
ENGROSSED SUBSTITUTE SENATE BILL 5172

AS AMENDED BY THE HOUSE

Passed Legislature - 2021 Regular Session

State of Washington

67th Legislature

2021 Regular Session

By Senate Labor, Commerce & Tribal Affairs (originally sponsored by Senators King, Brown, Fortunato, Honeyford, Muzzall, Schoesler, Short, and Wagoner)

READ FIRST TIME 02/15/21.

1 AN ACT Relating to the retroactivity of overtime claims in
2 exceptional cases; amending RCW 49.46.130; and creating a new
3 section.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

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

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

1 potential workplace exposures are compounded by systemic barriers to
2 testing, prevention measures, and medical care.

3 The legislature also intends to avoid disruptions within the
4 state's vital agricultural sector. While Washington is well known as
5 the national leader in apple production, the state's agricultural
6 sector is incredibly diverse: Over 300 crops are harvested, and a
7 variety of livestock are raised on over 35,000 farms across the
8 state. The robust size of our agricultural sector means our state
9 overall ranks in the top 10 nationally in the size of our farm labor
10 force. Agriculture is a cornerstone of our state economy. Uncertainty
11 from recent legal decisions regarding overtime standards are
12 compounding the pandemic's disruptions to the food chain and the
13 safety challenges of operating during a public health crisis.

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

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

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

32 (2) This section does not apply to:

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

37 (b) Employees who request compensating time off in lieu of
38 overtime pay;

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

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

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

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

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

36 (h) Any industry in which federal law provides for an overtime
37 payment based on a workweek other than forty hours. However, the
38 provisions of the federal law regarding overtime payment based on a
39 workweek other than forty hours shall nevertheless apply to employees
40 covered by this section without regard to the existence of actual

1 federal jurisdiction over the industrial activity of the particular
2 employer within this state. For the purposes of this subsection,
3 "industry" means a trade, business, industry, or other activity, or
4 branch, or group thereof, in which individuals are gainfully employed
5 (section 3(h) of the Fair Labor Standards Act of 1938, as amended
6 (Public Law 93-259));

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

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

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

24 (a) The regular rate of pay of the employee is in excess of one
25 and one-half times the minimum hourly rate required under RCW
26 49.46.020; and

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

30 In determining the proportion of compensation representing
31 commissions, all earnings resulting from the application of a bona
32 fide commission rate is to be deemed commissions on goods or services
33 without regard to whether the computed commissions exceed the draw or
34 guarantee.

35 (4) No employer of commissioned salespeople primarily engaged in
36 the business of selling automobiles, trucks, recreational vessels,
37 recreational vessel trailers, recreational vehicle trailers,
38 recreational campers, manufactured housing, or farm implements to
39 ultimate purchasers shall violate subsection (1) of this section with

1 respect to such commissioned salespeople if the commissioned
2 salespeople are paid the greater of:

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

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

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

23 (6) (a) Beginning January 1, 2022, any agricultural employee shall
24 not be employed for more than 55 hours in any one workweek unless the
25 agricultural employee receives one and one-half times that
26 agricultural employee's regular rate of pay for all hours worked over
27 55 in any one workweek.

28 (b) Beginning January 1, 2023, any agricultural employee shall
29 not be employed for more than 48 hours in any one workweek unless the
30 agricultural employee receives one and one-half times that
31 agricultural employee's regular rate of pay for all hours worked over
32 48 in any one workweek.

33 (c) Beginning January 1, 2024, any agricultural employee shall
34 not be employed for more than 40 hours in any one workweek unless the
35 agricultural employee receives one and one-half times that
36 agricultural employee's regular rate of pay for all hours worked over
37 40 in any one workweek.

38 (7) (a) No damages, statutory or civil penalties, attorneys' fees
39 and costs, or other type of relief may be granted against an employer
40 to an agricultural or dairy employee seeking unpaid overtime due to

1 the employee's historical exclusion from overtime under subsection
2 (2)(g) of this section, as it existed on November 4, 2020.

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

8 (c) This subsection does not apply to dairy employees entitled to
9 backpay or other relief as a result of being a member in the class of
10 plaintiffs in Martinez-Cuevas v. DeRuyter Bros. Dairy, 196 Wn.2d 506
11 (2020).

12 (8) For the purposes of this section, "agricultural employee"
13 means any individual employed: (a) On a farm, in the employ of any
14 person, in connection with the cultivation of the soil, or in
15 connection with raising or harvesting any agricultural or
16 horticultural commodity, including raising, shearing, feeding, caring
17 for, training, and management of livestock, bees, poultry, and
18 furbearing animals and wildlife, or in the employ of the owner or
19 tenant or other operator of a farm in connection with the operation,
20 management, conservation, improvement, or maintenance of such farm
21 and its tools and equipment; (b) in packing, packaging, grading,
22 storing or delivering to storage, or to market or to a carrier for
23 transportation to market, any agricultural or horticultural
24 commodity; or (c) commercial canning, commercial freezing, or any
25 other commercial processing, or with respect to services performed in
26 connection with the cultivation, raising, harvesting, and processing
27 of oysters or in connection with any agricultural or horticultural
28 commodity after its delivery to a terminal market for distribution
29 for consumption. An agricultural employee does not include a dairy
30 employee.

31 (9) For the purposes of this section, "dairy employee" includes
32 any employee engaged in dairy cattle and milk production activities
33 described in code 112120 of the North American industry
34 classification system.

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