claimants were employed in logging operations, their claim for overtime must be decided under the Fair Labor Standards Act, and under that Act claimant's claim must be denied because of the provisions of Section 213(b)(28). ***----- In the Matter of Superior Forest Products, 4 BOLI 223, 229-30 (1984).***

6.0 DEDUCTIONS FROM WAGES

6.1 --- Generally

❑ In order to prevail on allegations that respondent violated ORS 653.045(3) and OAR 839-020-0012, the agency must provide credible evidence that (1) respondent made wage payments to claimants; (2) respondent made deductions from claimants' wage payments; and (3) respondent did not provide the itemized statement required by ORS 652.610 at the time respondent made the wage payments. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 190-91 (2007).***

❑ When there was no evidence presented to show that respondent ever took any deductions from claimant's pay, the forum held that respondent did not violate ORS 653.045(3). ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 191 (2007).***

❑ When claimant received 11 wage payments from respondent and respondent never gave claimant any kind of itemized statement showing the total gross payment being made, the total number of hours worked during the times covered by the gross payments, claimant's rate of pay, and the pay periods for which the payments were made, the forum concluded that respondent committed 11 violations of OAR 839-020-0012. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 191 (2007).***

❑ Under ORS 652.610(3)(a), respondent is permitted to make lawful payroll deductions, including those required by law. ***----- In the Matter of Vidal and Jody Soberon, 24 BOLI 98, 106 (2002)***.

❑ When respondent untimely provided claimant with an itemized statement showing obligatory legal withholdings and the agency produced no evidence to show that respondent did not actually pay the amounts withheld to the proper authorities, the forum concluded that respondent's deductions were lawful. ***----- In the Matter of Vidal and Jody Soberon, 24 BOLI 98, 106 (2002)***.

❑ When the agency did not articulate any legal theory that would negate respondent's legal obligation to withhold certain amounts if not timely withheld, the forum concluded respondent's obligatory deductions were lawful. ***----- In the Matter of Vidal and Jody Soberon, 24 BOLI 98, 106 (2002)***.

❑ Respondent withheld claimant's final paycheck, claiming claimant owed him an amount of money that exceeded the amount claimant earned during the period of his wage claim. Claimant credibly testified that he never entered into a written agreement with respondent or signed an authorization for deductions from his wages. Respondent did not appear or proffer evidence to dispute or contradict the agency's credible evidence. In the absence of a written agreement between respondent and claimant, meeting the requirements set forth in ORS 652.610(3)(e) and voluntarily signed by claimant, the forum found respondent unlawfully withheld claimant's wages. ***----- In the Matter of Arthur Lee, 22 BOLI 99, 107 (2001).***

❑ ORS 652.610 severely limits the circumstances under which an employer may take deductions 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 Robert N. Brown, 20 BOLI 157, 162-63 (2000)***.

❑ Respondent withheld money from an employee's paycheck because the employee allegedly had damaged the respondent's truck. ORS 652.610 strictly limits the

circumstances under which an employer may withhold an employee's wages. Because none of those circumstances applied to this case, the forum held that respondent owed claimant the withheld amount in unpaid wages. ***----- In the Matter of Richard R. Mabe, 19 BOLI 223, 229 (2000)***.

❑ ORS 652.610(3) prohibits employers from deducting any part of an employee's wages unless the employer is required to do so by law; the deductions are for the employee's benefit, in which case they must be authorized in writing by the employee and recorded in the employer's books; or the deductions are authorized by a collective bargaining agreement to which the employer is a party. ***----- In the Matter of Leslie Elmer DeHart, 18 BOLI 199, 208 (1999)***.

❑ An employer may deduct the fair market value of meals furnished by the employer, for the private benefit of the employee, from the minimum wage. However, this only applies when an employer continuously meets certain conditions. For example, the employee must have authorized the deduction in writing, the deduction must meet the other requirements for a lawful deduction under ORS 652.610, and the employer must make a full settlement on each regular payday of sums owed to the employer by the employee because of the meals furnished. ***----- In the Matter of Diran Barber, 16 BOLI 190, n.197-98 (1997).*** *See also In the Matter of Rainbow Auto Parts and Dismantlers, 10 BOLI 66, 72-73 (1991).*

❑ A key provision of the deductions statute provides that no employer may withhold, deduct, or divert any portion of an employee's wages unless the deductions are authorized in writing by the employee, are for the employee's benefit, and are recorded in the employer's books. ***----- In the Matter of Jewel Schmidt, 15 BOLI 236, 244 (1997).***

❑ Interpreting ORS 652.610, as amended in 1981, the commissioner stated that the legislative intent was "(1) that any withholding beyond that required by law or bargaining agreement must be authorized in writing and be for the employee's benefit; and (2) that the employer could not be the ultimate recipient." ***----- In the Matter of Handy Andy Towing, Inc, 12 BOLI 284, 295 (1994).***

❑ ORS 653.035 allows employers to deduct the fair market value of facilities or services furnished by the employer for the private benefit of the employee; however, OAR 839-20-025 provides that facilities or services furnished by the employer as a condition of employment shall not be considered to be for the private benefit of the employee. ***----- In the Matter of Rainbow Auto Parts and Dismantlers, 10 BOLI 66, 72-73 (1991).***

❑ ORS 652.610(3) regulates when an employer may withhold, deduct, or divert any portion of an employee's wages. Except as required by law or authorized by a collective bargaining agreement, nothing in that statute allows a deduction for wages when the employee has not authorized that deduction in writing, particularly when the ultimate recipient of the money withheld is the employer. ***----- In the Matter of Anita's Flowers & Boutique, 6 BOLI 258, 2268 (1987).***

Overruled in part on other grounds, *In the Matter of Central Pacific Freight Lines, Inc.,* 7 BOLI 272, 280 (1972).

6.2 --- Authorization of Deductions

❑ When respondent conveyed a car to the wage claimant well after the payroll period, claimant did not authorize the transaction, and respondent did not record the transaction in his books, the forum found that the value of the car could not be deducted from the amount of wages owed and unpaid. ***----- In the Matter of William Presley, 25 BOLI 56, 71-72 (2004).***

Affirmed, *Presley v. Bureau of Labor and Industries,* 200 Or App 113, 112 P3d 485 (2005).

❑ Respondent withheld claimant's final paycheck, claiming claimant owed him an amount of money that exceeded the amount claimant earned during the period of his wage claim. Claimant credibly testified that he never entered into a written agreement with respondent or signed an authorization for deductions from his wages. Respondent did not appear or proffer evidence to dispute or contradict the agency's credible evidence. In the absence of a written agreement between respondent and claimant, meeting the requirements set forth in ORS 652.610(3)(e) and voluntarily signed by claimant, the forum found respondent unlawfully withheld claimant's wages. ***----- In the Matter of Arthur Lee, 22 BOLI 99, 107 (2001).***

❑ When respondent deducted "process fees" from each of claimant's numerous payroll draws to cover administrative expenses, the forum held that the fees were unlawful deductions because they were not authorized by claimant and were for the benefit of respondent, not claimant. ***----- In the Matter of Cox and Frey Enterprises, 21 BOLI 175, 180 (2001).***

❑ When respondent alleged at hearing that claimant was paid a monthly salary plus beer and food but presented no evidence to establish the fair market value of any meals or drinks provided to claimant and presented no evidence that he met the other conditions necessary to make this deduction from claimant's minimum wage, the commissioner disallowed any deduction from the minimum wage for any beer or food respondent furnished claimant. ***----- In the Matter of Diran Barber, 16 BOLI 190, n.197-98 (1997).***

❑ Respondents' unauthorized deductions from claimant's wages to cover draws or debts allegedly owed to one respondent were illegal under *former* ORS 652.610(3) when claimant never authorized, in writing, deductions from her pay during the period of employment at issue in her wage claim, and when she never signed such an authorization after an employee leasing company became her joint employer. ***----- In the Matter of Staff, Inc., 16 BOLI 97, 118 (1997).***

❑ When respondent operated an adult care home and employed claimant as the resident manager and there was no agreement as to the value or deductibility of any meals or lodging furnished to claimant, no written agreement authorizing respondent's deduction from claimant's wages for the purported cost of meals and lodging, and meals and lodging provided to claimant were a condition of employment rather than for her

private benefit, any such deduction would be a violation of ORS 652.610 and constitute a failure to pay wages earned. ***----- In the Matter of John Hatcher, 14 BOLI 289, 297-99 (1996).***

❑ When claimant worked as a caregiver at respondent's adult foster care home, resided at the home, took his meals with the residents, had no agreement with respondent that the meals and lodging were part of his remuneration, and respondent did not provide claimant an itemized contemporaneous accounting each payday as to the value of the meals and lodging, the forum held that claimant's presence during meals and at night was for the employer's benefit and not for the claimant's private benefit, and therefore would not constitute a setoff from wages owed. ***----- In the Matter of Ashlanders Senior Foster Care, Inc., 14 BOLI 54, 74-75 (1995).***

❑ Respondent deducted the cost of claimant's business cards from claimant's wages. This was a violation of ORS 652.610 and constituted a failure to pay wages earned when the deduction was not authorized in writing by the employee and was not for the employee's benefit. ***----- In the Matter of Mary Stewart-Davis, 13 BOLI 188, 195-96, 199 (1994).***

> Affirmed without opinion, *Stewart-Davis v. Bureau of Labor and Industries,* 136 Or App 212, 901 P2d 268 (1995).

❑ Interpreting ORS 652.610, as amended in 1981, the commissioner stated that the legislative intent was: "(1) that any withholding beyond that required by law or bargaining agreement must be authorized in writing and be for the employee's benefit; and (2) that the employer could not be the ultimate recipient." ***----- In the Matter of Handy Andy Towing, Inc, 12 BOLI 284, 295 (1994).***

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

❑ When respondent deducted "process fees" from each of claimant's numerous payroll draws to cover administrative expenses, the forum held that the fees were unlawful deductions because they were not authorized by claimant and were for the benefit of respondent, not claimant. ***----- In the Matter of Cox and Frey Enterprises, 21 BOLI 175, 180 (2001).***

❑ Except as required by law or authorized by a collective bargaining agreement, nothing in ORS 652.610(3) allows for a deduction from wages when the employee has not authorized that deduction in writing, particularly when the ultimate recipient of the money withheld is the employer. ***----- In the Matter of Harold Zane Block, 17 BOLI 150, 160 (1998)***.

❑ When claimant lived in respondent's adult care home as a condition of employment, the lodging was not for claimant's private benefit, as used in OAR 839-20-025(4)(c), (6). ***----- In the Matter of Jewel Schmidt, 15 BOLI 236, 244 (1997).***

❑ When respondent operated an adult care home and employed claimant as the resident manager and there was no agreement as to the value or deductibility of any meals or lodging furnished to claimant, no written agreement authorizing respondent's deduction from claimant's wages for the purported cost of meals and lodging, and meals and lodging provided to claimant were a condition of employment rather than for her private benefit, any such deduction would be a violation of ORS 652.610 and constitute a failure to pay wages earned. ***----- In the Matter of John Hatcher, 14 BOLI 289, 297-99 (1996).***

❑ When claimant worked as a caregiver at respondent's adult foster care home, resided at the home, took his meals with the residents, had no agreement with respondent that the meals and lodging were part of his remuneration, and respondent did not provide claimant an itemized contemporaneous accounting each payday as to the value of the meals and lodging, the forum held that claimant's presence during meals and at night was for the employer's benefit and not for the claimant's private benefit, and therefore did not constitute a setoff from wages owed. ***----- In the Matter of Ashlanders Senior Foster Care, Inc., 14 BOLI 54, 74-75 (1995).***

❑ Respondent deducted the cost of claimant's business cards from claimant's wages. This was a violation of ORS 652.610 and constituted a failure to pay wages earned when the deduction was not authorized in writing by the employee and was not for the employee's benefit. ***----- In the Matter of Mary Stewart-Davis, 13 BOLI 188, 195-96, 199 (1994).***

> Affirmed without opinion, *Stewart-Davis v. Bureau of Labor and Industries,* 136 Or App 212, 901 P2d 268 (1995).

❑ Interpreting ORS 652.610 in 1981, as amended in 1981, the commissioner stated that the legislative intent was: "(1) that any withholding beyond that required by law or bargaining agreement must be authorized in writing and be for the employee's benefit; and (2) that the employer could not be the ultimate recipient." ***----- In the Matter of Handy Andy Towing, Inc, 12 BOLI 284, 295 (1994).***

❑ ORS 652.610(3) regulates when an employer may withhold, deduct, or divert any portion of an employee's wages. Except as required by law or authorized by a collective bargaining agreement, nothing in that statute allows a deduction for wages when the employee has not authorized that deduction in writing, particularly when the ultimate recipient of the money withheld is the employer. The forum held that a proposed deduction from claimant's wages to cover customer refunds for returned flowers would constitute an illegal deduction. ***---- In the Matter of Anita's Flowers & Boutique, 6 BOLI 258, 2268 (1987).***

> Overruled in part on other grounds, *In the Matter of Central Pacific Freight Lines, Inc.,* 7 BOLI 272, 280 (1972).

6.4 --- Specific Deductions and Setoffs

6.4.1 --- Draws, Advances, Loans

❑ When respondent deducted "process fees" from each of claimant's numerous payroll draws to cover administrative expenses, the forum held that the fees were unlawful deductions because they were not authorized by claimant and were for the benefit of respondent, not claimant. ***----- In the Matter of Cox and***

Frey Enterprises, 21 BOLI 175, 180 (2001).

❑ When respondents did not assert a lawful setoff on due legal process, pursuant to *former* ORS 652.610(4), for the draws they gave claimant, claimant nonetheless agreed to allow a setoff from her wages due and owing for the draws she received. Accordingly, the forum reduced the amount of wages due by the amount of draws claimant received from respondents. . ***----- In the Matter of Staff, Inc., 16 BOLI 97, 118-19 (1997).***

❑ In a default case, the forum allowed a $20 setoff against wages owed when claimant acknowledged that respondent had lent him $20 and that he had not repaid the loan. ***----- In the Matter of S.B.I., Inc., 12 BOLI 102, 110 (1993).***

6.4.2 --- Meals, Lodging, Facilities

❑ When the forum found that respondent provided lodging and the use of its facilities to the wage claimants so that they would be available on respondent's premises to guests or prospective guests at all times during the night, the forum concluded the lodging and facilities were for respondent's benefit and not for the private benefit of the wage claimants and respondent was not entitled to a setoff. ***----- In the Matter of Elisha, Inc., 25 BOLI 125, 151 (2004).***

> Affirmed without opinion, *Elisha, Inc. v. Bureau of Labor and Industries,* 198 Or App 285, 108 P3d 1219 (2005).

❑ When undisputed evidence showed that respondent had a policy of allowing relatives of respondent's employees to stay for free in vacant rooms if the employees cleaned the rooms and that the rooms the wage claimants' children occupied could not be rented because the plumbing was not functioning, the forum did not allow respondent a setoff for the value of the lodging provided to the wage claimant's children. ***----- In the Matter of Elisha, Inc., 25 BOLI 125, 151 (2004).***

> Affirmed without opinion, *Elisha, Inc. v. Bureau of Labor and Industries,* 198 Or App 285, 108 P3d 1219 (2005).

❑ Respondent, who has the burden of proof, did not establish the "fair market value" of any meals or drinks consumed by claimant or any other of the conditions that must be met before meals and drinks can be deducted from the minimum wage. ***----- In the Matter of Jo-El, Inc., 22 BOLI 1, 8 (2001).***

❑ When respondent alleged at hearing that claimant was paid a monthly salary plus beer and food but presented no evidence to establish the fair market value of any meals or drinks provided to claimant and presented no evidence that he met the other conditions necessary to make this deduction from claimant's minimum wage, the commissioner disallowed any deduction from the minimum wage for any beer or food respondent furnished claimant. ***----- In the Matter of Diran Barber, 16 BOLI 190, n.197-98 (1997).***

❑ When claimant lived in respondent's adult care home as a condition of employment, the lodging was not for claimant's private benefit, as used in OAR 839-20-025(4)(c), (6). ***----- In the Matter of Jewel Schmidt, 15 BOLI 236, 244 (1997).***

❑ Under some circumstances, an employer can deduct from the minimum wage the fair market value of meals, lodging, and other facilities or services furnished by the employer to an employee for the private benefit of the employee. ***----- In the Matter of Jewel Schmidt, 15 BOLI 236, 243 (1997).***

❑ When respondent operated an adult care home and employed claimant as the resident manager and there was no agreement as to the value or deductibility of any meals or lodging furnished to claimant, no written agreement authorizing respondent's deduction from claimant's wages for the purported cost of meals and lodging, and meals and lodging provided to claimant were a condition of employment rather than for her private benefit, any such deduction would be a violation of ORS 652.610 and constitute a failure to pay wages earned. ***----- In the Matter of John Hatcher, 14 BOLI 289, 297-99 (1996).***

❑ When claimant worked as a caregiver at respondent's adult foster care home, resided at the home, took his meals with the residents, had no agreement with respondent that the meals and lodging were part of his remuneration, and respondent did not provide claimant an itemized contemporaneous accounting each payday as to the value of the meals and lodging, the forum held that claimant's presence during meals and at night was for the employer's benefit and not for the claimant's private benefit, and therefore did not constitute a setoff from wages owed. ***----- In the Matter of Ashlanders Senior Foster Care, Inc., 14 BOLI 54, 74-75 (1995).***

❑ When respondent and claimants had a rent agreement for $150 per month for two rooms in respondent's store where claimants worked, claimants acknowledged they had not paid rent for eight months, and claimants agreed to allow a setoff for $1200 in rent from their due and owing wages, the forum reduced the amount of wages due by that setoff. ***----- In the Matter of Martin's Mercantile, 12 BOLI 262, 274 (1994).***

❑ When claimant occupied a mobile home located on respondents' business property and acted as night watchman at respondent's request, the mobile home was not a facility furnished for the private benefit of the employee, and claimant was not, as a matter of law, indebted to respondents for rent or maintenance of the premises he occupied for their benefit. ***----- In the Matter of Rainbow Auto Parts and Dismantlers, 10 BOLI 66, 72-73 (1991).***

6.4.3 --- Tools, Equipment, Uniforms

❑ When respondent failed to pay all wages due to a wage claimant upon termination because claimant had allegedly failed to turn in a cleaned uniform, the commissioner found an unauthorized withholding in violation of ORS 652.610. ***----- In the Matter of Danny Jones, 15 BOLI 96, 103 (1996).***

❑ When respondent's answer suggested that the wage claimant was indebted to respondent for using respondent's equipment on a job of his own, but the evidence established that the equipment was used by claimant at respondent's request and direction and that claimant was paid for his time by the customer, the

forum disallowed any setoff for use of the equipment and deducted the hours involved. ***----- In the Matter of Samuel Loshbaugh, 14 BOLI 224 (1995).***

6.4.4 --- Breakage, Damage

❑ When claimant admitted damaging the trailer he was hauling on the first day of his employment, and respondent withheld claimant's paycheck to recover the damage, the forum held that, even if respondent's claim was supported by proof of actual damages, ORS 652.610, concerning deductions from wages, precluded respondent from withholding claimant's wages except in certain circumstances that did not apply. ***----- In the Matter of Arnold J. Mitre, 23 BOLI 46, 55 (2002).***

❑ Respondent withheld money from an employee's paycheck because the employee allegedly had damaged the respondent's truck. ORS 652.610 strictly limits the circumstances under which an employer may withhold an employee's wages. Because none of those circumstances applied to this case, the forum held that respondent owed claimant the withheld amount in unpaid wages. ***----- In the Matter of Richard R. Mabe, 19 BOLI 223, 229 (2000)***.

❑ The forum required an employer to repay money it had withheld from an employee's earnings to repay damage the employee's son did to a tow truck. ***----- In the Matter of Leslie Elmer DeHart, 18 BOLI 199, 208 (1999)***.

❑ Claimant signed an agreement that allowed respondent to deduct from claimant's pay any damages caused to the person or property of another by claimant while in respondent's employ. The commissioner found that $200 withheld from claimant's pay by respondent for damage to a customer's vehicle was wages owed to claimant and ordered those paid, together with penalty wages of $1,440 based on claimant's usual daily rate of earnings. ***----- In the Matter of Handy Andy Towing, Inc, 12 BOLI 284, 290, 292 (1994).***

❑ In response to an order of determination, respondent alleged that a wage claimant's hourly rate was changed to a piece rate basis and that spoiled material and damaged tools were deducted from claimant's wages. The agency's motion to strike the defense was granted since it could not be shown that such deductions were for claimant's benefit or did not go in respondent's pocket. ***----- In the Matter of Daniel Burdick, 12 BOLI 66, 67, 76-77 (1993).***

❑ When respondent paid a $400 grocery and rent bill for claimant and claimant admitted he caused an estimated $400 in damage to respondent's pickup truck, the commissioner allowed those amounts to be setoffs against claimant's earned wages. ***----- In the Matter of Dan's Ukiah Service, 8 BOLI 96, 107 (1989).***

❑ When an employer asserted that there should be certain offsets against any wages otherwise owing to a wage claimant, the commissioner held that the employer had a right to assert a claim of negligent damage to equipment operated by claimant, but could not perfunctorily use that claim to avoid payment of wages. The commissioner cited two appellate decisions, *Sabin v. Willamette Western Corp.,* 276 Or 1083, 557 P2d 1344 (1976) and *Schulstad v. Hudson Oil,* 55 Or App 323 (1981) in support of this holding. ***----- In the Matter of S.O.S. Towing and Storage, Inc., 3 BOLI 145, 148 (1982).***

6.4.5 --- Other Deductions, Setoffs, or Counterclaims

❑ When respondent argued that claimant's NSF checks should act as an offset against unpaid wages, the forum analyzed this potential offset as a deduction and found that none of the factors set out in ORS 652.610(3) applied. The forum also concluded that ORS 652.610 and 652.360, read together, require that an employer pay an employee the wages that are due and seek to resolve any claims the employer may have against the employee by other means. ***----- In the Matter of Jo-El, Inc., 22 BOLI 1, 9 (2001).***

❑ When respondent failed to provide documentation of $4,018.24 in deductions from claimant's paychecks and was unable to satisfactorily account for those deductions, the forum concluded that the deductions constituted unpaid wages that were due and owing to claimant. ***----- In the Matter of Cox and Frey Enterprises, 21 BOLI 175, 189 (2001).***

❑ When respondent deducted "process fees" from each of claimant's numerous payroll draws to cover administrative expenses, the forum held that the fees were unlawful deductions because they were not authorized by claimant and were for the benefit of respondent, not claimant. ***----- In the Matter of Cox and Frey Enterprises, 21 BOLI 175, 180 (2001).***

❑ A wage claimant was required to sign a written authorization acknowledging respondent's policy to be that if he accepted a check without a check guarantee card, and the check bounced, the amount of the check would be withheld from his wages. Pursuant to this policy, respondent withheld $105 from his check. The commissioner found that this was an unlawful deduction under ORS 652.610(3). ----- ***In the Matter of Goodman Oil Company, Inc., 20 BOLI 218, 222 (2000)***.

❑ ORS 652.610 severely limits the circumstances under which an employer may take deductions 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 Robert N. Brown, 20 BOLI 157, 162-63 (2000)***.

❑ Because respondent did not appear or present evidence that deductions he claimed for taxes withheld for claimant were paid, respondent's liability for unpaid wages was for the gross amount. ***----- In the Matter of Samuel Loshbaugh, 14 BOLI 224, n.* (1995).***

❑ An employer was entitled to a setoff against wages owed to claimant for an overpayment of accrued vacation benefits. ***----- In the Matter of Mario Pedroza, 13 BOLI 220, 225, 231 (1994).***

❑ Respondent deducted the cost of claimant's business cards from claimant's wages. This was a violation of ORS 652.610 and constituted a failure to pay wages earned when the deduction was not authorized in writing by the employee and was not for the employee's benefit. ***----- In the Matter of Mary Stewart-Davis, 13***

BOLI 188, 195-96, 199 (1994).

> Affirmed without opinion, *Stewart-Davis v. Bureau of Labor and Industries,* 136 Or App 212, 901 P2d 268 (1995).

❑ When respondent gave claimant gasoline on two occasions and claimant agreed to allow a setoff for the fair market value of the gas from his wages due, the forum reduced the amount of wages due by that setoff. ***----- In the Matter of Kenny Anderson, 12 BOLI 275, 282 (1994).***

❑ When the employer alleged that claimant was fired for theft of over $1,000, the commissioner held that ORS 652.610 precludes an employer from withholding an employee's wages except in certain specified circumstances, none of which applied in the case. ORS 652.610, together with ORS 652.360, require that an employer pay an employee wages that are due and seek to resolve any claims the employer may have against the employee by other means. ***----- In the Matter of Ken Taylor, 11 BOLI 139, 144 (1992).***

❑ When respondents declared that claimant did little or no work, with the apparent inference that this was poor performance and that claimant earned no pay when he did such work, the commissioner held that respondent's defense lacked merit. The commissioner held that respondent's recourse was to take disciplinary action or termination claimant, if appropriate, but could not seek redress by refusing payment, after the fact, for hours actually worked by claimant. ***----- In the Matter of Dan's Ukiah Service, 8 BOLI 96, 106 (1989).*** *See also In the Matter of Marion Nixon, 5 BOLI 82, 88 (1986).*

❑ When an employer admitted in its answer that an amount of net wages were due, but no evidence was presented to show that the employer had paid or deposited any taxes owed by claimant to the IRS or the State of Oregon, the forum held that the entire wage claim amount for gross wages was due and owing. ***----- In the Matter of Ebony Express, Inc., 7 BOLI 91, 96 (1998).***

❑ ORS 652.610(3) regulates when an employer may withhold, deduct, or divert any portion of an employee's wages. Except as required by law or authorized by a collective bargaining agreement, nothing in that statute allows a deduction for wages when the employee has not authorized that deduction in writing, particularly when the ultimate recipient of the money withheld is the employer. The forum held that a proposed deduction from claimant's wages to cover customer refunds for returned flowers would constitute an illegal deduction. ***---- In the Matter of Anita's Flowers & Boutique, 6 BOLI 258, 2268 (1987).***

> Overruled in part on other grounds, *In the Matter of Central Pacific Freight Lines, Inc.,* 7 BOLI 272, 280 (1972).

❑ When a claimant received goods and services pursuant to a wage agreement and claimant admitted she received said goods and services as compensation for work performed, the forum held that said compensation constituted a lawful setoff against the wages due to claimant, pursuant to ORS 652.610(4). ***---- In the Matter of Sheila Wood, 5 BOLI 240, 251 (1986).***

❑ When allegations of theft are used to support a deduction from wages, the deduction is unlawful unless the employee admits to the charges and to a setoff against wages. ***----- In the Matter of Judith Wilson, 5 BOLI 219, 227 (1986).***

7.0 PAYMENT OF WAGES

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

❑ Based on the credible testimony of claimant and an LLP partner that the partner, on behalf of the LLP, agreed to pay claimant $15 per hour for his work, the forum concluded that claimant's agreed rate of pay was $15 per hour. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 222 (2006).***

❑ Based on claimants' credible testimony that respondent agreed to pay them $15 per hour, respondent's lack of credibility and the lack of any evidence to show that $15 per hour was an unusual wage rate for a framer at that time, the forum concluded that respondent agreed to pay claimants $15 per hour. ***---- In the Matter of Gary Lee Lucas, 26 BOLI 198, 212(2005).***

❑ When the order of determination alleged that claimant's agreed wage rate was $9 per hour, respondents did not deny this allegation in their answer, and claimant credibly testified that respondent's manager agreed to pay him $9 per hour, the forum concluded that claimant's agreed wage rate during the wage claim period was $9 per hour. ***----- In the Matter of Orion Driftboat and Watercraft Company, 26 BOLI 137, 148 (2005).***

❑ In its response to the agency's motion to amend, respondent, through its president, asserted that claimant was paid $12 per hour for the work he performed. The forum deemed the statement an admission that claimant worked for an agreed upon rate of $12 per hour for the work he performed. ***----- In the Matter of Kilmore Enterprises, 26 BOLI 111,122 (2004).***

❑ In weighing the testimony of respondent and claimant, the forum found claimant's statement that respondent agreed to pay him $15 per hour was more believable than respondent's statement that they agreed to a piece rate for the work performed. ***----- In the Matter of Paul Andrew Flagg, 25 BOLI 1, 10 (2003).***

❑ Based on claimant's credible testimony and the fact that she was actually paid $3,000 in gross salary for eight separate months, the forum concluded that claimant's agreed pay rate was a $3,000 per month salary based on working eight hours per day, five days per week. ***----- In the Matter of The Alphabet House, 24 BOLI 262, 279-80 (2003).***

❑ Based on the claimant's testimony that was found to be more credible than respondent's, the forum concluded that respondent agreed to pay him $8.00 per hour for his work, despite respondent's assertion in the answer that she agreed to pay him $8.50 per hour. ***----- In the Matter of Stephanie Nichols, 24 BOLI 107, 121 (2002).***

❑ Based on claimants' credible testimony, the forum

concluded that respondents agreed to pay them $10 per hour for their work and one claimant $15 per hour for any overtime work. ***----- In the Matter of Barbara and Robert Blair, 24 BOLI 89, 97 (2002).***

❑ When respondents defaulted by failing to appear at hearing; their only evidentiary contribution was an unsworn statement in their answer that claimant's wage rate was $6.50 per hour; and claimant credibly testified that his wage rate did not change during his employment, and provided wage stubs showing that respondents paid him $13.00 per hour, the forum concluded that claimant's wage rate was $13.00 per hour. ***----- In the Matter of Peter N. Zambetti, 23 BOLI 234, 241 (2002).***

❑ Based on claimants' uncontradicted testimony that respondent agreed to pay them $9 per hour for their services, the forum concluded that respondent and claimants agreed to the $9 per hour rate. ***----- In the Matter of Triple A Construction, LLC, 23 BOLI 79, 93-94 (2002).***

❑ Based on claimant's credible testimony, the forum concluded that respondent agreed to pay him $2800 per month for his work, plus $200 for vehicle and gas expense. ***----- In the Matter of Heiko Thanheiser, 23 BOLI 68, 76 (2002).***

❑ When the agency alleged that a claimant was hired at the agreed rate of $7 per hour, but provided no sworn testimony, affidavits, business records, or other reliable evidence that established claimant's rate and that claimant did not testify, the forum computed claimant's unpaid wages at the minimum wage rate. ***----- In the Matter of Duane Knowlden, 23 BOLI 56, 64 (2002).***

❑ When the agency alleged that a claimant was hired at the agreed rate of $7 per hour and the claimant testified credibly that respondent agreed to pay him $7 per hour as a supervisory employee, the forum calculated claimant's unpaid wages at that rate. ***----- In the Matter of Duane Knowlden, 23 BOLI 56, 64 (2002).***

❑ Based on claimant's credible testimony, the forum concluded that respondent agreed to pay him $800 per week for his work. ***----- In the Matter of Arnold J. Mitre, 23 BOLI 46, 54 (2002).***

❑ Based on claimants' credible testimony, the forum concluded that respondent agreed to pay them $12 and $8 per hour, respectively, for their work. ***----- In the Matter of Stan Lynch, 23 BOLI 34, 43 (2002).***

❑ When claimant did not testify at the hearing, but stated on his wage claim that his agreed wage rate was $15 per hour, and an unsworn statement in respondent's answer stated respondent agreed to pay claimant $10 per hour, but respondent's earlier certified statement to the agency stated that claimant's agreed rate was $15 per hour, the forum concluded claimant was hired at the agreed rate of $15 per hour. ***----- In the Matter of Usra A. Vargas, 22 BOLI 212, 220-21 (2001).***

❑ Based on respondent's admission, the forum concluded that respondent had agreed to pay a wage claimant $8 per hour for the first two hours he worked and $10 per hour thereafter. ***----- In the Matter of Usra A. Vargas, 22 BOLI 212, 220 (2001).***

❑ Claimant's credible testimony that respondent offered him $10 per hour to work for respondent as a car painter established that respondent employed claimant for the agreed rate of $10 per hour. ***----- In the Matter of Ilya Simchuk, 22 BOLI 186, 196 (2001).***

❑ When respondent and the wage claimant agreed that the claimant would be paid 20% for each load of potato waste that claimant delivered, and that rate did not equal minimum wage and overtime for all hours worked, the forum held that the agreement was no defense to a failure to pay the minimum wage, overtime, or final wages when due. ***----- In the Matter of Harold Zane Block, 17 BOLI 150, 158 (1998).***

❑ When a job order was placed with the Oregon State Employment Department on behalf of respondents at a specific daily wage rate, the Employment Department dispatched claimant to the job site with respondents' knowledge, and there was no evidence that the terms of the job order were modified before claimant started work, the forum found that respondents employed claimant at the rate detailed in the job order. ***----- In the Matter of Jack Crum Ranches, Inc., 14 BOLI 258, 270-71 (1995).***

❑ When an employer and employee had an oral wage agreement the employee would work for $92 per day and the employer paid her at the rate of $17.25 per hour for overtime on one occasion, the commissioner held that the agreed regular rate was $11.50 per hour for eight hours per day. ***----- In the Matter of Mario Pedroza, 13 BOLI 220, 231 (1994).***

❑ Respondent placed a job order with the Employment Division seeking job applicants that set out the job title, job description, number of hours per week, job duration, employment location and requirements, and the amount of compensation. The forum found these terms sufficiently definition, clear, and complete to meet the requirements that make an offer binding. When claimant performed the duties of the job, he accepted respondent's job offer by his conduct, and the forum found that respondent and claimant had an implied employment agreement and the wage rate was the one offered in the job order. ***----- In the Matter of Box/Office Delivery, 12 BOLI 141, 149 (1994).***

❑ Respondent placed a job order with the Employment Division, claimant responded to the job order, and respondent told claimant to report to work the next day for training. The forum found that claimant accepted respondent's job offer by going to work, and that offer included the wage rate referred to in the job offer. Nothing in the facts or the law permitted respondent to pay only the minimum wage while claimant was training on the job. ***----- In the Matter of Box/Office Delivery, 12 BOLI 141, 148 (1994).***

❑ An employer is free to set the terms and conditions of the work and of the compensation and the employee may accept or reject those conditions. ***----- In the Matter of Box/Office Delivery, 12 BOLI 141, 148 (1994).***

❑ Claimant and employer had an employment agreement for a monthly salary of $1,600 for all hours

worked, and claimant was paid $800 twice a month, from the 1st to the 15th, and from the 16th to the end of the month. Claimant quit on the 12th of the month. When there was no agreement regarding prorating a final paycheck, the forum found a reasonable proration method was for the employer to pay the claimant 12/15 of $800, or $640, for the pay period between the 1st and the 15th. ***----- In the Matter of Central Pacific Freight Lines, Inc., 7 BOLI 272, 279 (1989).***

7.2 --- Reimbursable Expenses

❑ Under Oregon law the Commissioner has the authority to enforce wage claims which are defined in ORS 652.320(9) as "an employee's claim * * * for compensation for the employee's own personal services." It has long been the policy of the Bureau of Labor and Industries that unpaid job-related expenses can be included in a wage claim if there has been an explicit agreement between the parties that the employer would pay for such expenses or if the employer in fact does pay other such expenses. ***----- In the Matter of Northwest Civil Processing, 21 BOLI 232, 246 (2001).***

❑ When the agency claimed claimant was entitled to a mileage rate of $.31 per mile as reimbursement for a total of 1,736 miles and the evidence showed there was a tacit agreement for reimbursement, but no agreed rate, the forum declined to award claimant mileage reimbursement based on the agency's failure to show a specific agreement. ***----- In the Matter of Northwest Civil Processing, 21 BOLI 232, 247 (2001).***

❑ Employee expenses are recoverable in a wage claim when there is an agreement for reimbursement of the expenses or the expenses are of a type normally reimbursed by the employer. ***----- In the Matter of Jack Crum Ranches, Inc., 14 BOLI 258, 259 (1995).***

❑ Reimbursable expenses are not included in the calculation of penalty wages. ***----- In the Matter of Sylvia Montes, 11 BOLI 268, 272, 279 (1993).***

❑ Unpaid job-related expenses are properly included in a wage claim under ORS chapter 652 if there has been an explicit agreement between the parties that the employer would pay for such expenses or if the employer in fact does pay other such expenses. ***----- In the Matter of Sylvia Montes, 11 BOLI 268, 278 (1993).*** *See also In the Matter of Kevin McGrew, 8 BOLI 251, 261-62 (1990); In the Matter of All Season Insulation Company, Inc., 2 BOLI 264, 278 (1982).*

❑ Respondents told claimants that uniforms were required and that claimants would be reimbursed for the expense of purchasing the uniforms, but never reimbursed claimants. The commissioner added claimants' uniform expenses to the order awarding final wages and penalty wages to claimants. ***----- In the Matter of Flavors Northwest, 11 BOLI 215, 221, 224, 229-30 (1993).***

❑ Job-related reimbursable expenses are properly included in a wage claim under ORS chapter 652. It is the policy of the agency that unpaid job-related expenses can be included in a wage claim if there has been an explicit agreement between the parties that the employer would pay for such expenses. ***----- In the Matter of Kevin McGrew, 8 BOLI 251, 261-62 (1990).***

❑ Reimbursable expenses are governed entirely by the employment agreement. As with fringe benefits, an employer is free to set the terms and conditions of an expenses reimbursement, and an employee may accept respondent reject those conditions. When a mileage reimbursement was conditioned on claimant first submitting required information about his trips on forms supplied by the employer, and claimant failed to satisfy that condition, the employer's obligation to reimburse the claimant did not arise. ***----- In the Matter of Central Pacific Freight Lines, Inc., 7 BOLI 272, 279 (1989).***

❑ It is the policy of the Bureau of Labor and Industries that unpaid job-related expenses can be included in a wage claim if there has been an explicit agreement between the parties that the employer would pay for such expenses or if the employer in fact does pay other such expenses. ***----- In the Matter of Central Pacific Freight Lines, Inc., 7 BOLI 272, 279 (1989).***

❑ Neither the state minimum wage law nor the federal Fair Labor Standards Act, with their accompanying regulations, require an employer to keep records regarding reimbursable expenses. ***----- In the Matter of Central Pacific Freight Lines, Inc., 7 BOLI 272, 279 (1989).***

❑ Agency policy is to not include reimbursable expenses in the wages used to calculate penalty wages, overruling *In the Matter of Anita's Flowers & Boutique, 6 BOLI 258, 266-67 (1987)* in that limited respect. ***----- In the Matter of Central Pacific Freight Lines, Inc., 7 BOLI 272, 280 (1989).***

❑ For purposes of calculating penalty wages, the forum included reimbursable mileage expenses in calculating claimant's total earnings,. ***----- In the Matter of Anita's Flowers & Boutique, 6 BOLI 258, 266-67 (1987).***

> Overruled on this point, *In the Matter of Central Pacific Freight Lines, Inc.,* 7 BOLI 272, 280 (1972).

❑ When respondent employed claimant as a truck driver and gave him a bad final check for $129.70 for wages and $49.70 in expenses, such as gas and oil, connected with operating the truck, the commissioner found that respondent's failure to pay the wages and reimbursable expenses within 48 hours after claimant quit was a violation of ORS 652.140. ***----- In the Matter of Richard Panek, 4 BOLI 218, 221 (1984).***

❑ A job-related expense that claimant incurred for fuel that the employer routinely provided, and for which the employer had reimbursed the claimant on one other occasion, is properly included in a wage claim under ORS chapter 652. ***----- In the Matter of All Season Insulation Company, Inc., 2 BOLI 264, 278 (1982).***

7.3 --- Paydays, Pay Periods

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

❑ Respondent, as an employer, has a duty to know the amount of wages due its employees. ***----- In the Matter of Orion Driftboat and Watercraft Company, 26 BOLI 137, 148 (2005).*** *See also In the Matter of Adesina Adeniji, 25 BOLI 162, 173 (2004); In the Matter*

of William Presley, 25 BOLI 56, 72 (2004), affirmed, Presley v. Bureau of Labor and Industries, 200 Or App 113, 112 P3d 485 (2005); In the Matter of Devon Peterson, 24 BOLI 189, 199 (2003); In the Matter of Stephanie Nichols, 24 BOLI 107, 122 (2002). See also Triple A Construction, LLC, 23 BOLI 79, 95 (2002), In the Matter of Duane Knowlden, 23 BOLI 56, 66 (2002), In the Matter of Arnold J. Mitre, 23 BOLI 46, 55 (2002), In the Matter of Stan Lynch, 23 BOLI 34, 44 (2002); In the Matter of Usra A. Vargas, 22 BOLI 212, 222 (2001); In the Matter of Jo-El, Inc., 22 BOLI 1, 8 (2001); In the Matter of Northwest Civil Processing, 21 BOLI 232, 247 (2001); In the Matter of Danny Vong Phuoc Trong, 21 BOLI 217, 231 (2001); In the Matter of Francisco Cisneros, 21 BOLI 190, 215 (2001), affirmed without opinion, Cisneros v. Bureau of Labor and Industries, 187 Or App 114, 66 P3d 1030 (2003); In the Matter of Robert N. Brown, 20 BOLI 157, 163 (2000); In the Matter of Nova Garbush, 20 BOLI 65, 72 (2000); In the Matter of Barbara Coleman, 19 BOLI 230, 265 (2000); In the Matter of Majestic Construction, Inc., 19 BOLI 59, 68 (1999); In the Matter of Debbie Frampton, 19 BOLI 27, 40 (1999); In the Matter of Belanger General Contracting, 19 BOLI 17, 26 (1999); In the Matter of Leslie Elmer DeHart, 18 BOLI 199, 209 (1999); In the Matter of R.L. Chapman Ent. Ltd., 17 BOLI 277, 284 (1999); In the Matter of Harold Zane Block, 17 BOLI 150, 160 (1998); In the Matter of David Creager, 17 BOLI 102, 111 (1998); In the Matter of Scott A. Andersson, 17 BOLI 15, 24 (1998); In the Matter of Graciela Vargas, 16 BOLI 246, 255 (1998); In the Matter of Diran Barber, 16 BOLI 190, 199 (1997); In the Matter of Tina Davidson, 16 BOLI 141, 148-49 (1997); In the Matter of Staff, Inc., 16 BOLI 97, 119; In the Matter of Burrito Boy, Inc., 16 BOLI 1, 19 (1997); In the Matter of Jewel Schmidt, 15 BOLI 236, 245 (1997); In the Matter of Mark Johnson, 15 BOLI 139, 142 (1996); In the Matter of Danny Jones, 15 BOLI 25, 32 (1996; In the Matter of John Hatcher, 14 BOLI 289, 302 (1996); In the Matter of Jack Crum Ranches, Inc., 14 BOLI 258, 271 (1995); In the Matter of Samuel Loshbaugh, 14 BOLI 224, 230 (1995); In the Matter of Gerald Brown, 14 BOLI 154, 169 (1995); In the Matter of Locating, Inc., 14 BOLI 97, 109 (1995); affirmed without opinion, Locating, Inc. v. Deforest, 139 Or App 600, 911 P2d 1289 (1996).; In the Matter of Ashlanders Senior Foster Care, Inc., 14 BOLI 54, 81 (1995); Katherine Hoffman, 14 BOLI 41, 47 (1995); In the Matter of Anna Pache, 13 BOLI 249, 271 (1994); In the Matter of Mario Pedroza, 13 BOLI 220, 232 (1994); In the Matter of U.S. Telecom International, 13 BOLI 114, 122 (1994); In the Matter of Kenny Anderson, 12 BOLI 275, 283 (1994); In the Matter of Martin's Mercantile, 12 BOLI 262, 275 (1994); In the Matter of Box/Office Delivery, 12 BOLI 141, 149 (1994); In the Matter of S.B.I., Inc., 12 BOLI 102, 110 (1993); In the Matter of Crystal Heart Books Co., 12 BOLI 33, 47 (1993); In the Matter of John Mathioudakis, 12 BOLI 11, 23 (1993); In the Matter of Sylvia Montes, 11 BOLI 268, 279 (1993); In the Matter of Judith Wilson, 5 BOLI 219, 226 (1986).

❑ An employer has the duty to know the amount of wages due an employee and that amount is due upon termination of the employee's employment. ***----- In the Matter of John M. Sanford, Inc., 26 BOLI 72, 81 (2004), amended 26 BOLI 110 (2004).***

❑ It is the employer's duty to maintain an accurate record of an employee's time worked. ***----- In the Matter of Norma Amazola, 18 BOLI 209, 218 (1999).*** *See also In the Matter of Troy R. Johnson*, *17 BOLI 285, 292 (1999).*

❑ An employer's failure to apprehend the correct application of the law and the employer's actions based on this incorrect application do not exempt it from a determination that it willfully failed to pay overtime. ***----- In the Matter of Burrito Boy, Inc., 16 BOLI 1, 19 (1997).*** *See also In the Matter of Mario Pedroza, 13 BOLI 220, 232 (1994).*

❑ It is the employer's duty to maintain an accurate record of an employee's time worked. A purported delegation of that duty forms no defense against a failure to pay all sums due to the employee upon termination. The employee has an absolute duty to pay what is really due. ***----- In the Matter of Samuel Loshbaugh, 14 BOLI 224, 229 (1995)***

❑ When respondent attempted to use a fluctuating workweek method of compensating claimant's overtime but failed to meet the requirements of OAR 839-20-030(3)(f), failed to apprehend the correct interpretation and application of the law, and based its actions upon its incorrect application, this did not exempt it from a determination that it willfully failed to pay overtime. Willful, under ORS 652.150, simply means conduct done of free will. ***----- In the Matter of Locating, Inc., 14 BOLI 97, 110 (1995).***

> Affirmed without opinion, *Locating, Inc. v. Deforest,* 139 Or App 600, 911 P2d 1289 (1996).

❑ The commissioner rejected respondent's argument that he would have complied with the law if only the agency had told him of all the requirements. Employers have a legal duty to know and comply with the law and to become aware of the laws that apply to them. In this case, respondent knew but did not comply with the requirements of the law. ***----- In the Matter of John Mathioudakis, 12 BOLI 11, 12 (1993).***

❑ The forum rejected an employer's argument that he could not be found to have willfully failed to pay a claimant at the minimum wage because he was unaware that the law imposed a minimum wage rate requirement on him, finding his ignorance of the legal requirement to pay at least the minimum wage was irrelevant because all employers are charged with knowing the wage and hour laws governing their activities as an employer. Employers are also charged with knowing the hours an employee works and the rate of pay paid employees for each hour worked. An employer cannot escape liability for penalty wages with the defense of ignorance of the law. ***----- In the Matter of Country Auction, 5 BOLI 256, 267 (1986).***

❑ When an employer failed to make it clear to claimant that claimant was to take a lunch break and allowed claimant to work from 8 a.m. to 5 p.m., the employer was presumed to know that there are nine hours between 8 a.m. and 5 p.m., not eight hours. Even if this failure to pay for nine hours per day was an oversight, the employer would still be subject to penalty

wages under ORS 652.150 because an oversight of such an obvious fact does not negate a conclusion of willfulness. ***----- In the Matter of Booker Pannell, 5 BOLI 228, 238-39 (1986).***

❑ Employers cannot be excused from paying overtime due to ignorance of their legal obligation to pay overtime for all hours over 40 worked in a single workweek. An employer has a duty to know what wages are due to an employee at the time of termination and is obligated to pay for the overtime hours worked. ***----- In the Matter of John Owen, 5 BOLI 121, 128 (1986).***

❑ Since respondent offered no testimony or evidence of any kind to show the number of hours claimant worked, although he had a legal duty to know the hours worked, claimant's statement and record of the number of hours she worked must be accepted. ***----- In the Matter of Jack Coke, 3 BOLI 238, 242-43 (1983).***

❑ An employer has a duty to know the amount of wages due to an employee at the time the employee is terminated and that amount becomes due and payable immediately upon termination of employment. Accordingly, the forum rejected respondent's defense that it did not know the amount owing and was therefore unable to pay. ***----- In the Matter of S.O.S. Towing and Storage, Inc., 3 BOLI 145, 148 (1982).***

7.5 --- Employers' Duty to Pay

❑ Respondents have an absolute duty under ORS 652.140 to pay the wages that are really due even if the amount due exceeds the amount alleged in the agency's charging document. ***----- In the Matter of John M. Sanford, Inc., 26 BOLI 72, 86 (2004), amended 26 BOLI 110 (2004).***

❑ An employer's duty to pay the wages actually due is absolute. ***----- In the Matter of Tina Davidson, 16 BOLI 141, 148 (1997).*** *See also In the Matter of Mary Stewart-Davis, 13 BOLI 188, 199 (1994), affirmed without opinion, Stewart-Davis v. Bureau of Labor and Industries, 136 Or App 212, 901 P2d 268 (1995); In the Matter of Handy Andy Towing, Inc, 12 BOLI 284, 294 (1994).*

❑ It is the employer's duty to maintain an accurate record of an employee's time worked. A purported delegation of that duty forms no defense against a failure to pay all sums due to the employee upon termination. The employee has an absolute duty to pay what is really due. ***----- In the Matter of Samuel Loshbaugh, 14 BOLI 224, 229 (1995)***

❑ When a claimant could have attempted to recover the wages that the employer owed him from a third party, through a logger's lien, his failure to do so did not extinguish or diminish the employer's liability for violating ORS 652.140. It is the employer's absolute responsibility, and his alone, to pay the claimant's wages. ***----- In the Matter of Kenneth Cline, 4 BOLI 68, 80-81 (1983).***

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

❑ When respondent acknowledged that he owed wages to claimant, respondent had an ongoing duty under the law to pay the unpaid wages. If respondent did not know how to contact claimant at first, he should have paid the wages he conceded were due to the agency once the agency notified him of the wage claim. ***---- In the Matter of Kenny Anderson, 12 BOLI 275, 283 (1994).***

❑ Under ORS 652.160, when there is a dispute over wages, an employer must pay the amount conceded to be due the employee "without condition." When a final paycheck contains a condition that is based on the acceptance of terms in an attached letter, the check is invalid under ORS 652.160. ***----- In the Matter of Edward Arnold, 5 BOLI 204, 216 (1986).***

7.7 --- Final Paycheck

7.7.1 --- Generally

❑ It is the employer's duty to maintain an accurate record of an employee's time worked. A purported delegation of that duty forms no defense against a failure to pay all sums due to the employee upon termination. The employee has an absolute duty to pay what is really due. ***----- In the Matter of Samuel Loshbaugh, 14 BOLI 224, 229 (1995)***

❑ Claimant and employer had an employment agreement for a monthly salary of $1,600 for all hours worked, and claimant was paid $800 twice a month, from the 1st to the 15th, and from the 16th to the end of the month. Claimant quit on the 12th of the month. When there was no agreement regarding prorating a final paycheck, the forum found a reasonable proration method was for the employer to pay the claimant 12/15 of $800, or $640, for the pay period between the 1st and the 15th. ***----- In the Matter of Central Pacific Freight Lines, Inc., 7 BOLI 272, 279 (1989).***

❑ Respondent discharged claimant when respondent ceased doing business and permanently closed the store. Claimant's earned and unpaid wages became due and payable immediately upon claimant's discharge. ***----- In the Matter of John Cowdrey, 5 BOLI 291, 297-98 (1986).***

❑ Under ORS 652.160, when there is a dispute over wages, an employer must pay the amount conceded to be due the employee "without condition." When a final paycheck contains a condition that is based on the acceptance of terms in an attached letter, the check is invalid under ORS 652.160. ***----- In the Matter of Edward Arnold, 5 BOLI 204, 216 (1986).***

❑ When respondent employed claimant as a truck driver and gave him a bad final check for $129.70 for wages and $49.70 in expenses, such as gas and oil, connected with operating the truck, the commissioner found that respondent's failure to pay the wages and reimbursable expenses within 48 hours after claimant quit was a violation of ORS 652.140. ***----- In the Matter of Richard Panek, 4 BOLI 218, 221 (1984).***

7.7.2 --- Seasonal Farmworkers

7.7.3 --- Strikes

7.8 --- Method of Payment, Legal Tender

7.9 --- Vacation Pay

❑ When claimant claimed paid vacation days that he used during the last week that he was employed, the forum found he was entitled to use those vacation days and included that amount when calculating claimant's unpaid wages based on credible evidence, including an excerpt from respondent's company policy, showing that claimant was eligible for paid time off and was not restricted from using it during the time period he claimed. ***----- In the Matter of Troy Melquist dba RedCellX, Inc., 27 BOLI 171, 181-82 (2006).***

❑ When used in accordance with company policy, paid time off is compensation for services performed by an employee for an employer and constitutes "wages" as defined by statute. ***----- In the Matter of Troy Melquist dba RedCellX, Inc., 27 BOLI 171, 182 (2006).***

❑ When respondent's personnel manual contained no reference to vacation pay and claimant did not take any vacation prior to the effective end of her employment, and when there was no evidence of respondent's policy, if any, concerning payment for accrued vacation time upon termination of employment and no evidence that other employees took paid vacation after their last day on the job, the forum declined to base an award of unpaid wages for accrued vacation leave on speculation. ***----- In the Matter of The Alphabet House, 24 BOLI 262, 280-81 (2003).***

❑ When the agency sought one month of wages representing vacation pay, it was the agency's burden to establish that claimant was entitled to vacation pay. ***----- In the Matter of The Alphabet House, 24 BOLI 262, 280 (2003).***

❑ An employer was entitled to a setoff against wages owed to claimant for an overpayment of accrued vacation benefits. ***----- In the Matter of Mario Pedroza, 13 BOLI 220, 225, 231 (1994).***

8.0 WORKING CONDITIONS

8.1 --- Meal Periods and Rest Periods

❑ When claimant, a cook, did not receive a meal period of not less than 30 minutes during which he was relieved of all duties, and when he continued to perform duties or remained on call during his meal periods, the forum held that he did not receive the "appropriate meal period" required by OAR 839-20-050(2) and that respondent should not have deducted a one-half hour meal period from his work hours each day***. ----- In the Matter of John Mathioudakis, 12 BOLI 11, 19, 23 (1993).***

❑ When respondent told claimant his work day was 8 a.m. to 5 p.m. and that claimant should take a one-half hour lunch break, but claimant did not take that break and worked 45 hours per week and respondent was in a position to know that, respondent was liable for five hours of overtime pay per week. ***----- In the Matter of Booker Pannell, 5 BOLI 228, 238 (1986).***

❑ OAR 839-20-050 requires businesses to provide each employee with meal and rest periods. Required rest and meal periods may not be deducted from an employee's wages when the employee is not completely relieved from duty. ***----- In the Matter of Judith Wilson, 5 BOLI 219, 226 (1986).***

9.0 RECORDS

9.1 --- Personnel

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

❑ When respondent required claimant to record her daily hours and weekly totals on time sheets and produced those records during the wage claim investigation at the agency's request, the forum held it was the claimant's threshold burden to establish that the records were "inaccurate or inadequate." ***----- In the Matter of Rubin Honeycutt, 25 BOLI 91, 103-04 (2003).***

❑ Failure to make and keep available payroll records is a serious violation because it significantly impedes the commissioner's ability to determine whether employees are properly compensated, which potentially affects the substantive rights of the workers. ***----- In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration, 25 BOLI 12, 53 (2003).***

> Affirmed without opinion, *Ochoa v. Bureau of Labor and Industries*, 196 Or App 639, 103 P3d 1212 (2004).

❑ One of the purposes of the statute requiring an employer to provide workers within an itemized statement of earnings each time they are paid for work performed is to afford workers an opportunity to verify that they have been correctly paid for all of the hours they worked. ***----- In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration, 25 BOLI 12, 52 (2003).***

> Affirmed without opinion, *Ochoa v. Bureau of Labor and Industries*, 196 Or App 639, 103 P3d 1212 (2004).

❑ When respondent failed to provide claimant an itemized statement with each wage payment over a two month period, but later provided claimant an itemized statement showing obligatory legal withholdings over the same time period and the agency did not allege that respondent violated ORS 652.610, the forum did not find a records violation. ***----- In the Matter of Vidal and Jody Soberon, 24 BOLI 98, 106 (2002)***.

❑ Oregon law requires employers to maintain accurate records of the hours worked by their employees. ***----- In the Matter of Duane Knowlden, 23 BOLI 56, 66 (2002).*** *See also In the Matter of Stan Lynch, 23 BOLI 34, 44 (2002); In the Matter of Tina Davidson, 16 BOLI 141, 148 (1997); In the Matter of Jewel Schmidt, 15 BOLI 236, 242 (1997); In the Matter of Jack Crum Ranches, Inc., 14 BOLI 258, 270 (1995); In the Matter of Mary Rock, 7 BOLI 85, 90 (1988).*

❑ ORS 653.045 requires employers to keep and maintain proper records of wages, hours, and other conditions and practices of employment. ***----- In the Matter of Triple A Construction, LLC, 23 BOLI 79, 94 (2002).*** *See also In the Matter of Heiko Thanheiser, 23 BOLI 68, 76 (2002); In the Matter of Usra A. Vargas, 22 BOLI 212, 220-21 (2001).*

❑ 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. ***----- In the Matter of Triple A Construction, LLC, 23 BOLI 79, 94 (2002).*** *See also In the Matter of Usra A. Vargas, 22 BOLI 212, 220-21 (2001).*

❑ 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 Heiko Thanheiser, 23 BOLI 68, 77 (2002).*** *See also In the Matter of Usra A. Vargas, 22 BOLI 212, 221 (2001; In the Matter of Francisco Cisneros, 21 BOLI 190, 213-14 (2001); appeal pending; In the Matter of Barbara Coleman, 19 BOLI 230, 265 (2000); In the Matter of Ann L. Swanger, 19 BOLI 42, 56 (1999); In the Matter of Debbie Frampton, 19 BOLI 27, 38-39 (1999); In the Matter of Sabas Gonzalez, 19 BOLI 1, 14 (1999).*

❑ When respondent neither kept nor produced a record of hours or dates worked by two wage claimants and produced only unreliable records purporting to represent a third claimant's hours worked as a dishwasher, the forum examined the agency's evidence to determine if it showed the amount and extent of the claimants' work as a matter of just and reasonable inference. ***----- In the Matter of Francisco Cisneros, 21 BOLI 190, 214 (2001).***

> Affirmed without opinion, *Cisneros v. Bureau of Labor and Industries,* 187 Or App 114, 66 P3d 1030 (2003).

❑ Respondent's failure to produce records required by statute or to otherwise provide any credible evidence of the number of hours worked by the claimants was considered because it was an aid to the forum in evaluating the credibility of the claimants. ***----- In the Matter of Francisco Cisneros, 21 BOLI 190, 216 (2001).***

> Affirmed without opinion, *Cisneros v. Bureau of Labor and Industries*, 187 Or App 114, 66 P3d 1030 (2003).

❑ Oregon law requires employers to maintain accurate records of the hours their employees work and the wages they are paid. ***----- In the Matter of Sharon Kaye Price, 21 BOLI 78, 88 (2000).*** *See also In the Matter of Barbara Coleman, 19 BOLI 230, 265 (2000); In the Matter of Sabas Gonzalez, 19 BOLI 1, 14 (1999); In the Matter of Troy R. Johnson*, *17 BOLI 285, 292 (1999).*

❑ When claimant's testimony regarding the hours he worked was not credible, the forum declined to "speculate or draw inferences about wages owed based on insufficient, unreliable evidence." As a result, despite respondents' failure to create and maintain a record of hours worked by claimant, the agency's case failed because it could not prove a prima facie case. ***----- In the Matter of Ann L. Swanger, 19 BOLI 42, 57 (1999)***.

❑ The forum will rely on a claimant's evidence regarding the number of hours worked even when it is only approximate so as "not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work" when such inability is based on "an employer's failure to keep proper records, in conformity with his statutory duty * * *." ***----- In the Matter of Debbie Frampton, 19 BOLI 27, 38-39 (1999)***.

❑ The agency sought a $1000 civil penalty against respondent for violating ORS 653.045, which requires employers to make and keep available records of the number of hours worked by each employee. Respondent, however, was liable for claimant's unpaid wages only as a successor to the corporation that had employed claimant. The definition of "employer" that applies to ORS 653.045 is "any person who employs another person," and does not incorporate the concept of successor liability. Consequently, respondent was not an "employer" for purposes of ORS 653.045, and could not be made to pay a penalty for the corporation's violation of that statute. ***----- In the Matter of Sabas Gonzalez, 19 BOLI 1, 15 (1999)***.

❑ Oregon law requires employers to maintain payroll records. ***----- In the Matter of David Creager, 17 BOLI 102, 109 (1998).*** *See also In the Matter of Scott A. Andersson, 17 BOLI 15, 23 (1998); In the Matter of Graciela Vargas, 16 BOLI 246, 261 (1998); In the Matter of Jewel Schmidt, 15 BOLI 236, 242 (1997); In the Matter of Sunnyside Enterprises of Oregon, 14 BOLI 170, 182 (1995); In the Matter of Martin's Mercantile, 12 BOLI 262, 273-74 (1994); In the Matter of Ken Taylor, 11 BOLI 139, 144 (1992); In the Matter of Rainbow Auto Parts and Dismantlers, 10 BOLI 66, 73 (1991); In the Matter of Jack Mongeon, 6 BOLI 194, 200 (1987); In the Matter of Judith Wilson, 5 BOLI 219, 225 (1986); In the Matter of Marion Nixon, 5 BOLI 82, 87-88 (1986).*

❑ It is the employer's duty to maintain an accurate record of an employee's time worked. A purported delegation of that duty forms no defense against a failure to pay all sums due to the employee upon termination. The employee has an absolute duty to pay what is really due. ***----- In the Matter of Samuel Loshbaugh, 14 BOLI 224, 229 (1995)***

❑ Oregon law requires that employers maintain particular payroll records. ***----- In the Matter of Ashlanders Senior Foster Care, Inc., 14 BOLI 54, 79 (1995).***

❑ Respondent had a duty to keep records of the hours worked by claimant. Respondent cannot present such records as were kept and then deny their accuracy. ***----- In the Matter of Mary Stewart-Davis, 13 BOLI 188, 200 (1994).***

> Affirmed without opinion, *Stewart-Davis v. Bureau of Labor and Industries,* 136 Or App 212, 901 P2d 268 (1995).

❑ Under the minimum wage law, employers have a duty to keep proper records of wages, hours, and other conditions and practices of employment. ***----- In the Matter of Crystal Heart Books Co., 12 BOLI 33, 35 (1993).*** *See also In the Matter of John Mathioudakis, 12 BOLI 11, 22 (1993); In the Matter of Sylvia Montes, 11 BOLI 268, 276 (1993).*

❑ It is incumbent on the employer to maintain payroll records and to produce them to establish the appropriate amounts involved when the forum concludes that the employee was employed and improperly compensated.

----- In the Matter of Richard Ilg, 11 BOLI 230, 240 (1993).

> Affirmed without opinion, *Ilg v. Bureau of Labor and Industries,* 132 Or App 552, 890 P2d 454 (1995).

❑ Neither the state minimum wage law nor the federal Fair Labor Standards Act, with their accompanying regulations, require an employer to keep records regarding reimbursable expenses. ***----- In the Matter of Central Pacific Freight Lines, Inc., 7 BOLI 272, 279 (1989).***

❑ When wages are based on a mileage rate, as with truck drivers, an employer has a duty to keep track of mileage in order to properly compensate the driver, and the employer would take payroll deductions from those wages. ***----- In the Matter of Central Pacific Freight Lines, Inc., 7 BOLI 272, 279 (1989).***

❑ When respondent failed to comply with ORS 652.130, which requires employers to give every employee working on a quantity wage basis with a statement of scale or quantity produced by the employee at least once a month, the forum relied upon the claimant's estimate when (1) it was the only existing estimate and the best estimate; (2) the claimant was qualified to make the estimate; (3) the estimate was made within six months of the work; (4) the claimant's estimate was conservative; and (5) the employer did not dispute the estimate. ***----- In the Matter of Kenneth Cline, 4 BOLI 68, 80 (1983).***

❑ Federal law firmly places the burden of proof on employers, not wage claimants, to produce accurate and complete work time and pay records once the claimant has proved that he or she performed work for which he or she was not properly compensated, and the forum adopts that policy. This forum will not penalize the claimant for not keeping written payroll records that would allow him to have a current record of pertinent figures and has agreed with the claimant's assertion that his mental records were accurate and complete when made, even if they are not now, absent contrary proof from the employer. ***----- In the Matter of Godfather's Pizzeria, Inc., 2 BOLI 279, 296 (1982).***

❑ A job-related expense that claimant incurred for fuel that the employer routinely provided, and for which the employer had reimbursed the claimant on one other occasion, is properly included in a wage claim under ORS chapter 652. ***----- In the Matter of All Season Insulation Company, Inc., 2 BOLI 264, 278 (1982).***

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

10.1 --- Generally

❑ ORS 12.110(3) provides that an action to collect unpaid overtime wages shall be commenced within two years. A wage claim action for minimum wage and overtime wages commenced when respondent was served with the order of determination by certified mail. ***----- In the Matter of John Hatcher, 14 BOLI 289, 294 (1996).***

❑ When some of claimant's unpaid wages were earned from an employer who was not a party to the contested case proceeding, the commissioner could not order that employer to pay wages or penalty wages. ***----- In the Matter of Jack Crum Ranches, Inc., 14 BOLI 258, 268 (1995).***

❑ Unpaid job-related expenses are properly included in a wage claim under ORS chapter 652 if there has been an explicit agreement between the parties that the employer would pay for such expenses or if the employer in fact does pay other such expenses. ***----- In the Matter of Sylvia Montes, 11 BOLI 268, 278 (1993).*** *See also In the Matter of Kevin McGrew, 8 BOLI 251, 261-62 (1990); In the Matter of All Season Insulation Company, Inc., 2 BOLI 264, 278 (1982).*

❑ It is the policy of the agency that unpaid job-related expenses can be included in a wage claim if there has been an explicit agreement between the parties that the employer would pay for such expenses or if the employer does in fact pay other such expenses. ***----- In the Matter of Central Pacific Freight Lines, Inc., 7 BOLI 272, 279 (1989).***

❑ Respondent asserted that claimant was careless by taking her pay records when she quit, and that any wages awarded to claimant should be diminished in proportion to the amount of negligence attributable to claimant. The forum found that claimant did not take her pay records, that a wage claim is essentially a contract matter, that in this case it was a statutory violation, and that respondent's reliance on a negligence theory was misplaced. ***----- In the Matter of Mary Rock, 7 BOLI 85, 91 (1988).***

❑ In a wage claim case, the employer alleged that the order of determination failed to clearly state a claim upon which relief could be granted. The order of determination stated the name of the employer, the period of the wage claim, the alleged number of hours worked, the rate of pay, the amount of wages claimed due, and set forth the average daily wage, that more than 30 days had elapsed since the wages became due, the amount of penalty wages, and the dates upon which interest would begin to accrue on the unpaid wages. The forum held that the allegations in the order of determination were sufficiently clear to enable the respondent employer to reply. ***----- In the Matter of Mary Rock, 7 BOLI 85, 90 (1988).***

10.2 --- Assignment of Wage Claim

❑ The wage claims of four claimants were rejected because there were no assignments of claims in the record for them. ***----- In the Matter of Anna Pache, 13 BOLI 249, 253 (1994).***

❑ When the agency proved that 20 wage claimants had filed and assigned wage claims and presented 10 of the claimants plus four other witnesses who collectively gave testimony regarding the employment and wages owed to all 20, the commissioner was able to find the precise amounts owed to each of the 20 claimants. ***----- In the Matter of Blue Ribbon Christmas Trees, Inc., 12 BOLI 209, 218 (1994).***

❑ A claimant's assignment of his wage claim, including his claim for penalty wages, survives his death and can be enforced and collected upon by the Bureau of Labor and Industries for the benefit of his estate and heirs thereto. ***----- In the Matter of Superior Forest***

Products, 4 BOLI 223, 224 (1984).

10.3 --- Agency's Prima Facie Case

❑ The agency's prima facie case must include credible evidence of the following elements: 1) respondent employed claimant during the wage claim period claimed; 2) the pay rate upon which respondent and claimant agreed, if it exceeded the minimum wage; 3) claimant performed work for which she was not properly compensated; and 4) the amount and extent of work claimant performed for respondent. ***----- In the Matter of Sue Dana, 28 BOLI 22, 29 (2006).*** *See also In the Matter of Jorge E. Lopez, 28 BOLI 10, 18 (2006); In the Matter of Captain Hooks, LLP, 27 BOLI 211, 222 (2006); Troy Melquist dba RedCellX, Inc., 27 BOLI 171, 180 (2006); In the Matter of Gary Lee Lucas, 26 BOLI 198, 210 (2005); In the Matter of Orion Driftboat and Watercraft Company, 26 BOLI 137, 146 (2005); In the Matter of Kilmore Enterprises, 26 BOLI 111,114 (2004); In the Matter of John M. Sanford, Inc., 26 BOLI 72, 80 (2004), amended 26 BOLI 110 (2004); In the Matter of Millennium Internet, Inc., 25 BOLI 200, 205 (2004); In the Matter of Adesina Adeniji, 25 BOLI 162, 169 (2004); In the Matter of William Presley, 25 BOLI 56, 68 (2004), affirmed, Presley v. Bureau of Labor and Industries, 200 Or App 113, 112 P3d 485 (2005);In the Matter of Elisha, Inc., 25 BOLI 125, 147 (2004), affirmed without opinion, Elisha, Inc. v. Bureau of Labor and Industries, 198 Or App 285, 108 P3d 1219 (2005); In the Matter of Rubin Honeycutt, 25 BOLI 91, 103 (2003); In the Matter of Paul Andrew Flagg, 25 BOLI 1, 9 (2003); In the Matter of TCS Global, 24 BOLI 246 (2003); In the Matter of Procom Services, Inc., 24 BOLI 238, 243 (2003); In the Matter of The Alphabet House, 24 BOLI 262 (2003); In the Matter of Devon Peterson, 24 BOLI 189, 199 (2003); In the Matter of Barbara and Robert Blair, 24 BOLI 89, 96 (2002); In the Matter of Stephanie Nichols, 24 Bureau of Labor and Industries 107, 119 (2002); In the Matter of Scott Miller, 23 BOLI 243, 258 (2002); In the Matter of Toni Kuchar, 23 BOLI 265, 274 (2002); In the Matter of Peter N. Zambetti, 23 BOLI 234, 241 (2002); In the Matter of Rubin Honeycutt, 23 BOLI 224, 231 (2002); In the Matter of G and G Gutters, Inc., 23 BOLI 135, 144 (2002), In the Matter of Triple A Construction, LLC, 23 BOLI 79, 92 (2002), In the Matter of Heiko Thanheiser, 23 BOLI 68, 75 (2002), In the Matter of Arnold J. Mitre, 23 BOLI 46, 55 (2002), In the Matter of Stan Lynch, 23 BOLI 34, 42 (2002); In the Matter of Usra A. Vargas, 22 BOLI 212, 220 (2001); In the Matter of Ilya Simchuk, 22 BOLI 186, 194 (2001); In the Matter of Sreedhar Thakkun, 22 BOLI 108, 115 (2001); In the Matter of Arthur Lee, 22 BOLI 99, 106 (2001); In the Matter of Jo-El, Inc., 22 BOLI 1, 3 (2001); In the Matter of Danny Vong Phuoc Truong, 21 BOLI 217, 230 (2001); Francisco Cisneros, 21 BOLI 190, 213 (2001); In the Matter of Bubbajohn Howard Washington, 21 BOLI 91, 99-100 (2000); In the Matter of Sharon Kaye Price, 21 BOLI 78, 88 (2000); In the Matter of Contractor's Plumbing Service, Inc., 20 BOLI 257, 270 (2000); In the Matter of Robert N. Brown, 20 BOLI 157, 162 (2000); In the Matter of Nova Garbush, 20 BOLI 65, 71 (2000); In the Matter of Barbara Coleman, 19 BOLI 230, 262-63 (2000); In the Matter of Majestic Construction, Inc., 19 BOLI 59, 67 (1999); In the Matter of Ann L. Swanger, 19 BOLI 42, 55 (1999); In the Matter of Debbie Frampton, 19 BOLI 27, 38 (1999); In the Matter of Belanger General Contracting, 19 BOLI 17, 25 (1999); In the Matter of Catalogfinder, Inc., 18 BOLI 242, 260 (1999).*

❑ When respondent defaulted, the agency was required to establish a prima facie case on the record to support the allegations in its charging documents. ***----- In the Matter of Jorge E. Lopez, 28 BOLI 10, 17-18 (2006).***

❑ In a default case, when the record included evidence that conflicted with the agency's contention and was not supplemented with evidence showing why the duly registered owners should be disregarded, the agency did not make the requisite showing that respondent employed claimants and the orders of determination were dismissed. ***----- In the Matter of Jorge E. Lopez, 28 BOLI 10, 22 (2006).***

❑ The agency's prima facie case supporting its allegations in the order of determination included credible evidence showing: 1) respondent employed claimants; 2) respondent agreed to pay one claimant $9.15 per hour and the other claimant $8.00 per hour; 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 Okechi Village & Health Center, 27 BOLI 156, 166 (2006).***

❑ The final element of the agency's prima facie case requires proof of the amount and extent of work performed by the claimants. The agency's burden of proof can be met by producing sufficient evidence from which "a just and reasonable inference may be drawn. ***---- In the Matter of Danny Vong Phuoc Truong, 21 BOLI 217, 230 (2001****). See also In the Matter of Francisco Cisneros, 21 BOLI 190, 213 (2001), affirmed without opinion, Cisneros v. Bureau of Labor and Industries, 187 Or App 114, 66 P3d 1030 (2003).*

❑ In cases involving payouts from the wage security fund, 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) BOLI has paid out money from the fund and seeks to recover that money, a rebuttable presumption exists that the agency's determination is valid for the sums actually paid out. The presumption may be rebutted by credible evidence to the contrary. ***----- In the Matter of Catalogfinder, Inc., 18 BOLI 242, 260 (1999)****.*

❑ When some claimants seeking wages in excess of the amounts paid by the wage security fund did not testify at hearing and the only evidence in the record regarding their pay rates and hours worked was their wage claim forms, the forum concluded that the agency failed to establish a prima facie case that the respondent owed those wages. ***----- In the Matter of Catalogfinder, Inc., 18 BOLI 242, 263-64 (1999)****.*

❑ The agency established a prima facie case when credible evidence showed that respondent employed claimant during the period of the wage claim and willfully failed to pay all earned and payable wages that were due to him. ***----- In the Matter of S.B.I., Inc., 12 BOLI 102, 109 (1993).*** *See also In the Matter of Daniel*

Burdick, 12 BOLI 66, 77 (1993).

❑ In a default situation, the forum's task is to determine if the agency has made a prima facie case on the record that the employer has violated the law. In a wage claim case, when the evidence on the record showed that the respondent owed earned, unpaid, due, and payable wages to the claimant, and that the respondent willfully failed to pay those wages, and when the evidence was not only uncontroverted, but complete, credible, and persuasive, this clearly constituted a prima facie case that respondent violated ORS 652.140 and owed the claimant penalty wages pursuant to ORS 652.150. ***----- In the Matter of Fred Vankeirsbilck, 5 BOLI 90, 93-94 (1986).***

11.0 AFFIRMATIVE DEFENSES

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

❑ When an employee leasing company was a joint employer of a wage claimant who brought an earlier court action against the other joint employer, the leasing company was not a party to the court action and was in no position to raise the defense of claim preclusion. ***----- In the Matter of Staff, Inc., 16 BOLI 97, 122 (1997).***

❑ Respondents moved for summary judgment on the basis that an assigned wage claim was precluded because claimant had prosecuted another action, based on the same factual transaction as the one at issue in the wage claim, against one of the respondents in district court. The commissioner held that the agency and claimant were the same party for purposes of claim preclusion, and that the agency would be precluded from prosecuting another action against respondent if the second action (the wage claim) was one that was: (1) based on the same factual transaction that was at issue in the first; (2) sought a remedy additional or alternative to the one sought in the court action; and (3) was of such a nature as could have been joined in the first action. ***In the Matter of Staff, Inc., 16 BOLI 97, 120-21 (1997).***

❑ There are exceptions to the general rule of claim preclusion. A defendant is generally free to waive the right to a combined action. Silence in the face of simultaneous actions based on the same factual transaction constitutes acquiescence. Respondent's failure to object to splitting the claims is effective as an acquiescence in the splitting. In addition, when a statutory scheme contemplates that the contentions arising from a transaction or series of transactions may be split, splitting as contemplated by the statutory scheme is not merged in or barred by a former adjudication concerning the overall transaction. ***----- In the Matter of Staff, Inc., 16 BOLI 97, 121-122 (1997).***

❑ The commissioner held that ORS 652.380(1) and the statutory scheme in ORS chapter 652 regarding wage claims contemplates that the contentions arising from a transaction or series of transactions may be split. Accordingly, a wage claim is not merged in or barred by a judgment from an earlier court action involving reimbursable expenses. ***----- In the Matter of Staff, Inc., 16 BOLI 97, 121-122 (1997).***

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

❑ A respondent has the burden of proving the affirmative defense of laches and must establish: (1) there was an unreasonable delay by the agency; (2) the agency had full knowledge of facts that would have allowed it to avoid the unreasonable delay; and (3) the unreasonable delay resulted in such prejudice to respondent that it would be inequitable to afford the relief sought by the agency. ***----- In the Matter of Staff, Inc., 16 BOLI 97, 122-23 (1997).***

11.3 --- Financial Inability to Pay Wages

❑ When a partnership exists, the primary question is not whether an individual partner had the financial resources to pay wages when they accrued, but whether the partnership had sufficient assets to pay the wages when they accrued. If so, then the partners are jointly and severally liable. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 230 (2006).***

❑ Testimony of an employer, even when found credible, is ordinarily insufficient in and of itself to establish an inability to pay wages at the time they accrued. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 230 (2006).***

❑ When the only evidence provided regarding a respondent partnership's expenses was that a check was made out to its bookkeeper on an undisclosed date to cover her mortgage payment and that only $10 was left in the partnership's checking account two weeks after claimant's last day of work, the forum found that this evidence was insufficient to meet respondents' burden of proof, and found both partners jointly and severally liable for claimant's unpaid wages and penalty wages. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 230 (2006).***

❑ To meet its burden of proof, an employer must provide specific information as to the financial resources and expenses of both the business and the employer personally during the wage claim period, including submission of records from which that information came. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 230 (2006).***

❑ An employer bears the burden of proving the defense of financial inability to pay wages at the time they accrue. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 230 (2006).***

❑ The affirmative defense of financial inability to pay at the time wages accrued set out in ORS 652.150 is not available under ORS 653.055. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 225 (2006).***

❑ In a case involving three respondents – two individual partners and their LLP – when an individual partner raised the affirmative defense of financial inability to pay in his answer but neither the second partner nor the LLP raised this defense in their answer, the forum did not consider the financial inability of the second partner or the LLP to pay claimant's wages in deciding whether to award penalty wages. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 223 (2006).***

❑ The defense of financial inability to pay wages at the time they accrue is an affirmative defense. ***----- In the***

Matter of Captain Hooks, LLP, 27 BOLI 211, 223 (2006).

❑ The failure of the party to raise the affirmative defense of financial ability to pay wages at the time they accrue is waived if not raised in the employer's answer. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 223 (2006).***

❑ No financial inability to pay wages at the time they were earned exists when an employer continues to operate its business and chooses to pay certain debts and obligations in preference to an employee's wages. ***----- In the Matter of Elisha, Inc., 25 BOLI 125, 159 (2004).***

> Affirmed without opinion, *Elisha, Inc. v. Bureau of Labor and Industries,* 198 Or App 285, 108 P3d 1219 (2005).

❑ The defense of financial inability to pay wages at the time they accrued is an affirmative one and a respondent bears the burden of persuasion to establish it. A respondent has the burden of producing evidence to support this defense if it wishes to avoid summary judgment. A showing of financial inability to pay wages at the time they accrued requires specific information as to the financial resources and expenses of the business. ***----- In the Matter of Westland Resources, Inc., 23 BOLI 276, 281 (2002).***

❑ Respondents can avoid liability for penalty wages by proving, by a preponderance of the evidence, their financial inability to pay a claimant's wages at the time they accrued. No financial inability exists if an employer "continues to operate a business or chooses to pay certain debts and obligations in preference to employee's wages." ***----- In the Matter of Debbie Frampton, 19 BOLI 27, 41 (1999)***.

❑ The forum rejected respondents' "financial inability to pay" defense when respondents paid other bills related to their business during the time they failed to pay claimant all wages she was due, continued to operate their business during that time, and had trouble meeting their personal financial obligations, but paid some outstanding bills. ***----- In the Matter of Debbie Frampton, 19 BOLI 27, 41 (1999)***.

❑ When respondent was operating her business at the time she failed to pay claimant's wages and was still operating the business at the time of the hearing and always paid cash for produce when it was delivered, respondent failed to meet her burden of proving she was financially unable to pay claimant's wages at the time they accrued. ***----- In the Matter of Norma Amezola, 18 BOLI 209, 218 (1999)***.

❑ Respondent has the burden to show its financial inability to pay wages at the time they were due. When a respondent's answer includes this defense but the respondent produces no supporting evidence, a claimant's right to penalty wages is not overcome. ***----- In the Matter of R.L. Chapman Ent. Ltd., 17 BOLI 277, 284-85 (1999)***.

❑ When respondent did not plead or show that he was financially unable to pay claimant's wages at the time they accrued, respondent could not escape penalty wage liability. ***----- In the Matter of Harold Zane Block, 17 BOLI 150, 158 (1998)***.

❑ The defense of financial inability to pay wages at the time they accrued is an affirmative defense subject to proof. It is a respondent's burden to show the respondent's financial inability to pay a claimant's wages. ***----- In the Matter of Graciela Vargas, 16 BOLI 246, 256 (1998).*** *See also In the Matter of Ebony Express, Inc., 7 BOLI 91, 96 (1998).*

❑ Respondent waived its affirmative defense of financial inability to pay when two orders of determination advised her of the need to raise this affirmative defense and she did not raise it in her answer or amended answers. ***----- In the Matter of Graciela Vargas, 16 BOLI 246, 256 (1998).***

❑ In a wage claim case, respondent filed exceptions asking the forum to consider her defense of financial inability to pay wages at the time they accrued when some evidence came in at hearing concerning respondent's financial difficulties. Respondent did not amend her answer at hearing to conform to this evidence. The forum rejected the exceptions because the agency had no opportunity to object, to seek discovery, or to present evidence to meet this new issue. Testimony of an employer, even when such testimony is credible, is not ordinarily sufficient, in and of itself, to prove financial inability to pay. A showing of financial inability to pay requires specific information as to the financial resources and requirements of both the employer's business and the employer personally, if the business is not a corporation, during the wage claim period, as well as submission of the records from which that information came. ***----- In the Matter of Graciela Vargas, 16 BOLI 246, 257 (1998).*** *See also In the Matter of U.S. Telecom International, 13 BOLI 114, 122-23 (1994).*

❑ When respondent continued to operate a restaurant and a lunch truck while claimants' wages accrued and for months thereafter and had income during from other employment during this period, the forum inferred that she was paying other debts and expenses, but not claimants' wages. The important time frame for measuring respondent's financial ability to pay was when claimants' wages were accruing, not months later when she sold the restaurant. Respondent's vague and unsubstantiated evidence of financial inability to pay claimants' wages was insufficient to prove her defense of financial inability to pay. ***----- In the Matter of Graciela Vargas, 16 BOLI 246, 257 (1998).***

❑ It is respondent's burden to establish respondent's financial inability to pay a claimant's wages. ***----- In the Matter of Jewel Schmidt, 15 BOLI 236, 245 (1997).*** *See also In the Matter of Susan Palmer, 15 BOLI 226, 235 (1997); In the Matter of U.S. Telecom International, 13 BOLI 114, 122 (1994); In the Matter of Sylvia Montes, 11 BOLI 268, 279 (1993).*

❑ When respondents failed to plead and prove the affirmative defense of financial inability to pay wages when due and knew the wage claimants were not being paid wages for their work, respondents were liable for penalty wages. ***----- In the Matter of Geoffroy***

Enterprises, Inc., 15 BOLI 148, 167 (1996).

❑ The defense of financial inability to pay wages at the time they accrued is an affirmative defense subject to proof. When respondent's business continued after claimant quit, and respondent paid its other employees and other obligations at that time and thereafter, respondent failed to prove its defense. ***----- In the Matter of Ashlanders Senior Foster Care, Inc., 14 BOLI 54, 81 (1995).***

❑ Inability to pay wages is an affirmative defense subject to proof. When respondent's business continued to operate after claimant quit and other employees and suppliers were paid, the allocation of available funds was respondent's choice. Respondent failed to show its inability to pay claimant. ***----- In the Matter of Mary Stewart-Davis, 13 BOLI 188, 201 (1994).***

> Affirmed without opinion, *Stewart-Davis v. Bureau of Labor and Industries,* 136 Or App 212, 901 P2d 268 (1995).

❑ A showing of financial inability to pay requires specific information as to the financial resources and requirements of both the employer's business and the employer personally, if the business is not a corporation, during the wage claim period, as well as submission of the records from which that information came. The commissioner found that respondent failed to prove this affirmative defense when the only specific evidence produced of respondent's alleged inability was a computerized printout of social security benefits received at times material. Respondent provided no documentation of total earnings during the wage claim period, including any income from employment respondent was known to have had during the period, such as income tax statements. Respondent provided no records concerning income of his wife or ownership of the residence, occupied by respondent's wife and allegedly owned by her, from which respondent conducted his business. ***----- In the Matter of U.S. Telecom International, 13 BOLI 114, 123 (1994).*** *See also In the Matter of Lois Short, 5 BOLI 277, 288 (1986).*

❑ The employer has the burden of proving financial inability to pay wages at the time they accrued. The only way an employer who has willfully failed to pay termination wages when due can avoid paying penalty wages for that failure is to show that the employer could not have paid the employee the wages when they were due. There are no exceptions respondent qualifications to the phrase "financially unable." It is a very strict standard designed to impress upon employers the absoluteness of the duty to pay the wages ORS 652.140 has imposed on them. If an employer has chosen to apply his or her resources elsewhere than to an employee's wages, the employer cannot escape penalty wage liability. When an employer chose to make payments on other debts and to retain all his business assts rather than pay the wage claimant, this constituted unwillingness, not an inability, to pay. ***----- In the Matter of Kenny Anderson, 12 BOLI 275, 283 (1994).***

❑ The forum awarded penalty wages to 20 claimants when there was no evidence of insolvency on the part of the corporate employer. ***----- In the Matter of Blue Ribbon Christmas Trees, Inc., 12 BOLI 209, 218 (1994).***

❑ When respondent alleged in her request for hearing that she was "bankrupt," but presented no evidence of financial inability to pay at the time wages were due, the commissioner held that the failure to pay was willful and assessed penalty wages. ***----- In the Matter of Secretarial Link, 12 BOLI 58, 65 (1993).***

❑ The commissioner found that respondents failed to prove their affirmative defense of financial inability to pay wages when evidence showed that the business continued to operate after claimants quit, other employees were paid, other obligations of the business were met, and both respondents had income independent of the business. A temporary shortage of cash does not constitute financial inability to pay when an employer continues to operate a business and chooses to pay certain obligations in preference to employee wages. ***----- In the Matter of Flavors Northwest, 11 BOLI 215, 228 (1993).***

❑ Respondent's financial inability to pay is an affirmative defense to a penalty for failure to pay wages when due. Respondent waived the defense by not including it in its answer, and the commissioner found that respondent had willfully failed to pay wages when due and assessed penalty wages. ***----- In the Matter of Victor Klinger, 10 BOLI 36, 45 (1991).***

❑ It is the employer's burden to show its financial inability to pay a claimant's wages. When an employer files an answer alleging financial inability to pay but produces no evidence in support of its defense, a claimant's right to penalty wages will not be overcome. ***----- In the Matter of Mega Marketing, 9 BOLI 133, 138 (1990).***

❑ In determining whether an employer had a financial inability to pay wages, assets other than cash must be considered. Therefore, a temporary shortage of cash does not necessarily constitute financial inability to pay. When an employer continues to operate a business and chooses to pay certain debts and obligations in preference to an employee's wages, there is no financial inability. ***----- In the Matter of Country Auction, 5 BOLI 256, 265 (1986).***

❑ A general showing of financial trouble does not constitute a showing that the employer was financially unable, in the strict sense in which this forum interprets that phrase, to pay any of the wages the claimant earned during the wage claim period. A showing of financial inability to pay requires specific information as to the financial resources and requirements of both the employer's business and the employer personally, if the business is not a corporation, during the wage claim period, as well as submission of the records from which that information came. ***----- In the Matter of Country Auction, 5 BOLI 256, 263-64 (1986).***

❑ When the employer's records established that the small business lost hundreds of dollars each month during the two-month period of the wage claim, the business closed the following month, the tax return showed a net loss for the applicable tax year, and the employer credible testimony established that the employer "put every cent made into the shop" and

"money from home went into the shop," the forum found that the employer, a sole proprietor, was financial unable to pay the wages owed at the time those wages accrued. ***----- In the Matter of Sheila Wood, 5 BOLI 240, 255 (1986).***

❑ The employer has the burden of proving an inability to pay wages at the time the wages accrued. Testimony of an employer, even when credible, is not ordinarily sufficient by itself to prove financial inability to pay. ***----- In the Matter of Sheila Wood, 5 BOLI 240, 255 (1986).***

❑ In a default hearing, although the forum made findings of fact regarding the employer's financial ability to pay wages, the forum "emphatically" noted that it is an employer's burden to show any financial inability to pay, not the agency's burden to show the employer's financial ability to pay the claimant's wages. ***----- In the Matter of Jorrion Belinsky, 5 BOLI 1, 4, 10 (1985).***

❑ The meaning of ORS 652.150 is obvious – the only way an employer who has willfully failed to pay termination wages when due can avoid paying penalty wages for that failure is to show that the employer could not have paid the employee the wages when they were due. There are no exceptions or qualifications to the phrase "financially unable." It is a very strict standard designed to impress upon employers the absoluteness of the duty to pay the wages ORS 652.140 has imposed on them. If an employer has chosen to apply his or her resources elsewhere than to an employee's wages, the employer cannot escape penalty wage liability. When an employer chose to make payments on other debts and to retain all his business assts rather than pay the wage claimant, this constituted unwillingness, not an inability, to pay, and the forum found that the employer did not meet his burden of proving that he was financially unable to pay claimant the wages that were due at the time they accrued and was liable for penalty wages. ***----- In the Matter of Kenneth Cline, 4 BOLI 68, 81 (1983).***

11.4 --- Other

❑ The defense of independent contractor is an affirmative one that a respondent has the burden of proving. ***----- In the Matter of Gary Lee Lucas, 26 BOLI 198, 210 (2005).*** *See also In the Matter of Orion Driftboat and Watercraft Company, 26 BOLI 137, 146 (2005); In the Matter of Rubin Honeycutt, 23 BOLI 224, 232 (2002); In the Matter of Leslie Elmer DeHart, 18 BOLI 199, 206-07(1999).*

❑ When an employment relationship has been previously established, the burden is on the employer to prove a change in status. ***----- In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration, 25 BOLI 12, 40 (2003).***

> Affirmed without opinion, *Ochoa v. Bureau of Labor and Industries, 196 Or App 639, 103 P3d 1212 (2004).*

❑ Respondent's defense that it was exempt from the minimum wage requirement because claimant was in "training" during the wage claim period was rejected by the forum because it did not meet the four criteria contained in OAR 839-020-0044. ***----- In the Matter of Jo-El, Inc., 22 BOLI 1, 3 (2001).***

❑ Respondent's defense that ORS 79.5050(4) prevented it from being held liable to repay the wage security fund as a successor or purchaser was held to be an affirmative defense that was waived by respondent's failure to plead it in the answer. ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 296 (2001).***

> Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 188 Or App 566, 65 P3d 1132 (2003).

❑ A respondent successor employer who was covered by the FLSA was not excluded from the ORS 652.310(1) definition of "employer" under ORS 652.310(1)(b) when that employer was not also covered by the Davis-Bacon Act or Service Contract Act. ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 282-86 (2001).***

> Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 188 Or App 566, 65 P3d 1132 (2003).

❑ Merely being an FLSA-regulated employer is not a total defense under ORS 652.310(1)(b). ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 278-280 (2001).***

> Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 188 Or App 566, 65 P3d 1132 (2003).

❑ In a wage security fund case, the forum held that respondent successor employer's proffered defense that it was excluded from the definition of "employer" pursuant to ORS 652.310(1)(b) was an affirmative defense that was waived by respondent's failure to raise it in its answer. ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 278-280 (2001).***

> Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 188 Or App 566, 65 P3d 1132 (2003).

❑ In its case summary filed prior to hearing, respondent generally defended its position by stating that claimant "is not entitled to a 'minimum wage' under the facts and circumstances of this case." However, in its answer and at hearing, respondent did not assert and the forum did not find any exemption or exclusion from the coverage of the Minimum Wage Law, ORS 653.010 to 653.261, or the Wage and Hour Laws, ORS chapter 652, for respondent or claimant. Respondent had the duty to raise such an exemption or exclusion as an affirmative defense in its answer and present evidence to support its defense and was held to have waived the defense because of its failure to do so. ***----- In the Matter of Northwest Civil Processing, 21 BOLI 232, 243-44 (2001).***

❑ When respondent's' answer raised an affirmative defense that claimant was not an "employee" as defined by ORS 652.210(2) and 652.310(2) because respondent never paid or agreed to pay for claimant's services, the forum held that ORS chapter 653 governs minimum wage claims and, for purposes of chapter 653, a person is an "employee" of another if that other "suffer[s] or permit[s]" the person to work. ***----- In the Matter of Bubbajohn Howard Washington, 21 BOLI 91, 101 (2000).***

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)

❑ This forum has consistently held that an employer may not avoid the mandate to pay overtime by entering into an agreement with an employee and an employee may not on his or her own behalf waive the employer's statutory duty to pay overtime. ***----- In the Matter of Scott Miller, 23 BOLI 243, 250 (2000)***.

❑ When respondent and a wage claimant entered into an employment agreement that contained a provision stating that "employer shall pay overtime at the same rate as regular time," and respondent argued claimant waived her right to overtime by signing the agreement, the forum interpreted the provision by looking first to its language, which the forum found to be unambiguous, and then in context with the rest of the agreement. The forum found that claimant and respondent intended this provision to waive respondent's statutory obligation to pay overtime as a condition of claimant's employment. ***--- In the Matter of Scott Miller, 23 BOLI 243, 248-49 (2000)***.

❑ An employer's agreement with an employee to pay the employee less than the minimum wage is not a defense to a wage collection proceeding based on the minimum wage. ***----- In the Matter of Toni Kuchar, 23 BOLI 265, 274 (2002).*** *See also In the Matter of Debbie Frampton, 19 BOLI 27, 38 (1999; In the Matter of Leslie Elmer DeHart, 18 BOLI 199, 208-09 (1999).*

❑ Employers are required to pay the minimum wage even when general industry practice is to pay less than that wage. ***----- In the Matter of Debbie Frampton, 19 BOLI 27, 38 (1999)***.

❑ When respondent and the wage claimant agreed that the claimant would be paid 20% for each load of potato waste that claimant delivered, and that rate did not equal minimum wage and overtime for all hours worked, the forum held that the agreement was no defense to a failure to pay the minimum wage, overtime, or final wages when due. ***----- In the Matter of Harold Zane Block, 17 BOLI 150, 158 (1998)***.

❑ A salary agreement between respondent and claimant is no defense to respondent's failure to pay the minimum wage and overtime. ***----- In the Matter of Diran Barber, 16 BOLI 190, 198 (1997).***

❑ An employee leasing agreement between two respondents, a corporation engaged in reforestation and an employee leasing company, was no defense to an employee leasing company's failure to pay final wages when due to a claimant. Joint employers are responsible, both individually and jointly, for compliance with all the applicable provisions of Oregon's wage and hour laws. This is consistent with the responsibility of joint employers under the federal Fair Labor Standards Act. ***----- In the Matter of Staff, Inc., 16 BOLI 97, 115 (1997).***

❑ An employer may not make an agreement with an employee whereby the employer is not required to comply with the minimum wage law or the wage collection law. ***----- In the Matter of Frances Bristow, 16 BOLI 28, 41 (1997).***

❑ Respondent and claimant agreed that claimant would be paid on a commission basis, but claimant earned no commissions. The commissioner held that respondent owed claimant the minimum wage for each hour claimant worked. ***----- In the Matter of Frances Bristow, 16 BOLI 28, 35-36 (1997).*** *See also ----- In the Matter of U.S. Telecom International, 13 BOLI 114, 120-22 (1994).*

❑ An agreement between respondent and claimant to waive overtime pay is void as a matter of law. An employer cannot avoid the mandate to pay overtime wages by entering into an agreement with an employee, nor can an employee, on his own behalf, waive the employer's statutory duty to pay overtime. ***----- In the Matter of Danny Jones, 15 BOLI 25, 30-32 (1996).*** *See also In the Matter of Ken Taylor, 11 BOLI 139, 144-45 (1992).*

❑ The agreement to pay at a fixed rate includes the statutory requirement to pay a minimum wage. When claimant agreed to work as the resident manager of an adult foster care home for $500 per month, she could not agree to accept less than the minimum wage, whether as a salary or otherwise. ***----- In the Matter of John Hatcher, 14 BOLI 289, 301 (1996).***

❑ Under ORS 653.310(2),"'employee' means any individual who otherwise than as a copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate * * *." Under the same statute, "an employer who pays or agrees to pay an individual at a fixed rate" includes an employer who is required by law to pay a minimum wage to workers but has failed to do so. The absence of an agreement to pay at a fixed rate or actual payment to a worker will not take the worker out of the definition of "employee" when the minimum wage law requires that worker to be paid a minimum wage. ***----- In the Matter of Gerald Brown, 14 BOLI 154, 163 (1995).*** *See also In the Matter of U.S. Telecom International, 13 BOLI 114, 121 (1994); In the Matter of Martin's Mercantile, 12 BOLI 262, 273 (1994).*

❑ The law requires employers to pay employees a minimum wage. A wage agreement to work at the rate of five percent of gate receipts, when the actual sums paid resulted in a rate of less than the minimum wage of $4.75 per hour, did not constitute a defense to the application of the minimum wage law to the work performed under the agreement under ORS 653.055(2) and could not be used to take the worker out of the definition of "employee." ***----- In the Matter of Gerald Brown, 14 BOLI 154, 163 (1995).***

❑ An agreement between an employer and employee for the employee to receive straight time wages for overtime hours is no defense to an administrative action to collect earned, due, and payable wages. ***----- In the Matter of Locating, Inc., 14 BOLI 97, 108 (1995).***

Affirmed without opinion, *Locating, Inc. v. Deforest,*

139 Or App 600, 911 P2d 1289 (1996).

❑ Claimant could not agree to accept less than minimum wage, whether as a "salary" or otherwise. An agreement to pay at a fixed rate includes the statutory requirement to pay minimum wage. ***----- In the Matter of Ashlanders Senior Foster Care, Inc., 14 BOLI 54, 80 (1995).***

❑ Respondent's agreement with claimants to pay them at a piece rate that was less than minimum wage was no defense to claimants' claim for minimum wage and penalty wages. ***----- In the Matter of Anna Pache, 13 BOLI 249, 269 (1994).***

❑ An agreement between the employer and the claimant, a hairdresser, that claimant would work for commissions only was no defense to the employer's failure to pay claimant minimum wage and overtime, in violation of ORS 653.025(3) and 653.261. ***----- In the Matter of Mary Stewart-Davis, 13 BOLI 188, 194-95 (1994).***

Affirmed without opinion, *Stewart-Davis v. Bureau of Labor and Industries,* 136 Or App 212, 901 P2d 268 (1995).

❑ ORS 653.055 allows an employer to credit commission payments against minimum wage earned, but specifies that a combination of commission and minimum wage must be paid when commission alone does not cover the time worked. Claimant could not agree to accept less than minimum wage. ***----- In the Matter of Mary Stewart-Davis, 13 BOLI 188, 198 (1994).***

Affirmed without opinion, *Stewart-Davis v. Bureau of Labor and Industries,* 136 Or App 212, 901 P2d 268 (1995).

❑ Employers are free to compensate employees at any rate, or solely by commission, so long as the agreed periodic or commission rate does not result in an employee earning less than minimum wage for all hours worked. ***----- In the Matter of Mary Stewart-Davis, 13 BOLI 188, 198 (1994).***

Affirmed without opinion, *Stewart-Davis v. Bureau of Labor and Industries,* 136 Or App 212, 901 P2d 268 (1995).

❑ Respondent agreed with claimants to pay them 10 percent of gross sales from his store, but claimants did not receive the minimum wage or overtime under ORS 653.025 and 653.261. The forum held that this agreement to work at less than the minimum wage and overtime was no defense to an action under ORS 653.055(1). ***----- In the Matter of Martin's Mercantile, 12 BOLI 262, 273 (1994).***

❑ Claimant could not accept or agree to accept less than minimum wage and overtime for time worked in excess of 40 hours per week. ***----- In the Matter of La Estrellita, Inc., 12 BOLI 232, 243 (1994).***

❑ In response to an order of determination, respondent alleged that a wage claimant's hourly rate was changed to a piece rate basis but never provided payroll data. The commissioner used the hourly rate to compute the wages due because there was no evidence from which the commissioner could determine whether the alleged piece rate provided a minimum wage. ***----- In the Matter of Daniel Burdick, 12 BOLI 66, 76 (1993).***

❑ Claimant, a cook, worked over 40 hours a week on a salary, signed a form saying he was a manager, and did not complain during his employment that he was not receiving overtime pay. The forum found that these facts were no defense to respondent's failure to pay overtime and held respondent liable for the full amount of wages earned, plus penalty wages. ***----- In the Matter of John Mathioudakis, 12 BOLI 11, 21 (1993).***

❑ When respondents failed to pay claimant the minimum wage, it was no defense that respondents and claimant had an agreement the claimant would work at a rate of $15 per truckload. ***----- In the Matter of Sylvia Montes, 11 BOLI 268, 277 (1993).***

❑ An agreement between claimant and respondent that claimant would receive straight time wages for overtime hours worked was no defense to an administrative action to collect claimant's earned, due, and payable wages. ***----- In the Matter of Ken Taylor, 11 BOLI 139, 145 (1992).***

❑ When respondent admitted in his answer that the wage claim was his employee and that overtime was earned but not paid because the employee had agreed to await respondent's success in challenging the enforcement practices of the state fire marshall, the commissioner held that any agreement between an employee and an employer to work at less than the wage rate required by law was no defense to an action under ORS 653.055, and that respondent was liable for the full amount of overtime wages that were past due, plus penalty wages. ***----- In the Matter of Victor Klinger, 10 BOLI 36, 40-41 (1991).***

❑ Any agreement between a claimant and employer for claimant to work at less than the minimum wage rate is no defense to a claim for wages to which the claimant is entitled pursuant to ORS 653.025. ***----- In the Matter of Country Auction, 5 BOLI 256, 264 (1986).***

❑ Claimant agreed to work for respondent in exchange for products and services at respondent's beauty salon. The forum held that any agreement between an employer and employee for compensation at less than the minimum wage rate is unlawful when the employer is subject to the provisions of ORS 653.025. ***----- In the Matter of Sheila Wood, 5 BOLI 240, 251 (1986).***

❑ When the forum concluded that an employer was legally obligated to pay claimant a wage rate of $3.10 per hour, pursuant to ORS 653.025, for claimant's 40 hours of work per week, the employer was obligated to pay claimant at least $124 per week, a sum which exceeded even the highest weekly wage rate that the employer set for the claimant. ***----- In the Matter of Cheryl Miller, 5 BOLI 175, 178 (1986).***

❑ An agreement between an employer and an employee to waive overtime pay is void under Oregon law. ORS 652.360 provides that "no employer may by special contract or any other means exempt himself from any provision of or liability or penalty imposed by ORS 652.31 to 652.405 or by any statute relating to the

payment of wages[.]" Thus, employers cannot exempt themselves from the provisions of ORS 653.251. Pursuant to ORS 653.261, the Wage and Hour Commission has adopted OAR 839-21-107, which requires that "all work performed in excess of forty (40) hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay[.]" An employer cannot avoid the mandate to pay overtime wages by entering into an agreement with an employee and an employee, on his own behalf, cannot waive the employer's statutory duty to pay overtime. ORS 653.055(2) explicitly states that an employer cannot use, as a defense to a wage claim, the fact that there was an agreement between the employer and employee to work for less than the wage rate, including the overtime rate, required by ORS 653.261. There are obvious public policy reasons for the statutory prohibition against an employer using the fact that the employee agreed to forego overtime compensation as a defense to an overtime wage claim. If such an agreement were a defense, an employer could require an employee to "agree" to waive overtime as a condition of employment and the purposes of the overtime wage laws would be frustrated. ***----- In the Matter of John Owen, 5 BOLI 121, 125-26 (1986).***

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

❑ A respondent's ignorance or misunderstanding of the law does not exempt that respondent from a determination that it willfully failed to pay wages earned and owed. ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 203 (2006).***

❑ Respondent, as an employer, had a duty to know the laws that regulate employment in this state. ***----- In the Matter of Okechi Village & Health Center, 27 BOLI 156, 169 (2006).***

❑ An employer's failure to apprehend the correct application of the law and actions based on that incorrect application is not a defense. ***----- In the Matter of Gary Lee Lucas, 26 BOLI 198, 216 (2005).*** *See also In the Matter of Elisha, Inc., 25 BOLI 125, 158 (2004), affirmed without opinion, Elisha, Inc. v. Bureau of Labor and Industries, 198 Or App 285, 108 P3d 1219 (2005); In the Matter of The Alphabet House, 24 BOLI 262, 283 (2003).*

❑ Respondent's failure to apprehend the correct application of the law and respondent's actions based on this incorrect application did not exempt respondent from a determination that it willfully failed to pay wages earned and due. ***----- In the Matter of Toni Kuchar, 23 BOLI 265, 275 (2002).*** *See also In the Matter of Triple A Construction, LLC, 23 BOLI 79, 95 (2002); In the Matter of Northwest Civil Processing, 21 BOLI 232, 247-48 (2001).*

❑ Respondent's ignorance or misunderstanding of the law does not exempt him from a determination that he willfully failed to pay overtime. ***----- In the Matter of Danny Vong Phuoc Trong, 21 BOLI 217, 231 (2001).***

❑ An employer's failure to apprehend the correct application of the law and the employer's actions based on that incorrect application do not exempt it from a determination that it willfully failed to pay overtime. ***----- In the Matter of Burrito Boy, Inc., 16 BOLI 1, 19 (1997).*** *See also In the Matter of Mario Pedroza, 13 BOLI 220, 232 (1994).*

❑ Ignorance of the law is irrelevant to determining whether an employer has willfully failed to pay wages when due. ***----- In the Matter of Burrito Boy, Inc., 16 BOLI 1, 19 (1997)***.

❑ When respondent attempted to use a fluctuating workweek method of compensating claimant's overtime but failed to meet the requirements of OAR 839-20-030(3)(f), failed to apprehend the correct interpretation and application of the law, and based its actions upon its incorrect application, this did not exempt it from a determination that it willfully failed to pay overtime. Willful, under ORS 652.150, simply means conduct done of free will. ***----- In the Matter of Locating, Inc., 14 BOLI 97, 110 (1995).***

> Affirmed without opinion, *Locating, Inc. v. Deforest,* 139 Or App 600, 911 P2d 1289 (1996).

❑ Employers cannot be excused from their obligation to pay overtime for all hours worked in a single workweek due to their ignorance of that legal obligation. ***----- In the Matter of Mario Pedroza, 13 BOLI 220, 232 (1994).***

❑ The phrase "willfully fails to pay any wages," as used in ORS 652.150, has repeatedly been held not to imply or require blame, malice, wrong, perversion, or moral delinquency. The language simply means conduct done of free will. Respondent's ignorance of the law is not relevant. It isn't necessary that there be evidence of a manifest intent to violate the law. It is enough that what was done by the employer was done of free will. ***----- In the Matter of Mary Stewart-Davis, 13 BOLI 188, 200 (1994).***

> Affirmed without opinion, *Stewart-Davis v. Bureau of Labor and Industries,* 136 Or App 212, 901 P2d 268 (1995).

❑ The commissioner rejected respondent's argument that he would have complied with the law if only the agency had told him of all the requirements. Employers have a legal duty to know and comply with the law and to become aware of the laws that apply to them. In this case, respondent knew but did not comply with the requirements of the law. ***----- In the Matter of John Mathioudakis, 12 BOLI 11, 12 (1993).***

❑ The forum rejected an employer's argument that he could not be found to have willfully failed to pay a claimant at the minimum wage because he was unaware that the law imposed a minimum wage rate requirement on him, finding his ignorance of the legal requirement to pay at least the minimum wage was irrelevant because all employers are charged with knowing the wage and hour laws governing their activities as an employer. Employers are also charged with knowing the hours an employee works and the rate of pay paid employees for each hour worked. An employer cannot escape liability for penalty wages with the defense of ignorance of the law. ***----- In the Matter of Country Auction, 5 BOLI 256, 267 (1986).***

❑ The forum found an employer's conduct was "willful"

under ORS 652.150 because her conduct was knowing, intentional, and voluntary – she intended to pay claimant as she did and her ignorance of the law was not relevant. To act willfully does not mean to act with malice. ***----- In the Matter of Sheila Wood, 5 BOLI 240, 255 (1986).***

❑ Employers cannot be excused due to ignorance of their legal obligation to pay overtime for all hours over 40 worked in a single workweek. An employer has a duty to know what wages are due to an employee at the time of termination and is obligated to pay for the overtime hours worked. ***----- In the Matter of John Owen, 5 BOLI 121, 128 (1986).***

12.3 --- Unconstitutionality

❑ In a post-hearing memorandum, respondent argued that the agency's failure to question the existence of respondents' LLP in its charging document violated respondents' due process rights by failing to include a "statement of the matters that constitute the violation" in the charging document. The forum rejected respondents' argument, holding that the alleged failure was not a "matter" that constituted an alleged "violation," but a matter that related to the joint and several liability of two respondent partners, both whom were named, along with the LLP, as the employer in the agency's charging document. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 231 (2006).***

❑ The forum dismissed respondent's affirmative defense that ORS 652.610(3) and the agency's order of determination alleging a violation of that statute unconstitutionally deprived respondent of its right to contract with its employees, in violation of Article I, section 10 of the United States Constitution. ----- ***In the Matter of Goodman Oil Company, Inc., 20 BOLI 218, 223-24 (2000)***.

❑ The forum dismissed respondent's affirmative defense that the imposition of $1560 in penalty wages was excessive and unconstitutional under the Eighth Amendment to the Constitution of the United States. ----- ***In the Matter of Goodman Oil Company, Inc., 20 BOLI 218, 224-25 (2000)***.

12.4 --- Arbitration Agreements

❑ The forum held that a mandatory arbitration clause in an employment agreement did not apply to a void provision of the agreement, namely, a provision stating that respondent was not required to pay claimant overtime pay for all hours worked past 40 hours in a given workweek. ***----- In the Matter of Scott Miller, 23 BOLI 243, 250 (2000)***.

12.5 --- Other

❑ Respondent's argument that claimant had waived her right to any additional compensation due by acknowledging she was paid for all hours worked was contrary to the law. Respondent is required to pay its employees at the proper rate and a wage claimant's acceptance of straight time pay for her overtime hours worked is not a defense to an administrative action to collect earned, due, and payable wages. ***----- In the Matter of Scott Miller, 23 BOLI 243, 263 (2002.***

❑ Respondent has the burden of presenting evidence to support the affirmative defense that claimant was a professional who was exempt from statutory overtime requirements. ***----- In the Matter of Scott Miller, 23 BOLI 243, 259 (2002).***

❑ Respondent's purported ignorance of the hours worked by claimants that was based in part on a deliberate failure to maintain statutorily-mandated records and a malfunctioning time clock was not a defense to respondent's alleged willful failure to pay wages. ***----- In the Matter of Francisco Cisneros, 21 BOLI 190, 215 (2001).***

> Affirmed without opinion, *Cisneros v. Bureau of Labor and Industries,* 187 Or App 114, 66 P3d 1030 (2003).

❑ When respondent's' answer raised an affirmative defense that claimant was not an "employee" as defined by ORS 652.210(2) and 652.310(2) because respondent never paid or agreed to pay for claimant's services, the forum held that ORS chapter 653 governs minimum wage claims and, for purposes of chapter 653, a person is an "employee" of another if that other "suffer[s] or permit[s]" the person to work. ***----- In the Matter of Bubbajohn Howard Washington, 21 BOLI 91, 101 (2000).***

❑ Respondents' implied argument that they did not know they were claimant's employers did not change the forum's conclusion that respondents acted willfully in failing to pay claimant the minimum wage. ***----- In the Matter of Debbie Frampton, 19 BOLI 27, 40 (1999)***.

❑ Work may be voluntary, without expectation of compensation, *only* if the entity for which the services are performed is "a public employer * * * or a religious, charitable, educational, public service or similar nonprofit corporation, organization or institution for community service, religious or humanitarian reasons" or the work is part of a work training program administered under the state or federal assistance laws. ***----- In the Matter of Arabian Riding and Recreation Corp., 16 BOI 79, 92 (1997).***

❑ Respondent operated a ranch for horse rentals and riding and permitted minors to work at the ranch in exchange for "free" horse riding. The commissioner held that the minors were employees, not volunteers, because there was no evidence or attempt to show that respondent was a public employer or a religious, charitable, or educational institution as described or was involved in a federal or state public assistance program. ***----- In the Matter of Arabian Riding and Recreation Corp., 16 BOI 79, 92 (1997).***

❑ Respondent argued that a 16-year-old minor was an unpaid intern exchanging his volunteer labor for training and knowledge in the film business and introduced evidence that such intern arrangements were common throughout the film industry. The commissioner found that no matter how widespread that type of "training" might have been in the past or was elsewhere, it is not lawful in Oregon, whether involving adult or minor employees. ***----- In the Matter of LaVerne Springer, 15 BOLI 47, 67 (1996).***

❑ Claimant's alleged comparative negligence in failing to maintain accurate payroll records is not a defense to a statutory claim for wages owed. ***----- In the Matter of***

Mary Rock, 7 BOLI 85, 90 (1988).

❑ The forum rejected a respondent employer's defense that it did not know the amount of wages owing at the time of claimant's termination and therefore was unable to pay. ***----- In the Matter of S.O.S. Towing and Storage, Inc., 3 BOLI 145, 148 (1982).***

13.0 PENALTY WAGES

13.1 --- Under ORS 652.150

13.1.1 --- Generally

❑ The forum may award civil penalty wages when a respondent's failure to pay wages is willful. Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission willfully if he or she acts, or fails to act, intentionally, as a free agent, and with knowledge of what is being done or not done. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 189 (2007).*** *See also In the Matter of Sue Dana, 28 BOLI 22, 30 (2006); In the Matter of In the Matter of Captain Hooks, LLP, 27 BOLI 211, 222-23 (2006); In the Matter of Bukovina Express, Inc., 27 BOLI 184, 203 (2006); In the Matter of Troy Melquist dba RedCellX, Inc., 27 BOLI 171, 182 (2006); In the Matter of Okechi Village & Health Center, 27 BOLI 156, 167 (2006); In the Matter of Gary Lee Lucas, 26 BOLI 198, 213-14 (2005), appeal pending; In the Matter of Orion Driftboat and Watercraft Company, 26 BOLI 137, 148 (2005); In the Matter of Kilmore Enterprises, Inc., 26 BOLI 111, 124 (2004); In the Matter of John M. Sanford, Inc., 26 BOLI 72, 81 (2004), amended 26 BOLI 110 (2004); In the Matter of Millennium Internet, Inc., 25 BOLI 200, 205 (2004); In the Matter of Adesina Adeniji, 25 BOLI 162, 173 (2004); In the Matter of William Presley, 25 BOLI 56, 72 (2004), affirmed, Presley v. Bureau of Labor and Industries, 200 Or App 113, 112 P3d 485 (2005);In the Matter of Elisha, Inc., 25 BOLI 125, 158 (2004), affirmed without opinion, Elisha, Inc. v. Bureau of Labor and Industries, 198 Or App 285, 108 P3d 1219 (2005); In the Matter of Paul Andrew Flagg, 25 BOLI 1, 10 (2003); In the Matter of TCS Global, 24 BOLI 246 (2003); In the Matter of Procom Services, Inc., 24 BOLI 238, 245 (2003); In the Matter of The Alphabet House, 24 BOLI 262, 281-82 (2003); In the Matter of Barbara and Robert Blair, 24 BOLI 89, 97 (2002); In the Matter of Stephanie Nichols, 24 Bureau of Labor and Industries 107, 122 (2002; In the Matter of Westland Resources Group LLC, 23 BOLI 276, 280 (2002; In the Matter of Toni Kuchar, 23 BOLI 265, 275 (2002; In the Matter of Scott Miller, 23 BOLI 243, 260 (2002); In the Matter of Peter N. Zambetti, 23 BOLI 234, 242 (2002); In the Matter of G and G Gutters, Inc., 23 BOLI 135, 147 (2002); In the Matter of Triple A Construction, LLC, 23 BOLI 79, 94-95 (2002), In the Matter of Duane Knowlden, 23 BOLI 56, 65 (2002), In the Matter of Arnold J. Mitre, 23 BOLI 46, 51 (2002), In the Matter of Stan Lynch, 23 BOLI 34, 44 (2002); In the Matter of Usra A. Vargas, 22 BOLI 212, 222 (2001); In the Matter of Ilya Simchuk, 22 BOLI 186, 197 (2001); In the Matter of Sreedhar Thakkun, 22 BOLI 108, 115 (2001); In the Matter of Arthur Lee, 22 BOLI 99, 107 (2001); In the Matter of Jo-El, Inc., 22 BOLI 1, 3 (2001); In the Matter of Northwest Civil Processing, 21 BOLI 232, 247 (2001); In the Matter of Danny Vong Phuoc Trong, 21 BOLI 217, 231 (2001); In the Matter of Francisco Cisneros, 21 BOLI 190, 215 (2001); In the Matter of Cox and Frey Enterprises, 21 BOLI 175, 181 (2001); In the Matter of Bubbajohn Howard Washington, 21 BOLI 91, 102 (2000); In the Matter of Sharon Kaye Price, 21 BOLI 78, 89 (2000); In the Matter of Contractor's Plumbing Service, Inc., 20 BOLI 257, 274 (2000); In the Matter of Robert N. Brown, 20 BOLI 157, 163 (2000); In the Matter of Nova Garbush, 20 BOLI 65, 72 (2000); In the Matter of Barbara Coleman, 19 BOLI 230, 265 (2000); In the Matter of Richard R. Mabe, 19 BOLI 223, 229 (2000); In the Matter of Majestic Construction, Inc., 19 BOLI 59, 68 (1999); In the Matter of Debbie Frampton, 19 BOLI 27, 40 (1999); In the Matter of Belanger General Contracting, 17 BOLI 17, 26 (1999); In the Matter of Norma Amezola, 18 BOLI 209, 219 (1999); In the Matter of Leslie Elmer DeHart, 18 BOLI 199, 209 (1999); In the Matter of Troy R. Johnson, 17 BOLI 285, 292 (1999); In the Matter of R.L. Chapman Ent. Ltd., 17 BOLI 277, 284 (1999); In the Matter of Harold Zane Block, 17 BOLI 150, 160 (1998); In the Matter of Thomas J. Heywood, 17 BOLI 144, 147 (1998); In the Matter of David Creager, 17 BOLI 102, 111 (1998); In the Matter of Scott A. Andersson, 17 BOLI 15, 24 (1998); In the Matter of Graciela Vargas, 16 BOLI 246, 255 (1998); In the Matter of Diran Barber, 16 BOLI 190, 18-99 (1997); In the Matter of Tina Davidson, 16 BOLI 141, 148-49 (1997); In the Matter of Staff, Inc., 16 BOLI 97, 119 (1997); In the Matter of Burrito Boy, Inc., 16 BOLI 1, 19 (1997); In the Matter of Jewel Schmidt, 15 BOLI 236, 244-45 (1997); In the Matter of Susan Palmer, 15 BOLI 226, 234 (1997); In the Matter of Geoffroy Enterprises, Inc., 15 BOLI 148, 167 (1996); In the Matter of Mark Johnson, 15 BOLI 139, 142 (1996); In the Matter of Danny Jones, 15 BOLI 25, 32 (1996); In the Matter of Jack Crum Ranches, Inc., 14 BOLI 258, 271 (1995); In the Matter of Samuel Loshbaugh, 14 BOLI 224, 230 (1995); In the Matter of Gerald Brown, 14 BOLI 154, 169 (1995); In the Matter of Locating, Inc., 14 BOLI 97, 109 (1995), affirmed without opinion, Locating, Inc. v. Deforest, 139 Or App 600, 911 P2d 1289 (1996); In the Matter of Katherine Hoffman, 14 BOLI 41, 47 (1995); In the Matter of Anna Pache, 13 BOLI 249, 271 (1994); In the Matter of Mario Pedroza, 13 BOLI 220, 231 (1994); In the Matter of U.S. Telecom International, 13 BOLI 114, 122 (1994); In the Matter of Kenny Anderson, 12 BOLI 275, 282 (1994); In the Matter of Martin's Mercantile, 12 BOLI 262, 274 (1994); In the Matter of Box/Office Delivery, 12 BOLI 141, 149 (1994); In the Matter of S.B.I., Inc., 12 BOLI 102, 110 (1993); In the Matter of Crystal Heart Books Co., 12 BOLI 33, 46 (1993); In the Matter of John Mathioudakis, 12 BOLI 11, 23 (1993); In the Matter of Mega Marketing, 9 BOLI 133, 138 (1990).*

❑ 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, wrong, 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 Carl Odoms, 27 BOLI 232, 240-41 (2006).***

❑ Respondents argued that penalty wages could not exceed claimant's total unpaid wages because the

agency presented no proof that either respondent "received written notice of demand to pay wages directed to them personally." The agency presented proof that it had sent notice to respondents, but no proof that either respondent actually received those letters. However, when the agency's order of determination stated that claimant was owed $2,137.50 in unpaid wages and included the following language: "[p]ursuant to ORS 652.332, the employer is hereby directed to pay the Commissioner of the Bureau of Labor and Industries the amount of the wage claims * * *," the forum held that that order also constituted a written notice of nonpayment within the meaning of ORS 652.150(2). ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 224 (2006).***

❑ 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 Procom Services, Inc., 24 BOLI 238, 245 (2003).***

❑ When respondent admitted he intentionally withheld claimant's final paycheck to cover amounts respondent believed were owed for property damage caused by claimant, the forum concluded there was no evidence that Respondent acted other than voluntarily or as a free agent. The forum concluded that respondent acted willfully and assessed penalty wages in accordance with ORS 652.150 and OAR 839-001-0470. ***----- In the Matter of Arnold J. Mitre, 23 BOLI 46, 55 (2002).***

❑ When respondent deducted process fees from claimant's pay draws and argued it was not a free agent, in that it had to have some way of recovering the costs it incurred to make this benefit to claimant possible, but produced no evidence to show it was under duress or coercion in making its business decision to charge process fees, the forum found respondent was a free agent in deciding to recover those costs by deducting them directly from claimant's paycheck and had acted willfully. ***----- In the Matter of Cox and Frey Enterprises, 21 BOLI 175, 181 (2001).***

13.1.2 --- Willfulness of Failure to Pay Wages

❑ Respondent's failure to pay wages to claimant was willful when respondent knowingly agreed to pay claimant a wage for working a 24 hour shift that was substantially below Oregon's minimum wage; respondent was aware of the total hours that claimant worked; respondent knowingly paid claimant a wage for working a 24 hour shift that was substantially below Oregon's minimum wage; respondent failed to pay claimant overtime wages for any week in which claimant worked overtime, and there was no evidence that respondent acted other than as a free agent in underpaying claimant. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 189 (2007).***

❑ Respondent's telephone message to claimant and her subsequent admissions to the agency investigator and in her answer demonstrated that respondent knew claimant was owed wages for the house cleaning work she performed at respondent's behest. Respondent's claim that claimant could not be paid until respondent was paid by a third party was not credible and, in any event, is not a defense. There was no other evidence that respondent was acting other than intentionally and as a free agent and the forum determined that respondent had willfully failed to pay due and owing wages to claimant and was liable for penalty wages in the amount of $1,740. ***----- In the Matter of Sue Dana, 28 BOLI 22, 30-31 (2006).***

❑ The forum concluded that respondent willfully failed to pay wages to four wage claimants when the agency proved that all four claimants worked hours for which they were not paid, all four claimants asked respondent to pay them the wages they had earned and respondent declined to pay them, and there was no evidence that respondent acted other than voluntarily or as a free agent in declining to pay claimants their unpaid, due and owing wages. ***----- In the Matter of Carl Odoms, 27 BOLI 232, 241 (2006).***

❑ When respondents did not dispute claimant's hourly wage, the amount claimant was owed, or that he performed all his work on respondents' property, using tools and equipment provided by respondents, under respondent's general direction, the forum inferred that both respondents were aware of the amount and extent of the work performed by claimant. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 223 (2006).***

❑ When respondents were aware of the amount and extent of claimant's work and paid him nothing, choosing instead to spend the partnership funds on expenses other than claimant's wages, they acted as free agents in making this choice, and the agency provided documentary and testimonial evidence that it made the written demand for claimant's wages required by ORS 652.150, the forum assessed penalty wages. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 223-24 (2006).***

❑ When respondent, through its principal, admitted that it did not pay claimant any wages for the work he performed, and the evidence established that the principal, acting on respondent's behalf, assigned claimant to make a delivery to the east coast, knew he had made the trip and additional deliveries upon his return one week later, and that she refused to pay claimant the wages he earned during that period despite his repeated requests, the forum inferred that respondent, through its principal, voluntarily and as a free agent failed to pay claimant all of the wages he earned in the wage claim period and was liable for penalty wages. ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 203 (2006).***

❑ When the record was replete with evidence that respondent knew he owed wages to claimants, but engaged in a pattern of conduct designed to avoid paying the wages, acting voluntarily and as a free agent when he failed to pay all of the wages claimants were owed when they quit their employment, respondent's failure to pay was willful and respondent was held liable to each claimant for penalty wages. ***----- In the Matter of Troy Melquist dba RedCellX, Inc., 27 BOLI 171, 182 (2006).***

❑ Respondent's failure to pay claimants earned and unpaid wages was willful when respondent admitted claimants worked hours exceeding 40 per week, but denied owing overtime wages because claimants were

performing "cleaning and maintenance" duties during those hours under an independent contractor agreement; there was no proof of an independent contractor agreement; and there was no evidence that respondent acted other than voluntarily and as a free agent when it failed to pay claimants all of the wages earned and due when they voluntarily ended their employment. ***----- In the Matter of Okechi Village & Health Center, 27 BOLI 156, 167 (2006).***

❑ Respondent's failure to pay claimants their agreed wage rate was willful when respondent was well aware of the hours worked by claimants, unilaterally chose to pay them a percentage of the draw instead of the higher agreed rate, and there was no evidence that respondent acted other than voluntarily or as a free agent in not paying claimants their agreed wage rate. ***----- In the Matter of Gary Lee Lucas, 26 BOLI 198, 214 (2005).***

❑ When respondent underpaid claimants based on his mistaken perception that claimants were independent contractors, respondent's failure to pay the proper wage rate was willful. ***----- In the Matter of Gary Lee Lucas, 26 BOLI 198, 214 (2005).***

❑ When respondent did not maintain a record of claimant's hours, but respondent's manager asked claimant to write down his hours and post them by the manager's desk, and claimant did this throughout his employment, the forum concluded that respondent knew claimant's hours of work and acted voluntarily and as a free agent in not paying claimant his earned wages in full, entitling claimant to penalty wages. ***----- In the Matter of Orion Driftboat and Watercraft Company, 26 BOLI 137, 148-49 (2005).***

❑ The forum assessed penalty wages when respondent willfully failed to pay claimant his earned, due, and unpaid wages; the agency made a written demand for claimant's wages on claimant's behalf when it issued its order of determination; more than 12 days elapsed since respondent received that written notice of claimant's wage claim; and more than 30 days elapsed since claimant's last workday. ***----- In the Matter of Orion Driftboat and Watercraft Company, 26 BOLI 137, 149 (2005).***

❑ When respondent admitted that claimant performed work as a laborer on certain projects for respondent for $12 per hour, readily admitted it still owed claimant $1,200 for his labor, and did not allege it was financially unable to pay claimant's wages at the time his wages accrued or present any evidence that explained or excused its failure to pay claimant all of the wages due when he left respondent's employ, the forum inferred that respondent voluntarily and as a free agent failed to pay claimant all of his wages and that respondent acted willfully and was liable for penalty wages under ORS 652.150. ***----- In the Matter of Kilmore Enterprises, Inc., 26 BOLI 111, 124 (2004).***

❑ Respondent paid claimant for an additional hour a day that he recorded, did not discipline him for spending an excessive amount of time on maintenance, always paid him for the additional hours recorded, never accused him of "padding" his hours until after claimant voluntarily quit, and admitted that he purposely deducted "several hours" from Claimant's final pay check that had been duly recorded on Claimant's time sheet. The forum inferred that respondent voluntarily and as a free agent failed to pay claimant all of the wages he earned, and that respondent acted willfully and was liable for penalty wages pursuant to ORS 652.150. ***----- In the Matter of John M. Sanford, Inc., 26 BOLI 72, 81 (2004), amended 26 BOLI 110 (2004).***

❑ When respondent knew claimant was performing work as a dispatcher, made no apparent effort to confirm whether claimant was recording the time on his time cards, and the time cards clearly denoted the nature of the work being recorded and respondent knew or should have known claimant was not recording his hours as a dispatcher, the forum inferred that respondent voluntarily and as a free agent failed to pay claimant all of the wages he earned as a dispatcher and concluded that respondent acted willfully and was liable for penalty wages. ***----- In the Matter of TCS Global, 24 BOLI 246, 260 (2003).***

❑ The forum concluded that respondent's failure to pay claimant's wages was willful in the absence of evidence that respondent acted other than voluntarily and as a free agent in failing to pay claimant the wages he earned. ***----- In the Matter of Paul Andrew Flagg, 25 BOLI 1, 11 (2003).*** *See also In the Matter of The Alphabet House, 24 BOLI 262, 282 (2003).*

❑ When respondent's manager was aware of claimant's actual employment conditions and hours worked and there was no evidence that respondent acted other than voluntarily and as a free agent in failing to pay claimant the wages she earned, the forum concluded that respondent's failure to pay claimant's wages was willful. ***----- In the Matter of Procom Services, Inc., 24 BOLI 238, 244 (2003).***

❑ When evidence showed respondent hired claimants and was usually present at the worksite, the forum concluded that respondent knew claimants' hours of work and voluntarily and as a free agent failed to pay claimants for the work they performed during the wage claim periods. ***----- In the Matter of Devon Peterson, 24 BOLI 189, 200 (2003).***

❑ When the claimants credibly testified to their wage agreements and that one of the respondents was aware of the amount and extent of the work they performed, the forum concluded that respondents acted willfully and assessed penalty wages against respondents. ***----- In the Matter of Barbara and Robert Blair, 24 BOLI 89, 98 (2002).***

❑ When respondent worked with claimant at the same job site, the forum concluded she was aware of claimant's work hours, and that, as respondent LLC's managing member, she voluntarily and as a free agent, willfully failed to pay claimant for all of the work claimant performed. ***----- In the Matter of Stephanie Nichols, 24 BOLI 107, 121 (2002).***

❑ Respondent's admission that it owed $11,591.36 in unpaid wages to claimant established respondent's knowledge that it failed to pay claimant those wages. The forum inferred from that knowledge that respondent acted voluntarily and as a free agent in failing to pay

those wages, and there was no evidence that allowed the forum to view respondent's failure to pay claimant in any other light. The forum concluded that respondent's failure to pay claimant's wages was willful. ***----- In the Matter of Westland Resources, Inc., 23 BOLI 276, 280 (2002).***

❑ When respondent did not deny she did not pay claimant the minimum wage for all hours claimant worked and the evidence showed her failure to pay the minimum wage rate was intentional, the forum inferred respondent voluntarily and as a free agent failed to pay claimant all of the wages she earned and acted willfully and was therefore liable for penalty wages under *former* ORS 652.150. ***----- In the Matter of Toni Kuchar, 23 BOLI 265, 275 (2002).***

❑ Respondent's failure to apprehend the correct application of the law and respondent's actions based on this incorrect application did not exempt respondent from a determination that he willfully failed to pay wages earned and due. ***----- In the Matter of Scott Miller, 23 BOLI 243, 262 (2002.*** *See also In the Matter of Ilya Simchuk, 22 BOLI 186, 197 (2001); In the Matter of Northwest Civil Processing, 21 BOLI 232, 248 (2001).*

❑ When respondents acknowledged they did not pay claimant for all of the hours he worked in July 2000; claimant credibly testified that respondents did not change the agreed upon wage rate at any time during his employment; credible evidence established respondents knew the amount and extent of the work claimant performed during July; and there was no evidence to show respondents acted other than intentionally and as free agents when they failed to pay claimant all wages owed at the time claimant quit his employment, the forum found that respondents acted willfully and were liable for penalty wages under ORS 652.150. ***----- In the Matter of Peter N. Zambetti, 23 BOLI 234, 242-43 (2002).***

❑ When two wage claimants credibly testified to their wage agreements with respondent and that respondent's president was aware of the amount and extent of the work they performed, and there was no evidence to show that respondent acted other than intentionally and as a free agent in underpaying them, the forum found that respondent's failure to pay wages was willful and awarded penalty wages. ***----- In the Matter of G and G Gutters, Inc., 23 BOLI 135, 146 (2002).***

❑ Respondent's argument that she intended to pay claimants when a "customer" against whom she had legal action pending paid her was not a defense, but instead showed that she voluntarily and as a free agent failed to pay two claimants all the wages they earned. ***----- In the Matter of Usra A. Vargas, 22 BOLI 212, 222 (2001).***

❑ Based on claimant's credible testimony that he worked on vehicles in respondent's shop at respondent's request, and that respondent was at the workplace while claimant worked on those vehicles, the forum concluded that respondent knew claimant's hours of work. There was no evidence that respondent acted other than voluntarily or as a free agent in not paying claimant for the 14.5 hours he worked on vehicles that were the subject of the wage claim and the forum determined that respondent acted willfully and awarded penalty wages. ***----- In the Matter of Sreedhar Thakkun, 22 BOLI 108, 116 (2001).***

❑ Credible evidence established that respondent intentionally withheld claimant's final paycheck to cover amounts respondent claimed were owed on a loan he made to claimant. From that fact, the forum inferred that respondent acted voluntarily and as a free agent and willfully failed to pay claimant all of his earned wages. ***----- In the Matter of Arthur Lee, 22 BOLI 99, 108 (2001).***

❑ Based on claimant's credible testimony that claimant's work schedule was written on respondent's calendar and claimant worked those hours, the forum inferred that respondent's president knew claimant's hours of work and willfully failed to pay claimant's wages. ***----- In the Matter of Jo-El, Inc., 22 BOLI 1, 9 (2001).***

❑ When respondent admitted it was not paying claimant the minimum wage and the evidence showed respondent's failure to pay the minimum wage was intentional, the forum inferred that respondent voluntarily and as a free agent failed to pay claimant all of the wages he earned and that respondent acted willfully and was liable for penalty wages under ORS 652.150. ***----- In the Matter of Northwest Civil Processing, 21 BOLI 232, 247-48 (2001).***

❑ When respondent was aware that claimants were employed by him and performing work on his behalf, and of the salary agreement with claimants, the commissioner found that respondent willfully failed to pay claimants wages due and owing to them. ***----- In the Matter of Francisco Cisneros, 21 BOLI 190, 216 (2001).***

Affirmed without opinion, *Cisneros v. Bureau of Labor and Industries,* 187 Or App 114, 66 P3d 1030 (2003).

❑ When respondent deducted process fees from claimant's pay draws and argued it was not a free agent, in that it had to have some way of recovering the costs it incurred to make this benefit to claimant possible, but produced no evidence to show it was under duress or coercion in making its business decision to charge process fees, the forum found respondent was a free agent in deciding to recover those costs by deducting them directly from claimant's paycheck and had acted willfully. ***----- In the Matter of Cox and Frey Enterprises, 21 BOLI 175, 181 (2001).***

❑ Based on claimant's credible testimony that respondent told claimant what time to report for work and was present at respondent's parking lot during much of time that claimant worked, the forum inferred that respondent knew claimant's hours of work. There was no evidence that respondent acted other than voluntarily or as a free agent and the forum concluded that respondent acted willfully. ***----- In the Matter of Bubbajohn Howard Washington, 21 BOLI 91, 102 (2000).***

❑ When claimants and respondent's daughter were respondent's only employees at a facility that provided round-the-clock care for elderly residents, that fact alone was sufficient to establish that respondent must have

known the hours that claimants were at work. In addition, respondent required claimants to record their hours on respondent's calendars and to initial medication logs whenever they gave medicine to a resident, which provided respondent with additional daily information regarding the hours claimants worked. Finally, as a sole proprietor, respondent was directly responsible for ensuring that her employees were paid and would know whether that had happened. Based on these facts, the forum found that respondent voluntarily and as a free agent failed to pay claimants the wages they earned. ***----- In the Matter of Sharon Kaye Price, 21 BOLI 78, 89 (2000).***

❑ The commissioner found that respondent's failure to pay wages was willful when respondent testified that he voluntarily chose not to pay claimant based on his perception that she was stealing from him. ----- ***In the Matter of Robert N. Brown, 20 BOLI 157, 163 (2000)***.

❑ The commissioner found that respondent's failure to pay wages was willful when respondent intentionally avoided claimant whenever claimant tried to collect her wages. ----- ***In the Matter of Nova Garbush, 20 BOLI 65, 73 (2000)***.

❑ Respondent's failure to pay claimant's wages was willful when respondent hired claimant, was aware that claimant was performing services on her behalf, and intentionally refused to pay claimant any wages. ***----- In the Matter of Barbara Coleman, 19 BOLI 230, 265-66 (2000)***.

❑ Respondent's failure to pay wages was willful when he knew the exact amount of wages due claimant but intentionally refused to pay any of it until the agency sent him a demand letter, and then paid only part of the amount owed. ***----- In the Matter of Richard R. Mabe, 19 BOLI 223, 230 (2000)***.

❑ Respondents' implied argument that they did not know they were claimant's employers did not change the forum's conclusion that respondents acted willfully in failing to pay claimant the minimum wage. ***----- In the Matter of Debbie Frampton, 19 BOLI 27, 40 (1999)***.

❑ The forum found that respondent's failure to pay claimant's wages was willful when respondent had paid claimant for his previous work on other contracts and respondent's supervisor was aware that claimant was not being paid for the work at issue. ***----- In the Matter of Belanger General Contracting, 19 BOLI 17, 26 (1999)***.

❑ When the respondent intentionally failed to pay wages and acted voluntarily and as a free agent, his failure to pay wages was willful and the forum ordered him to pay penalty wages. ***----- In the Matter of Leslie Elmer DeHart, 18 BOLI 199, 209 (1999)***.

❑ The forum found that the respondent's failure to pay wages was willful when he acted voluntarily in employing the claimants, deciding when and how much to pay them, and knew the claimants were not paid for the work they performed on certain dates. ***----- In the Matter of Troy R. Johnson, 17 BOLI 285, 292 (1999).***

❑ The forum found that the respondent's failure to pay wages was willful when the respondent knew it had not paid the wage claimants and the respondent acted voluntarily and as a free agent. ***----- In the Matter of R.L. Chapman Ent. Ltd., 17 BOLI 277, 284 (1999)***.

❑ When the evidence showed that respondent deducted the value of a mistakenly dumped load of potato waste from claimant's wages, and committed this act voluntarily, intentionally, and as a free agent, respondent acted willfully and was liable for penalty wages. ***----- In the Matter of Harold Zane Block, 17 BOLI 150, 161 (1998)***.

❑ The forum found that the respondent's failure to pay wages was willful when the respondent acted voluntarily in employing the claimants and deciding when and how much to pay them, and he admitted that he owed them wages. ***----- In the Matter of Thomas J. Heywood, 17 BOLI 144, 147 (1998)***.

❑ An employer's failure to apprehend the correct application of the law and the employer's actions based on that incorrect application do not exempt it from a determination that it willfully failed to pay overtime. ***----- In the Matter of Burrito Boy, Inc., 16 BOLI 1, 19 (1997).*** *See also In the Matter of Mario Pedroza, 13 BOLI 220, 232 (1994).*

❑ Ignorance of the law is irrelevant to determining whether an employer has willfully failed to pay wages when due. ***----- In the Matter of Burrito Boy, Inc., 16 BOLI 1, 19 (1997)***.

❑ A faulty payroll system is no defense to a failure to pay wages owed and does not allow an employer's actions to be characterized as unintentional. ***----- In the Matter of Burrito Boy, Inc., 16 BOLI 1, 19 (1997).***

❑ When respondent knew it was paying claimant a salary and knew from claimant's time card that he was working over 40 hours in a week, respondent intentionally did not pay claimant overtime wages during this period. When evidence showed that respondent acted voluntarily and was a free agent, the commissioner held that respondent must be deemed to have acted willfully under the *Sabin* test and was liable for penalty wages under ORS 652.150. ***----- In the Matter of Burrito Boy, Inc., 16 BOLI 1, 19 (1997).***

❑ When respondent knew she was not paying claimants' wages and either claimed she did not have the money to pay the wages or claimed she had later sent the money, respondent acted voluntarily and as a free agent. Under the circumstances, the commissioner held that respondent acted willfully under the *Sabin* test and was liable for penalty wages under ORS 652.150. ***----- In the Matter of Susan Palmer, 15 BOLI 226, 234 (1997).***

❑ When respondent either knew, or by exercising reasonable diligence, should have known that he had not paid claimant all earned wages when due as provided in ORS 652.140, respondent acted voluntarily and was a free agent. Respondent acted willfully and was liable for penalty wages under ORS 652.150. ***----- In the Matter of Mark Johnson, 15 BOLI 139, 142 (1996).***

❑ Respondent failed to pay all wages due to three discharged wage claimants no later than the first business day after their respective terminations. The commissioner found three violations of ORS 652.140

and imposed penalty wages under ORS 652.150. ***----- In the Matter of Danny Jones, 15 BOLI 96, 105 (1996).***

❑ Awarding penalty wages turns on the issue of willfulness. The phrase "willfully fails to pay any wages," as used in ORS 652.150, does not imply or require blame, malice, or moral delinquency. Willfulness only requires that what was done was done with free will by the employer. ***----- In the Matter of John Hatcher, 14 BOLI 289, 302 (1996).***

❑ "Willful," under ORS 652.150, simply means conduct done of free will. "Willful" does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency. A financially able employer is liable for a penalty when it has willfully done or failed to do any act that foreseeably would, and in fact did, result in its failure to meet its statutory wage obligations. ***----- In the Matter of Sunnyside Enterprises of Oregon, 14 BOLI 170, 184 (1995).*** *See also In the Matter of Mario Pedroza, 13 BOLI 220, 232 (1994); In the Matter of Sylvia Montes, 11 BOLI 268, 279 (1993); In the Matter of Mark Vetter, 11 BOLI 25, 31 (1992); In the Matter of William Sarna, 11 BOLI 20, 24 (1992).*

❑ Willfulness only requires that what was done was done with free will by the employer. ***----- In the Matter of John Hatcher, 14 BOLI 289, 302 (1996).***

❑ When respondent attempted to use a fluctuating workweek method of compensating claimant's overtime but failed to meet the requirements of OAR 839-20-030(3)(f), failed to apprehend the correct interpretation and application of the law, and based its actions upon its incorrect application, this did not exempt it from a determination that it willfully failed to pay overtime. Willful, under ORS 652.150, simply means conduct done of free will. ***----- In the Matter of Locating, Inc., 14 BOLI 97, 110 (1995).***

> Affirmed without opinion, *Locating, Inc. v. Deforest,* 139 Or App 600, 911 P2d 1289 (1996).

❑ A financially able employer is liable for penalty wages when he or she willfully does or fails to do any act that results in failure to meet his or her statutory obligation. ***----- In the Matter of Locating, Inc., 14 BOLI 97, 106-08 (1995).***

> Affirmed without opinion, *Locating, Inc. v. Deforest,* 139 Or App 600, 911 P2d 1289 (1996).

❑ "Willfully fails to pay any wages," as used in ORS 652.150, does not imply or require blame, malice, wrong, perversion, or moral delinquency. The language simply means conduct done of free will. It is not necessary that there be evidence of a manifest intent to violate the law. ***----- In the Matter of Ashlanders Senior Foster Care, Inc., 14 BOLI 54, 81 (1995).***

❑ Respondent relied on a payroll service and a generalized "bookkeeping error" to negate the existence of willfulness in his failure to pay overtime. The commissioner held that a faulty payroll system is no defense to a failure to pay wages owed and does not allow a respondent's actions to be characterized as unintentional. ***----- In the Matter of Mario Pedroza, 13 BOLI 220, 232 (1994).***

❑ The phrase "willfully fails to pay any wages," as used in ORS 652.150, has repeatedly been held not to imply or require blame, malice, wrong, perversion, or moral delinquency. The language simply means conduct done of free will. Respondent's ignorance of the law is not relevant. It isn't necessary that there be evidence of a manifest intent to violate the law. It is enough that what was done by the employer was done of free will. ***----- In the Matter of Mary Stewart-Davis, 13 BOLI 188, 200 (1994).***

> Affirmed without opinion, *Stewart-Davis v. Bureau of Labor and Industries,* 136 Or App 212, 901 P2d 268 (1995).

❑ Claimant signed an agreement that allowed respondent to deduct from claimant's pay any damages caused to the person or property of another by claimant while in respondent's employ. The commissioner found that $200 withheld from claimant's pay by respondent for damage to a customer's vehicle was wages owed to claimant, and that respondent's failure to pay the $200 was willful. The commissioner ordered those wages paid, together with penalty wages of $1,440 based on claimant's usual daily rate of earnings. ***----- In the Matter of Handy Andy Towing, Inc, 12 BOLI 284, 290, 292 (1994).***

❑ When respondent alleged in her request for hearing that she was "bankrupt," but presented no evidence of financial inability to pay at the time wages were due, the commissioner held that the failure to pay was willful and assessed penalty wages. ***----- In the Matter of Secretarial Link, 12 BOLI 58, 65 (1993).***

❑ Respondent argued that he did not willfully violate the law. The forum held that an intentional violation of the law is not required in order to find that an employer has acted "willfully" understand ORS 652.150. ORS 652.150 prescribes penalty wages for an act — the intentional failure to pay wages due – rather than a willful violation of the law. ***----- In the Matter of John Mathioudakis, 12 BOLI 11, 23 (1993).***

❑ When respondent failed to pay claimant overtime pay based on an agreement with claimant to work all hours at his straight time rate of pay, the commissioner found that respondent intentionally and knowingly paid claimant for overtime at his straight time rate, and the respondent was a free agent. Respondent acted willfully and was liable for penalty wages under ORS 652.150. ***----- In the Matter of Ken Taylor, 11 BOLI 139, 145-46 (1992).***

❑ Willfulness 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 Rainbow Auto Parts and Dismantlers, 10 BOLI 66, 74 (1991).***

❑ When respondent told claimant he would pay claimant's overtime wages when he got a settlement from a lawsuit with the state fire marshall, the commissioner found that respondent had willfully failed to pay wages when due and assessed penalty wages. ***----- In the Matter of Victor Klinger, 10 BOLI 36, 44 (1991).***

❑ The forum found that penalty wages turn on the

issue of willfulness. Willfulness does not imply or require blame, malice, wrong, 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. When the evidence established that respondent knew he owed each claimant wages, that he intentionally failed to pay those wages, and there was no evidence to show that respondent was not a free agent, the forum found that respondent's action or inaction was willful under ORS 652.150. ***----- In the Matter of Kevin McGrew, 8 BOLI 251, 262-63 (1990).***

❑ Awarding penalty wages turns on the issue of willfulness. The Attorney General has advised the commissioner that willful, under ORS 652.150, "simply means conduct done of free will." Willful does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency. A financially able employer is liable for penalty wages when he or she willfully does or fails to do any act that foreseeably would, and in fact did, result in failure to meet his or her statutory obligation. ***----- In the Matter of Dan's Ukiah Service, 8 BOLI 96, 108 (1989)***.

❑ Willful, under ORS 652.150, simply means conduct done of free will. A financially able employer is liable for penalty wages when it has willfully done or failed to any act that foreseeably would, and in fact did, result in failure to meet his or her statutory obligation. ***----- In the Matter of Central Pacific Freight Lines, Inc., 7 BOLI 272, 279 (1989).***

❑ The forum rejected an employer's argument that he could not be found to have willfully failed to pay a claimant at the minimum wage because he was unaware that the law imposed a minimum wage rate requirement on him. The fact that he may not have actually known of the legal requirement that he pay claimant at least the minimum wage is irrelevant because all employers are charged with knowing the wage and hour laws governing their activities as an employer. Employers are also charged with knowing the hours an employee works and the rate of pay paid employees for each hour worked. An employer cannot escape liability for penalty wages with the defense of ignorance of the law. ***----- In the Matter of Country Auction, 5 BOLI 256, 267 (1986).***

❑ The forum found an employer's conduct was "willful" under ORS 652.150 because her conduct was knowing, intentional, and voluntary – she intended to pay claimant as she did and her ignorance of the law was irrelevant. To act willfully does not mean to act with malice. ***----- In the Matter of Sheila Wood, 5 BOLI 240, 255 (1986).***

❑ When an employer failed to make it clear to claimant that claimant was to take a lunch break and allowed claimant to work from 8 a.m. to 5 p.m., the employer was presumed to know that there are nine hours between 8 a.m. and 5 p.m., not eight hours. Even if this failure to pay for nine hours per day was an oversight, the employer would still be subject to penalty wages under ORS 652.150 because an oversight of such an obvious fact does not negate a conclusion of willfulness. ***----- In the Matter of Booker Pannell, 5 BOLI 228, 238-39 (1986).***

❑ Awarding penalty wages turns on the issue of willfulness. In *State ex rel Nilsen v. Johnson employment al,* 233 Or 103, 108, 377 P2d 331 (1962), the court adopted a test articulated in *Davis v. Morris,* 37 Cal App 2d 269, 99 P2d 345 (1960). This test states that in civil cases willfulness does not imply or require blame, malice, or moral delinquency, but only requires that that which is done 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 Jack Coke, 3 BOLI 238, 243 (1983).*** *See also In the Matter of S.O.S. Towing and Storage, Inc., 3 BOLI 145, 148 (1982).*

13.1.3 --- Liability of Certain Respondents

❑ Two respondent partners claimed to have formed a limited liability partnership (LLP) that insulated them from personal liability for claimant's unpaid wages. The forum concluded that respondents did not provide personal service or services as required to qualify as "professionals" or persons providing services substantially similar to the professional service or services provided by the types of professionals listed in ORS 67.005(13)(a)-(m), that the LLP name that respondents registered with the secretary of state did not acquire the legal status of an LLP as a matter of law, and that both respondent partners were jointly and severally liable for the obligations incurred by the partnership, including claimant's unpaid wages, penalty wages, and civil penalties. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 229 (2006).***

❑ Although respondent LLC was held liable for civil penalty wages, respondent Nichols, as a successor employer, could not be held individually liable for penalty wages. ***----- In the Matter of Stephanie Nichols, 24 BOLI 107, 122 (2002).***

❑ In accordance with agency policy, the forum did not hold respondent liable for penalty wages when respondent was liable for claimant's unpaid wages only as a successor to claimant's employer. ***----- In the Matter of Sabas Gonzalez, 19 BOLI 1, 15 (1999)***.

❑ Respondents who are partners are jointly and severally liable for unpaid wages and penalty wages. ***----- In the Matter of Scott A. Andersson, 17 BOLI 15, 20-21, 25 (1998)***.

❑ In a wage claim case with joint employers, claimant was owed wages based on unpaid work time and unlawful deductions. One respondent, an employee leasing company, argued that it shouldn't be liable for civil penalty wages because it did not know of problems with claimant's pay, it relied on payroll information from the other joint employer, and claimant was silent about the payroll problems, and that silence constituted acquiescence and agreement with her wages. The commissioner found that claimant was not silent but complained regularly to the joint employer, per that employer's direction, and that the joint employer regularly put her off by claiming there were errors by the employee leasing company, and that the joint employer would investigate them. The commissioner held that the employee leasing company was not shielded from liability under these facts, stating that the employee leasing company had a legal responsibility to pay its

employees properly and could not hide behind the co-employer, that the employee leasing company had a legal duty to keep appropriate records and to know the amount of wages due its employees, and the delegation by contract of some of those duties to claimant's co-employer did not relieve the employee leasing company from its responsibilities or liabilities. To the extent the joint employer had the contractual duty to maintain payroll records and give payroll information to the employee leasing company, the joint employer was the company's representative and the joint employer's knowledge should be imputed to the company. ***----- In the Matter of Staff, Inc., 16 BOLI 97, 119-20 (1997).***

❑ When two respondents jointly employed a wage claimant pursuant to an employee leasing agreement between them and each respondent retained sufficient control of the terms and conditions of employment to be considered a joint employer, the commissioner held that each joint employer was required to comply with Oregon's wage and hour laws and each employer was liable, both individually and jointly, for any violation of those laws. ***----- In the Matter of Staff, Inc., 16 BOLI 97, 114-16 (1997).***

❑ When two wage claimants earned wages before and after a corporation was involuntarily dissolved, respondent, who was the successor to the corporation, was liable for wages earned before the dissolution. Respondent was the employer of claimants on the dates when their employment terminated and was liable for violations of ORS 652.140 and for penalty wages pursuant to ORS 652.150. ***----- In the Matter of Susan Palmer, 15 BOLI 226, 234 (1997).***

❑ The agency issued an order of determination jointly against three separate employers who shared work crews and equipment. Each employer was found to have failed to pay all sums due to claimant, and the forum treated the employers as one employer for purposes of penalty wages, which were assessed against them jointly. ***----- In the Matter of Jack Crum Ranches, Inc., 14 BOLI 258, 271 (1995).***

❑ The agency has a policy of not holding successor employers liable for penalty wages under ORS 652.150. ***----- In the Matter of Gerald Brown, 14 BOLI 154, 169 (1995).*** *See also In the Matter of Anita's Flowers & Boutique, 6 BOLI 258, 269 (1987), overruled in part on other grounds, In the Matter of Central Pacific Freight Lines, Inc., 7 BOLI 272, 280 (1972).*

❑ Respondents who are partners are jointly and severally liable for penalty wages under ORS 652.150 for willfully failing to pay all wages or compensation to claimant when due as provided in ORS 652.140. ***----- In the Matter of William Sarna, 11 BOLI 20, 24 (1992).***

❑ Respondents who are partners are jointly and severally liable for unpaid wages and penalty wages. ***----- In the Matter of Rainbow Auto Parts and Dismantlers, 10 BOLI 66, 74 (1991).***

❑ Two employers, a dissolved corporation and its sole owner and president, were named in an order of determination. The sole owner was found liable for penalty wages when he was a successor in interest to the dissolved corporation and, in addition, he failed to pay claimant's wages that were earned both before and after the corporation dissolved. ***----- In the Matter of Waylon & Willies, Inc., 7 BOLI 68, 74-75 (1988).***

13.1.4 --- Computation

❑ The forum assessed penalty wages in the manner provided for in ORS 652.150 (hourly rate - $7.26 x eight hours per day x 30 days = $1,742). ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 189 (2007).*** *See also In the Matter of Sue Dana, 28 BOLI 22, 31 (2006); In the Matter of Carl Odoms, 27 BOLI 232, 241 (2006); In the Matter of Captain Hooks, LLP, 27 BOLI 211, 224 (2006); In the Matter of Bukovina Express, Inc., 27 BOLI 184, 204-05 (2006); In the Matter of Troy Melquist dba RedCellX, Inc., 27 BOLI 171, 182-83 (2006); In the Matter of Okechi Village & Health Center, 27 BOLI 156, 168 (2006); In the Matter of Gary Lee Lucas, 26 BOLI 198, 214 (2005); In the Matter of Orion Driftboat and Watercraft Company, 26 BOLI 137, 149 (2005); In the Matter of Kilmore Enterprises, Inc., 26 BOLI 111, 124 (2004); In the Matter of John M. Sanford, Inc., 26 BOLI 72, 82 (2004), amended 26 BOLI 110 (2004); In the Matter of Paul Andrew Flagg, 25 BOLI 1, 11 (2003); In the Matter of TCS Global, 24 BOLI 246, 260 (2003); In the Matter of Stephanie Nichols, 24 BOLI 107, 122 (2002); In the Matter of Toni Kuchar, 23 BOLI 265, 275 (2002); In the Matter of Scott Miller, 23 BOLI 243, 262 (2002); In the Matter of Peter N. Zambetti, 23 BOLI 234, 242-43 (2002); In the Matter of Triple A Construction, LLC, 23 BOLI 79, 95 (2002); In the Matter of Duane Knowlden, 23 BOLI 56, 61-62 (2002); In the Matter of Stan Lynch, 23 BOLI 34, 45 (2002); In the Matter of Usra A. Vargas, 22 BOLI 212, 222-23 (2001); In the Matter of Ilya Simchuk, 22 BOLI 186, 198 (2001); In the Matter of Sreedhar Thakkun, 22 BOLI 108, 116 (2001); In the Matter of Jo-El, Inc., 22 BOLI 1, 10 (2001); In the Matter of Northwest Civil Processing, 21 BOLI 232, 248 (2001).*

❑ Claimant was entitled to the maximum penalty wages allowed by ORS 652.150 when respondent's failure to pay wages was willful and the agency provided documentary and testimonial evidence that it made the written demand required by ORS 652.150 for claimant's wages. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 189 (2007).***

❑ The forum normally has not computed an "average" hourly rate in those cases when a claimant was paid at one hourly rate during the wage claim period with no alternative form of compensation, even if the unpaid wages included overtime earnings. ***----- In the Matter of John M. Sanford, Inc., 26 BOLI 72, 83 (2004), amended 26 BOLI 110 (2004).***

❑ When claimant was paid $3000 per month in salary and the forum found respondent liable for penalty wages based on $9,000 in unpaid earned and owed wages, penalty wages were computed by dividing $9,000 by 532 hours worked resulting in a $16.92 hourly rate that was multiplied by 8 hours per day, multiplied by 30 days, for a total of $4,061. ***----- In the Matter of The Alphabet House, 24 BOLI 262, 276 (2003).***

❑ When claimants voluntarily quit their employment and their wages became due five days after they quit, not counting weekends and holidays, and more than 30 elapsed since that date, the forum found respondent

liable for penalty wages in the amounts of $1,742 as to one claimant and $1,740 as to the other. ***----- In the Matter of Devon Peterson, 24 BOLI 189, 192, 200 (2003).***

❑ When more than one wage rate is paid during the wage claim period, penalty wages are computed by taking the total earned during the wage claim period, dividing that figure by the total number of hours worked during the wage claim period, multiplying that figure by eight hours, and multiplying again by 30 days. ***----- In the Matter of Westland Resources, Inc., 23 BOLI 276, 282 (2002).***

❑ When claimant earned several different rates of pay, depending on the type of work he performed each day, the forum calculated penalty wages by determining the number of hours he worked and amount earned in his last 30 days of employment, dividing the hours into his earnings to determine his average hourly wage, multiplying that hourly wage by eight hours, then multiplying that total by 30 days. ***----- In the Matter of G and G Gutters, 23 BOLI 135, 140 (2002).***

❑ When claimant was a salaried employee, the forum calculated penalty wages by determining the number of hours he worked and amount earned in his last 30 days of employment, dividing the hours into his earnings to determine his average hourly wage, multiplying that hourly wage by eight hours, then multiplying that total by 30 days. ***----- In the Matter of G and G Gutters, 23 BOLI 135, 139 (2002).***

❑ When claimant was a salaried employee, the forum calculated penalty wages by dividing his weekly salary by 40 hours, multiplying that hourly wage by eight hours, then multiplying that total by 30 days. ***----- In the Matter of Heiko Thanheiser, 23 BOLI 68, 73 (2002).***

❑ When respondent agreed to pay claimant $160 per day and claimant earned $960, the forum computed penalty wages by dividing $960 (total wages earned) by 61¾ (total hours worked), which equals an average hourly rate of $15.55. The forum then multiplied $15.55 times 8 (hours per day) and then by 30 (the maximum number of days for which penalty wages continue to accrue) for a total of $3,732. ***----- In the Matter of Arnold J. Mitre, 23 BOLI 46, 51 (2002).***

❑ When respondent's failure to maintain records made it impossible to determine either the total wages earned or total number of hours worked in each of the claimants' last days of employment subsequent to claimants' last payroll period, the forum calculated penalty wages by dividing the total wages earned through each claimant's last payroll period by the total number of hours worked during that same time period. ***----- In the Matter of Francisco Cisneros, 21 BOLI 190, 215 (2001).***

> Affirmed without opinion, *Cisneros v. Bureau of Labor and Industries,* 187 Or App 114, 66 P3d 1030 (2003).

❑ When the agency sought penalty wages based on the average hourly rate for the entire period encompassed by the claimant's wage claim, but there was no evidence in the record showing how many hours claimant worked and how much he earned during the first two years covering his wage claim, the forum used claimant's hourly wage of $10 per hour during his last year of employment to calculate civil penalty wages. ***----- In the Matter of Cox and Frey Enterprises, 21 BOLI 175, 190 (2001).***

❑ The forum computed claimants' penalty wages by dividing the total earned during the wage claim period by the total number of hours worked in that period, and multiplying that figure by eight hours, multiplied by 30 days. ***----- In the Matter of Sharon Kaye Price, 21 BOLI 78, 90 (2000).***

❑ Penalty wages were calculated in accordance with the relevant laws and agency policy as follows: "Total earned during the wage claim period divided by the total number of hours worked during the wage claim period, multiplied by eight hours, multiplied by 30 days." ***----- In the Matter of Barbara Coleman, 19 BOLI 230, 266 (2000)***. *See also In the Matter of Belanger General Contracting*, *19 BOLI 17, 26 (1999).*

❑ Pursuant to agency policy, penalty wages due under ORS 652.150 are rounded to the nearest dollar. ***----- In the Matter of Staff, Inc., 16 BOLI 97, 119 (1997).*** *See also In the Matter of Mark Johnson, 15 BOLI 139, 143-44 (1996); In the Matter of Danny Jones, 15 BOLI 25, 32 (1996); In the Matter of Gerald Brown, 14 BOLI 154, 169 (1995); In the Matter of Locating, Inc., 14 BOLI 97, 109 (1995), affirmed without opinion, Locating, Inc. v. Deforest, 139 Or App 600, 911 P2d 1289 (1996); In the Matter of Jack Crum Ranches, Inc., 14 BOLI 258, 271 (1995); In the Matter of Sunnyside Enterprises of Oregon, 14 BOLI 170, 184 (1995); Katherine Hoffman, 14 BOLI 41, 47 (1995); In the Matter of Anna Pache, 13 BOLI 249, 272 (1994); In the Matter of Mario Pedroza, 13 BOLI 220, 232 (1994); In the Matter of Martin's Mercantile, 12 BOLI 262, 275 (1994); In the Matter of Kenny Anderson, 12 BOLI 275, 283 (1994); In the Matter of S.B.I., Inc., 12 BOLI 102, 110 (1993); In the Matter of Sylvia Montes, 11 BOLI 268, 279 (1993); In the Matter of Waylon & Willies, Inc., 7 BOLI 68, 72 (1988).*

❑ When more than one wage rate is earned during a wage claim period, it is the agency's policy to compute the average hourly wage during the wage claim period, no matter how many wage rates apply, when determining penalty wages. As a starting point, only the wage rates used and wages earned during the actual wage claim period are used to determine the average hourly wage. The equation is as follows: Total earned during the wage claim period divided by the total number of hours worked during the wage claim period, multiplied by eight hours, multiplied by 30 days. ***----- In the Matter of Burrito Boy, Inc., 16 BOLI 1, 20 (1997).***

❑ When more than one wage rate was earned during a wage claim period, but there was insufficient evidence to determine an average hourly wage for purposes of calculating penalty wages, the forum calculated the penalty wages based on claimant's final wage rate and the wage rate at which nearly all the unpaid wages were earned – a semimonthly salary. ***----- In the Matter of Burrito Boy, Inc., 16 BOLI 1, 20 (1997).***

❑ It is the agency's policy to include the amount of bonuses earned during the wage claim period in penalty wage computations. ***----- In the Matter of Mark Johnson, 15 BOLI 139, 142-43 (1996).***

❑ To calculate penalty wages under ORS 652.150, a claimant's compensation continues from the due date thereof at the same hourly rate for eight hours per day until paid or until action therefore is commenced, for up to 30 days. When more than one hourly rate is paid during a wage claim period and a bonus is paid in addition to the hourly rate of pay, the agency's policy is to calculate an average hourly wage as a base factor for computing the penalty wage. ***----- In the Matter of Mark Johnson, 15 BOLI 139, 143 (1996).***

❑ The average daily rate from which penalty wages are calculated is the result of dividing the total number of days worked by the employee into the total amount earned b the employee during the period. The penalty wage is then determined by multiplying the average daily rate by the number of days, up to 30, that wages remain unpaid. ***----- In the Matter of Ashlanders Senior Foster Care, Inc., 14 BOLI 54, 69 (1995)***.

❑ The commissioner has inherent authority to fashion a remedy based on evidence in before the forum. When penalty wage calculations in the proposed order were erroneous, the commissioner based the final order on the correct calculations. ***----- In the Matter of Mary Stewart-Davis, 13 BOLI 188, 200 (1994).***

> Affirmed without opinion, *Stewart-Davis v. Bureau of Labor and Industries,* 136 Or App 212, 901 P2d 268 (1995).

❑ When some of 20 wage claimants worked on an hourly basis and some on a piece rate basis, the commissioner approved the agency's method of calculating each claimant's earnings, determining whether it met minimum wage, deducting any payments, and computing penalty wages based on dividing the number of days each claimant worked into that claimant's earnings and multiplying the resultant average daily rate by 30. ***----- In the Matter of Blue Ribbon Christmas Trees, Inc., 12 BOLI 209, 217, 219 (1994).***

❑ Penalty wages were computed as follows: $142.60 (total wages earned) divided by six (number of days worked during the wage claim period) equals $23.77 (the average daily rate of pay). This figure of $23.77 was multiplied by 30 (the number of days for which penalty wages continued to accrue) for a total of $713.00 (rounded to the nearest dollar, pursuant to agency policy). This "average daily rate" method is an appropriate method of determining an employee's rate of pay based on actual earnings, and of calculating penalty wages. ***----- In the Matter of Box/Office Delivery, 12 BOLI 141, 150-52 (1994)***.

❑ ORS 652.150 does not mean the penalty is to be determined by the amount that the employee earned, but by the rate of pay at which he worked. The penalty wages assessed can exceed the amount of wages earned in the 30 days before discovery. ***----- In the Matter of Box/Office Delivery, 12 BOLI 141, 152 (1994).***

❑ Reimbursable expenses are not included in the calculation of penalty wages. ***----- In the Matter of Sylvia Montes, 11 BOLI 268, 272, 279 (1993).***

❑ When employees are paid on a piece rate basis, penalty wages are computed according to agency policy by dividing the total piece rate earnings by the number of days (including portions of days) actually worked to arrive at the average daily rate. ***----- In the Matter of Richard Ilg, 11 BOLI 230, 236-37 (1993).***

> Affirmed without opinion, *Ilg v. Bureau of Labor and Industries,* 132 Or App 552, 890 P2d 454 (1995).

❑ Penalty wages are computed according to agency policy by multiplying the hourly rate by the regular hours actually worked, multiplying one and one half the hourly rate by the overtime hours actually worked, and dividing the combined products by the number of days actually worked to arrive at the average daily rate. ***----- In the Matter of Flavors Northwest, 11 BOLI 215, 224, 224 (1993).***

❑ Agency policy is to not include reimbursable expenses in the wages used to calculate penalty wages, overruling *In the Matter of Anita's Flowers & Boutique, 6 BOLI 258, 266-67 (1987)* in that limited respect. ***----- In the Matter of Central Pacific Freight Lines, Inc., 7 BOLI 272, 280 (1989).***

❑ When an employer argued that penalty wages under ORS 652.150 could not exceed a claimant's monthly salary, the commissioner ruled that the average daily rate method was an appropriate method of determining an employee's rate of pay based on actual earnings. Claimant's average daily rate, based on his actual earnings during the wage claim period, is the "same rate" as his agreed rate for purposes of ORS 652.150. 30 days of penalty wages could be more than a claimant's monthly salary because the penalty accrues each day, for no more than 30 days, while the claimant's employment agreement allowed for days off during the month. The average daily rate method accurately measures the rate of pay per day that the claimant received under his agreement. ***----- In the Matter of Central Pacific Freight Lines, Inc., 7 BOLI 272, 280 (1989).***

❑ Respondent objected to a request by the hearings referee that the agency recompute penalty wages in order to correctly account for claimant's wage and compensation agreement. The forum overruled the objection, stating that the hearings referee has the right and duty to conduct a full and full inquiry and create a complete record. Where errors are detected, the hearings referee is empowered to cause them to be corrected. This is especially true when there are arithmetic errors or other similar computation oversights. The issue of penalty wages was squarely before the forum, as it was raised in the order of determination. The charging document may be amended to request increased damages or, when appropriate, penalties to conform to the evidence presented at the contested case hearing. In this case, the employers presented no evidence that they were prejudiced and they did not object to the admission into evidence of claimant's records that formed the basis for the penalty computations. ***----- In the Matter of Anita's Flowers & Boutique, 6 BOLI 258, 259 (1987).***

> Overruled in part on other grounds, *In the Matter of Central Pacific Freight Lines, Inc.,* 7 BOLI 272, 280 (1972).

❑ Reimbursable mileage expenses were included in calculating claimant's total earnings, for purposes of calculating penalty wages. ***----- In the Matter of Anita's Flowers & Boutique, 6 BOLI 258, 266-67 (1987).***

> Overruled on this point, *In the Matter of Central Pacific Freight Lines, Inc., 7 BOLI 272, 280 (1972).*

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

❑ In its order of determination, the agency sought only $2,487 in unpaid wages for claimant, based on its allegation that claimant had been paid $910. At hearing, the agency proved that claimant had only been paid $400 for work performed during the wage claim period. Based on the evidence presented at hearing, the forum awarded claimant approximately $510 more in unpaid wages than the amount sought in the order of determination, for a total of $2,995. ***----- In the Matter of Stan Lynch, 23 BOLI 34, 44 (2002).***

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

14.0 CIVIL PENALTIES UNDER ORS 653.256

14.1 --- Generally

❑ The commissioner shall consider aggravating and mitigating circumstances set out in OAR 839-020-1020 when determining the amount of civil penalties. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 192 (2007).***

❑ It is the employer's responsibility to provide the commissioner with any mitigating evidence concerning the amount of civil penalties to be assessed. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 192 (2007).***

❑ The actual amount of the civil penalty the commissioner assesses for violations of ORS 653.045 depends on the mitigating and aggravating circumstances set forth in OAR 839-020-1020. ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 208 (2006).*** *See also In the Matter of Okechi Village & Health Center, 27 BOLI 156, 169 (2006); In the Matter of TCS Global, 24 BOLI 246, 261 (2003); In the Matter of The Alphabet House, 24 BOLI 262, 283 (2003).*

❑ ORS 653.256 authorizes the commissioner to assess civil penalties for each willful violation of ORS 653.045. ***----- In the Matter of Okechi Village & Health Center, 27 BOLI 156, 169 (2006).***

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

14.2.1 --- Generally

❑ OAR 839-020-0083(3) interprets ORS 653.045(2) to require that "all records required to be preserved and maintained by these rules shall be made available for inspections and transcription by the commissioner or duly authorized representative of the commissioner." ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 194 (2007).***

❑ The presence of 21 weekly time sheets in the record, 13 of which were provided by the claimant, showed that respondent made a record of the actual hours worked per week by claimant. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 194 (2007).***

❑ Respondent violated ORS 653.045(3) by failing to make claimant's weekly time sheets available to the commissioner for inspection in response to a written request. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 194 (2007).***

❑ The forum inferred that respondent failed to keep available for inspection 13 weekly time sheets that were not provided to the agency. Had respondent kept these records, it would have provided them when it provided eight of claimant's 21 weekly time sheets. Respondent's failure to keep and make these 13 weekly time sheets available to the commissioner for inspection was a violation of ORS 653.045(2). ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 194 (2007).***

❑ Pursuant to 839-020-0004(33), respondent was presumed to have known the requirements of ORS 653.045(2). When there was undisputed evidence that respondent received the agency's request for claimant's weekly time sheets, the forum found that respondent's violation of ORS 653.045(2) was willful. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 194 (2007).***

❑ When the agency made a prima facie case that respondent had knowledge of facts and circumstances that put it on notice of its duty to keep and maintain records pertaining to claimant and there was no credible evidence to suggest otherwise, the forum concluded that respondent willfully failed to make and maintain required records in accordance with ORS 653.045(1). ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 207 (2006).***

❑ When the agency presented credible evidence that respondent employed claimant in March 2004, was required to pay him the minimum wage in accordance with ORS 653.025, and respondent steadfastly maintained throughout the agency's wage claim investigation and in its answer that it kept no records whatsoever for claimant, the forum concluded that respondent was required to "make and keep available to the commissioner" records pertaining to claimant's employment, including the number of hours he worked each week and each pay period, and failed to do so. ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 207 (2006).***

❑ Respondent, as an employer, had a duty to know the laws that regulate employment in this state. When respondent knew or should have known it was required to make and keep records of claimant's work hours and kept records of another claimant's work hours, the forum concluded that respondent willfully violated ORS 653.045. ***----- In the Matter of Okechi Village & Health Center, 27 BOLI 156, 169 (2006).***

❑ When the hearing record included evidence that respondent maintained and provided the agency with a record of claimant's actual work hours, including his original time cards, but despite the agency's repeated requests and ample opportunity to do so, respondent

failed to make a second claimant's payroll records available for the agency's inspection, the forum inferred that respondent did not make records pertaining to the second claimant or it would have provided them when it provided the first claimant's payroll records. ***----- In the Matter of Okechi Village & Health Center, 27 BOLI 156, 168-69 (2006).***

❑ When the agency sought $24,000 in civil penalties based on respondent's alleged willful failure to make and keep available required payroll and other records in violation of ORS 653.045 and OAR 839-020-0080, but did not specifically allege which of the many subsections of OAR 839-020-0800 was violated, the forum looked to language of ORS 653.045 to determine if one or more violations occurred. ***----- In the Matter of Gary Lee Lucas, 26 BOLI 198, 214 (2005).***

❑ When respondent kept a daily record of the hours worked by two wage claimants and totaled those hours each pay period, and recorded claimants' names and stated the type of work they performed, the forum found that this evidence satisfied every requirement of ORS 653.045(1)(a) and (b) except for the record of claimants' addresses. No evidence was presented as to whether respondent maintained a written record of the addresses of claimants, and the forum found that respondent did not violate ORS 653.045 and OAR 839-020-0080 as charged. ***----- In the Matter of Gary Lee Lucas, 26 BOLI 198, 214 (2005).***

❑ When the agency presented no evidence or argument other than its general allegation that respondent violated ORS 653.045(1) and OAR 839-020-0080, the forum did not find a violation. ***----- In the Matter of Rubin Honeycutt, 25 BOLI 91, 105 (2003).***

❑ When the agency requested payroll records from respondent, respondent provided those records, and the agency did not prove those records were falsified, the forum found that respondent did not fail to make records required to be preserved and maintained available for inspection by the commissioner. ***----- In the Matter of Rubin Honeycutt, 25 BOLI 91, 106 (2003).***

❑ When the agency presented no evidence or argument other than its general allegation that respondent violated ORS 653.045(1) and OAR 839-020-0080, the forum did not find a violation. ***----- In the Matter of Rubin Honeycutt, 25 BOLI 91, 105 (2003).***

❑ To establish a violation of ORS 653.045(1), the agency was required to prove that respondents (1) employed workers and (2) failed to make and keep available required records. ***----- In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration, 25 BOLI 12, 45 (2003).***

> Affirmed without opinion, *Ochoa v. Bureau of Labor and Industries,* 196 Or App 639, 103 P3d 1212 (2004).

❑ When the forum found respondent was required to pay claimant the minimum wage rate for the hours he worked as a dispatcher, and when respondent admitted it did not make a record of the hours claimant worked as a dispatcher, and knew or should have known it was required to make and keep records of claimant's work hours, and, in fact, knew of the requirement because it kept records of the hours claimant worked as a flagger and pilot car operator, the forum found respondent willfully violated ORS 653.045. ***----- In the Matter of TCS Global, 24 BOLI 246, 261 (2003).***

❑ When the agency failed to specifically allege which of the many subsections of OAR 839-020-800 was violated, the forum looked to the language of ORS 653.045 to determine if one or more violations occurred and determined that the applicable statutory language requires employers to make a record of "the actual hours worked each week and pay period by each employee." ***----- In the Matter of The Alphabet House, 24 BOLI 262, 282 (2003).***

❑ When evidence showed respondent made a record of claimant's work hours in November and December 2000, but there was no evidence that respondent made records of her work hours in October 2000 or September 2001, the forum found that respondent committed two violations of ORS 653.045(1)(b) by failing to make a record of the actual hours worked each week by claimant in October 2000 or September 2001. ***----- In the Matter of The Alphabet House, 24 BOLI 262, 282 (2003).***

❑ ORS 653.045(2) requires employers to keep records required by ORS 653.045(1) "open for inspection by the commissioner or commissioner's designee at any reasonable time." The agency's rule, OAR 839-020-0083(3), interprets the statute to require that these records "shall be made available for inspections." ***----- In the Matter of Stephanie Nichols, 24 BOLI 107, 123 (2002).***

❑ When the forum found that respondent LLC failed to make a record of claimant's "actual hours worked" or the "total wages paid each pay period" to claimant, the forum assessed a civil penalty against the LLC. ***----- In the Matter of Stephanie Nichols, 24 BOLI 107, 123 (2002).***

❑ As the definition of employer that applies to ORS 653.045 is "any person who employs another person," and does not incorporate the concept of successor liability, the forum could not hold a successor respondent individually liable for civil penalties. ***----- In the Matter of Stephanie Nichols, 24 BOLI 107, 123 (2002).***

❑ The agency sought a $1000 civil penalty against respondent for violating ORS 653.045, which requires employers to make and keep available records of the number of hours worked by each employee. Respondent, however, was liable for claimant's unpaid wages only as a successor to the corporation that had employed claimant. The definition of "employer" that applies to ORS 653.045 is "any person who employs another person," and does not incorporate the concept of successor liability. Consequently, respondent was not an "employer" for purposes of ORS 653.045, and could not be made to pay a penalty for the corporation's violation of that statute. ***----- In the Matter of Sabas Gonzalez, 19 BOLI 1, 15 (1999)***.

14.2.2 --- Aggravating and Mitigating Circumstances

❑ Respondent's violations of ORS 653.045(2) were aggravated in four ways. First, respondent knew, or

should have known, of the violations. Respondent received the agency's request for records and did not provide all the requested records. In the agency's request, respondent was further notified that failure to maintain and provide those records was a violation of Oregon law and BOLI's administrative rules. Second, it would not have been difficult for respondent to comply with the requirements of ORS 653.045(2). Respondent kept and provided copies of eight of claimant's weekly time sheets and there is no evidence that respondent was impeded in any manner from keeping and providing the other 13 to the agency in response to its request. Third, there is no evidence that respondent took any measures to ensure that these violations did not occur. Fourth, respondent's failure to keep and provide all of claimant's weekly time sheets was a serious violation because it potentially affected claimant's substantive rights, in that one of the purposes of the statute is to afford give BOLI the opportunity to verify that employees have been paid correctly for all hours worked. Respondent's violation was of substantial magnitude because of the number of time sheets respondent failed to keep and provide (13) and respondent's failure to keep and provide these records made the agency's investigation of claimant's wage claim much more difficult and time consuming. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 194-95 (2007).***

❑ When respondent presented no mitigating evidence for the forum to consider when determining the amount of the civil penalty for respondent's failure to keep and maintain records; the agency alleged and proved that respondent, as an employer, knew or should have known of the violations and, despite numerous opportunities to comply with the law prior to the order of determination, respondent failed to avail itself of those opportunities, and the agency gave respondent numerous opportunities to correct the violations; and that respondent's failure to make and keep records hampered the agency's ability to determine claimant's actual wages owed, the forum concluded that respondent's violation was serious. ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 208 (2006).***

❑ When respondent offered no mitigating evidence and the forum concluded that respondent knew or should have known of the violation, that the agency gave respondent ample opportunity to correct the violation but it failed to do so, and that respondent's failure to make and keep records hampered the agency's investigation and its ability to determine whether claimant was paid correctly or to determine the amount of any additional wages owed, the forum concluded that the violations were serious. ***----- In the Matter of Okechi Village & Health Center, 27 BOLI 156, 169 (2006).***

❑ Respondents' 29 violations of ORS 653.045(1) were aggravated by their seriousness, in that failure to make and keep available payroll records significantly impedes the commissioner's ability to determine whether employees are properly compensated, which potentially affects the substantive rights of the workers; the fact that respondents knew or should have known it was required to keep records for its employees; and the absence of mitigating circumstances. ***----- In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration, 25 BOLI 12, 52-53 (2003).***

> Affirmed without opinion, *Ochoa v. Bureau of Labor and Industries,* 196 Or App 639, 103 P3d 1212 (2004).

❑ When respondent's violations only involved one salaried employee, the forum found the magnitude and seriousness of the violations low. ***----- In the Matter of The Alphabet House, 24 BOLI 262, 283 (2003).***

❑ When respondent was ultimately responsible to insure that claimant, its record keeper, created the records required by law, respondent should have known of the violations. ***----- In the Matter of The Alphabet House, 24 BOLI 262, 283 (2003).***

❑ When claimant was the employee responsible for making the very records on which the agency based its allegations, the forum found respondent's two violations mitigated. ***----- In the Matter of The Alphabet House, 24 BOLI 262, 283 (2003).***

❑ It is the employer's responsibility to present any mitigating evidence and the commissioner must consider any mitigating evidence the employer presents.***----- In the Matter of The Alphabet House, 24 BOLI 262, 283 (2003)****; See also In the Matter of Stephanie Nichols, 24 BOLI 107, 123 (2002).*

❑ Respondent's violation of ORS 653.045 was aggravated by evidence showing that respondent knew or should have known of the violation; respondent had the opportunity to correct the violation but failed to do so; and by respondent's failure to keep a record of claimant's work hours that made it impossible for the forum to determine the total amount of wages earned and owed. ***----- In the Matter of TCS Global, 24 BOLI 246, 261 (2003).***

❑ Respondent's violation of ORS 653.045(2) was aggravated because respondent's manager knew or should have known of the violation, in that employers are presumed to know the laws they are required to follow and the manager was acting as an agent for respondent; the manager could have easily obtained a receipt from claimant for the cash payment of wages to him and presumably could have obtained a copy of the second money order to provide to BOLI, had she made an attempt to do so; the violation was serious and of significant magnitude, in that it resulted in BOLI having to conduct a hearing to determine that wages were owed to claimant and the actual amount of wages owed; and because the failure to make these records resulted in the loss of a substantive right to claimant in the form of $228 in unpaid wages. Respondent presented no mitigating circumstances. ***----- In the Matter of Stephanie Nichols, 24 BOLI 107, 124 (2002).***

❑ Respondent's violation of ORS 653.045(1) was aggravated because respondent's manager knew or should have known of the violation; respondent's manager worked on the job site and could have easily written down claimant's daily work hours and made copies of the money orders she used to pay claimant; the violation was serious because it affected BOLI's ability to determine the actual amount of wages owed to claimant; and respondent's failure to make records resulted in a substantive wage loss of $228 to claimant.

The magnitude of the violation was not great because it only affected one employee. ***----- In the Matter of Stephanie Nichols, 24 BOLI 107, 123 (2002).***

❑ The commissioner shall consider aggravating and mitigating circumstances when determining the amount of civil penalties for violations of ORS 653.045. ***----- In the Matter of Stephanie Nichols, 24 BOLI 107, 123 (2002).***

14.2.3 --- Civil Penalties

❑ The commissioner is authorized to assess a civil penalty "not to exceed $1,000" for each violation of ORS 653.045(2). Based on the aggravating circumstances and absence of mitigating circumstances, the forum assessed the $1,000 civil penalty sought by the agency for respondent's violation of ORS 653.045(2). ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 194-95 (2007).***

❑ The actual amount of the civil penalty the commissioner assesses for violations of ORS 653.045 depends on the mitigating and aggravating circumstances set forth in OAR 839-020-1020. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 194-95 (2007).*** *See also In the Matter of Bukovina Express, Inc., 27 BOLI 184, 208 (2006); In the Matter of Okechi Village & Health Center, 27 BOLI 156, 169 (2006); In the Matter of TCS Global, 24 BOLI 246, 261 (2003); In the Matter of The Alphabet House, 24 BOLI 262, 283 (2003).*

❑ Based on the aggravating circumstances and absence of mitigating circumstances, the forum assessed the $1,000 civil penalty sought by the agency for respondent's violation of ORS 653.045(1). ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 208 (2006).***

❑ ORS 653.256 authorizes the commissioner to assess civil penalties for each willful violation of ORS 653.045. ***----- In the Matter of Okechi Village & Health Center, 27 BOLI 156, 169 (2006).***

❑ Based on the number of aggravating circumstances and absence of any mitigating circumstances, the forum assessed two $1,000 civil penalties – one for respondent's failure to make a record of claimant's actual work hours each week and each pay period, and one for respondent's failure to make records available for the agency's inspection. ***----- In the Matter of Okechi Village & Health Center, 27 BOLI 156, 169 (2006).***

❑ Based on several aggravating circumstances and the lack of mitigating circumstances, the forum assessed $5,800 in civil penalties for respondents' 29 violations of ORS 653.045(1). ***----- In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration, 25 BOLI 12, 52-53 (2003).***

> Affirmed without opinion, *Ochoa v. Bureau of Labor and Industries,* 196 Or App 639, 103 P3d 1212 (2004).

❑ Based on several aggravating circumstances and the lack of mitigating circumstances, the forum assessed a civil penalty of $1000 for respondent's violation of ORS 653.045. ***----- In the Matter of TCS Global, 24 BOLI 246, 261 (2003).***

❑ When the forum found that respondent LLC failed to make a record of claimant's "actual hours worked" or the "total wages paid each pay period" to claimant, the forum assessed the $1,000 civil penalty sought by the agency against the LLC for respondent's violation of ORS 653.045(1). ***----- In the Matter of Stephanie Nichols, 24 BOLI 107, 123 (2002).***

❑ Based on several aggravating circumstances and the lack of any mitigating circumstances, the forum assessed a civil penalty of $1,000 for respondent's violation of ORS 653.045(2). ***----- In the Matter of Stephanie Nichols, 24 BOLI 107, 124 (2002).***

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

14.3.1 --- Generally

❑ Pursuant to 839-020-0004(33), a respondent was presumed to have known the requirements of OAR 839-020-0012. Based on this presumption, the forum found that respondent willfully violated OAR 839-020-0012 on 11 occasions by failing to provide claimant with statements of itemized deductions when she was paid. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 192 (2007).***

❑ In order to prevail on allegations that respondent violated ORS 653.045(3) and OAR 839-020-0012 by failing to provide an itemized statement showing deductions made from claimant's wages, the agency must provide credible evidence that (1) respondent made wage payments to claimants; (2) respondent made deductions from claimants' wage payments; and (3) respondent did not provide the itemized statement required by ORS 652.610 at the time respondent made the wage payments. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 190-91 (2007).***

❑ When there was no evidence presented to show that respondent ever took any deductions from claimant's pay, the forum held that respondent did not violate ORS 653.045(3) by failing to provide an itemized statement showing deductions made from claimant's wages. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 191 (2007).***

❑ When claimant received 11 wage payments from respondent and respondent never gave claimant any kind of itemized statement showing the total gross payment being made, the total number of hours worked during the times covered by the gross payments, claimant's rate of pay, and the pay periods for which the payments were made, the forum concluded that respondent committed 11 violations of OAR 839-020-0012. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 191 (2007).***

❑ In order to prevail, the agency must prove that (1) respondent made wage payments to claimants; (2) respondent made deductions from claimants' wage payments; and (3) respondent did not provide the itemized statement required by ORS 652.610 at the time respondent made the wage payments. ***----- In the Matter of Gary Lee Lucas, 26 BOLI 198, 215 (2005).***

❑ The agency proved that respondent made wage

payments to the claimants and did not provide an itemized statement of deductions, but presented no evidence to show that respondent made any deductions from any of the claimants' paychecks. Since respondent did not make any deductions, respondent did not violate ORS 653.045, OAR 839-020-0012, or OAR 839-020-0080 by failing to provide claimants "with itemized statements of amounts and purposes of deductions." ***----- In the Matter of Gary Lee Lucas, 26 BOLI 198, 215 (2005).***

❑ Respondents committed 106 violations of ORS 653.045(3) when they failed to provide itemized statements of earnings to workers each time they were paid for work performed and 106 paychecks were issued. ***----- In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration, 25 BOLI 12, 52 (2003).***

> Affirmed without opinion, *Ochoa v. Bureau of Labor and Industries*, 196 Or App 639, 103 P3d 1212 (2004).

❑ In order to prevail on its allegation that respondent failed to supply claimant with itemized statements of deductions in violation of ORS 653.045(3), the agency was required to prove that: (1) respondents made wage payments to claimant; (2) respondents made deductions from claimant's wage payments; and (3) respondents did not provide the itemized statement required by statute at the time respondent made the wage payments. ***----- In the Matter of The Alphabet House, 24 BOLI 262, 285 (2003).***

❑ When the wage claimant did not receive wage payments from respondent in October, November, or December 2000, the forum found the agency's allegation that respondent failed to provide claimant with itemized statements of deductions in those months failed. Also, in the absence of evidence that respondent made deductions from claimant's $207.72 paycheck that was issued in September 2001, the forum found the agency's allegation that respondent violated ORS 653.045(3) failed. ***----- In the Matter of The Alphabet House, 24 BOLI 262, 285 (2003).***

❑ Despite its finding that respondent did not provide claimant with an itemized statement of deductions for the paycheck respondent issued to her, the forum concluded that the allegation failed because the agency did not present evidence that any deductions were taken from the claimant's paycheck. ***----- In the Matter of The Alphabet House, 24 BOLI 262, 285 (2003).***

❑ The purpose of OAR 839-020-0012(1) is so workers can verify that they have been correctly paid for all hours worked. When the itemized statements contain inaccurate information, this becomes impossible. ***----- In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 289 (2001).***

> Reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries,* 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004).

❑ To comply with OAR 839-020-0012(1), each itemized wage statement must state the exact number of hours the worker actually worked on the date for which the worker's paycheck is issued. ***----- In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 288 (2001).***

> Reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries,* 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004).

❑ Respondent, a temporary employment service, violated OAR 839-020-0012(1)(c) and (h) when itemized wage statements to two workers showed that they worked more hours on those dates than were reflected on the daily work tickets completed by respondent and submitted to its client for reimbursement. Although the workers were paid less than the prevailing wage rate, the itemized statements did not violate OAR 839-020-0012(1)(d) for the reason that the wage rate appearing on the statements was the wage rate the workers actually received. ***----- In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 289 (2001).***

> Reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries,* 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004).

14.3.2 --- Aggravating and Mitigating Circumstances

❑ Respondent's violations of OAR 839-020-0012 were aggravated in five ways. First, respondent knew, or should have known, of the violations. Although there was no evidence presented that respondent had actual knowledge of the requirements of OAR 839-020-0012 when claimant was paid, respondent, as an employer, still had a duty to know the laws that regulate employment in Oregon. Accordingly, the forum finds that respondent should have known, of the violations. OAR 839-020-1020(1)(d). Second, it would not have been difficult for respondent to comply with the requirements of OAR 839-020-0012, and there was no evidence that respondent was impeded in any manner from creating itemized statements to give to claimant when she was paid. Third, there was no evidence that respondent took any measures to ensure that these violations did not occur. Fourth, respondent's failure to comply with the law deprived claimant of her rights to receive and be privy to legally required information regarding her pay. Fifth, respondent's failure to provide claimant with itemized statements was a serious violation because it potentially affected her substantive rights, in that one of the purposes of the statute is to afford workers an opportunity to verify that they have been paid correctly for all hours worked. Respondent's violations were of substantial magnitude because of the number of violations (11) and because an indirect result of the violations was that claimant was underpaid by nearly $7,000; a fact she was unaware of until BOLI commenced its investigation. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 192-93 (2007).***

❑ Failure to provide statements of itemized deductions is a serious violation because it potentially affects the substantive rights of workers, in that one of the purposes of the statute is to afford workers an opportunity to verify that they have been correctly paid for all the hours they worked. ***----- In the Matter of Rodrigo Ayala Ochoa,***

revised final order on reconsideration, 25 BOLI 12, 52 (2003).

> Affirmed without opinion, *Ochoa v. Bureau of Labor and Industries*, 196 Or App 639, 103 P3d 1212 (2004).

14.3.3 --- Civil Penalties

❑ The commissioner may assess a civil penalty against any person who willfully violates OAR 839-020-0012. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 191 (2007).***

❑ Based on the aggravating circumstances, the forum assessed a civil penalty of $1,000 for each of respondent's 11 violations of OAR 839-020-0012, for a total of $11,000. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 193 (2007).***

❑ When respondents failed to provide itemized statements of earnings to workers each time they were paid for work performed; 106 paychecks were issued; and respondents' workers, who were paid on a piece rate basis, had no way of knowing whether they were paid at least the minimum wage for the hours they worked, the forum found the violations to be serious and assessed $150 in civil penalties per violation, for a total of $15,900, for respondents' 106 violations of ORS 653.045(3). ***----- In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration, 25 BOLI 12, 52 (2003).***

> Affirmed without opinion, *Ochoa v. Bureau of Labor and Industries*, 196 Or App 639, 103 P3d 1212 (2004).

❑ The forum assessed the $2,000 civil penalty sought by the agency for respondent's four violations of OAR 839-020-0012 when the violations were serious and of moderate magnitude; respondent knew or should have known of the violations; respondent could have easily complied with the rule; and there were no mitigating circumstances. ***----- In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 289 (2001).***

> Reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries,* 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004).

14.4 --- Failure to Post Summary of Wage and Hour Laws

14.4.1 --- Generally

❑ Respondent's failure to post summaries of certain laws at the work site was a violation of ORS 653.050. ***----- In the Matter of Lambertus Sandker, 18 BOLI 277, 291-92 (1999)***.

❑ ORS 653.050 requires employers to post summaries of certain statutes and rules at the work site when employees actually perform their work. Posting the laws at the employer's office is not sufficient when the employees do not perform any work at the office and the office is not located close to the place where the employees actually work. ***----- In the Matter of Lambertus Sandker, 18 BOLI 277, 291-92 (1999)***.

14.4.2 --- Aggravating and Mitigating Circumstances

❑ Respondent's violation of ORS 653.050 was aggravated by the fact that he should have known of the requirement and by the ease with which he could have complied with it. The violation was mitigated by the fact that respondent did have the summaries posted in his office, where his employees reported to work each morning before being transported to the work site. In addition, no employee's rights were violated as a result of the respondent's failure to properly post the summaries. ***----- In the Matter of Lambertus Sandker, 18 BOLI 277, 291-92 (1999)***.

14.4.3 --- Civil Penalties

❑ When there were aggravating and mitigating circumstances, the forum imposed a penalty of $250 for respondent's violation of ORS 653.050. ***----- In the Matter of Lambertus Sandker, 18 BOLI 277, 291-92 (1999)***.

14.5 --- Failure to Provide Meal and Rest Periods

14.5.1 --- Generally

14.5.2 --- Aggravating and Mitigating Circumstances

14.5.3 --- Civil Penalties

14.6 --- Discrimination Based on Wage Claim

14.6.1 --- Generally

14.6.2 --- Aggravating and Mitigating Circumstances

14.6.3 --- Civil Penalties

14.7 --- Failure to Pay Minimum Wage – Civil Penalties Awarded to Wage Claimant (ORS 653.055)

14.7.1 --- Generally

❑ Claimant's weekly time sheets show that she worked at least one 24 hour shift during each week of her employment in 2004 and 2005 and was paid only $100 for each 24 hour shift, which equals a wage of $4.17 per hour ($100 divided by 24 hours = $4.17), an amount less than the minimum wage. Because respondent agreed to pay claimant $8 per hour for her shorter shifts, claimant was entitled to that higher rate of pay for those hours and the forum did not consider the pay she received for her shorter shifts in determining whether claimant was paid the minimum wage for all hours worked. As claimant worked at least one 24 hour shift during each week of her employment for which she was not paid the minimum wage, it necessarily follows that she was not paid the minimum wage during any of her 11 bi-weekly payroll periods. Respondent's failure to pay claimant at least the minimum wage during 11 pay periods constituted 11 violations of ORS 653.025 and OAR 839-020-0010(1). ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 196 (2007).***

❑ The agency does not need to prove "willfulness" in order to establish that a wage claimant is entitled to civil penalties based on a respondent's failure to pay that claimant the wages to which claimant is entitled under ORS 653.010 to 653.261. ***----- In the Matter of MAM***

Properties, LLC, 28 BOLI 172, 190 (2007).

❑ The affirmative defense of financial inability to pay at the time wages accrued set out in ORS 652.150 is not available under ORS 653.055. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 225 (2006).***

❑ "Willfulness" is not an element of a violation of ORS 653.055. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 225 (2006).***

❑ When claimant worked an estimated 84 hours and was paid nothing for those hours, respondent was held liable for civil penalties under ORS 653.055. ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 205 (2006).***

❑ Oregon's minimum wage requirements are contained in ORS 653.025 and fall within the range of wage entitlement encompassed by ORS 653.055. ***----- In the Matter of Adesina Adeniji, 25 BOLI 162, 174 (2004).*** *See also In the Matter of William Presley, 25 BOLI 56, 73 (2004), affirmed, Presley v. Bureau of Labor and Industries, 200 Or App 113, 112 P3d 485 (2005).*

❑ When a respondent pays an employee "less than the wages to which the employee is entitled under ORS 653.010 to 653.261," the forum may award civil penalties to the employee. ***----- In the Matter of Adesina Adeniji, 25 BOLI 162, 174 (2004).*** *See also In the Matter of William Presley, 25 BOLI 56, 73 (2004), affirmed, Presley v. Bureau of Labor and Industries, 200 Or App 113, 112 P3d 485 (2005).*

14.7.2 --- Civil Penalties

❑ The statutory requirement to pay the minimum wage is found in ORS 653.025, and the separate requirement to pay overtime wages is contained in ORS 653.261 and OAR 839-020-0030, the agency rule interpreting ORS 653.261. As both of these statutes fall within the range of statutes set out in ORS 653.055, respondent's failure to pay the minimum wage and 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 MAM Properties, LLC, 28 BOLI 172, 190 (2007).***

❑ The agency does not need to prove "willfulness" in order to establish that a wage claimant is entitled to civil penalties based on a respondent's failure to pay that claimant the wages to which claimant is entitled under ORS 653.010 to 653.261. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 190 (2007).***

❑ The forum assessed a civil penalty of $1,742 for respondent's failure to pay claimant the minimum wage or overtime wages, computed by multiplying $7.26 per hour (claimant's average wage) by 8 hours per day multiplied by 30 days pursuant to ORS 652.150. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 190 (2007).***

❑ If an employer pays an employee less than the minimum wage 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 Sue Dana, 28 BOLI 22, 31 (2006).***

❑ Oregon's minimum wage requirements are included under ORS 653.025 and are within the range of wage entitlements encompassed by ORS 653.055. When the agency alleged respondent failed to pay claimant a rate equal to at least the 2005 minimum wage rate for the hours claimant worked between April 28 and May 10, 2005, and presented sufficient evidence to show respondent failed to pay claimant the minimum wage rate required under ORS 653.025 for each hour that claimant worked for respondent, the forum held respondent liable to claimant for $1,740 in civil penalties as provided in ORS 652.150 ($7.25 x 8 hours per day x 30 days). ***----- In the Matter of Sue Dana, 28 BOLI 22, 30-31 (2006).***

❑ When the agency asked the forum to hold a successor respondent jointly liable for ORS 653.055 civil penalties, the forum held that the successor was not liable for civil penalties because the agency failed to establish that the successor was an employer as defined in ORS 653.010(3) and paid its employee, in this case, claimant, less than the minimum wage to which claimant was entitled under ORS 653.010 to 653.261. ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 205-06 (2006).***

❑ The forum assessed a civil penalty of $1,692 for respondent's failure to pay claimant the minimum wage, computed by multiplying $7.05 per hour by 8 hours per day multiplied by 30 days pursuant to ORS 652.150. ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 205 (2006).***

❑ Civil penalties awarded to a wage claimant for violations of ORS 653.025 are computed in the same manner as penalty wages under ORS 652.150. ***----- In the Matter of Adesina Adeniji, 25 BOLI 162, 174 (2004).*** *See also In the Matter of William Presley, 25 BOLI 56, 73 (2003), affirmed, Presley v. Bureau of Labor and Industries, 200 Or App 113, 112 P3d 485 (2005).*

❑ The forum assessed a civil penalty of $1,656 for respondent's failure to pay claimant the minimum wage, computed by multiplying $6.90 per hour by 8 hours per day multiplied by 30 days pursuant to ORS 652.150. ***----- In the Matter of Adesina Adeniji, 25 BOLI 162, 174 (2004).***

❑ The forum assessed a civil penalty of $1,560 for respondent's failure to pay claimant the minimum wage, computed by multiplying $6.50 per hour by 8 hours per day multiplied by 30 days pursuant to ORS 652.150. ***----- In the Matter of William Presley, 25 BOLI 56, 73 (2003).***

Affirmed, *Presley v. Bureau of Labor and Industries,* 200 Or App 113, 112 P3d 485 (2005).

14.8 --- Failure to Pay Overtime Wages – Civil Penalties Awarded to Claimant (ORS 653.055)

14.8.1 --- Generally

❑ When the forum determined that claimant worked in excess of 40 hours per week in 19 of the 21 weeks that she was employed by respondent, that respondent paid her every two weeks during 11 pay periods, that respondent never paid claimant any overtime pay, and that the two weeks in which claimant did not work

overtime were not consecutive, the forum also concluded that claimant earned overtime pay in all 11 pay periods. By not paying claimant overtime in any of the 11 pay periods in which she earned overtime pay, respondent committed 11 violations of ORS 653.261 and OAR 839-020-0030(1). Respondent was aware of the number of overtime hours claimant worked each week and should have known it was required to pay claimant overtime wages, yet failed to do so. Accordingly, the forum found that respondent's 11 violations were willful. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 198 (2007).***

❑ The affirmative defense of financial inability to pay at the time wages accrued set out in ORS 652.150 is not available under ORS 653.055. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 225 (2006).***

❑ "Willfulness" is not an element of a violation of ORS 653.055. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 225 (2006).***

❑ When undisputed evidence contained in respondent's time records established that two claimants collectively worked more than 40 hours in a given workweek during 10 separate weeks, but it was impossible to determine the exact weeks for which overtime was not paid because of respondent's "percentage" method of payment, the forum concluded that claimants were not paid overtime wages that they earned based on the substantial underpayment of wages in each pay period in which claimants worked overtime. ***----- In the Matter of Gary Lee Lucas, 26 BOLI 198, 215 (2005).***

14.8.2 --- Civil Penalties

❑ The statutory requirement to pay the minimum wage is found in ORS 653.025, and the separate requirement to pay overtime wages is contained in ORS 653.261 and OAR 839-020-0030, the agency rule interpreting ORS 653.261. As both of these statutes fall within the range of statutes set out in ORS 653.055, respondent's failure to pay the minimum wage and 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 MAM Properties, LLC, 28 BOLI 172, 190 (2007).***

❑ The agency does not need to prove "willfulness" in order to establish that a wage claimant is entitled to civil penalties based on a respondent's failure to pay that claimant the wages to which claimant is entitled under ORS 653.010 to 653.261. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 190 (2007).***

❑ The forum assessed a civil penalty of $1,742 for respondent's failure to pay claimant the minimum wage or overtime wages, computed by multiplying $7.26 per hour (claimant's average wage) by 8 hours per day multiplied by 30 days pursuant to ORS 652.150. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 190 (2007).***

❑ Respondents' failure to pay overtime wages to claimant entitled claimant to a civil penalty, in addition to penalty wages awarded under ORS 652.150. The forum computed the civil penalty in the same manner as ORS 652.150 penalty wages (hourly rate - $15 x eight hours per day x 30 days = $3,600). ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 225 (2006).***

❑ When claimants were entitled to receive overtime wages pursuant to ORS 653.261 and respondent failed to pay the overtime wages claimants earned during the applicable wage claim periods, the forum concluded that under ORS 653.055(1)(b), respondent was liable to each claimant for civil penalties as provided in ORS 652.150. The forum awarded claimants civil penalties of $2,196 and $1,920, respectively, calculated pursuant to ORS 652.150. ***----- In the Matter of Okechi Village & Health Center, 27 BOLI 156, 168 (2006).***

❑ When a respondent pays an employee "less than the wages to which the employee is entitled under ORS 653.010 to 653.261," the forum may award civil penalties to the employee. ***----- In the Matter of Larsen Golf Construction, Inc., 25 BOLI 206, 215 (2004).***

❑ Respondent's failure to pay overtime wages subjected respondent to civil penalties payable to the claimant in addition to penalty wages awarded pursuant to ORS 652.150. ***----- In the Matter of Larsen Golf Construction, Inc., 25 BOLI 206, 216 (2004).***

❑ Civil penalties awarded to a wage claimant for violations of ORS 653.261 are computed in the same manner as penalty wages under ORS 652.150. ***----- In the Matter of Larsen Golf Construction, Inc., 25 BOLI 206, 216 (2004).***

❑ When claimants were entitled to receive overtime wages pursuant to ORS 653.261 and respondent failed to pay the overtime wages claimants earned during the applicable wage claim periods, the forum concluded that under ORS 653.055(1)(b) respondent was liable to each claimant for civil penalties as provided in ORS 652.150. The forum awarded claimants civil penalties of $4,320 and $6,386, respectively, calculated pursuant to ORS 652.150. ***----- In the Matter of Larsen Golf Construction, Inc., 25 BOLI 206, 216 (2004).***

14.9 --- Civil Penalties Awarded to Agency for Violations of ORS 653.025 and ORS 653.261 (ORS 653.256)

14.9.1 --- Generally

❑ When respondent knowingly agreed to pay claimant less than the minimum wage for her 24 hour shifts, paid her less than the minimum wage for each those shifts, and respondent was presumed to know the law, the forum found that respondent's 11 violations were willful. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 196 (2007).***

❑ In its notice of intent, the agency alleged that respondent committed eight violations of ORS 653.261 and OAR 839-020-0030 by failing "to pay overtime for all hours worked over forty (40) in violation of ORS 653.261 and OAR 839-020-0030." The agency sought to assess $8,000 in civil penalties. The agency proved that respondent did not pay overtime, but did not articulate how it determined respondent had committed eight separate violations of ORS 653.261. Without a means of determining the specific number of violations, the forum concluded that respondent committed two violations of ORS 653.261, one relating to each wage

claimant. ***----- In the Matter of Gary Lee Lucas, 26 BOLI 198, 215-16 (2005).***

14.9.2 --- Aggravating and Mitigating Circumstances

❑ Respondent's violations of ORS 653.025 and OAR 839-020-0010(1) were aggravated in four ways. First, Respondent knew or should have known of the violations. Respondent was presumed to know the minimum wage, yet agreed to pay claimant $100 for each 24 hour shift and paid claimant that amount. Second, respondent relied on claimant's weekly time sheets, which contained an accurate account of the number of hours that claimant worked during her 4 hour and 24 hour shifts, to compute claimant's pay. Consequently, respondent had an opportunity to comply with the requirements of ORS 653.025 and OAR 839-010-0010(1) each time claimant was paid, but failed to do so. Third, there is no evidence that respondent took any measures to ensure that these violations did not occur. Fourth, respondent's failure to pay claimant the minimum wage was a serious violation because it affected claimant's substantive right to be paid the minimum wage. The 11 violations were of great magnitude because claimant was underpaid approximately $3 per hour during a total of 1404 hours worked, claimant was underpaid a total of $6,761.11, and two of claimant's checks bounced and were only made good after she left respondent's employment. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 196-97 (2007).***

❑ OAR 839-020-1020 sets out the mitigating and aggravating circumstances that may be considered by the commissioner in determining the amount of civil penalty to be assessed for violations of ORS 653.261 and OAR 839-020-0030. ***----- In the Matter of Gary Lee Lucas, 26 BOLI 198, 216 (2005).***

❑ It is the employer's responsibility to provide mitigating evidence, and the commissioner must consider all mitigating circumstances presented by the employer. ***----- In the Matter of Gary Lee Lucas, 26 BOLI 198, 216 (2005).***

❑ Respondent's violation of ORS 653.261 was aggravated by the fact that respondent's failure to pay overtime to the claimants resulted in a substantive loss to claimants of payment of overtime wages for 89 hours of work. ***----- In the Matter of Gary Lee Lucas, 26 BOLI 198, 217 (2005).***

❑ Respondent's violation of ORS 653.261 was aggravated by the fact that complying with the law would have been a simple matter of calculating the overtime pay due to claimants based on the records respondent kept and paying them their overtime wages. ***----- In the Matter of Gary Lee Lucas, 26 BOLI 198, 216-17 (2005).***

❑ The magnitude and seriousness of respondent's violations of ORS 653.261 was moderate, as they impacted two workers. ***----- In the Matter of Gary Lee Lucas, 26 BOLI 198, 216 (2005).***

❑ Respondent's violation of ORS 653.261 was aggravated by the fact that, as claimants' employer and immediate supervisor, respondent should have known that he was not paying earned overtime wages to claimants, in that employers are presumed to know the laws they are required to follow. ***----- In the Matter of Gary Lee Lucas, 26 BOLI 198, 216 (2005).***

14.9.3 --- Civil Penalties

❑ Based on the aggravating circumstances, the forum assessed civil penalties of $1,000 for each of respondent's 11 violations of ORS 653.261 and OAR 839-020-0030, for a total of $11,000. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 197 (2007).***

❑ Based on the aggravating circumstances, the forum assessed civil penalties of $1,000 for each of respondent's 11 violations of ORS 653.025 and OAR 839-020-0010(1), for a total of $11,000. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 197 (2007).***

❑ When respondent's violations were aggravated and there were no mitigating factors, the forum assessed a civil penalty of $1,000 for each of two violations of ORS 653.261. ***----- In the Matter of Gary Lee Lucas, 26 BOLI 198, 217 (2005).***

15.0 WAGE SECURITY FUND

15.1 --- In General

❑ When the agency established that respondent operated a restaurant in Oregon; that respondent engaged claimant's services as a food server between November and December 2002; that the agency investigated claimant's wage claim, made a determination that claimant's claim was valid, and established the means by which she made that determination; and that the agency paid out $253.33 to claimant from the fund based on its determination that the wage claim was valid, the forum concluded that respondent was "the employer" for the purpose of ORS 652.414(3) and was liable for the amount paid to claimant from the fund, plus a 25 percent penalty on the amount paid or $200, whichever was greater. ***----- In the Matter of Lisa Sanchez, 27 BOLI 56, 61-62 (2005).***

❑ In a wage security fund case, respondent and the agency entered into a number of stipulations at the outset of the hearing, including the validity of the underlying wage claims, that the commissioner had made a determination that the wage claimants were entitled to and had received payment from the fund in a specified amount, and as to the admission of a number of exhibits. ***----- In the Matter of SQDL Co., 22 BOLI 223, 228 (2001).***

❑ The analysis for determining whether a person is an "employer" either as a "successor" or "lessee or purchaser" is same for wage claim and wage security fund recovery cases. ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 286 (2001).***

> Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 188 Or App 566, 65 P3d 1132 (2003).

❑ In a wage security fund case, the forum held that respondent's proffered defense that it was excluded from the definition of "employer" pursuant to ORS

652.310(1)(b) was an affirmative defense that was waived by respondent's failure to raise it in its answer. ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 278-280 (2001).***

> Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 188 Or App 566, 65 P3d 1132 (2003).

❑ When some claimants seeking wages in excess of the amounts paid by the wage security fund did not testify at hearing and the only evidence in the record regarding their pay rates and hours worked was their wage claim forms, the forum concluded that the agency failed to establish a prima facie case that the respondent owed those wages. ***----- In the Matter of Catalogfinder, Inc., 18 BOLI 242, 263-64 (1999)***.

❑ An administrative proceeding to collect sums paid out by the wage security fund is a "proceeding" for purposes of ORS 652.414(2). ***----- In the Matter of Catalogfinder, Inc., 18 BOLI 242, 258 (1999)***.

❑ In administering the wage security fund, the commissioner is required to pay wage claimants up to $2000 of their unpaid wages earned within 60 days of the cessation of their employer's business when the commissioner determines that the claim is valid. ***----- In the Matter of Catalogfinder, Inc., 18 BOLI 242, 259 (1999)***.

❑ A successor employer is liable for claimants' wages paid from the wage security fund. ***----- In the Matter of Tire Liquidators, 10 BOLI 84, 93 (1991).***

15.2 --- Prima Facie Case

❑ In a wage security fund case, the agency was required to show (1) that respondent was claimant's employer; (2) an amount was paid to claimant from the wage security fund as unpaid wages; and (3) respondent, its successor, or both were liable for the amounts paid from the wage security fund. ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 199 (2006).***

❑ In a wage security fund case, the agency was required to establish that (1) respondent was an employer at material times; (2) an amount was paid to claimant from the fund as unpaid wages; and (3) respondent was liable for the amounts paid from the fund. ***----- In the Matter of Lisa Sanchez, 27 BOLI 56, 61 (2005).***

❑ To establish a prima facie case to enable the commissioner to recover amounts paid from the wage security fund, the agency must show that a valid wage claim was filed against an employer for wages earned within 60 days of the employer's cessation of business, that the claim cannot be paid from the employer's assets or by other means, and that the commissioner has paid it from the fund to the extent allowable. ***----- In the Matter of Microtan Smart Cable, 11 BOLI 128, 137 (1992).***

15.3 --- Presumptions

❑ The presumption regarding the validity of the amount paid out to a wage claimant from the wage security fund was rebutted by the claimant's testimony that her wage claim was only for 74.5 hours of unpaid wages, in contrast to the payment for 88.5 hours that the WSF reimbursed her for. The amount respondent was further ordered to repay was further reduced by $54 in gross wages claimant earned on December 20, 2004, because the agency's order of determination only sought recovery for wages claimant earned through "12-17-04." ***----- In the Matter of Carl Odoms, 27 BOLI 232, 240 (2006).***

❑ In cases involving payouts from the wage security fund, 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 wage security fund 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 Carl Odoms, 27 BOLI 232, 240 (2006).*** *See also In the Matter of Jamie Sue Sziisz, 26 BOLI 228, 233 (2005); In the Matter of Kilmore Enterprises, Inc., 26 BOLI 111, 123 (2004); In the Matter of Kathy Morse, 25 BOLI 75, 78-79 (2004); In the Matter of Catalogfinder, Inc., 18 BOLI 242, 260 (1999).*

❑ The forum found that a rebuttable presumption existed that the agency's determination was valid for the sums actually paid out based on credible testimony by the agency's investigator concerning her investigation and eventual determination, credible testimony by both claimants, and agency exhibits showing the documents gathered in her investigation, and the investigator's testimony that BOLI paid claimant $452.44 from the wage security fund. ***----- In the Matter of Jamie Sue Sziisz, 26 BOLI 228, 233 (2005).***

❑ Respondent rebutted the presumption that the agency's determination was valid for the sums actually paid out by successfully by the wage security fund by showing claimant was an independent contractor during part of the wage claim period. The effect was to reduce respondent's liability to the fund by $1,500. ***----- In the Matter of Kilmore Enterprises, Inc., 26 BOLI 111, 123 (2004).***

❑ The rebuttable presumption of claim validity that applies to sums actually paid out by the wage security fund does not apply to wages sought by the agency in excess of any amount paid by the fund. ***----- In the Matter of Catalogfinder, Inc., 18 BOLI 242, 260 (1999)***.

15.4 --- Liability

❑ Respondent's liability to the wage security fund is limited to the amount disbursed that equals the amount respondent owed claimants when they left respondent's employ, as alleged in the agency's order of determination. ***----- In the Matter of Carl Odoms, 27 BOLI 232, 240 (2006).***

❑ The forum held that the commissioner was entitled to recover a 25 percent penalty on the amount paid from the wage security fund, or $200, and a respondent predecessor and respondent successor were jointly and severally liable to the commissioner for that amount. ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 202 (2006).***

❑ The forum imposed joint and several liability upon a

respondent predecessor and its successor when there was a common principal and claimant's wages were paid out of the wage security fund, taking notice that, although responsibility for full recompense usually falls upon a bona fide successor, in Oregon an administratively dissolved corporation has five years from the date of dissolution to apply to the secretary of state for reinstatement, during which time it continues its corporate existence and can conduct activities necessary "to wind up and liquidate its business and affairs." Given the common principal and the close timing of the asset transfer, the forum found there was uncertainty about the eventual property or asset distribution between the two respondents. To ensure that the wage security fund was not left without a remedy, the forum imposed joint and several liability upon both respondents for repayment to the wage security fund of claimant's unpaid wages. ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 201-02 (2006).***

❑ As the successor to Bukovina Inc., Bukovina LLC was held liable for the wages claimant earned in March 2004 before Bukovina Inc. was dissolved and was subject to the agency's wage security fund recovery action under ORS 652.414(3). ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 200-01 (2006).***

❑ When none of the six elements that must be evaluated for an employer to be a successor were present, the forum found that respondent was not a "successor" employer under ORS 652.310 and was not liable to repay the wage security fund for the wages paid out by the fund to employees of respondent's alleged predecessor. ***----- In the Matter of SQDL Co., 22 BOLI 223, 242 (2001).***

❑ When five out of six elements of the forum's successorship test were indicative of successorship, with the sixth being neutral, the forum concluded that respondent was a successor employer and liable to repay the wage security fund for wages owed by its predecessor. ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 293 (2001).***

> Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 188 Or App 566, 65 P3d 1132 (2003).

❑ A respondent employer who met both the "successor" and "purchaser" definitions of employer under ORS 652.310(1) was ordered to repay the wage security fund for the wages paid out by the fund to 93 wage claimants who had been employed by respondent's predecessor. ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 297 (2001).***

> Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 188 Or App 566, 65 P3d 1132 (2003).

❑ A successor employer is liable for claimants' wages paid from the wage security fund. ***----- In the Matter of Tire Liquidators, 10 BOLI 84, 93 (1991).***

15.5 --- Repayment

❑ Respondent was ordered to repay the wage security fund $5,399.13 for unpaid wages paid out to four wage claimants, plus a 25 percent penalty on that sum amounting to $1,349.78. ***----- In the Matter of Carl Odoms, 27 BOLI 232, 240 (2006).***

❑ The presumption regarding the validity of the amount paid out to a wage claimant from the wage security fund was rebutted by the claimant's testimony that her wage claim was only for 74.5 hours of unpaid wages, in contrast to the payment for 88.5 hours that the wage security fund reimbursed her for. The amount respondent was further ordered to repay was further reduced by $54 in gross wages claimant earned on December 20, 2004, because the agency's order of determination only sought recovery for wages claimant earned through "12-17-04." ***----- In the Matter of Carl Odoms, 27 BOLI 232, 240 (2006).***

❑ The forum ordered respondent to repay the wages paid out by the wage security fund to three wages claimants when the agency presented credible evidence, through documentary evidence and witness testimony, that it made a determination on the validity of the claims of claimants; it based its determination on the information available at the time; and it paid out money from the wage security fund. ***----- In the Matter of Carl Odoms, 27 BOLI 232, 240 (2006).***

❑ Respondent was ordered to repay the wage security fund $5,399.13 for unpaid wages paid out to four wage claimants, plus a 25 percent penalty on that sum amounting to $1,349.78. ***----- In the Matter of Carl Odoms, 27 BOLI 232, 240 (2006).***

❑ Respondent was found liable to repay the wage security fund for $253.33, plus an additional $200, amounting to $453.33, as provided by statute. ***----- In the Matter of Lisa Sanchez, 27 BOLI 656, 62 (2005).***

❑ Respondent was found liable to repay the wage security fund for $452.44, plus a 25 percent penalty on that sum amounting to $113.11. ***----- In the Matter of Jamie Sue Sziisz, 26 BOLI 228, 233 (2005).***

❑ Respondent was found liable to repay the wage security fund for $371.57, plus a 25 percent penalty on that sum amounting to $92.89. ***----- In the Matter of Kathy Morse, 25 BOLI 75, 78-79 (2004).***

❑ In an action to recover wage security fund payouts, respondent's failure to deny any of the alleged facts in the agency's notice of intent constituted an admission to all of them, including an admission to the validity of the underlying wage claims, and the forum granted summary judgment to the agency for amounts paid out by the fund and a 25% penalty. ***----- In the Matter of Hickox Enterprises, Inc., 22 BOLI 10, 14 (2001).***

❑ In an action to recover wage security fund payouts, the forum held that the agency was entitled to recover from respondent the sum of $46,602.37 paid to the 50 wage claimants from the wage security fund and sought in the order of determination, along with a 25 percent penalty of $11,650.59 assessed on that sum, plus interest until paid. ***----- In the Matter of Hickox Enterprises, Inc., 22 BOLI 10, 17 (2001).***

❑ When five out of six elements of the forum's successorship test were indicative of successorship, with the sixth being neutral, the forum concluded that respondent was a successor employer and liable to

repay the wage security fund for wages owed by its predecessor. ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 293 (2001).***

> Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 188 Or App 566, 65 P3d 1132 (2003).

❑ A respondent employer who met both the "successor" and "purchaser" definitions of employer under ORS 652.310(1) was ordered to repay the wage security fund for the wages paid out by the fund to 93 wage claimants who had been employed by respondent's predecessor. ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 297 (2001).***

> Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 188 Or App 566, 65 P3d 1132 (2003).

❑ Respondent was found liable to repay the wage security fund for $73,699.06, plus an additional 25 percent penalty, or $18,424.77, as provided by statute. ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 293 (2001).***

> Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries*, 188 Or App 566, 65 P3d 1132 (2003).

❑ Respondent was found liable to repay the wage security fund for $24,081, plus an additional 25 percent penalty, amounting to $6,020.25, as provided by statute. ***----- In the Matter of ----- In the Matter of Catalogfinder, Inc., 18 BOLI 242, 265 (1999)***

15.6 --- Penalty

❑ The forum held that the commissioner was entitled to recover a 25 percent penalty on the amount paid or $200, and a respondent predecessor and respondent successor were jointly and severally liable to the commissioner for that amount. ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 202 (2006).***

❑ In an action to recover wage security fund payouts, respondent's failure to deny any of the alleged facts in the agency's notice of intent constituted an admission to all of them, including an admission to the validity of the underlying wage claims, and the forum granted summary judgment to the agency for amounts paid out by the fund and a 25 percent penalty. ***----- In the Matter of Hickox Enterprises, Inc., 22 BOLI 10, 14 (2001).***

16.0 FEDERAL LAW

16.1 --- Fair Labor Standards Act

❑ In determining whether respondent's employees were suffered or permitted to work, the forum adopted an approach suggested by the authors of an article examining the history of the Fair Labor Standards Act's suffer or permit to work standard that involved applying the definitions directly and determining first if the work is encompassed within the overall business of the supposed employer. If so, the work is suffered or permitted by the employer unless it is so highly skilled and capital intensive that it forms a completely separate business. When the business owner supplies the capital and the work is unskilled, a business will be determined to have suffered or permitted the work within the meaning of the definition. ***----- In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration, 25 BOLI 12, 39-40 (2003).***

> Affirmed without opinion, *Ochoa v. Bureau of Labor and Industries*, 196 Or App 639, 103 P3d 1212 (2004).

❑ In order to determine whether claimants were employees or independent contractors under Oregon's minimum wage and wage collection laws, the forum relied on an "economic reality" test. The test, derived from one used by the federal courts when applying the Fair Labor Standards Act, helps to determine "whether the alleged employee, as a matter of economic reality, is economically dependent upon the business to which [he or she] renders [his or her] services." ***----- In the Matter of Triple A Construction, LLC, 23 BOLI 79, 92 (2002).***

❑ A respondent successor employer who was covered by the FLSA was not excluded from the ORS 652.310 definition of "employer" pursuant to ORS 652.310 when that employer was not also covered by the Davis-Bacon Act or Service Contract Act. ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 282-86 (2001).***

> Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 188 Or App 566, 65 P3d 1132 (2003).

❑ Merely being an FLSA-regulated employer is not a total defense under ORS 652.310(1)(b). ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 278-280 (2001).***

> Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 188 Or App 566, 65 P3d 1132 (2003).

❑ An employee leasing agreement between two respondents, a corporation engaged in reforestation and an employee leasing company, was no defense to an employee leasing company's failure to pay final wages when due to a claimant. Joint employers are responsible, both individually and jointly, for compliance with all the applicable provisions of Oregon's wage and hour laws. This is consistent with the responsibility of joint employers under the federal Fair Labor Standards Act. ***----- In the Matter of Staff, Inc., 16 BOLI 97, 115 (1997).***

❑ The commissioner adopted an "economic reality" test to determine whether a claimant is an employee or independent contractor under Oregon's minimum wage and wage collection laws, the same test used by federal courts when applying the Fair Labor Standards Act. ***----- In the Matter of Frances Bristow, 16 BOLI 28, 37 (1997).***

❑ The forum abandoned the *All Seasons* "retained right to control" test as its means of determining whether a wage claimant was an employee or independent contractor and adopted the "economic reality" test developed by federal courts in FLSA cases. ***----- In the Matter of Geoffroy Enterprises, Inc., 15 BOLI 148, 162-65 (1996).***

❑ Neither the state minimum wage law nor the federal Fair Labor Standards Act, with their accompanying regulations, require an employer to keep records regarding reimbursable expenses. ***----- In the Matter of Central Pacific Freight Lines, Inc., 7 BOLI 272, 279***

(1989).

❑ ORS 653.010(7) specifically provides that the minimum wage law and the rules adopted by the Wage and Hour Commission on payment of overtime "do not apply to any of the following employees: * * * (7) Any person regulated under the Federal Fair Labor Standards Act." Persons employed in logging operations are regulated by that Act. Section 213 of the Act (Exemptions) provides in paragraph (b)(28) that Section 207 (Maximum Hours) does not apply to: "any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight." There was testimony at hearing that the employer did not employ more than eight persons. Therefore, since claimants were employed in logging operations, their claim for overtime must be decided under the Fair Labor Standards Act, and under that Act claimant's claim must be denied because of the provisions of Section 213(b)(28). ***----- In the Matter of Superior Forest Products, 4 BOLI 223, 229-30 (1984).***

16.2 --- Other

❑ A respondent successor employer who was covered by the FLSA was not excluded from the ORS 652.310 definition of "employer" pursuant to ORS 652.310 when that employer was not also covered by the Davis-Bacon Act or Service Contract Act. ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 282-86 (2001).***

> Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 188 Or App 566, 65 P3d 1132 (2003).

❑ When the forum had not previously discussed an element of the executive exemption in any depth, and there were no reported Oregon cases on point, the forum looked for guidance to the federal regulations interpreting the federal exemption statute, which is nearly identical to ORS 653.020(3). ***----- In the Matter of Lane-Douglas Construction, Inc., 21 BOLI 36, 56 (2000).***

❑ Cases interpreting and applying the successor doctrine in National Labor Relations Board cases are instructive in interpreting and applying the successor doctrine in wage claim cases. ***----- In the Matter of Gerald Brown, 14 BOLI 154, 168 (1995).***

17.0 --- STATUTORY INTERPRETATION

❑ When statutory interpretation is required, the forum must attempt to discern the legislature's intent. To do that, the forum first examines the text and context of the statute. The text of the statutory provision itself is the starting point for interpretation and the best evidence of the legislature's intent. Also relevant is the context of the statutory provision, which includes other provisions of the same statute and other related statutes. If the legislature's intent is clear from the text and context of the statutory provision, further inquiry is unnecessary. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 229 (2006).*** *See also In the Matter of Fjord, Inc., 21 BOLI 260, 279 (2001), affirmed without opinion, Fjord, Inc. v. Bureau of Labor and Industries, 188 Or App 566, 65 P3d 1132 (2003); In the Matter of Catalogfinder, 18 BOLI 242, 258-59 (1999).*

❑ When the words "substantially similar" appeared in ORS 67.005(12), but were not defined in ORS Chapter 67 and the forum found no case law on point, the forum found they were words of common usage and ascribed to them their plain, natural and ordinary meaning contained in Webster's Third New Int'l Dictionary. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 229 (2006).***

❑ When respondent cited a Montana Supreme Court case to support its proffered statutory interpretation, the forum stated that it is not bound by decisions of Montana courts. ***----- In the Matter of Elisha, Inc., 25 BOLI 125, 158 (2004).***

> Affirmed without opinion, *Elisha, Inc. v. Bureau of Labor & Industries*, 198 Or App 285, 108 P3d 1219 (2005).

❑ When statutory interpretation is required, the forum must attempt to discern the legislature's intent. To do that, the forum first examines the text and context of a statutory provision. The text of the statutory provision is the best evidence of the legislature's intent. The context of the statutory provision is also relevant and includes other provisions of the same statute and other related statutes. If the legislature's intent is clear from the text and context of the statutory provision, further inquiry is unnecessary. The forum may consider legislative history only if the intent of the legislature is not clear from a text and context inquiry. ***----- In the Matter of Elisha, Inc., 25 BOLI 125, 148 (*2004).**

> Affirmed without opinion, *Elisha, Inc. v. Bureau of Labor & Industries*, 198 Or App 285, 108 P3d 1219 (2005).

❑ Because the words "maintenance" and "management" and the phrase "assisting in management" are not defined in the relevant statute or related statutes, and they are words of common usage, the forum ascribed to them their plain, natural and ordinary meaning. ***----- In the Matter of Elisha, Inc., 25 BOLI 125, 148 (2004).***

> Affirmed without opinion, *Elisha, Inc. v. Bureau of Labor & Industries*, 198 Or App 285, 108 P3d 1219 (2005).

❑ To interpret "suffer or permit to work" and to determine what is required to prove employment under ORS chapter 653, the forum looked first to the statute's text and context. ***----- In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration, 25 BOLI 12, 38 (2003).***

> Affirmed without opinion, *Ochoa v. Bureau of Labor and Industries*, 196 Or App 639, 103 P3d 1212 (2004).

18.0 AGENCY RULE INTERPRETATION

19.0 BANKRUPTCY

❑ When the agency moved to dismiss a wage claim case based on the chapter 7 bankruptcy discharge of respondent, and the ALJ had already issued a proposed order, the ALJ issued an order granting the agency's

motion. Later, the agency, through its general counsel, filed a motion stating that the agency's request for dismissal was in error and requesting that the commissioner issue a final order. Respondent filed no objections, and the agency's motion was granted and a final order issued. ***----- In the Matter of Westland Resources Group LLC, 23 BOLI 276, 283 (2002).***

20.0 CONSTITUTIONALITY

❑ In a post-hearing memorandum, respondent argued that the agency's failure to question the existence of respondents' LLP in its charging document violated respondents' due process rights by failing to include a "statement of the matters that constitute the violation" in the charging document. The forum rejected respondents' argument, holding that the alleged failure was not a "matter" that constituted an alleged "violation," but a matter that related to the joint and several liability of two respondent partners, both whom were named, along with the LLP, as the employer in the agency's charging document. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 231 (2006).***

❑ The forum dismissed respondent's affirmative defense that ORS 652.610(3) and the agency's order of determination alleging a violation of that statute unconstitutionally deprived respondent of its right to contract with its employees, in violation of Article I, section 10 of the United States Constitution. ***----- In the Matter of Goodman Oil Company, Inc., 20 BOLI 218, 223-24 (2000)***.

❑ The forum dismissed respondent's affirmative defense that the imposition of $1560 in penalty wages was excessive and unconstitutional under the Eighth Amendment to the Constitution of the United States. ***----- In the Matter of Goodman Oil Company, Inc., 20 BOLI 218, 224-25 (2000)***.