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**SUBSTITUTE SENATE BILL 5569**

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**State of Washington**

**55th Legislature**

**1997 Regular Session**

**By** Senate Committee on Commerce & Labor (originally sponsored by Senators Schow, Sellar and Wood)

Read first time 02/12/97.

1 AN ACT Relating to overtime compensation for commissioned  
2 salespersons; amending RCW 49.46.130 and 49.46.010; adding a new  
3 section to chapter 49.46 RCW; creating a new section; and declaring an  
4 emergency.

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

6 NEW SECTION. **Sec. 1.** A new section is added to chapter 49.46 RCW  
7 to read as follows:

8 Section 3, chapter 289, Laws of 1975 1st ex. sess., codified as RCW  
9 49.46.130, was adopted for the purpose of creating conformity between  
10 state overtime pay standards and the federal fair labor standards act.  
11 RCW 49.46.130(2)(h) was intended to incorporate alternative federal  
12 premium guarantee standards for retail commissioned salespersons, found  
13 at 29 U.S.C. 207(i), into the state wage and hour law.

14 The legislature finds that retail sales typically peak during  
15 holiday seasons and events such as product promotions and new product  
16 arrivals. Retail commissioned salespersons can maximize their incomes,  
17 and are therefore most benefited, by maximizing the hours they work  
18 during periods when the sales per hour ratio is high. Employment  
19 policies that penalize employers for working retail commissioned

1 salespersons more than forty hours in a peak sales work week are  
2 detrimental to the well-being of Washington's retail commissioned  
3 salespersons.

4 **Sec. 2.** RCW 49.46.130 and 1995 c 5 s 1 are each amended to read as  
5 follows:

6 (1) Except as otherwise provided in this section, no employer shall  
7 employ any of his employees for a work week longer than forty hours  
8 unless such employee receives compensation for his employment in excess  
9 of the hours above specified at a rate not less than one and one-half  
10 times the regular rate at which he is employed.

11 (2) This section does not apply to:

12 (a) Any person exempted pursuant to RCW 49.46.010(5). The payment  
13 of compensation or provision of compensatory time off in addition to a  
14 salary shall not be a factor in determining whether a person is  
15 exempted under RCW 49.46.010(5)(c);

16 (b) Employees who request compensating time off in lieu of overtime  
17 pay;

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

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

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

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

34 (g) Any individual employed (i) on a farm, in the employ of any  
35 person, in connection with the cultivation of the soil, or in  
36 connection with raising or harvesting any agricultural or horticultural  
37 commodity, including raising, shearing, feeding, caring for, training,  
38 and management of livestock, bees, poultry, and furbearing animals and

1 wildlife, or in the employ of the owner or tenant or other operator of  
2 a farm in connection with the operation, management, conservation,  
3 improvement, or maintenance of such farm and its tools and equipment;  
4 or (ii) in packing, packaging, grading, storing or delivering to  
5 storage, or to market or to a carrier for transportation to market, any  
6 agricultural or horticultural commodity; or (iii) commercial canning,  
7 commercial freezing, or any other commercial processing, or with  
8 respect to services performed in connection with the cultivation,  
9 raising, harvesting, and processing of oysters or in connection with  
10 any agricultural or horticultural commodity after its delivery to a  
11 terminal market for distribution for consumption;

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

23 (3) No employer shall be deemed to have violated subsection (1) of  
24 this section by employing any employee of a retail or service  
25 establishment for a work week in excess of the applicable work week  
26 specified in subsection (1) of this section if:

27 (a) The regular rate of pay of the employee is in excess of one and  
28 one-half times the minimum hourly rate required under RCW 49.46.020;  
29 and

30 (b) More than half of the employee's compensation for a  
31 representative period, of not less than one month, represents  
32 commissions on goods or services.

33 In determining the proportion of compensation representing  
34 commissions, all earnings resulting from the application of a bona fide  
35 commission rate is to be deemed commissions on goods or services  
36 without regard to whether the computed commissions exceed the draw or  
37 guarantee.

38 (4) No employer of commissioned salespeople primarily engaged in  
39 the business of selling automobiles, trucks, recreational vessels,

1 recreational vessel trailers, recreational vehicle trailers,  
2 recreational campers, or manufactured housing to ultimate purchasers  
3 shall violate subsection (1) of this section with respect to such  
4 commissioned salespeople if the commissioned salespeople are paid the  
5 greater of:

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

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

12 ~~((+4))~~ (5) No public agency shall be deemed to have violated  
13 subsection (1) of this section with respect to the employment of any  
14 employee in fire protection activities or any employee in law  
15 enforcement activities (including security personnel in correctional  
16 institutions) if: (a) In a work period of twenty-eight consecutive  
17 days the employee receives for tours of duty which in the aggregate  
18 exceed two hundred forty hours; or (b) in the case of such an employee  
19 to whom a work period of at least seven but less than twenty-eight days  
20 applies, in his or her work period the employee receives for tours of  
21 duty which in the aggregate exceed a number of hours which bears the  
22 same ratio to the number of consecutive days in his or her work period  
23 as two hundred forty hours bears to twenty-eight days; compensation at  
24 a rate not less than one and one-half times the regular rate at which  
25 he or she is employed.

26 **Sec. 3.** RCW 49.46.010 and 1993 c 281 s 56 are each amended to read  
27 as follows:

28 As used in this chapter:

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

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

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

36 (4) "Employer" includes any individual, partnership, association,  
37 corporation, business trust, or any person or group of persons acting

1 directly or indirectly in the interest of an employer in relation to an  
2 employee;

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

5 (a) Any individual (i) employed as a hand harvest laborer and paid  
6 on a piece rate basis in an operation which has been, and is generally  
7 and customarily recognized as having been, paid on a piece rate basis  
8 in the region of employment; (ii) who commutes daily from his or her  
9 permanent residence to the farm on which he or she is employed; and  
10 (iii) who has been employed in agriculture less than thirteen weeks  
11 during the preceding calendar year;

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

15 (c) Any individual employed in a bona fide executive,  
16 administrative, or professional capacity or in the capacity of outside  
17 salesman as those terms are defined and delimited by rules of the  
18 director. However, those terms shall be defined and delimited by the  
19 Washington personnel resources board pursuant to chapter 41.06 RCW;

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

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

38 (f) Any newspaper vendor or carrier;

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

3 (h) Any individual engaged in forest protection and fire prevention  
4 activities;

5 (i) Any individual employed by any charitable institution charged  
6 with child care responsibilities engaged primarily in the development  
7 of character or citizenship or promoting health or physical fitness or  
8 providing or sponsoring recreational opportunities or facilities for  
9 young people or members of the armed forces of the United States;

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

14 (k) Any resident, inmate, or patient of a state, county, or  
15 municipal correctional, detention, treatment or rehabilitative  
16 institution;

17 (l) Any individual who holds a public elective or appointive office  
18 of the state, any county, city, town, municipal corporation or quasi  
19 municipal corporation, political subdivision, or any instrumentality  
20 thereof, or any employee of the state legislature;

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

23 (n) Any individual employed as a seaman on a vessel other than an  
24 American vessel((-))i

25 (6) "Occupation" means any occupation, service, trade, business,  
26 industry, or branch or group of industries or employment or class of  
27 employment in which employees are gainfully employed;

28 (7) "Retail or service establishment" means an establishment  
29 seventy-five percent of whose annual dollar volume of sales of goods or  
30 services, or both, is not for resale and is recognized as retail sales  
31 or services in the particular industry.

32 NEW SECTION. Sec. 4. Nothing in this act shall be construed to  
33 alter the terms, conditions, or practices contained in any collective  
34 bargaining agreement in effect at the time of the effective date of  
35 this act until the expiration date of such agreement.

36 NEW SECTION. Sec. 5. This act is necessary for the immediate  
37 preservation of the public peace, health, or safety, or support of the

1 state government and its existing public institutions, and takes effect  
2 immediately.

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