

**ESSB 5172 - H AMD 677**

By Representative Hoff

**ADOPTED 04/09/2021**

1 Strike everything after the enacting clause and insert the  
2 following:

3 "NEW SECTION. **Sec. 1.** In order to stabilize, strengthen, and  
4 protect our state's agricultural workforce and economy, it is the  
5 intent of the legislature to pass the laws necessary to protect  
6 farmworkers and to provide agricultural employers with certainty and  
7 predictability.

8 The legislature intends to address the historical exceptions of  
9 agricultural work from overtime standards from both the federal fair  
10 labor standards act and the state minimum wage act when they were  
11 enacted over 60 years ago. Excluded from the opportunity to earn  
12 overtime pay, farmworkers across our state remain among our state's  
13 poorest workers. A United States department of labor study in 2016  
14 found that nationally, 30 percent of farmworker families live below  
15 the poverty line, almost double the poverty rate of American  
16 families overall. The state department of health found that the  
17 current novel coronavirus pandemic has had a significant and  
18 disproportionate impact on farmworkers. The virus' risks to  
19 essential farmworkers from potential workplace exposures are  
20 compounded by systemic barriers to testing, prevention measures, and  
21 medical care.

22 The legislature also intends to avoid disruptions within the  
23 state's vital agricultural sector. While Washington is well known as  
24 the national leader in apple production, the state's agricultural  
25 sector is incredibly diverse: Over 300 crops are harvested, and a  
26 variety of livestock are raised on over 35,000 farms across the  
27 state. The robust size of our agricultural sector means our state

1 overall ranks in the top 10 nationally in the size of our farm labor  
2 force. Agriculture is a cornerstone of our state economy.

3 Uncertainty from recent legal decisions regarding overtime standards  
4 are compounding the pandemic's disruptions to the food chain and the  
5 safety challenges of operating during a public health crisis.

6 The legislature intends to provide clear overtime standards to  
7 reduce litigation between parties in this key sector of the state's  
8 economy during the challenges and additional costs brought on by the  
9 novel coronavirus and to protect the security of our food supply  
10 chain. This act's transitional approach is reasonable to achieve the  
11 legislature's purpose of increasing the safety of an at risk and  
12 essential workforce, increasing the public welfare of low-income  
13 individuals by removing a historical barrier to their earning  
14 potential, and maintaining the food security and economic security  
15 provided by a stable agricultural sector.

16

17 **Sec. 2.** RCW 49.46.130 and 2013 c 207 s 1 are each amended to  
18 read as follows:

19 (1) Except as otherwise provided in this section, no employer  
20 shall employ any of his or her employees for a workweek longer than  
21 forty hours unless such employee receives compensation for his or  
22 her employment in excess of the hours above specified at a rate not  
23 less than one and one-half times the regular rate at which he or she  
24 is employed.

25 (2) This section does not apply to:

26 (a) Any person exempted pursuant to RCW 49.46.010(3). The  
27 payment of compensation or provision of compensatory time off in  
28 addition to a salary shall not be a factor in determining whether a  
29 person is exempted under RCW 49.46.010(3)(c);

30 (b) Employees who request compensating time off in lieu of  
31 overtime pay;

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

34

1 (d) Seasonal employees who are employed at concessions and  
2 recreational establishments at agricultural fairs, including those  
3 seasonal employees employed by agricultural fairs, within the state  
4 provided that the period of employment for any seasonal employee at  
5 any or all agricultural fairs does not exceed fourteen working days  
6 a year;

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

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

16 (g) Any individual employed (~~((i) on a farm, in the employ of~~  
17 ~~any person, in connection with the cultivation of the soil, or in~~  
18 ~~connection with raising or harvesting any agricultural or~~  
19 ~~horticultural commodity, including raising, shearing, feeding,~~  
20 ~~caring for, training, and management of livestock, bees, poultry,~~  
21 ~~and furbearing animals and wildlife, or in the employ of the owner~~  
22 ~~or tenant or other operator of a farm in connection with the~~  
23 ~~operation, management, conservation, improvement, or maintenance of~~  
24 ~~such farm and its tools and equipment; or (ii) in packing,~~  
25 ~~packaging, grading, storing or delivering to storage, or to market~~  
26 ~~or to a carrier for transportation to market, any agricultural or~~  
27 ~~horticultural commodity; or (iii) commercial canning, commercial~~  
28 ~~freezing, or any other commercial processing, or with respect to~~  
29 ~~services performed in connection with the cultivation, raising,~~  
30 ~~harvesting, and processing of oysters or in connection with any~~  
31 ~~agricultural or horticultural commodity after its delivery to a~~  
32 ~~terminal market for distribution for consumption)) as an  
33 agricultural employee. This exemption from subsection (1) of this  
34 section applies only until December 31, 2021;~~

1 (h) Any industry in which federal law provides for an overtime  
2 payment based on a workweek other than forty hours. However, the  
3 provisions of the federal law regarding overtime payment based on a  
4 workweek other than forty hours shall nevertheless apply to  
5 employees covered by this section without regard to the existence of  
6 actual federal jurisdiction over the industrial activity of the  
7 particular employer within this state. For the purposes of this  
8 subsection, "industry" means a trade, business, industry, or other  
9 activity, or branch, or group thereof, in which individuals are  
10 gainfully employed (section 3(h) of the Fair Labor Standards Act of  
11 1938, as amended (Public Law 93-259));

12 (i) Any hours worked by an employee of a carrier by air subject  
13 to the provisions of subchapter II of the Railway Labor Act (45  
14 U.S.C. Sec. 181 et seq.), when such hours are voluntarily worked by  
15 the employee pursuant to a shift-trading practice under which the  
16 employee has the opportunity in the same or in other workweeks to  
17 reduce hours worked by voluntarily offering a shift for trade or  
18 reassignment; and

19 (j) Any individual licensed under chapter 18.85 RCW unless the  
20 individual is providing real estate brokerage services under a  
21 written contract with a real estate firm which provides that the  
22 individual is an employee. For purposes of this subsection (2)(j),  
23 "real estate brokerage services" and "real estate firm" mean the  
24 same as defined in RCW 18.85.011.

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

29 (a) The regular rate of pay of the employee is in excess of one  
30 and one-half times the minimum hourly rate required under RCW  
31 49.46.020; and

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

1 In determining the proportion of compensation representing  
2 commissions, all earnings resulting from the application of a bona  
3 fide commission rate is to be deemed commissions on goods or  
4 services without regard to whether the computed commissions exceed  
5 the draw or guarantee.

6 (4) No employer of commissioned salespeople primarily engaged in  
7 the business of selling automobiles, trucks, recreational vessels,  
8 recreational vessel trailers, recreational vehicle trailers,  
9 recreational campers, manufactured housing, or farm implements to  
10 ultimate purchasers shall violate subsection (1) of this section  
11 with respect to such commissioned salespeople if the commissioned  
12 salespeople are paid the greater of:

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

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

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

33 (6)(a) Beginning January 1, 2022, any agricultural employee  
34 shall not be employed for more than 55 hours in any one workweek

1 unless the agricultural employee receives one and one-half times  
2 that agricultural employee's regular rate of pay for all hours  
3 worked over 55 in any one workweek.

4 (b) Beginning January 1, 2023, any agricultural employee shall  
5 not be employed for more than 48 hours in any one workweek unless  
6 the agricultural employee receives one and one-half times that  
7 agricultural employee's regular rate of pay for all hours worked  
8 over 48 in any one workweek.

9 (c) Beginning January 1, 2024, any agricultural employee shall  
10 not be employed for more than 40 hours in any one workweek unless  
11 the agricultural employee receives one and one-half times that  
12 agricultural employee's regular rate of pay for all hours worked  
13 over 40 in any one workweek.

14 (7)(a) No damages, statutory or civil penalties, attorneys' fees  
15 and costs, or other type of relief may be granted against an  
16 employer to an agricultural or dairy employee seeking unpaid  
17 overtime due to the employee's historical exclusion from overtime  
18 under subsection (2)(g) of this section, as it existed on November  
19 4, 2020.

20 (b) This subsection applies to all claims, causes of actions,  
21 and proceedings commenced on or after November 5, 2020, regardless  
22 of when the claim or cause of action arose. To this extent, this  
23 subsection applies retroactively, but in all other respects it  
24 applies prospectively.

25 (c) This subsection does not apply to dairy employees entitled  
26 to backpay or other relief as a result of being a member in  
27 the class of plaintiffs in Martinez-Cuevas v. DeRuyter Bros. Dairy,  
28 196 Wn.2d 506 (2020).

29 (8) For the purposes of this section, "agricultural employee"  
30 means any individual employed: (a) On a farm, in the employ of any  
31 person, in connection with the cultivation of the soil, or in  
32 connection with raising or harvesting any agricultural or  
33 horticultural commodity, including raising, shearing, feeding,  
34 caring for, training, and management of livestock, bees, poultry,

1 and furbearing animals and wildlife, or in the employ of the owner  
2 or tenant or other operator of a farm in connection with the  
3 operation, management, conservation, improvement, or maintenance of  
4 such farm and its tools and equipment; (b) in packing, packaging,  
5 grading, storing or delivering to storage, or to market or to a  
6 carrier for transportation to market, any agricultural or  
7 horticultural commodity; or (c) commercial canning, commercial  
8 freezing, or any other commercial processing, or with respect to  
9 services performed in connection with the cultivation, raising,  
10 harvesting, and processing of oysters or in connection with any  
11 agricultural or horticultural commodity after its delivery to a  
12 terminal market for distribution for consumption. An agricultural  
13 employee does not include a dairy employee.

14 (9) For the purposes of this section, "dairy employee" includes  
15 any employee engaged in dairy cattle and milk production activities  
16 described in code 112120 of the North American industry  
17 classification system."

18

19 Correct the title.

20

- EFFECT: Restructures the bill, placing the provisions on phased-in overtime, retroactive claims, and the expiration of the overtime exemption into one section.
- Re-words the retroactivity provision to specify that it applies to claims, causes of action, and proceedings commenced on or after November 5, 2020, regardless of when the cause of action or claim arose and that in all other respects it applies prospectively.
- Clarifies the definition of dairy employee.
- Clarifies intent section language regarding number of years the overtime exemption has been in place.

--- END ---