

SSB 5172 - S AMD 459
By Senator Keiser

ADOPTED AS AMENDED 03/09/2021

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 70 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 families
16 overall. The state department of health found that the current novel
17 coronavirus pandemic has had a significant and disproportionate
18 impact on farmworkers. The virus' risks to essential farmworkers from
19 potential workplace exposures are compounded by systemic barriers to
20 testing, prevention measures, and medical care.

21 The legislature also intends to avoid disruptions within the
22 state's vital agricultural sector. While Washington is well known as
23 the national leader in apple production, the state's agricultural
24 sector is incredibly diverse: Over 300 crops are harvested, and a
25 variety of livestock are raised on over 35,000 farms across the
26 state. The robust size of our agricultural sector means our state
27 overall ranks in the top 10 nationally in the size of our farm labor
28 force. Agriculture is a cornerstone of our state economy. Uncertainty
29 from recent legal decisions regarding overtime standards are
30 compounding the pandemic's disruptions to the food chain and the
31 safety challenges of operating during a public health crisis.

32 The legislature intends to provide clear overtime standards to
33 reduce litigation between parties in this key sector of the state's

1 economy during the challenges and additional costs brought on by the
2 novel coronavirus and to protect the security of our food supply
3 chain. This act's transitional approach is reasonable to achieve the
4 legislature's purpose of increasing the safety of an at risk and
5 essential workforce, increasing the public welfare of low-income
6 individuals by removing a historical barrier to their earning
7 potential, and maintaining the food security and economic security
8 provided by a stable agricultural sector.

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

11 (1) Except as otherwise provided in this section and section 4 of
12 this act, no employer shall employ any of his or her employees for a
13 workweek longer than forty hours unless such employee receives
14 compensation for his or her employment in excess of the hours above
15 specified at a rate not less than one and one-half times the regular
16 rate at which he or she is employed.

17 (2) This section does not apply to:

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

22 (b) Employees who request compensating time off in lieu of
23 overtime pay;

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

26 (d) Seasonal employees who are employed at concessions and
27 recreational establishments at agricultural fairs, including those
28 seasonal employees employed by agricultural fairs, within the state
29 provided that the period of employment for any seasonal employee at
30 any or all agricultural fairs does not exceed fourteen working days a
31 year;

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

35 (f) An individual employed as a truck or bus driver who is
36 subject to the provisions of the Federal Motor Carrier Act (49 U.S.C.
37 Sec. 3101 et seq. and 49 U.S.C. Sec. 10101 et seq.), if the
38 compensation system under which the truck or bus driver is paid

1 includes overtime pay, reasonably equivalent to that required by this
2 subsection, for working longer than forty hours per week;

3 (g) (~~Any~~) Except as otherwise provided in section 4 of this
4 act, any individual employed (i) on a farm, in the employ of any
5 person, in connection with the cultivation of the soil, or in
6 connection with raising or harvesting any agricultural or
7 horticultural commodity, including raising, shearing, feeding, caring
8 for, training, and management of livestock, bees, poultry, and
9 furbearing animals and wildlife, or in the employ of the owner or
10 tenant or other operator of a farm in connection with the operation,
11 management, conservation, improvement, or maintenance of such farm
12 and its tools and equipment; or (ii) in packing, packaging, grading,
13 storing or delivering to storage, or to market or to a carrier for
14 transportation to market, any agricultural or horticultural
15 commodity; or (iii) commercial canning, commercial freezing, or any
16 other commercial processing, or with respect to services performed in
17 connection with the cultivation, raising, harvesting, and processing
18 of oysters or in connection with any agricultural or horticultural
19 commodity after its delivery to a terminal market for distribution
20 for consumption;

21 (h) Any industry in which federal law provides for an overtime
22 payment based on a workweek other than forty hours. However, the
23 provisions of the federal law regarding overtime payment based on a
24 workweek other than forty hours shall nevertheless apply to employees
25 covered by this section without regard to the existence of actual
26 federal jurisdiction over the industrial activity of the particular
27 employer within this state. For the purposes of this subsection,
28 "industry" means a trade, business, industry, or other activity, or
29 branch, or group thereof, in which individuals are gainfully employed
30 (section 3(h) of the Fair Labor Standards Act of 1938, as amended
31 (Public Law 93-259));

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

39 (j) Any individual licensed under chapter 18.85 RCW unless the
40 individual is providing real estate brokerage services under a

1 written contract with a real estate firm which provides that the
2 individual is an employee. For purposes of this subsection (2)(j),
3 "real estate brokerage services" and "real estate firm" mean the same
4 as defined in RCW 18.85.011.

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

9 (a) The regular rate of pay of the employee is in excess of one
10 and one-half times the minimum hourly rate required under RCW
11 49.46.020; and

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

15 In determining the proportion of compensation representing
16 commissions, all earnings resulting from the application of a bona
17 fide commission rate is to be deemed commissions on goods or services
18 without regard to whether the computed commissions exceed the draw or
19 guarantee.

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

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

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

33 (5) No public agency shall be deemed to have violated subsection
34 (1) of this section with respect to the employment of any employee in
35 fire protection activities or any employee in law enforcement
36 activities (including security personnel in correctional
37 institutions) if: (a) In a work period of twenty-eight consecutive
38 days the employee receives for tours of duty which in the aggregate
39 exceed two hundred forty hours; or (b) in the case of such an
40 employee to whom a work period of at least seven but less than

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

7 **Sec. 3.** RCW 49.46.130 and 2013 c 207 s 1 are each amended to
8 read as follows:

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

15 (2) This section does not apply to:

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

20 (b) Employees who request compensating time off in lieu of
21 overtime pay;

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

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

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

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

1 ~~(g) ((Any individual employed (i) on a farm, in the employ of any~~
2 ~~person, in connection with the cultivation of the soil, or in~~
3 ~~connection with raising or harvesting any agricultural or~~
4 ~~horticultural commodity, including raising, shearing, feeding, caring~~
5 ~~for, training, and management of livestock, bees, poultry, and~~
6 ~~furbearing animals and wildlife, or in the employ of the owner or~~
7 ~~tenant or other operator of a farm in connection with the operation,~~
8 ~~management, conservation, improvement, or maintenance of such farm~~
9 ~~and its tools and equipment; or (ii) in packing, packaging, grading,~~
10 ~~storing or delivering to storage, or to market or to a carrier for~~
11 ~~transportation to market, any agricultural or horticultural~~
12 ~~commodity; or (iii) commercial canning, commercial freezing, or any~~
13 ~~other commercial processing, or with respect to services performed in~~
14 ~~connection with the cultivation, raising, harvesting, and processing~~
15 ~~of oysters or in connection with any agricultural or horticultural~~
16 ~~commodity after its delivery to a terminal market for distribution~~
17 ~~for consumption;~~

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

29 ~~((i))~~ (h) Any hours worked by an employee of a carrier by air
30 subject to the provisions of subchapter II of the Railway Labor Act
31 (45 U.S.C. Sec. 181 et seq.), when such hours are voluntarily worked
32 by the employee pursuant to a shift-trading practice under which the
33 employee has the opportunity in the same or in other workweeks to
34 reduce hours worked by voluntarily offering a shift for trade or
35 reassignment; and

36 ~~((j))~~ (i) Any individual licensed under chapter 18.85 RCW
37 unless the individual is providing real estate brokerage services
38 under a written contract with a real estate firm which provides that
39 the individual is an employee. For purposes of this subsection (2)

1 (~~(j)~~) (i), "real estate brokerage services" and "real estate firm"
2 mean the same as defined in RCW 18.85.011.

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

7 (a) The regular rate of pay of the employee is in excess of one
8 and one-half times the minimum hourly rate required under RCW
9 49.46.020; and

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

13 In determining the proportion of compensation representing
14 commissions, all earnings resulting from the application of a bona
15 fide commission rate is to be deemed commissions on goods or services
16 without regard to whether the computed commissions exceed the draw or
17 guarantee.

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

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

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

31 (5) No public agency shall be deemed to have violated subsection
32 (1) of this section with respect to the employment of any employee in
33 fire protection activities or any employee in law enforcement
34 activities (including security personnel in correctional
35 institutions) if: (a) In a work period of twenty-eight consecutive
36 days the employee receives for tours of duty which in the aggregate
37 exceed two hundred forty hours; or (b) in the case of such an
38 employee to whom a work period of at least seven but less than
39 twenty-eight days applies, in his or her work period the employee
40 receives for tours of duty which in the aggregate exceed a number of

1 hours which bears the same ratio to the number of consecutive days in
2 his or her work period as two hundred forty hours bears to twenty-
3 eight days; compensation at a rate not less than one and one-half
4 times the regular rate at which he or she is employed.

5 NEW SECTION. **Sec. 4.** A new section is added to chapter 49.46
6 RCW to read as follows:

7 (1) The overtime requirements of RCW 49.46.130 apply to hours
8 worked by an agricultural employee for an employer engaged in dairy
9 cattle and milk production activities described in code 112120 of the
10 North American industry classification system.

11 (2) Beginning January 1, 2022, any agricultural employee other
12 than employees described in subsection (1) of this section shall not
13 be employed for more than 55 hours in any one workweek unless the
14 agricultural employee receives one and one-half times that
15 agricultural employee's regular rate of pay for all hours worked over
16 55 in any one workweek.

17 (3) Beginning January 1, 2023, any agricultural employee other
18 than employees described in subsection (1) of this section shall not
19 be employed for more than 48 hours in any one workweek unless the
20 agricultural employee receives one and one-half times that
21 agricultural employee's regular rate of pay for all hours worked over
22 48 in any one workweek.

23 (4) Beginning January 1, 2024, any agricultural employee other
24 than employees described in subsection (1) of this section shall not
25 be employed for more than 40 hours in any one workweek unless the
26 agricultural employee receives one and one-half times that
27 agricultural employee's regular rate of pay for all hours worked over
28 40 in any one workweek.

29 (5) 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, caring
34 for, training, and management of livestock, bees, poultry, and
35 furbearing animals and wildlife, or in the employ of the owner or
36 tenant or other operator of a farm in connection with the operation,
37 management, conservation, improvement, or maintenance of such farm
38 and its tools and equipment; (b) in packing, packaging, grading,
39 storing or delivering to storage, or to market or to a carrier for

1 transportation to market, any agricultural or horticultural
2 commodity; or (c) commercial canning, commercial freezing, or any
3 other commercial processing, or with respect to services performed in
4 connection with the cultivation, raising, harvesting, and processing
5 of oysters or in connection with any agricultural or horticultural
6 commodity after its delivery to a terminal market for distribution
7 for consumption.

8 (6) The payment of compensation or provision of compensatory time
9 off in addition to a salary required under this section shall not be
10 a factor in determining whether a person is exempt under RCW
11 49.46.010(3)(c).

12 NEW SECTION. **Sec. 5.** A new section is added to chapter 49.48
13 RCW to read as follows:

14 (1) Before January 1, 2022, no damages, statutory penalties,
15 attorneys' fees and costs, or other type of relief may be granted
16 against an employer to an agricultural employee seeking unpaid
17 overtime due to the agricultural employee. This subsection applies
18 retroactively to claims filed before the effective date of this
19 section.

20 (2)(a) After January 1, 2022, for any claim or cause of action
21 filed between November 5, 2020, and January 1, 2025, seeking unpaid
22 overtime due to an agricultural employee for work performed between
23 November 5, 2017, and January 1, 2022, damages, statutory or civil
24 penalties, and attorneys' fees and costs shall not be granted against
25 an employer, if the employer:

26 (i) Provides a complete list to the department of labor and
27 industries with identifying information, as defined by the department
28 of labor and industries, of all the agricultural employees who were
29 employed by the employer for the preceding three years before the
30 effective date of this section; and

31 (ii) Timely responds to questions from the department of labor
32 and industries regarding agricultural employee eligibility under
33 section 7 of this act.

34 (b) This section does not apply to claims or causes of action for
35 unpaid overtime due to an agricultural employee for hours worked for
36 an employer engaged in dairy cattle and milk production activities
37 described in code 112120 of the North American industry
38 classification system.

1 (3) Employers may begin providing agricultural employee lists to
2 the department of labor and industries January 1, 2022.

3 (4) This section applies retroactively to claims filed for unpaid
4 overtime after November 5, 2020, and before the effective date of
5 this section.

6 (5)(a) For the purposes of this section, "agricultural employee"
7 means any individual employed: (i) On a farm, in the employ of any
8 person, in connection with the cultivation of the soil, or in
9 connection with raising or harvesting any agricultural or
10 horticultural commodity, including raising, shearing, feeding, caring
11 for, training, and management of livestock, bees, poultry, and
12 furbearing animals and wildlife, or in the employ of the owner or
13 tenant or other operator of a farm in connection with the operation,
14 management, conservation, improvement, or maintenance of such farm
15 and its tools and equipment; (ii) in packing, packaging, grading,
16 storing or delivering to storage, or to market or to a carrier for
17 transportation to market, any agricultural or horticultural
18 commodity; or (iii) commercial canning, commercial freezing, or any
19 other commercial processing, or with respect to services performed in
20 connection with the cultivation, raising, harvesting, and processing
21 of oysters or in connection with any agricultural or horticultural
22 commodity after its delivery to a terminal market for distribution
23 for consumption.

24 (b) For the purposes of this section, "agricultural employee"
25 does not include any agricultural employee of an employer engaged in
26 dairy cattle and milk production activities described in code 112120
27 of the North American industry classification system.

28 (c) For the purposes of this section, "agricultural employee"
29 does not include any employee exempt under RCW 49.46.010(3)(c).

30 NEW SECTION. **Sec. 6.** A new section is added to chapter 49.48
31 RCW to read as follows:

32 The agricultural overtime pay transition account is created in
33 the custody of the state treasurer. Expenditures from the account may
34 be used only for providing payments to eligible employees under
35 section 7 of this act. Only the director of the department of labor
36 and industries or the director's designee may authorize expenditures
37 from the account. The account is subject to allotment proceedings
38 under chapter 43.88 RCW, but an appropriation is not required for
39 expenditures.

1 NEW SECTION. **Sec. 7.** A new section is added to chapter 49.48
2 RCW to read as follows:

3 (1)(a) Beginning January 1, 2022, an employee may apply to the
4 department for a one-time payment under this subsection. If eligible,
5 the employee must receive \$5,000 in compensation from the
6 agricultural overtime pay transition account, subject to (b) of this
7 subsection. Applications must be submitted by December 31, 2024.

8 (b) Within 60 days of the application, the department must
9 determine the employee's eligibility and notify the employee of its
10 determination in writing. Upon determining an employee is eligible
11 for payment under this subsection, the department must provide
12 payment to the employee within 30 days. The department may extend
13 either of these time periods by providing advance written notice to
14 the employee setting forth good cause for an extension of the time
15 period and specifying the duration of the extension.

16 (c) An employee is eligible for compensation under this
17 subsection if:

18 (i) The employee is or was an agricultural employee who worked at
19 least 1,300 hours in any 12-month period between January 1, 2019, and
20 January 1, 2022, not including any hours worked for an employer
21 engaged in dairy cattle and milk production activities described in
22 code 112120 of the North American industry classification system;

23 (ii) The employee was not exempted under RCW 49.46.010(3)(c); and

24 (iii) The employee signs a release for any past claims of unpaid
25 overtime against their agricultural employers for hours worked before
26 the effective date of this section.

27 (2) The applicable statute of limitations for civil actions and
28 wage complaints filed with the department is tolled from the date an
29 employee submits an application to the department to the date on
30 which a final determination is made by the department on the
31 application or the date on which the employee receives a notification
32 from the department under subsection (1)(b) of this section,
33 whichever is later.

34 (3) The department may enter into an agreement with the
35 department of revenue or the employment security department for data
36 and technology sharing as it deems necessary to implement this
37 section.

38 (4) If an employer fails to respond to the department regarding
39 employee eligibility under this section, or has ceased operations,
40 the employee may submit an affidavit of their hours worked during the

1 eligibility window in this section. The director of the department
2 may assess a civil penalty of at least \$5,000, but not more than
3 \$5,100 for intentionally filing a false affidavit.

4 (5) For the purposes of this section:

5 (a) "Agricultural employee" has the meaning provided in section 4
6 of this act.

7 (b) "Department" means the department of labor and industries.

8 NEW SECTION. **Sec. 8.** A new section is added to chapter 49.48
9 RCW to read as follows:

10 (1) The department of labor and industries may conduct outreach
11 to agricultural employers and agricultural employees regarding the
12 provisions of this act and may provide technical assistance where
13 appropriate. The department of labor and industries may contract with
14 nonprofit organizations to assist with outreach and technical
15 assistance.

16 (2) The department of labor and industries may adopt rules to
17 carry out the purposes of this act.

18 NEW SECTION. **Sec. 9.** (1) Section 2 of this act expires January
19 1, 2024.

20 (2) Section 4 of this act expires January 1, 2025.

21 NEW SECTION. **Sec. 10.** Section 3 of this act takes effect
22 January 1, 2024."

SSB 5172 - S AMD 459
By Senator Keiser

ADOPTED AS AMENDED 03/09/2021

23 On page 1, line 2 of the title, after "cases;" strike the
24 remainder of the title and insert "amending RCW 49.46.130 and
25 49.46.130; adding a new section to chapter 49.46 RCW; adding new
26 sections to chapter 49.48 RCW; creating a new section; providing an
27 effective date; and providing expiration dates."

EFFECT: Removes all underlying provisions of the bill. Provides overtime pay to dairy employees immediately. Provides overtime pay for hours worked over 40 hours in a workweek to dairy employees upon the effective date of the bill. Phases-in overtime pay to all other agricultural employees beginning on January 1, 2022, with the Code Rev/KB:jlb 12 S-1988.1/21

employees receiving overtime for hours worked over 55 hours in a week and ending with those employees receiving overtime for hours worked over 40 hours in a week beginning January 1, 2024. Creates the following "safe harbor" process: (1) Prior to January 1, 2022, and applying retroactively, no relief may be granted to a nondairy agricultural employee against an employer for unpaid overtime claims; and (2) after January 1, 2022, for any claim or cause of action filed between November 5, 2020, and January 1, 2025, seeking unpaid overtime due to a nondairy agricultural employee, no relief may be granted if the employer provides certain employee information to L&I. Creates an agricultural overtime pay transition account that provides a one-time payment of \$5,000 to nondairy agricultural employees, following L&I eligibility determination and upon the employee's release of past unpaid overtime claims.

--- END ---