

SENATE BILL REPORT

ESB 5720

As Passed Senate, June 27, 2017

Title: An act relating to payment of production-based compensation wages for the employment and use of labor in agricultural activities and in the production, handling, and storage of farm products.

Brief Description: Addressing the payment of production-based compensation wages for the employment and use of labor in agricultural activities and in the production, handling, and storage of farm products.

Sponsors: Senators Hawkins, Hobbs, Takko, Baumgartner, Sheldon, King, Brown and Schoesler.

Brief History:

Committee Activity: Agriculture, Water, Trade & Economic Development: 2/14/17, 2/16/17 [DP, DNP, w/oRec].

Floor Activity:

Passed Senate: 3/03/17, 28-18.

Third Special Session: Passed Senate: 6/27/17, 26-21.

Brief Summary of Engrossed Bill

- Provides that an agricultural employer who paid employees may elect to pay remedial compensation to their employees for break times and rest periods under certain remedies, and if the employer pays remedial compensation, the employer shall not be held liable for a claim or cause of action for failure to pay for break times and rest periods.
- Requires an employer who elects to pay remedial compensation to make reasonable efforts to locate and pay the compensation to their employee, and if the employer is unable to locate an employee, the employer must pay the remedial compensation to the Department of Labor and Industries.

SENATE COMMITTEE ON AGRICULTURE, WATER, TRADE & ECONOMIC DEVELOPMENT

Majority Report: Do pass.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Signed by Senators Warnick, Chair; Hawkins, Vice Chair; Brown, Honeyford, Pearson and Short.

Minority Report: Do not pass.

Signed by Senators Chase, Ranking Minority Member; Wellman, Assistant Ranking Minority Member; McCoy and Van De Wege.

Minority Report: That it be referred without recommendation.

Signed by Senator Takko.

Staff: Karen Epps (786-7424)

Background: The Minimum Wage Act (MWA) sets forth overtime in addition to minimum wage requirements. The Industrial Welfare Act deals with wages, hours, and working conditions, including child labor, work apparel, and other matters. Under prevailing wage provisions, contractors and subcontractors on public works projects and public building service maintenance contracts must pay their workers prevailing wages. The Wage Payment Act provides for administrative or court action to collect wages under the MWA and other wage laws, as well as establishes other requirements. It is unlawful to make certain deductions from wages and to otherwise fail to pay wages under other laws.

In 2015, the state Supreme Court was asked to answer two certified questions arising from a class action employment lawsuit pending in federal district court, specifically:

1. Does an agricultural employer have an obligation under Washington's administrative code or the MWA to separately pay piece-rate workers for the rest breaks to which they are entitled?
2. If the answer is "yes," how must Washington agricultural employers calculate the rate of pay for the rest break time to which piece-rate workers are entitled?

The state Supreme Court described piece rate wages as wages, "tied to an employee's output (for example, per pound of fruit harvested) and is earned only when the employee is actively producing." The state Supreme Court held that employers must pay employees for rest breaks separate and apart from piece rate wage payments and the rate of pay for the rest break time must equal at least the applicable minimum wage or the employee's regular rate, whichever is greater. (*Demetrio v. Sakuma Brothers Farms, Inc.*, 183 Wn.2d 649, 653. (2015), considering whether employers that pay piece rate wages must separately pay piece-rate workers for rest breaks under the agricultural rest break regulation requiring employers to provide workers a 10-minute rest period in each 4-hour period of work.)

Summary of Engrossed Bill: An agricultural employer who paid employees on a production based or piece rate basis may elect to pay remedial compensation to their employees for break times or rest periods under one of the two remedies:

- an employer may make payments, including interest at the rate of 12 percent per annum from the date the payments were due, to each of its employees for break times or rest periods from the prior three years; or
- an employer may pay each employee an amount equal to 4.35 percent of the employee's gross earnings, including interest at the rate of 12 percent per annum from the date the wages were due to the employee during the prior three years.

If an employer elects to pay remedial compensation, the employer must make reasonable and good faith efforts to locate and pay remedial compensation to their employees. If an employer is unable to locate an employee, the employer must pay the remedial compensation to the Department of Labor and Industries. The Department of Labor and Industries must establish a system for tracking, locating, and paying out funds to these employees. A committee consisting of the Director of the Department of Labor and Industries or the Director's designee, the chairs and ranking members of the committees on agriculture in the Senate and House of Representatives, and a representative from an association representing agricultural workers and a labor union association must determine how many funds remaining after January 30, 2021, should be spent on behalf of agricultural employees in the state.

Employers that have paid remedial compensation by January 1, 2018, shall not be held liable for any claim or cause of action based solely upon the employer's failure to timely pay the employee compensation for break times or rest periods during the three-year period prior to the effective date of this bill.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: Yes.

Effective Date: The bill contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony on Original Bill: PRO: Tree fruit growers have been struggling with the challenges and the confusion created from a 2015 state Supreme Court decision. This bill is designed to provide clarity for employers and the workers. The bill provides a mechanism for employers to compensate workers for past rest periods. Washington's piece rate laws are lacking clarity and making it difficult for Washington's growers, large or small, to offer piece rate jobs for their employees. If the law stays ambiguous, it will force growers to only be able to offer to pay hourly rates in order to avoid potential legal problems. Growers thought they were following the law before the Supreme Court decision, but that ended up not being the case. Growers are happy to pay the wages, but they would like guidance from the Legislature to go back and pay those wages and also to provide clarity going forward so that growers know when they are paying piece rate wages, and know what they are paying for. Growers want to be able to pay employees without the veil of complications and lawsuits. Employers need to know how to pay employees in order to comply with the law. This bill provides clear rules for small farmers to follow when paying their employees fully and fairly. This bill resolves some of the potential liability for prior issues related to piece rate or production-based compensation and break pay. This bill reduces many of the administrative burdens facing a small farmer. This bill is needed so that growers can pay employees retroactively for rest breaks without the threat of class action lawsuits.

CON: Farmworkers need the opportunity to take a break after working outside all day. Farmworkers are not machines, they are people who deserve rest breaks. The court decision

says farmworkers should take a rest break and they should be paid at the hourly rate they are picking piece rate. This bill will make things more complicated for farmworkers and employers. The legislation denies agricultural workers their right to recover a full amount on their unpaid wages for work that they have already performed. This bill gives employers protection if they are sued as a way to avoid paying a penalty for shorting their workers. This bill provides a path for agricultural employers who have been sued and have cases pending before the Washington Supreme Court to avoid liability. This bill helps these companies avoid their legal obligations by providing a defense to the claims in those cases.

Persons Testifying: PRO: Senator Brad Hawkins, Prime Sponsor; Armando Escareno, Flor Maldonado, Kershaw Companies; Chris McCarthy, Auvil Fruit Company; West Mathison, Stemilt Growers; Jim Colbert, Jim Colbert Orchards, LLC; Richard Clyne, WA Farm Bureau; Bob Battles, Assoc of WA Business.

CON: Ramón Torres, Familias Unidas por la Justicia; Rosalinda Guillen, Community to Community Development; Antonio Ginatta, Columbia Legal Services; Eric Gonzalez, WA State Labor Council, AFL-CIO.

Persons Signed In To Testify But Not Testifying: No one.