

# HOUSE BILL REPORT

## ESSB 5172

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### As Passed House - Amended:

April 9, 2021

**Title:** An act relating to the retroactivity of overtime claims in exceptional cases.

**Brief Description:** Providing overtime standards for the agricultural workforce.

**Sponsors:** Senate Committee on Labor, Commerce & Tribal Affairs (originally sponsored by Senators King, Brown, Fortunato, Honeyford, Muzzall, Schoesler, Short and Wagoner).

### Brief History:

#### Committee Activity:

Labor & Workplace Standards: 3/23/21, 3/26/21 [DP];

Appropriations: 3/30/21, 4/1/21 [DP].

#### Floor Activity:

Passed House: 4/9/21, 91-7.

### Brief Summary of Engrossed Substitute Bill (As Amended By House)

- Phases in overtime pay requirements for certain agricultural employees as follows: (1) beginning January 1, 2022, after 55 hours; (2) beginning January 1, 2023, after 48 hours; and (3) beginning January 1, 2024, after 40 hours.
- Prohibits the award of damages or other relief to certain agricultural employees seeking unpaid overtime under the overtime statute as it existed on November 4, 2020, and applies the prohibition retroactively.

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## HOUSE COMMITTEE ON LABOR & WORKPLACE STANDARDS

**Majority Report:** Do pass. Signed by 6 members: Representatives Sells, Chair; Berry, Vice Chair; Hoff, Ranking Minority Member; Bronoske, Harris and Ortiz-Self.

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

**Minority Report:** Without recommendation. Signed by 1 member: Representative Mosbrucker, Assistant Ranking Minority Member.

**Staff:** Trudes Tango (786-7384).

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## HOUSE COMMITTEE ON APPROPRIATIONS

**Majority Report:** Do pass. Signed by 22 members: Representatives Ormsby, Chair; Bergquist, Vice Chair; Gregerson, Vice Chair; Macri, Vice Chair; Chandler, Chopp, Cody, Dolan, Fitzgibbon, Frame, Hansen, Harris, Hoff, Johnson, J., Lekanoff, Pollet, Ryu, Senn, Springer, Stonier, Sullivan and Tharinger.

**Minority Report:** Do not pass. Signed by 4 members: Representatives Stokesbary, Ranking Minority Member; Corry, Assistant Ranking Minority Member; Dye and Steele.

**Minority Report:** Without recommendation. Signed by 7 members: Representatives Chambers, Assistant Ranking Minority Member; MacEwen, Assistant Ranking Minority Member; Boehnke, Caldier, Jacobsen, Rude and Schmick.

**Staff:** Heidi Cao (786-7157).

### **Background:**

#### Overtime Pay.

Generally, employers must pay their employees at least one and one-half times the employee's regular hourly rate for any hours the employee works over 40 works in a workweek. One exemption to this requirement applies to agricultural workers. In particular, it applies to individuals working on a farm, including: soil cultivation; crop raising, including harvesting; handling livestock, including raising, shearing, feeding, caring for, training, and managing livestock, bees, poultry, furbearing animals, and wildlife; farm operations, including management, conservation, improvement, or maintenance of a farm, its tools and equipment; packing, packaging, grading, storing, or delivering any agricultural or horticultural commodity; commercial canning, freezing, or processing any agricultural or horticultural commodity including its delivery to a terminal market for distribution for consumption; and the cultivation, raising, harvesting, and processing of oysters, including delivery to a terminal market for distribution for consumption.

#### State Supreme Court Case.

On November 5, 2020, the state Supreme Court issued its decision in the *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc. (Martinez-Cuevas)* case. The majority opinion of the court held that the overtime exemption for agricultural employees was unconstitutional as applied to dairy workers because it violated the Privileges and Immunities clause of the state constitution. Part of the court's analysis was determining whether there were reasonable grounds to exempt the agricultural industry from the overtime laws, and the court found no

convincing legislative history showing reasonable grounds.

The court did not address the issue of the retroactive application of its ruling. Generally, court decisions apply retroactively. However, courts have discretion to apply decisions prospectively in exceptional cases where the court is overruling a law that was justifiably relied on and retroactive application would be substantially unfair.

**Summary of Amended Bill:**

Overtime Pay For Agricultural Employees.

The overtime exemption for agricultural employees applies until December 31, 2021, after which a phased approach to overtime pay for certain agricultural employees is established.

Beginning January 1, 2022, overtime pay of one and one-half times the agricultural employee's regular rate of pay must be paid for all hours the employee worked over 55 hours in any one workweek.

Beginning January 1, 2023, overtime pay is required for hours worked over 48 hours in any one workweek.

Beginning January 1, 2024, overtime pay is required for hours worked over 40 hours in any one workweek.

The phase-in does not apply to hours worked by an agricultural employee engaged in dairy cattle and milk production activities described in the North American Industrial Classification System.

Retroactive Claims For Overtime Pay.

No damages, statutory or civil penalties, attorneys' fees and costs, or other type of relief may be granted against an employer to an agricultural employee seeking unpaid overtime under the overtime statute, as it existed on November 4, 2020. This bar on unpaid overtime applies retroactively to claims, causes of actions, and proceedings commenced on or after November 5, 2020, regardless of when the claim or cause of action arose. To this extent, the bar applies retroactively, but in all other respects it applies prospectively. This bar does not apply to agricultural employees entitled to backpay or other relief as a result of being a member in the class of plaintiffs in the *Martinez-Cuevas* case.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.

### **Staff Summary of Public Testimony (Labor & Workplace Standards):**

(In support) This bill is a very important first step in achieving justice for farmworkers. They have been unfairly excluded from overtime pay for 60 years. Farmworkers work from sunrise to sunset picking this nation's fruits and vegetables. They work in difficult working conditions and have been treated unjustly. They are more likely than other categories of workers to be harassed and injured on the job. This bill will help in breaking the cycle of intergenerational poverty. A seasonality carve-out would undermine the state Supreme Court case, which recognized the protective nature of overtime laws in industries that are dangerous. The phase-in is fiscally responsible.

(Opposed) None.

(Other) The retroactivity provision is important and needed, but the bill needs a seasonality provision to recognize peaks in the growing season. Without a seasonality provision, farmers will have to reduce workers' hours and wages. There will be fewer crops grown, and farms will end up consolidating. It will impact small to medium sized farms, which are the employers that build the strongest bonds with their employees. Profit margins are very slim. The agricultural industry does not set its own prices and cannot pass on higher costs to consumers. This bill will make it harder for Washington farmers to be competitive with farms in neighboring states. Requiring overtime pay will hurt workers. There is so much uncertainty in the agricultural industry already. Other states have seasonality provisions, except for California and now there is no asparagus grown in California anymore. A seasonality provision would provide a cushion for employers to recoup costs during slower parts of the year. Wages for farmworkers in Washington are some of the highest in the nation.

### **Staff Summary of Public Testimony (Appropriations):**

(In support) Farmers and dairy employers are in favor of this bill and support overtime pay to agricultural workers to ensure a minimum standard of living. However, supporters urge for amendments to this bill to provide a degree of retroactive protection for farms from backpay claims and lawsuits. The current language of the bill falls short of the balance of agreement struck in the Senate and provides limited seasonal protection to farms. Retroactive lawsuits would destroy farm jobs and threaten the nature of agricultural businesses in Washington.

(Opposed) A striking amendment to this bill is essential to protect Washington farmers and ranch families from private and public litigations. This bill does not protect agricultural businesses from agency litigation or third-party qui tam actions. Retroactive claims and liabilities can put many farms out of business, and farms need complete protection. Testifiers urge for an exemption or a revised overtime threshold during peak harvest season. Certain vegetables and agricultural products require significant daily overtime during harvest seasons. The proposed overtime requirements are difficult to implement in

the context of a typical farm work schedule that is characterized by seasonal overtime and periods of rest, and would increase production costs. Increased production costs are easier for bigger farms to absorb, and would hurt businesses at smaller farms and the overall competitiveness of Washington crops and produce. Introducing a flexible seasonality provision would protect workers from reduced hours and protect employers from margin loss. Farm employees are worried as they consider the consequences of the bill and their job security.

**Persons Testifying (Labor & Workplace Standards):** (In support) Giovanni Severino, Progreso: Latino Progress; Dan Wood, Dairy Federation; Ramon Torres, Familias Unidas por la Justicia; Edgar Franks, Interpreter for R. Torres, Familias Unidas por la Justicia; Areli Arteaga, United Farm Workers; Paul Benz, Faith Action Network; Joe Kendo, Washington State Labor Council, American Federation of Labor and Congress of Industrial Organizations; Matthew Hepner, East Wenatchee City Council, Position 7; Dr. Bernal Baca, Chair, Washington State Commission on Hispanic Affairs; and Jason Sheehan, J & K Dairy, LLC.

(Other) Camas Uebelacker, Joshua Araiza, and Jack Field, Washington Cattle Feeders Association; Michael Gempler, Washington Growers League; Pam Lewison, Washington Policy Center; Manny Imperial, Imperial's Garden; Bre Elsey, Washington Farm Bureau; Nicole Berg, Washington Association of Wheat Growers; Alan Schreiber, Washington Asparagus Commission; Robert Battles, Association of Washington Business; Ignacio Diaz, Double M Orchards; Maria Flores; Uriel Vargas; Elvia Saucedo, Washington Farm Bureau Interpreter; Jason Matson, Matson Fruit Company; Flor de Maria Maldonado, M&A Orchards; and Chelsea Durfey Campbell, Lighthouse Farms.

**Persons Testifying (Appropriations):** (In support) Dan Wood, Washington State Dairy Federation; Joe Kendo, Washington State Labor Council, American Federation of Labor and Congress of Industrial Organizations; Case VanderMeulen, Coulee Flats Dairy LLC; Dan DeRuyter, George DeRuyter and Sons Dairy; and Jason Sheehan.

(Opposed) Alan Schreiber, Washington Asparagus Commission; Chafeka Abdellatif, Kershaw Companies; Flor de Maria Maldonado, M&A Orchards; Bre Elsey, Washington Farm Bureau; Jack Field and Camas Uebelacker, Washington Cattle Feeders Association; Michael Gempler, Washington Growers League; Diana Carlen, Washington Association of Wheat Growers and Washington State Potato and Onion Association; Manny Imperial and Jonathan Imperial, Imperial's Garden; Jose Luna, Luna and Vega Orchards LLC; Rosella Mosby, Mosby Farms; Rachelle Durfey, Lighthouse Farms LLC; and Adiana Salazar.

**Persons Signed In To Testify But Not Testifying (Labor & Workplace Standards):** None.

**Persons Signed In To Testify But Not Testifying (Appropriations):** None.