

SENATE BILL REPORT

ESSB 5172

As Passed Senate, March 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, Commerce & Tribal Affairs: 1/28/21, 2/15/21 [DPS, DNP, w/oRec].

Floor Activity: Passed Senate: 3/9/21, 37-12.

Brief Summary of Engrossed First Substitute Bill

- Phases in overtime pay to certain agricultural employees beginning on January 1, 2022, with the employees receiving overtime for hours worked over 55 in a week and ending with those employees receiving overtime for hours worked over 40 in a week beginning January 1, 2024.
- Removes the agricultural overtime exemption from the overtime law on January 1, 2024.
- Creates a safe harbor process protecting certain agricultural employers from specific types of relief being granted against such employers for certain claims and causes of action seeking unpaid overtime.

SENATE COMMITTEE ON LABOR, COMMERCE & TRIBAL AFFAIRS

Majority Report: That Substitute Senate Bill No. 5172 be substituted therefor, and the substitute bill do pass.

Signed by Senators Keiser, Chair; Conway, Vice Chair, Labor; Stanford, Vice Chair, Commerce & Tribal Affairs; Robinson and Saldaña.

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: Do not pass.

Signed by Senators Braun, Honeyford and Schoesler.

Minority Report: That it be referred without recommendation.

Signed by Senator King, Ranking Member.

Staff: Matt Shepard-Koningsor (786-7627)

Background: Minimum Wage and Overtime. As of January 1, 2021, the minimum wage in the state of Washington is \$13.69 per hour. The Department of Labor and Industries (L&I) calculates the state minimum wage. Washington employers must pay most employees at least the minimum wage for every hour worked. Most employees who work more than 40 hours in a seven-day workweek must be paid overtime. Overtime pay must be at least 1.5 times the employee's regular hourly rate and employees may not waive their right to overtime pay. Employers must pay overtime to eligible workers regardless of employer size. Collective bargaining agreements and employers may provide more generous overtime pay than state law requires. L&I handles worker rights complaints under the Wage Payment Act. Workers may also choose to file a civil action for violations under the Minimum Wage and Wage Payment Acts.

Overtime Exemptions. Although most employees are entitled to overtime pay after working 40 hours in a seven-day workweek, there are specific categories of employees who are not required to receive overtime, such as executive, administrative, and professional employees in some circumstances; casual laborers; certain seasonal employees; workers performing forest protection and fire prevention activities; and most agricultural workers.

Overtime does not apply to individuals working on a farm involved in:

- soil cultivation;
- raising crops;
- handling livestock;
- farm operations;
- packing, packaging, grading, storing, or delivering an agricultural or horticultural commodity;
- commercial canning, freezing, or processing an agricultural or horticultural commodity and related delivery; and
- cultivating, raising, harvesting, and processing oysters and related delivery.

Recent Washington Supreme Court Case. On November 5, 2020, the Washington Supreme Court ruled in *Jose Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*, that the current law exempting agricultural workers from overtime pay, as applied to dairy workers, is unconstitutional under the Washington State Constitution. Specifically, the court held that the stated purpose of the Minimum Wage Act is to protect the health and safety of Washington workers, as required by the constitution, and under it, the agricultural exemption to overtime pay granted an impermissible privilege or immunity to dairy

employers not to pay overtime to their workers. The decision did not address whether dairy employers must pay retroactive overtime for work in excess of 40 hours prior to the date of the decision because neither party raised the issue in its statement of grounds for review, therefore, the issue was not properly before the court.

Summary of Engrossed First Substitute Bill: Agricultural employee means any individual employed:

- on a farm, in the employ of any person, in connection with the cultivation of the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wildlife, or in the employ of the owner or tenant or other operator of a farm in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment;
- in packing, packaging, grading, storing or delivering to storage, or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; or
- in commercial canning, commercial freezing, or any other commercial processing, or with respect to services performed in connection with the cultivation, raising, harvesting, and processing of oysters or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.

Overtime Phase-In. Agricultural employees are entitled to overtime in the following manner:

- beginning January 1, 2022, no agricultural employee shall be employed for more than 55 hours in any one workweek unless the agricultural employee receives one and one-half times the employee's regular rate of pay for all hours worked over 55 in any one workweek;
- beginning January 1, 2023, no agricultural employee shall be employed for more than 48 hours in any one workweek unless the agricultural employee receives one and one-half times the employee's regular rate of pay for all hours worked over 48 in any one workweek; and
- beginning January 1, 2024, no agricultural employee shall be employed for more than 40 hours in any one workweek unless the agricultural employee receives one and one-half times the employee's regular rate of pay for all hours worked over 40 in any one workweek.

The overtime phase in does not apply to hours worked by an agricultural employee for an employer engaged in dairy cattle and milk production activities described in the North American industry classification system. The overtime phase-in provisions expire on January 1, 2025.

Safe Harbor. 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 due to the agricultural employee's historical exclusion from overtime under the Minimum Wage Act's agricultural exemption, as it existed on November 4, 2020.

The safe harbor provisions do not apply to agricultural employees entitled to backpay or other relief as a result of being a member in the class of plaintiffs in *Martinez-Cuevas v. DeRuyter Bros. Dairy*.

The safe harbor provisions apply retroactively to claims filed after November 5, 2020, and before the act's effective date.

Other. The agricultural exemption contained in the Minimum Wage Act is removed on January 1, 2024.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: The bill contains several effective dates. Please refer to the bill.

Staff Summary of Public Testimony on Original Bill: *The committee recommended a different version of the bill than what was heard.* PRO: This bill does not overturn a court decision but does address an issue the court was silent on, whether farmers are liable to pay three years of retroactive overtime. The bill is needed to rectify an unfair situation. This is a matter of fairness. Dairy employers operated under the current laws and interpretations and now they are being told to go back and pay overtime. Farmers were not violating the law, the law changed on them. Dairy farmers are not opposed to paying overtime. If employers have to pay overtime they will be out of business and not hire workers. Farms are being sued to collect overtime wages even though they never violated the laws.

CON: We should let the courts do their job and apply the standards already in place to decide the issue. The agricultural exemption has existed for 60 years and has saved the industry millions of dollars. The bill seeks to grant the same unconstitutional privilege to the industry the court invalidated. This bill will hurt Washington workers. The bill is not limited to exceptional cases and this would allow back-pay in many cases, whether related to agricultural employers or not.

OTHER: This bill also matters in other parts of the business community, not just agriculture.

Persons Testifying: PRO: Senator Curtis King, Prime Sponsor; Dan Wood, Dairy Federation; Case Vandermeulen, Coulee Flats Dairy LLC; Jeremy Visser, Natural Milk LLC; Jason Sheehan, J & K Dairy, LLC; Jack Field, Washington Cattle Feeders

Association; Fransisca VanderMeulen, Top en Twel; Austin Allred, Royal Dairy; Steve DeRuyter, Five D Farms LLC.; Felipe Garcia; Miguel Navarrete; Jason Matson, Matson Fruit Company; Bre Elsey, Washington Farm Bureau; Flor de Maria Maldonado-Alejandre, M&A Orchards, LLC; Scott Dilley, Washington State Dairy Federation; Camas Uebelacker, Washington Cattle Feeders Association; Grant Morris, Washington Potato & Onion Association; Robert Battles, Association of Washington Business; Nicole Berg, Washington Association of Wheat Growers.

CON: Elizabeth Strater, United Farm Workers; Andrea Schmitt, Columbia Legal Services; Joe Kendo, Washington State Labor Council; Ramon Torres, Familias Unidas por la Justicia; Edgar Franks (Interpreter), Familias Unidas por la Justicia (Interpreting); Toby Marshall, Washington Employment Lawyers Association; Mark Hanrahan, Hanrahan orchards.

OTHER: Pam Lewison, Washington Policy Center.

Persons Signed In To Testify But Not Testifying: PRO: Todd Burgers, Larson Gross CPAs & Consultants; Troy Lensen, Lensen Dairy LLC; Thomas Van Wingerden, Van Wingerden Greenhouses, Inc.; Gerald Baron, Save Family Farming; Brent Christiansen, Sunny Dene Ranch LLC; Kaleb Whitby, Whitby Dairy; Bev Koopmans; Jen Witman, Van Wingerden Greenhouses, Inc.; William DeRuyter, View Point Dairy; Christina Haggith, Van Wingerden Greenhouses, Inc; Brent Royslance, RG Dairy; Kirk Jacobson, Beef Northwest Feeders; Jared Easterday, Washington Cattle Feeders Association; Sarah Smith, Bare Bones Livestock Inc; Dexter Allred, Sand Slope; Steve Matzen, Northwest Dairy Association; Robin Gonzalez; Bryan Mains; Riley Mengarelli; Jennifer Mengarelli; Craig Christensen; Chafeka Abdellatif, Kershaw Companies; Lori Williams; Patrick Conley, Pat & Polly Conley Farm; Mark Tudor; David Piepel, Piepel Family Farms; Ryan Mensonides, Mensonides LLC; James Divis, On Point orchards; Tim McLaughlin, AgriMACS, Inc.; LaVonne Boogerd, Spring Creek Dairy; Kristyn Jody Mensonides, Mensonides Dairy; Darrin Morrison, Morrison Farms; Joe Hammes; Andrew Schafer; Frederick Jung; Michael Gempler, Washington Growers League; Patrick McConnell, 2M Farms; Dan DeRuyter, George DeRuyter and Sons Dairy; Christine Heinitz; Alan Steiger; Jon Gordon; Michael Preacher, Superfresh Growers; Daniel Dormaier; Gregory Smith, Triple S Farms Inc; Douglas Poole, Double P Ranch; James Nollmeyer, Washington Association of Wheat Growers; Chad Keller; Todd King C.P.A., Leffel Otis & Warwick P.S.; Gary Largent, Bar L Ranch; Jacob Klein, Walli Farms, Inc; Mike Carstensen, M&L Carstensen Farms; Bill Douglas, Farmer of Fruits; Alan Smick; Tim Curtis, Sterino Farms; Harold Cochran, Wheat Farmer; Cecil Sienknecht, Triple D Centennial Farms; Lorie Carstensen; George Struthers; Mike Wade, Columbia Fruit Packers, Inc.; Steve Krupke, Steve Krupke Farms JV; Mary McCormack; Wendell Kruger; Aaron Wilson; Andrew Juris, Washington Association of Wheat Growers; Janet Luft; Ben Adams, Adams Farm Partnership; Marci Green, Green View Farms Inc; Paul Malone; Joe Schmitz; Roger Dormaier, Dormaier Dipper Ranch LLC; Tina Poole; Michael McHargue; Rachelle Morton; Randy Suess, Washington Association of Wheat Growers; Michelle Hennings, Washington Association of Wheat Growers; Jerry Snyder, L Washington State Grange; Elliott Goodrich, Goodrich Farms Inc.;

Craig Cox; Amy McKay, McKay Farm & Ranch, Inc.; Jarom Davidson, Davidson Brothers Dairy; Chris Doelman; Thomas Null; Candi MooreRoach, Washington Association of Wheat Growers; Mandi Matthews, Washington Association of Wheat Growers; Anthony Veiga, dairyman; Casey Secrist; Terry Harding, Harding Farms; Kristine Zerr, The Kershaw Companies; David Carlton, Washington Association of Wheat Growers; Alan Voise, Voise Farms Joint Venture; Gary Bailey, LM Farms JV; Brian Bookey, National Food; Frank Hart, farmer; Terry Poe, Poe Farms Joint Venture; Henry Benthem, Ru-Ben Dairy, Inc.; Mark Wesen, Wesen Farms; Adam Dolsen, Dairy Farmer; Tyler Price, Price Cold Storage & Packing Co; Paul Martinez, Frosty Packing, LLC; Taflin Laylin; Dana Repp; Taryn Hartley; Bernt Lehn, Bernt Lehn Farms, Inc; April Clayton, Chelan/Douglas County Farm Bureau; Wade Meek; Pete Douglas, Douglas AG Services; Mark Streuli, Washington Cattlemens Association; Kathy Blasdel, Kiska Farms, Inc.; Zach Williams, Stemilt Growers LLC; Amy Mensonides; Patrick Zecchino, Zecchino Farms LLC; Kolby Secrist; Krista Stauffer; Art Mensonides, Mensonides Dairy; Theresa Mensonides; Auke Bruinsma; Joreen Bruinsma, farmer; Randy Clark, Volm Companies.

CON: Julie Beierle, Firewater Ranch Partnership; Kristyn Mensonides, Mensonides Dairy; RoxAnn Sherwood.