

DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES
STATE OF WASHINGTON

In re: PACCAR, Inc. dba Kenworth Truck
Co.,

Citation and Notice of Assessment No.
W-170-19, W-171-19, W-357-19, W-378-19

OAH Docket Nos. 04-2019-LI-01034,
06-2019-LI-01084

No. 2020-014-PL

AMENDED DIRECTOR'S ORDER

RCW 49.48.084(4); RCW 34.05

Joel Sacks, Director of the Washington State Department of Labor & Industries, having considered the Initial Order served on March 10, 2020, having considered the petition for administrative review filed by the Employment Standards Program of the Department of Labor & Industries (the Department), motion for reconsideration dated September 30, 2020, briefing submitted to the Director's office, and having reviewed the record created at hearing and the records and files herein, issues this Amended Director's Order.

The Director makes the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

1. On December 7, 2018, the Department issued two citations and notices of assessment to PACCAR, Inc. dba Kenworth Truck Co (PACCAR). On March 29, 2019, the Department issued a citation and notice of assessment to PACCAR. On April 5, 2019, the Department issued a citation and notice of assessment. PACCAR timely appealed.
2. On March 10, 2020, the Administrative Law Judge issued an Initial Order that reversed the citations. The Department timely appealed.

3. The Director adopts and incorporates by reference the following findings of fact from the March 10, 2020 Initial Order: 4.1 through 4.49.

II. CONCLUSIONS OF LAW

1. Based on the Department's timely filed petition for administrative review, there is authority to review and decide this matter.
2. The Director adopts and incorporates by reference the following conclusions of law from the Initial Order dated March 10, 2020: 5.2 through 5.9.
3. RCW 49.46.210(4) provides that "[a]n employer may not discriminate or retaliate against any employer for his or her exercise of any rights under this chapter, including the use of paid sick leave." See WAC 296-128-770, -780, -790.
4. The Department's administrative guidance on paid sick leave Frequently Asked Questions addresses the issue here:

5F: May an employer adopt an incentive-based program that rewards employees for not using their accrued paid sick leave?

A: No, an incentive-based program that counts the lawful use of paid sick leave as a factor in determining an employee's entitlement to an additional benefit is considered a form of retaliation for an employee's lawful use of paid sick leave. The lawful use of paid sick leave means that an employee has accrued, unused paid sick leave and is using it for one of the authorized purposes at RCW 49.46.210(1)(b) and (c). For example, programs that count the lawful use of paid sick leave as a disqualifying factor from a bonus or reward would unlawfully restrain an employee's right to use accrued paid sick leave. See WAC 296-128-770(1).

Administrative Policy, ES.B.1 at 10.

5. RCW 49.46.210(4) makes it unlawful to retaliate against an employee for using paid sick leave. It is unlawful for an employer to take any adverse action against an employee because the employee has exercised their rights provided under the paid and protected sick leave law. WAC 296-128-770(3).
6. PACCAR took adverse action against Jamey Jamison and Dwight Zeiba by withholding their holiday pay, and thereby retaliated against them. The employees engaged in protected activities by taking paid and protected sick leave. If the employees had not taken sick leave, they would have otherwise been entitled to the holiday pay. The causal connection between the exercise of a protected right and the reduction in holiday pay is confirmed by the fact that PACCAR reduces holiday pay in the exact proportion to the sick leave used, i.e. two hours of sick leave use results in two hours of holiday pay withheld. The employees would have earned holiday pay under the terms of the collective bargaining agreement had they been present on the last scheduled work shift before the

holiday. They took paid and protected sick leave for some part of their work shift the day before the holiday. In using accrued paid sick leave, Jamey Jamison and Dwight Zeiba exercised a protected right under the Minimum Wage Act. PACCAR retaliated against Zeiba and Jamison by withholding their holiday pay when they used paid sick leave on a day they were scheduled to work adjacent to a paid holiday.

7. PACCAR's holiday policy is unlawful because it retaliates against employees engaging in a protected activity by presuming that the use of sick leave around a paid holiday is unauthorized. RCW 49.46.210.
8. PACCAR endorses the Initial Order's conclusion that: "Kenworth offers the benefit of holiday pay only to employees who qualify for it. If the employee fails to qualify for the benefit, he or she does not receive the benefit. That circumstance does not constitute withholding an entitlement from an employee. Rather, it constitutes not giving the employee a benefit—a benefit not earned." Initial Order, 8. But there is adverse action because the employees did not receive a benefit they would have otherwise been qualified for if they didn't take sick leave. The parties may not enforce qualifications for a benefit in a collective bargaining agreement if those qualifications violate the sick leave law.
9. PACCAR argues that they should not have to pay the holiday pay because it is not wages.

"Wage" means compensation due to an employee by reason of employment, payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value, subject to such deductions, charges, or allowances as may be permitted by rules of the director.

But the paid sick leave provisions of the Minimum Wage Act do not limit recovery for instances of retaliation to wages, instead the rules more broadly refer to earnings. WAC 296-128-780(5) gives the Department the authority to provide multiple forms of relief to an employee when there is a finding of retaliation. WAC 296-128-780(5)(a) can order an employer to pay a worker "earning" the employee "did not receive due to the retaliatory action" By using the word earnings, there is a different intent than using the word wages. Amendments to the Minimum Wage Act through Initiative 1433 show an intent to not limit recovery to wages. For example, tips and service charges are not wages but may be recovered. RCW 49.46.020(3). And there is a broad scope of remedies beyond mere wage recovery as the Department can order an employer to restore an employee to equivalent circumstance if a job is lost or changed. WAC 296-128-780(5)(b). The anti-retaliation provisions are designed to have a wide range of enforcement options to remediate situations where workers are retaliated against for taking paid leave.

10. PACCAR points to WAC 296-128-600 to argue that the Department should not have cited them for withholding the holiday pay. This rule provides:

Normal hourly compensation does not include tips, gratuities, service charges, holiday pay, or other premium rates, unless the employer or a collective bargaining agreement allow for such considerations. However, where an employee's normal hourly compensation is a differential rate, meaning a different rate paid for the same work performed under differing conditions (e.g., a night shift), the differential rate is not a premium rate.

This rule addresses what the rate of pay is to pay when employees take sick leave. It does not describe what earnings may be assessed when an employer retaliates against an employee.

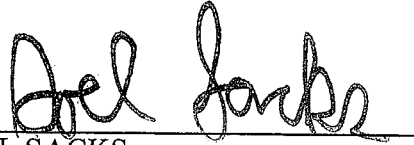
11. The citations at issue, W-170-19, W-171-19, W-357-19, and W-378-19 are affirmed. PACCAR is liable for earnings and interest as asserted by the Department in the four Citations and Notices of Assessment at issue.
12. As alleged in citation W-170-19, for July 4, 2018, PACCAR failed to pay earnings to Jamey Jamison and is liable for earnings of \$59.60 with interest, ongoing interest since the date of the citation except as stated below.
13. As alleged in citation W-171-19, for May 28, 2018, and September 4, 2018, PACCAR, failed to pay earnings to Jamey Jamison and is liable for earnings of \$528.48 with interest, ongoing interest since the date of the citation except as stated below.
14. As alleged in citation W-378-19, for December 24, 2018, PACCAR, Inc. failed to pay earnings to Dwight Zeiba and is liable for earnings of \$165.00 with interest, ongoing interest since the date of the citation except as stated below.
15. As alleged in citation W-357-19, PACCAR violated WAC 296-128-770 by maintaining an unlawful policy.
16. No penalties are assessed.
17. Interest is not owed for the following dates: April 3, 2020, to the date of this amended order.

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III. DECISION AND ORDER

1. Citations and Notices of Assessment W-170-19, W-171-19, W-357-19, and W-378-19, are AFFIRMED as MODIFIED.
2. PACCAR is ORDERED to pay earnings and interest stated in the citations, with ongoing interest from the date of the citation until the earnings amounts are paid, with the exception of interest accrued from April 3, 2020 to the date of this order.

DATED at Tumwater, Washington this 6 day of October 2020.

A handwritten signature in black ink, appearing to read "Joel Sacks", written over a horizontal line.

JOEL SACKS
Director

SERVICE

This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).

APPEAL RIGHTS

Reconsideration. Any party may file a petition for reconsideration. RCW 34.05.470. Any petition for reconsideration must be filed within 10 days of service of this Order and must state the specific grounds on which relief is requested. No matter will be reconsidered unless it clearly appears from the petition for reconsideration that (a) there is material clerical error in the order **or** (b) there is specific material error of fact or law. A petition for reconsideration, together with any argument in support thereof, should be filed by mailing, or by emailing to DirectorAppeal@LNI.WA.GOV, or delivering it directly to Joel Sacks, Director of the Department of Labor and Industries, P. O. Box 44001 Olympia, Washington 98504-4001, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Director's Office. RCW 34.05.010(6).

NOTE: A petition for reconsideration is not required before seeking judicial review. If a petition for reconsideration is filed, however, the 30-day period will begin to run upon the resolution of that petition. A timely filed petition for reconsideration is deemed to be denied if, within twenty (20) days from the date the petition is filed, the Director does not (a) dispose of the petition **or** (b) serve the parties with a written notice specifying the date by which it will act on the petition. RCW 34.05.470(3).

Judicial Review. Any petition for judicial review must be filed with the appropriate court and served within 30 days after service of this Order. RCW 34.05.542. Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement.

DECLARATION OF MAILING

I, Lisa Deck hereby declare under penalty of perjury under the laws of the State of Washington, that the AMENDED DIRECTOR'S ORDER was mailed on the 6 day of October 2020 via E-mail and U.S. Mail, postage prepaid, to the following:

Katharine Tylee Herz
Davis Wright Tremaine
929 108th Avenue NE, Suite 1500
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katetyleeherz@dwt.com

PACCAR, Inc. dba Kenworth Truck Co.
PO Box 1518
Bellevue, WA 98009-1518

Jamey Jamison
22705 Military Road S.
SeaTac, WA 98198
corvette12th@gmail.com

Katy Dixon, AAG
Attorney General's Office
800 Fifth Avenue, Suite 2000
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Dwight Zeiba
3634 N Stevens Street
Tacoma, WA 98407
dwrightzeiba@yahoo.com

DATED this 6 day of October 2020 Tumwater, Washington.



Lisa Deck

**WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS**

In the matter of the assessment of
Wage Payment and/or Minimum
Wage Act violations against:

PACCAR, Inc. dba
Kenworth Truck Co.,

Appellant.

Docket Nos. 04-2019-LI-01034
06-2019-LI-01084

INITIAL ORDER

Agency: Dept. of Labor and Industries
Program: Wage Payments
Agency Nos. W-170-19, W-171-19,
W-357-19, and W-378-19

1. ISSUES

- 1.1. During the period beginning May 11, 2018, through December 24, 2018, did PACCAR, Inc. dba Kenworth Truck Co. fail to pay wages to Jamey Jamison and/or Dwight Zeiba, as alleged in Citations and Notices of Assessment Nos. W-170-19, dated December 7, 2018; W-171-19, dated December 7, 2018; W-357-19, dated March 29, 2018; and/or W-378-19, dated April 5, 2019?
- 1.2. If so, did PACCAR, Inc. dba Kenworth Truck Co. violate statutes and/or regulations as asserted in those Citations and Notices of Assessment?
- 1.3. If so, is PACCAR, Inc. dba Kenworth Truck Co. liable for wages, interest, and/or penalties as assessed in those Citations and Notices of Assessment?

2. ORDER SUMMARY

- 2.1. Yes. During the period beginning May 11, 2018, through December 24, 2018, PACCAR, Inc. dba Kenworth Truck Co. declined to pay holiday pay to Jamey Jamison and Dwight Zeiba as alleged in Citations and Notices of Assessment Nos. W-170-19, dated December 7, 2018; W-171-19, dated December 7, 2018; W-357-19, dated March 29, 2018, and/or W-378-19, dated April 5, 2019.
- 2.2. No. PACCAR, Inc. dba Kenworth Truck Co. did not violate statutes and/or regulations as asserted in those Citations and Notices of Assessment.
- 2.3. No. PACCAR, Inc. dba Kenworth Truck Co. is not liable for wages, interest, and/or penalties as assessed in those Citations and Notices of Assessment.

3. HEARING

- 3.1. Hearing Date: January 23, 2020
- 3.2. Administrative Law Judge: Terry A. Schuh
- 3.3. Appellant: PACCAR, Inc. dba Kenworth Truck Co.

3.3.1. Representatives: Katharine Tylee Herz, Attorney, Davis Wright Tremaine, LLP; Christine Hawkins, Attorney, Davis Wright Tremaine, LLP; Adam Tullman, In-house Counsel, PACCAR, Inc. dba Kenworth Truck Co.

3.3.2. Witness: Kierstin Cavner, Human Resources Mgr., PACCAR, Inc. dba Kenworth Truck Co.

3.4. Agency: Department of Labor and Industries

3.4.1. Representative: Katy Dixon, Assistant Attorney General

3.4.2. Witnesses:

3.4.2.1. Jamey Jamison, Wage Claimant

3.4.2.2. Dwight Zeiba, Wage Claimant

3.4.2.3. Jay Scovell, Industrial Relations Agent, Dept. of Labor and Industries

3.4.2.4. Joshua Grice, Employment Standards Program Manager, Dept. of Labor and Industries

3.5. Exhibits: Agency Exhibits 1 through 30 and Appellant Exhibits A through L were admitted into the record as evidence.

3.6. Court Reporter: Kandi Clark, Central Court Reporting and Video

4. FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

Jurisdiction

4.1. The Department of Labor and Industries ("the Department") issued Citation and Notice of Assessment No. W-170-19, dated December 7, 2018. Ex. 3. The Department alleged that PACCAR, Inc. dba Kenworth Truck Co. ("Kenworth") failed to pay Jamey Jamison ("Mr. Jamison" or "Jamison") two hours of holiday pay for July 4, 2018. Ex. 3. Based on that allegation, the Department asserted unpaid wages of \$59.60, interest of \$10.04, and a penalty of \$1,000.00. Ex. 3.

4.2. Kenworth filed an appeal on January 4, 2019. Ex. 1.

4.3. The Department issued Citation and Notice of Assessment No. W-171-19, dated December 7, 2018. Ex. 4. The Department alleged that Kenworth failed to pay Dwight Zeiba ("Mr. Zeiba" or "Zeiba") eight hours of holiday pay for May 28, 2018, and for eight hours of holiday pay for September 4, 2018. Ex. 4. Based on that allegation, the Department asserted unpaid wages of \$528.48, interest of \$84.73, and a penalty of \$1,000. Ex. 4.

4.4. Kenworth filed an appeal on January 4, 2019. Ex. 1.

- 4.5. The Department issued Citation and Notice of Assessment No. W-357-19, dated March 29, 2019. Ex. 2. The Department alleged that Kenworth maintains an unlawful policy that counts the use of paid sick leave for an authorized purpose as an absence that may lead to or result in discipline. Ex. 2. Based on that allegation, the Department asserted a penalty of \$1,000.00. Ex. 2.
- 4.6. By means of a letter dated April 26, 2019, and filed with the Department on April 29, 2019, Kenworth requested that the Department reconsider the decision expressed in Citation and Notice of Assessment No. W-357-19 and that the Department consolidate that request with the current pending appeal addressing Citations and Notice of Assessment Nos. W-171-19 and W-170-19. Ex. 9. The Department apparently treated that letter as an appeal.
- 4.7. The Department issued Citation and Notice of Assessment No. W-378-19, dated April 5, 2019. Ex. 5. The Department alleged that Kenworth failed to pay Mr. Zeiba five hours of holiday pay for December 24, 2018. Ex. 5. Based on that allegation, the Department asserted unpaid wages of \$165.00, interest of \$4.69, and a penalty of \$1,000.00. Ex. 5.
- 4.8. By means of a letter dated April 26, 2019, and filed with the Department on April 29, 2019, Kenworth requested that the Department reconsider the decision expressed in Citation and Notice of Assessment No. W-378-19 and that the Department consolidate that request with the current pending appeal addressing Citations and Notice of Assessment Nos. W-171-19 and W-170-19. Ex. 9. The Department apparently treated that letter as an appeal.

Motion in Limine

- 4.9. The Department filed a Motion in Limine on January 21, 2020, seeking the exclusion of any evidence related to the claimants' reasons for taking sick leave.
- 4.10. Kenworth filed a response to the motion, opposing it on the grounds that if the claimants used sick leave for an unauthorized purpose, then the claimants' insulation of the paid sick leave law evaporates.
- 4.11. I heard oral argument on the motion at the Evidentiary Hearing before any evidence was presented by either party. Kenworth paid the claimed sick leave pay and did not assert at that time that it was for an unauthorized purpose. On the other hand, Kenworth declined to pay the holiday pay at issue here because the claimants failed to attempt to establish that they were qualified to receive it, i.e., the claimants did not attempt to establish that they satisfied an exception to their otherwise disqualifying failure to work their scheduled work shifts immediately before and after the holiday. Thus, whether the underlying sick leave was actually taken for an unauthorized purpose is not relevant here. All that would demonstrate

was that the attempt to qualify that was never made would have been futile. Therefore, I granted the motion.

Kenworth's Holiday Policy

- 4.12. Kenworth has negotiated a package of paid holidays with one or more unions that represent(s) many, if not most, of its employees. Cavner Testimony; Ex. A.
- 4.13. Each employee receives holiday pay for the designated holidays if he or she qualifies. Cavner Testimony; Ex. A.
- 4.14. To qualify for holiday pay, the Kenworth employee must work "the last regularly scheduled workday prior to and the first regularly schedule workday following the holiday. . . . In the event an employee does not work the regularly scheduled workday prior to and/or following the holiday, unless approved by [Kenworth], holiday pay shall be reduced in the amount equivalent to the time the employee failed to work as scheduled on the day before and/or after the holiday." Ex. A, p. 2, ¶ 10.1.2; Cavner Testimony.
- 4.15. There are exceptions to the requirement. Ex. A, p. 2, ¶ 10.1.2; Cavner Testimony. One such exception is that, if the relevant unworked time occurred because the employee suffered from a bona fide illness, the employee may still qualify for holiday pay. Ex. A, p. 2, ¶ 10.1.2; Cavner Testimony. However, to establish that exception, the employee must submit a physician's "certificate" to that effect. Ex. A, p. 2, ¶ 10.1.2; Cavner Testimony.
- 4.16. A physician's certificate or note simply confirms that the employee was unable to work during the time missed. Cavner Testimony.
- 4.17. A purpose of the qualifications for holiday pay under the holiday pay policy is to assure sufficient staffing before and after a holiday. Cavner Testimony.
- 4.18. No Washington state law requires employers to provide employees with holiday pay. Scovell Testimony.

Mr. Jamison and the July 4, 2018 holiday

- 4.19. July 4, 2018, was a paid holiday for qualifying Kenworth employees. Ex. A, p. 2.
- 4.20. Mr. Jamison was scheduled to work on July 3, 2018. Jamison Testimony.
- 4.21. On July 3, 2018, Mr. Jamison left work two hours early and submitted a paid sick leave request for those two hours. Jamison Testimony; Scovell Testimony; Cavner Testimony.
- 4.22. Mr. Jamison is familiar with the qualifications for holiday pay, including exceptions for illness if support by a physician's certificate. Jamison Testimony.

- 4.23. Mr. Jamison did not submit documentation of his illness from a physician. Jamison Testimony; Cavner Testimony. Kenworth never requested it. Ex. 13; Cavner Testimony.
- 4.24. Kenworth paid Mr. Jamison the two hours of sick leave for July 3, 2018. Jamison Testimony; Ex. 13; Cavner Testimony.
- 4.25. Kenworth paid Mr. Jamison six hours of holiday pay for July 4, 2018, instead of eight hours. Jamison Testimony; Scovell Testimony; Ex. 14, p. 1. As a result, Mr. Jamison received \$59.60 less than he would have had he been paid for eight hours. Ex. 15.
- 4.26. Mr. Jamison filed a wage complaint with the Department. Jamison Testimony; Ex. 10; Scovell Testimony.

Mr. Zeiba and the May 28, 2018, holiday

- 4.27. May 28, 2018, was a paid holiday for qualifying Kenworth employees. Ex. A, p. 2.
- 4.28. Mr. Zeiba scheduled a vacation from May 14 through May 27, 2018. Zeiba Testimony.
- 4.29. Accordingly, May 11, 2018, was Mr. Zeiba's last-scheduled workday before the May 28, 2018, holiday. Zeiba Testimony.
- 4.30. On May 11, 2018, Mr. Zeiba called in sick and submitted a paid sick leave request for his eight-hour shift. Zeiba Testimony.
- 4.31. Mr. Zeiba did not submit documentation of his illness from a physician. Zeiba Testimony; Cavner Testimony.
- 4.32. Kenworth paid Mr. Zeiba eight hours of sick leave for May 11, 2018. Zeiba Testimony; Cavner Testimony;
- 4.33. Kenworth did not pay Mr. Zeiba any holiday pay for May 28, 2018. Zeiba Testimony.
- 4.34. Mr. Zeiba filed a wage complaint with the Department. Zeiba Testimony; Ex. 16; Cavner Testimony.

Mr. Zeiba and the September 3, 2018, holiday

- 4.35. September 3, 2018, was a paid holiday for qualifying Kenworth employees. Ex. A, p. 2.
- 4.36. September 4, 2018, was Mr. Zeiba's next regularly scheduled workday following September 3, 2018. Zeiba Testimony.

- 4.37. Mr. Zeiba used eight hours of paid sick leave on September 4, 2018, to deal with a family emergency. Zeiba Testimony; Cavner Testimony.
- 4.38. Mr. Zeiba did not submit verification that he satisfied any of the exceptions, such that he qualified for holiday pay under the holiday pay policy. Zeiba Testimony; Cavner Testimony.
- 4.39. Kenworth paid Mr. Zeiba eight hours of sick leave for September 4, 2018. Zeiba Testimony.
- 4.40. Kenworth did not pay Mr. Zeiba any holiday pay for September 3, 2018. Zeiba Testimony.
- 4.41. Mr. Zeiba's holiday pay for May 28 and September 4, combined, would have been \$528.48. Ex. 6, p. 16; Ex. 4.
- 4.42. Mr. Zeiba reported the September 3 incident to the Department. Zeiba Testimony. The Department told him that he did not need to file a wage complaint because the Department would add this incident to the wage complaint Mr. Zeiba filed regarding the May 28, 2018, holiday. Zeiba Testimony.

Mr. Zeiba and the December 24, 2018 holiday

- 4.43. December 24, 2018, was a paid holiday for qualifying Kenworth employees. Ex. A, p. 2.
- 4.44. December 21, 2018, was Mr. Zeiba's last regularly scheduled workday prior to the December 24, 2018, holiday. Zeiba Testimony.
- 4.45. Mr. Zeiba worked three hours of his eight-hour shift on December 21, 2018, and then submitted paid sick leave for the remaining five hours. Zeiba Testimony; Cavner Testimony.
- 4.46. Mr. Zeiba did not submit documentation of his illness from a physician. Cavner Testimony.
- 4.47. Kenworth paid Mr. Zeiba five hours of sick leave for December 21, 2018. Zeiba Testimony.
- 4.48. Kenworth paid Mr. Zeiba three hours holiday pay for December 24, 2018, instead of eight hours. Cavner Testimony. Mr. Zeiba's holiday pay for the other five hours would have been \$165.00. Ex. 16, p. 10.
- 4.49. Mr. Zeiba filed a wage complaint. Zeiba Testimony; Ex. 17.

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5. CONCLUSIONS OF LAW

Based upon the facts above, I make the following conclusions:

Jurisdiction

5.1. I have jurisdiction to hear and decide this matter under Washington Administrative Code ("WAC") 296-128-800(6), WAC 296-128-840(3), Chapter 34.05 Revised Code of Washington ("RCW"), and Chapter 10-08 WAC.

Kenworth's holiday policy does not violate Washington state sick leave law

5.2. "It is in the public interest to provide reasonable paid sick leave for employees to care for the health of themselves and their families." RCW 49.46.200 (in pertinent part).

5.3. To that effect, an employee is authorized to use paid sick leave to care for his/her health of that of a family member. RCW 49.46.210(1)(b).

5.4. "An employer may not adopt or enforce any policy that counts the use of paid sick leave time as an absence that may lead to or result in discipline against the employee." RCW 49.46.210(3).

5.5. "An employer may not discriminate or retaliate against an employee for his or her exercise of any rights under this chapter including the use of paid sick leave." RCW 49.46.210(4).

5.6. An employer may require verification of an illness only if the absences exceed three days. RCW 49.46.210(1)(g).

5.7. An employer may not retaliate against an employee for his/her use of a paid sick leave. WAC 296-128-770.

5.8. An employer may not treat use of paid sick leave as a negative factor in anticipation of disciplining at employee. WAC 296-128-770(1), (2).

5.9. An employer may not take adverse action against an employee for exercising his/her rights regarding sick leave. WAC 296-128-770(3). *Adverse action* includes delaying payment for wages earned or reducing the employee's rate of pay. WAC 296-128-770(4).

5.10. "Normal hourly compensation does not include tips, gratuities, service charges, holiday pay, or other premium rates, unless the employer or a collective bargaining agreement allow for such considerations." WAC 296-128-600(10) (in pertinent part).]

5.11. Here, it is undisputed that Kenworth paid all sick leave to which the employees were entitled for the dates relevant here. The entirety of the Department's position in this matter, and the basis for it issuing the Citations and

Notice of Assessment at issue here, flows from the Department's interpretation and characterization of Kenworth's holiday policy, which the Department apparently views as an entitlement that cannot be in any way negatively impacted by an employee's use of sick leave. I am not persuaded that the Department's perspective is correct. First of all, holiday pay is a benefit that Kenworth offers to its employees, not at entitlement. There is no right to holiday pay under either the Wage Payment Act or the Minimum Wage Act. Secondly, Kenworth offers the benefit of holiday pay *only* to employees who qualify for it. If the employee fails to qualify for the benefit, he or she does not receive the benefit. That circumstance does not constitute *withholding* an entitlement from an employee. Rather, it constitutes not *giving* the employee a benefit – a benefit not earned. That circumstance is not disciplinary, not discriminatory, and not retaliatory. It is not an adverse action as described in the Department's regulation because it is not withholding wages the employee earned or reducing the employee's rate of pay. Nevertheless, the Department argued the Kenworth withheld a contractual benefit. However, the contract awards the benefit only to those who qualify. So Kenworth did not withhold a contractual benefit. It is important to recognize that, to qualify for paid holiday benefit, an employee must work both his/her last regularly scheduled workday before the holiday and his/her next regularly scheduled workday after the holiday. Exercising rights to paid sick leave does not of itself effect the standard for qualification. It only comes into play within the context of a contractual exception to the work requirement, for an absence due to a bona fide illness confirmed by a physician's certificate. The Department argued that Kenworth is forbidden by law from requiring a physician's certificate for so brief an alleged medical-related absence. So far as qualifying for paid sick leave, the Department is quite correct. And here, Kenworth paid that sick leave. However, requiring a physician's certificate to qualify for holiday pay does not violate or circumvent paid sick leave laws. Therefore, this circumstance is not a clever backdoor way to demand a doctor's note, as argued by the Department. This is particularly so given that Kenworth's holiday policy predates the paid sick leave law.¹ Further, if Kenworth employees are dissatisfied with their holiday pay benefit, they can instruct their union to negotiate a different expression of that benefit. Finally, I wish to emphasize, Kenworth did not decline to pay holiday pay because Mr. Jamison or Mr. Zeiba requested paid sick leave; rather, Kenworth declined to pay selected holiday pay because Mr. Jamison and Mr. Zeiba failed to work the hours required to qualify for it. In conclusion: Kenworth timely tendered full sick leave pay without reservation in the instances at issue here, fully in compliance with relevant laws; its

¹ I am not suggesting that Kenworth's holiday policy should in some way be grandfathered because it predates the paid sick leave law. I merely clarify that it should not be characterized as *designed* to circumvent a law that did not exist when the policy was created.

determination that, in the circumstances at issue here, the employees did not qualify for holiday pay, or qualified only for reduced holiday pay, did not violate Washington paid sick leave laws.

5.12. Accordingly, Kenworth is not liable for wages, interest, and/or penalties as asserted by the Department in the four Citations and Notice of Assessment at issue here.

5.13. Therefore, Citations and Notice of Assessment Nos. W-170-19, W-171-19, W-357-19, and W-378-19 should be set aside.

6. INITIAL ORDER

IT IS HEREBY ORDERED THAT:

6.1. The Department of Labor and Industries actions are SET ASIDE.

6.2. During the period beginning May 11, 2018, through December 24, 2018, PACCAR, Inc. dba Kenworth Truck Co. declined to pay certain holiday pay to Jamey Jamison and Dwight Zeiba, as alleged in Citations and Notices of Assessment Nos. W-170-19, dated December 7, 2018; W-171-19, dated December 7, 2018; W-357-19, dated March 29, 2018; and W-378-19, dated April 5, 2019.

6.3. However, in declining to pay that certain holiday pay, PACCAR, Inc. dba Kenworth Truck Co. did not violate statutes and/or regulations as asserted by the Department of Labor and Industries in Citations and Notice of Assessment Nos. W-170-19, W-171-19, W-357-19, and/or W-378-19.

6.4. Thus, Citations and Notices of Assessment Nos. W-170-19, W-171-19, W-357-19, and W-378-19 are SET ASIDE.

6.5. Accordingly, PACCAR, Inc. dba Kenworth Truck Co. is not liable for wages, interest, and/or penalties as assessed in Citations and Notices of Assessment Nos. W-170-19, W-171-19, W-357-19, and/or W-378-19.

Issued from Tacoma, Washington on the date of mailing.



Terry A. Schuh
Administrative Law Judge
Office of Administrative Hearings

CERTIFICATE OF SERVICE ATTACHED

APPEAL RIGHTS

PETITION FOR REVIEW

Any party that disputes this Initial Order may file a Petition for Administrative Review with the Director of the Department of Labor and Industries.² You may e-mail your Petition for Administrative Review to the Director at directorappeal@lni.wa.gov. You may also mail or deliver your Petition for Administrative Review to the Director at the Department's physical address listed below.

Mailing Address:

Director
Department of Labor and Industries
PO Box 44001
Olympia, WA 98504-4001

Physical Address:

7273 Linderson Way SW
Tumwater, WA 98501

If you e-mail your Petition for Administrative Review, please do not mail or deliver a paper copy to the Director.

Whether you e-mail, mail or deliver the Petition for Administrative Review, the Director *must actually receive* the Petition for Administrative Review during office hours at the Director's office within 30 days of the date this Initial Order was mailed to the parties. You must also provide a copy of your Petition for Administrative Review to the other parties at the same time.

If the Director does not receive a Petition for Administrative Review within 30 days from the date of the Initial Order, the Initial Order shall become final with no further right to appeal.³

If you timely file a Petition for Administrative Review, the Director will conduct an administrative review under chapter 34.05 RCW.

² RCW 49.48.084 and RCW 34.05.464.

³ RCW 49.48.084 and Chapter 34.05 RCW.

**CERTIFICATE OF SERVICE FOR OAH DOCKET NOS.
04-2019-LI-01034 & 06-2019-LI-01084**

I certify that true copies of this document were served from Tacoma, Washington via Consolidated Mail Services upon the following as indicated:

PACCAR, Inc dba Kenworth Truck Co. PO Box 1518 Bellevue, WA 98009-1518 <i>Appellant/Employer</i>	<input checked="" type="checkbox"/> First Class Mail <input checked="" type="checkbox"/> Certified Mail, Return Receipt 9489 0090 0027 6079 7473 47 <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail
Katharine Tylee Herz Davis Wright Tremaine, LLP 929 108th Avenue NE, Suite 1500 Bellevue, WA 98004-5149 <i>Appellant Representative</i>	<input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail
Katy J. Dixon, AAG Office of the Attorney General MS: TB-14 800 5th Ave Ste 2000 Seattle, WA 98104 <i>Respondent Representative</i>	<input type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input checked="" type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail
Dwight Zeiba 12713 219th Avenue E Bonney Lake, WA 98391 <i>Intervenor/Wage Claimant</i>	<input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail
Jamey Jamison 22705 Military Road S Seatac, WA 98198 <i>Intervenor/Wage Claimant</i>	<input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail

Date: Tuesday, March 10, 2020

OFFICE OF ADMINISTRATIVE HEARINGS



Amber Guarnacci
Legal Assistant 2