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**SENATE BILL 5476**

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**State of Washington****68th Legislature****2023 Regular Session****By** Senator King

1 AN ACT Relating to authorizing an agricultural employer to select  
2 any 12 weeks in a calendar year as special circumstance weeks for  
3 labor demand, during which in each of the selected 12 weeks, the  
4 agricultural employer may employ agricultural employees for up to 50  
5 hours before the requirement to pay overtime applies under RCW  
6 49.46.130; amending RCW 49.46.130; creating a new section; and  
7 declaring an emergency.

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

9 NEW SECTION. **Sec. 1.** In 2021, the legislature repealed the  
10 statute that exempted agricultural workers from overtime pay which  
11 had been in effect since 1959. With this historic legislation,  
12 Washington state became the first state in the nation to impose an  
13 overtime pay requirement for agricultural workers working in excess  
14 of 40 hours a week. Recognizing that such a change would be a  
15 sizeable shift in practice for all farmers and agricultural workers  
16 across the state, the legislature adopted a phased-in approach, but  
17 did not address the seasonal needs of Washington agriculture given  
18 the time-sensitive nature of growing and harvesting mature field  
19 crops and perishable fruits and vegetables. The agricultural industry  
20 is unique from other types of industry because of pressures on  
21 farmers, ranchers, and workers caused by issues mainly out of their

1 control such as uncertainty of weather, yields, calving, national and  
2 international shifts in trade policy, and transportation  
3 inconsistencies. Furthermore, farmers do not set their own prices and  
4 are price takers who cannot simply respond to increased production  
5 costs by increasing prices of their goods. Due to the tight margins  
6 that farms operate on, farm employers may be forced to limit overtime  
7 work, resulting in the full harvest not being collected and the  
8 worker being denied the opportunity to earn the wages for which they  
9 have become accustomed. The legislature believes it is reasonable to  
10 allow agricultural employers limited flexibility to shape work  
11 schedules during a narrow window of time to best fit the peaks of  
12 labor demand for their crops, thereby providing them some ability to  
13 weather the unpredictability of agricultural work and ensure that  
14 Washington's second largest industry remains vital and strong while  
15 also ensuring security for farm workers.

16 **Sec. 2.** RCW 49.46.130 and 2021 c 249 s 2 are each amended to  
17 read as follows:

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

24 (2) This section does not apply to:

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

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

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

33 (d) Seasonal employees who are employed at concessions and  
34 recreational establishments at agricultural fairs, including those  
35 seasonal employees employed by agricultural fairs, within the state  
36 provided that the period of employment for any seasonal employee at  
37 any or all agricultural fairs does not exceed fourteen working days a  
38 year;

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

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

10 (g) Any individual employed as an agricultural employee. This  
11 exemption from subsection (1) of this section applies only until  
12 December 31, 2021;

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

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

31 (j) Any individual licensed under chapter 18.85 RCW unless the  
32 individual is providing real estate brokerage services under a  
33 written contract with a real estate firm which provides that the  
34 individual is an employee. For purposes of this subsection (2)(j),  
35 "real estate brokerage services" and "real estate firm" mean the same  
36 as defined in RCW 18.85.011.

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

1 (a) The regular rate of pay of the employee is in excess of one  
2 and one-half times the minimum hourly rate required under RCW  
3 49.46.020; and

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

7 In determining the proportion of compensation representing  
8 commissions, all earnings resulting from the application of a bona  
9 fide commission rate is to be deemed commissions on goods or services  
10 without regard to whether the computed commissions exceed the draw or  
11 guarantee.

12 (4) No employer of commissioned salespeople primarily engaged in  
13 the business of selling automobiles, trucks, recreational vessels,  
14 recreational vessel trailers, recreational vehicle trailers,  
15 recreational campers, manufactured housing, or farm implements to  
16 ultimate purchasers shall violate subsection (1) of this section with  
17 respect to such commissioned salespeople if the commissioned  
18 salespeople are paid the greater of:

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

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

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

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

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

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

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

14 (d) (i) An agricultural employer may select any 12 weeks in a  
15 calendar year as special circumstance weeks for labor demand. During  
16 each of the selected 12 weeks, the agricultural employer may employ  
17 agricultural employees for up to 50 hours before the requirement to  
18 pay overtime under this section applies.

19 (ii) In addition to the records required to be kept under RCW  
20 49.30.020, an agricultural employer is responsible for maintaining  
21 records of which special circumstance weeks were utilized.

22 (iii) An agricultural employer must provide an annual initial  
23 disclosure of a good-faith estimate of the selected 12 weeks to their  
24 agricultural employees at least 30 days in advance of the first  
25 expected special circumstance week, or upon hiring for those who  
26 start work fewer than 30 days in advance. For agricultural employees  
27 employed under, and in compliance with federal requirements for,  
28 temporary work visas, the disclosure of a good-faith estimate must be  
29 made no later than the date of the worker's visa application,  
30 contemporaneous with required federal preemployment written  
31 disclosures to visa workers ordinarily due by the date of the  
32 worker's visa application.

33 (iv) An agricultural employee must be provided written notice, at  
34 least annually, of which weeks will be special circumstance weeks, no  
35 later than the seventh day before the first special circumstance  
36 week, or upon hiring for those starting work after the seventh day.  
37 The employer may change which are the special circumstance weeks  
38 after that notice if:

39 (A) The employer provides at least one week's written notice of  
40 any week being added or removed as a special circumstance week;

1       (B) The initial disclosure was the employer's good-faith,  
2 reasonable expectation of which weeks would be the special  
3 circumstance weeks; and

4       (C) The changes are based on circumstances not foreseeable at the  
5 time of the initial disclosure.

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

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

16       (c) This subsection does not apply to dairy employees entitled to  
17 back pay or other relief as a result of being a member in the class  
18 of plaintiffs in *Martinez-Cuevas v. DeRuyter Bros. Dairy*, 196 Wn.2d  
19 506 (2020).

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

39       (9) For the purposes of this section, "dairy employee" includes  
40 any employee engaged in dairy cattle and milk production activities

1 described in code 112120 of the North American industry  
2 classification system.

3 NEW SECTION. **Sec. 3.** This act is necessary for the immediate  
4 preservation of the public peace, health, or safety, or support of  
5 the state government and its existing public institutions, and takes  
6 effect immediately.

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