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**SUBSTITUTE HOUSE BILL 2190**

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**State of Washington**

**55th Legislature**

**1997 Regular Session**

**By** House Committee on Commerce & Labor (originally sponsored by Representatives McMorris and Clements)

Read first time 03/05/97.

1 AN ACT Relating to the application of the state wage and hour laws  
2 without altering the minimum wage; amending RCW 49.46.005, 49.46.010,  
3 49.46.090, 49.46.130, 49.48.030, 49.48.040, 49.52.050, 49.52.070, and  
4 49.52.080; adding a new section to chapter 49.46 RCW; repealing RCW  
5 49.12.150; prescribing penalties; and declaring an emergency.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

7 **Sec. 1.** RCW 49.46.005 and 1961 ex.s. c 18 s 1 are each amended to  
8 read as follows:

9 Whereas the establishment of a minimum wage for employees is a  
10 subject of vital and imminent concern to the people of this state and  
11 requires appropriate action by the legislature to establish minimum  
12 standards of employment within the state of Washington, therefore the  
13 legislature declares that in its considered judgment the health, safety  
14 and the general welfare of the citizens of this state require the  
15 enactment of this measure, and exercising its police power, the  
16 legislature endeavors by this chapter to establish a minimum wage for  
17 employees of this state to encourage employment opportunities within  
18 the state.

1       The legislature further finds and declares that it is in the  
2 interest of the health, safety, and the general welfare of the citizens  
3 of this state and necessary to aid and foster interstate and intrastate  
4 commerce, that the Washington minimum wage act parallel the federal  
5 fair labor standards act in the absence of express language to the  
6 contrary. Under this objective, the legislature finds that section 3,  
7 chapter 289, Laws of 1975 1st ex. sess. was adopted for the purpose of  
8 creating conformity between state overtime pay standards and the  
9 federal fair labor standards act. RCW 49.46.130(2)(h), was intended to  
10 incorporate alternative federal premium guarantee standards, whether  
11 based on a different minimum workweek, premium guarantee formula, or  
12 some combination thereof, into state wage and labor law.

13       The provisions of this chapter are enacted: (1) In the exercise of  
14 the police power of the state for the purpose of protecting the  
15 immediate and future health, safety and welfare of the people of this  
16 state; (2) to protect intrastate commerce from practices that burden  
17 and obstruct it; (3) to protect the right of collective bargaining; and  
18 (4) to define and limit the jurisdiction of the courts.

19       **Sec. 2.** RCW 49.46.010 and 1993 c 281 s 56 are each amended to read  
20 as follows:

21       As used in this chapter:

22       (1) "Director" means the director of labor and industries;

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

28       (3) "Employ" includes to permit to work;

29       (4) "Employer" includes any individual, partnership, association,  
30 corporation, business trust, or any person or group of persons acting  
31 directly or indirectly in the interest of an employer in relation to an  
32 employee;

33       (5) "Employee" includes any individual employed by an employer but  
34 shall not include:

35       (a) Any individual (i) employed as a hand harvest laborer and paid  
36 on a piece rate basis in an operation which has been, and is generally  
37 and customarily recognized as having been, paid on a piece rate basis  
38 in the region of employment; (ii) who commutes daily from his or her

1 permanent residence to the farm on which he or she is employed; and  
2 (iii) who has been employed in agriculture less than thirteen weeks  
3 during the preceding calendar year;

4 (b) Any individual employed in casual labor in or about a private  
5 home, unless performed in the course of the employer's trade, business,  
6 or profession;

7 (c) Any individual employed in a bona fide executive,  
8 administrative, or professional capacity or in the capacity of outside  
9 salesman as those terms are defined and delimited by rules of the  
10 director. However, those terms shall be defined and delimited by the  
11 Washington personnel resources board pursuant to chapter 41.06 RCW for  
12 employees employed under its jurisdiction;

13 (d) Any individual engaged in the activities of an educational,  
14 charitable, religious, state or local governmental body or agency, or  
15 nonprofit organization where the employer-employee relationship does  
16 not in fact exist or where the services are rendered to such  
17 organizations gratuitously. If the individual receives reimbursement  
18 in lieu of compensation for normally incurred out-of-pocket expenses or  
19 receives a nominal amount of compensation per unit of voluntary service  
20 rendered, an employer-employee relationship is deemed not to exist for  
21 the purpose of this section or for purposes of membership or  
22 qualification in any state, local government or publicly supported  
23 retirement system other than that provided under chapter 41.24 RCW;

24 (e) Any individual employed full time by any state or local  
25 governmental body or agency who provides voluntary services but only  
26 with regard to the provision of the voluntary services. The voluntary  
27 services and any compensation therefor shall not affect or add to  
28 qualification, entitlement or benefit rights under any state, local  
29 government, or publicly supported retirement system other than that  
30 provided under chapter 41.24 RCW;

31 (f) Any newspaper vendor or carrier;

32 (g) Any carrier subject to regulation by Part 1 of the Interstate  
33 Commerce Act;

34 (h) Any individual engaged in forest protection and fire prevention  
35 activities;

36 (i) Any individual employed by any charitable institution charged  
37 with child care responsibilities engaged primarily in the development  
38 of character or citizenship or promoting health or physical fitness or

1 providing or sponsoring recreational opportunities or facilities for  
2 young people or members of the armed forces of the United States;

3 (j) Any individual whose duties require that he or she reside or  
4 sleep at the place of his or her employment or who otherwise spends a  
5 substantial portion of his or her work time subject to call, and not  
6 engaged in the performance of active duties;

7 (k) Any resident, inmate, or patient of a state, county, or  
8 municipal correctional, detention, treatment or rehabilitative  
9 institution;

10 (l) Any individual who holds a public elective or appointive office  
11 of the state, any county, city, town, municipal corporation or quasi  
12 municipal corporation, political subdivision, or any instrumentality  
13 thereof, or any employee of the state legislature;

14 (m) All vessel operating crews of the Washington state ferries  
15 operated by the department of transportation;

16 (n) Any individual employed as a seaman on a vessel other than an  
17 American vessel;

18 (o) Any employee who is a computer systems analyst, computer  
19 programmer, software engineer, or other similarly skilled worker, whose  
20 primary duty is:

21 (i) The application of systems analysis techniques and procedures,  
22 including consulting with users, to determine hardware, software, or  
23 system functional specifications;

24 (ii) The design, development, documentation, analysis, creation,  
25 testing, or modification of computer systems or programs, including  
26 prototypes, based on and related to user or system design  
27 specifications;

28 (iii) The design, documentation, testing, creation, or modification  
29 of computer programs related to machine operating systems; or

30 (iv) A combination of duties described in (i), (ii), and (iii) of  
31 this subsection (5)(o), the performance of which requires the same  
32 level of skills; and  
33 who, for an employee who is compensated on an hourly basis, is  
34 compensated at a rate of not less than twenty-seven dollars and sixty-  
35 three cents an hour.

36 (6) "Occupation" means any occupation, service, trade, business,  
37 industry, or branch or group of industries or employment or class of  
38 employment in which employees are gainfully employed.

1       **Sec. 3.** RCW 49.46.090 and 1959 c 294 s 9 are each amended to read  
2 as follows:

3       ~~(1) ((Any employer who pays any employee less than wages to which~~  
4 ~~such employee is entitled under or by virtue of this chapter, shall be~~  
5 ~~liable to such employee affected for the full amount of such wage rate,~~  
6 ~~less any amount actually paid to such employee by the employer, and for~~  
7 ~~costs and such reasonable attorney's fees as may be allowed by the~~  
8 ~~court. Any agreement between such employee and the employer to work~~  
9 ~~for less than such wage rate shall be no defense to such action.))~~  
10 Except as provided in subsection (2) of this section, no employer shall  
11 be subject to any liability or punishment under this title on account  
12 of the failure of the employer to pay an employee minimum wages, or to  
13 pay an employee overtime compensation, for or on account of any of the  
14 following activities of the employee:

15       (a) Walking, riding, or traveling to and from the actual place of  
16 performance of the principal activity or activities that the employee  
17 is employed to perform; and

18       (b) Activities that are preliminary to or subsequent to the  
19 principal activity or activities that the employee is employed to  
20 perform;  
21 that occur either before the time on any particular workday at which  
22 the employee commences, or after the time on any particular workday at  
23 which the employee ceases, the principal activity or activities.

24       For purposes of this subsection, the use of an employer's vehicle  
25 for travel by an employee and activities performed by an employee that  
26 are incidental to the use of the vehicle for commuting shall not be  
27 considered part of the employee's principal activities if the use of  
28 the vehicle for travel is within the normal commuting area for the  
29 employer's business or establishment and the use of the employer's  
30 vehicle is subject to an agreement on the part of the employer and the  
31 employee or representative of the employee.

32       (2)(a) An employer shall not be relieved of liability or punishment  
33 under subsection (1) of this section if the activity of the employee is  
34 compensable by either:

35       (i) An express provision of a written or nonwritten contract in  
36 effect, at the time of such activity, between such employee, the  
37 employee's agent, or collective bargaining representative and the  
38 employer; or

1 (ii) A custom or practice in effect, at the time of such activity,  
2 at the establishment or other place where such employee is employed,  
3 covering the activity, not inconsistent with a written or nonwritten  
4 contract, in effect at the time of the activity, between such employee,  
5 the employee's agent, or collective bargaining representative and the  
6 employer.

7 (b) For the purposes of (a) of this subsection, an activity is  
8 considered as compensable under an applicable contract provision or  
9 custom or practice only when the activity is engaged in during the  
10 portion of the day with respect to which the activity is so made  
11 compensable.

12 (c) In applying the minimum wage and overtime compensation  
13 provisions of this title to determine the time for which an employer  
14 employs an employee with respect to walking, riding, traveling, or  
15 other activities preliminary to or subsequent to the activities  
16 described in subsection (1) of this section, there shall be counted all  
17 that time, but only that time, during which the employee engages in any  
18 such activity that is compensable within the meaning of (a) and (b) of  
19 this subsection (2).

20 (3) At the written request of any employee paid less than the wages  
21 to which he or she is entitled under or by virtue of this chapter or  
22 chapter 49.12 or 49.48 RCW, the director may take an assignment ((under  
23 this chapter or as provided in RCW 49.48.040 of such wage claim in  
24 trust for the assigning employee and may bring any legal action  
25 necessary to collect such claim, and the employer shall be required to  
26 pay the costs and such reasonable attorney's fees as may be allowed by  
27 the court)) of the wage claim in trust for the assigning employee, and  
28 may, as assignee for the employee, bring an action for unpaid wages  
29 under RCW 49.48.030 or an action for exemplary damages as provided  
30 under RCW 49.52.070.

31 **Sec. 4.** RCW 49.46.130 and 1995 c 5 s 1 are each amended to read as  
32 follows:

33 (1) Except as otherwise provided in this section, no employer shall  
34 employ any of his or her employees for a work week longer than forty  
35 hours unless such employee receives compensation for his or her  
36 employment in excess of the hours above specified at a rate not less  
37 than one and one-half times the regular rate at which he or she is  
38 employed.

1 (2) This section does not apply to:

2 (a) Any person exempted pursuant to RCW 49.46.010(5). The fact  
3 that an employee is subject to deductions from pay for voluntary or  
4 involuntary absences of less than a full day or of less than a full  
5 workweek shall not be a factor in determining whether that employee is  
6 exempted under RCW 49.46.010(5)(c), except during workweeks in which  
7 the employee incurs an actual reduction in pay. For purposes of this  
8 subsection, the term "actual reduction in pay" does not include any  
9 reduction in accrued paid leave or any other practice that does not  
10 reduce the amount of the employee's pay for the workweek in question.  
11 The payment of compensation or provision of compensatory time off in  
12 addition to a salary shall not be a factor in determining whether a  
13 person is exempted under RCW 49.46.010(5)(c);

14 (b) Employees who request compensating time off in lieu of overtime  
15 pay;

16 (c) Any individual employed as a seaman whether or not the seaman  
17 is employed on a vessel other than an American vessel;

18 (d) Seasonal employees who are employed at concessions and  
19 recreational establishments at agricultural fairs, including those  
20 seasonal employees employed by agricultural fairs, within the state  
21 provided that the period of employment for any seasonal employee at any  
22 or all agricultural fairs does not exceed fourteen working days a year;

23 (e) Any individual employed as a motion picture projectionist if  
24 that employee is covered by a contract or collective bargaining  
25 agreement which regulates hours of work and overtime pay;

26 (f) An individual employed as a truck or bus driver who is subject  
27 to the provisions of the Federal Motor Carrier Act (49 U.S.C. Sec.  
28 ~~((3101))~~ 31501 et seq. and 49 U.S.C. Sec. 10101 et seq.)~~((, if the~~  
29 ~~compensation system under which the truck or bus driver is paid~~  
30 ~~includes overtime pay, reasonably equivalent to that required by this~~  
31 ~~subsection, for working longer than forty hours per week));~~

32 (g) Any individual employed (i) on a farm, in the employ of any  
33 person, in connection with the cultivation of the soil, or in  
34 connection with raising or harvesting any agricultural or horticultural  
35 commodity, including raising, shearing, feeding, caring for, training,  
36 and management of livestock, bees, poultry, and furbearing animals and  
37 wildlife, or in the employ of the owner or tenant or other operator of  
38 a farm in connection with the operation, management, conservation,  
39 improvement, or maintenance of such farm and its tools and equipment;

1 or (ii) in packing, packaging, grading, storing or delivering to  
2 storage, or to market or to a carrier for transportation to market, any  
3 agricultural or horticultural commodity; or (iii) commercial canning,  
4 commercial freezing, or any other commercial processing, or with  
5 respect to services performed in connection with the cultivation,  
6 raising, harvesting, and processing of oysters or in connection with  
7 any agricultural or horticultural commodity after its delivery to a  
8 terminal market for distribution for consumption;

9 (h) Any industry in which federal law provides for an overtime  
10 payment (~~((based on a work week other than forty hours))~~) method, such as  
11 29 U.S.C. 207 (i) or (j). However, the provisions of the federal (~~(law~~  
12 ~~regarding overtime payment based on a work week other than forty~~  
13 ~~hours)) overtime payment method shall nevertheless apply to employees  
14 covered by this section without regard to the existence of actual  
15 federal jurisdiction over the industrial activity of the particular  
16 employer within this state. For the purposes of this subsection,  
17 "industry" means a trade, business, industry, or other activity, or  
18 branch, or group thereof, in which individuals are gainfully employed  
19 (section 3(h) of the Fair Labor Standards Act of 1938, as amended  
20 (Public Law 93-259)).~~

21 (3) No employer of commissioned salespeople primarily engaged in  
22 the business of selling automobiles, trucks, recreational vessels,  
23 recreational vessel trailers, recreational vehicle trailers,  
24 recreational campers, or manufactured housing to ultimate purchasers  
25 shall violate subsection (1) of this section with respect to such  
26 commissioned salespeople if the commissioned salespeople are paid the  
27 greater of:

28 (a) Compensation at the hourly rate, which may not be less than the  
29 rate required under RCW 49.46.020, for each hour worked up to forty  
30 hours per week, and compensation of one and one-half times that hourly  
31 rate for all hours worked over forty hours in one week; or

32 (b) A straight commission, a salary plus commission, or a salary  
33 plus bonus applied to gross salary.

34 (4) No public agency shall be deemed to have violated subsection  
35 (1) of this section with respect to the employment of any employee in  
36 fire protection activities or any employee in law enforcement  
37 activities (including security personnel in correctional institutions)  
38 if: (a) In a work period of twenty-eight consecutive days the employee  
39 receives for tours of duty which in the aggregate exceed two hundred



1 forty hours; or (b) in the case of such an employee to whom a work  
2 period of at least seven but less than twenty-eight days applies, in  
3 his or her work period the employee receives for tours of duty which in  
4 the aggregate exceed a number of hours which bears the same ratio to  
5 the number of consecutive days in his or her work period as two hundred  
6 forty hours bears to twenty-eight days; compensation at a rate not less  
7 than one and one-half times the regular rate at which he or she is  
8 employed.

9 NEW SECTION. **Sec. 5.** A new section is added to chapter 49.46 RCW  
10 to read as follows:

11 In any action or proceeding based on any act or omission on or  
12 after the effective date of this section, no employer shall be subject  
13 to any liability or punishment for or on account of the failure of the  
14 employer to pay minimum wages or overtime compensation under this title  
15 if the employer pleads and proves that the act or omission complained  
16 of was in good faith in conformity with and in reliance on any written  
17 administrative regulation, order, ruling, approval, or interpretation  
18 of the department, or any administrative practice or enforcement policy  
19 of the department with respect to the class of employers to which the  
20 employer belonged. Such a defense, if established, is a bar to the  
21 action or proceeding, notwithstanding that after the act or omission,  
22 the administrative regulation, order, ruling, approval, interpretation,  
23 practice, or enforcement policy is modified or rescinded or is  
24 determined by judicial authority to be invalid or of no legal effect.

25 **Sec. 6.** RCW 49.48.030 and 1971 ex.s. c 55 s 3 are each amended to  
26 read as follows:

27 ~~((In any action in which any person is successful in recovering  
28 judgment for wages or salary owed to him, reasonable attorney's fees,  
29 in an amount to be determined by the court, shall be assessed against  
30 said employer or former employer: PROVIDED, HOWEVER, That this section  
31 shall not apply if the amount of recovery is less than or equal to the  
32 amount admitted by the employer to be owing for said wages or salary.))~~

33 (1) Any employer who pays an employee less than the wages to which the  
34 employee is entitled under or by virtue of this chapter or chapter  
35 49.12 or 49.46 RCW, is liable in a civil action to the employee for the  
36 full amount of the unpaid wages, notwithstanding any agreement to work  
37 for a lower wage. In such an action, if the employee is successful in

1 recovering judgment for unpaid wages, reasonable attorneys' fees and  
2 costs, in an amount to be determined by the court, shall be awarded to  
3 the employee. However, the court shall not award attorneys' fees or  
4 costs to the employee if the amount of the judgment for unpaid wages is  
5 less than or equal to any amount previously offered or paid by the  
6 employer to such employee in response to the employee's wage claim.

7 (2) Any civil action under this section to recover unpaid wages  
8 must be commenced within two years of the date the claim for wages  
9 accrued. Unless otherwise agreed by all parties to the action, an  
10 employee is only entitled to bring the action on his or her own  
11 individual behalf, except an employee may also bring such an action on  
12 behalf of any other similarly situated employee who has given his or  
13 her prior written consent to become a party to the action and has filed  
14 the consent with the court in which the action is brought.

15 (3) For purposes of subsection (2) of this section, an action is  
16 considered to be commenced on the date determined in accordance with  
17 RCW 4.16.170, except that for a collective action, it is considered to  
18 be commenced in the case of any individual claimant:

19 (a) On the date determined in accordance with RCW 4.16.170, if the  
20 individual claimant is specifically named as a party plaintiff in the  
21 complaint and written consent of the individual to become a party  
22 plaintiff is filed on or before the date in the court in which the  
23 action is brought; or

24 (b) If the written consent was not so filed or if the name of the  
25 individual claimant did not so appear on the subsequent date on which  
26 the written consent is filed in the court in which the action was  
27 commenced.

28 **Sec. 7.** RCW 49.48.040 and 1987 c 172 s 1 are each amended to read  
29 as follows:

30 (1) The department of labor and industries may:

31 (a) Upon obtaining information indicating an employer may be  
32 committing a violation under chapter~~((s))~~ 39.12~~((r))~~ or 49.46 ~~((r and~~  
33 ~~49.48))~~ RCW, or this chapter, conduct investigations to ensure  
34 compliance with chapters 39.12~~((r))~~ and 49.46~~((r and 49.48))~~ RCW, and  
35 this chapter;

36 (b) ~~((Order))~~ Demand the payment of ~~((all))~~ any wages owed ~~((the~~  
37 ~~workers and institute actions necessary for the collection of the sums~~  
38 ~~determined owed))~~ to an employee; and

1 (c) Take assignments of wage claims (~~and prosecute actions for the~~  
2 ~~collection of wages of persons who are financially unable to employ~~  
3 ~~counsel when in the judgment of the director of the department the~~  
4 ~~claims are valid and enforceable in the courts~~) from employees and  
5 initiate civil actions to recover unpaid wages owed to the employees as  
6 provided under RCW 49.46.090 and 49.48.030.

7 (2) The director of the department or any authorized representative  
8 may, for the purpose of carrying out RCW 49.48.040 through 49.48.080:

9 (a) Issue subpoenas to compel the attendance of witnesses or parties  
10 and the production of books, papers, or records; (b) administer oaths  
11 and examine witnesses under oath; (c) take the verification of proof of  
12 instruments of writing; and (d) take depositions and affidavits. If  
13 assignments for wage claims are taken, court costs shall not be payable  
14 by the department for prosecuting such suits.

15 (3) The director shall have a seal inscribed "Department of Labor  
16 and Industries--State of Washington" and all courts shall take judicial  
17 notice of such seal. Obedience to subpoenas issued by the director or  
18 authorized representative shall be enforced by the courts in any  
19 county.

20 (4) The director or authorized representative shall have free  
21 access to all places and works of labor. Any employer or any agent or  
22 employee of such employer who refuses the director or authorized  
23 representative admission therein, or who, when requested by the  
24 director or authorized representative, wilfully neglects or refuses to  
25 furnish the director or authorized representative any statistics or  
26 information pertaining to his or her lawful duties, which statistics or  
27 information may be in his or her possession or under the control of the  
28 employer or agent, shall be guilty of a misdemeanor.

29 **Sec. 8.** RCW 49.52.050 and 1941 c 72 s 1 are each amended to read  
30 as follows:

31 Any employer or officer, vice principal or agent of any employer,  
32 whether said employer be in private business or an elected public  
33 official, who:

34 (1) Shall collect or receive from any employee a rebate of any part  
35 of wages theretofore paid by such employer to such employee; (~~or~~)

36 (2) Willfully and with intent to deprive the employee of any part  
37 of his or her wages, shall pay any employee a lower wage than the wage  
38 such employer is obligated to pay such employee by any statute,

1 ordinance, or contract((+)), or under or by virtue of chapter 49.12,  
2 49.46, or 49.48 RCW;

3 (3) Shall willfully make or cause another to make any false entry  
4 in any employer's books or records purporting to show the payment of  
5 more wages to an employee than such employee received; or

6 (4) Being an employer or a person charged with the duty of keeping  
7 any employer's books or records shall willfully fail or cause another  
8 to fail to show openly and clearly in due course in such employer's  
9 books and records any rebate of or deduction from any employee's wages;  
10 or

11 (5) Shall willfully receive or accept from any employee any false  
12 receipt for wages;  
13 shall be guilty of a misdemeanor.

14 **Sec. 9.** RCW 49.52.070 and 1939 c 195 s 3 are each amended to read  
15 as follows:

16 Any employer and any officer, vice principal, or agent of any  
17 employer who shall violate (~~any of the provisions of subdivisions (1)~~  
18 ~~and (2) of~~) RCW 49.52.050 (1) and (2) shall be liable in a civil  
19 action by the aggrieved employee (~~or his assignee to~~) under RCW  
20 49.48.030 for judgment for twice the amount of ((the)) wages unlawfully  
21 rebated or withheld by way of exemplary damages((, together with costs  
22 of suit and a reasonable sum for attorney's fees: PROVIDED, HOWEVER,  
23 That the benefits of this section shall not be available to any  
24 employee who has knowingly submitted to such violations)). However,  
25 the exemplary damages are not available to any employee who knowingly  
26 has submitted to the violation.

27 **Sec. 10.** RCW 49.52.080 and 1939 c 195 s 4 are each amended to read  
28 as follows:

29 The violations by an employer or any officer, vice principal, or  
30 agent of any employer of (~~any of the provisions of subdivisions (3),~~  
31 ~~(4), and (5) of~~) RCW 49.52.050 (3), (4), and (5) shall raise a  
32 presumption that any deduction from or underpayment of any employee's  
33 wages connected with such violation was willful.

34 NEW SECTION. **Sec. 11.** RCW 49.12.150 and 1913 c 174 s 18 are each  
35 repealed.

1        NEW SECTION.    **Sec. 12.**    This act is necessary for the immediate  
2    preservation of the public peace, health, or safety, or support of the  
3    state government and its existing public institutions, and takes effect  
4    immediately.

--- END ---