**5172-S AMS KEIS S1988.1 - NOT FOR FLOOR USE**

**SSB 5172** - S AMD **459**

By Senator Keiser

**ADOPTED AS AMENDED 03/09/2021**

Strike everything after the enacting clause and insert the following:

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

The legislature intends to address the historical exceptions of agricultural work from overtime standards from both the federal fair labor standards act and the state minimum wage act when they were enacted over 70 years ago. Excluded from the opportunity to earn overtime pay, farmworkers across our state remain among our state's poorest workers. A United States department of labor study in 2016 found that nationally, 30 percent of farmworker families live below the poverty line, almost double the poverty rate of American families overall. The state department of health found that the current novel coronavirus pandemic has had a significant and disproportionate impact on farmworkers. The virus' risks to essential farmworkers from potential workplace exposures are compounded by systemic barriers to testing, prevention measures, and medical care.

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

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

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

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

(2) This section does not apply to:

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

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

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

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

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

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

(g) ((~~Any~~)) Except as otherwise provided in section 4 of this act, any individual employed (i) 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; or (ii) 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 (iii) 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;

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) This section does not apply to:

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

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

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

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

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

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

(g) ((~~Any individual employed (i) 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; or (ii) 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 (iii) 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;~~

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(5) For the purposes of this section, "agricultural employee" means any individual employed: (a) 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; (b) 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 (c) 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.

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

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

(1) Before January 1, 2022, no damages, statutory 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. This subsection applies retroactively to claims filed before the effective date of this section.

(2)(a) 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 an agricultural employee for work performed between November 5, 2017, and January 1, 2022, damages, statutory or civil penalties, and attorneys' fees and costs shall not be granted against an employer, if the employer:

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

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

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

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

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

(5)(a) For the purposes of this section, "agricultural employee" means any individual employed: (i) 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; (ii) 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 (iii) 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) If an employer fails to respond to the department regarding employee eligibility under this section, or has ceased operations, the employee may submit an affidavit of their hours worked during the eligibility window in this section. The director of the department may assess a civil penalty of at least $5,000, but not more than $5,100 for intentionally filing a false affidavit.

(5) For the purposes of this section:

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

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

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

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

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

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

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

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

**SSB 5172** - S AMD **459**

By Senator Keiser

**ADOPTED AS AMENDED 03/09/2021**

On page 1, line 2 of the title, after "cases;" strike the remainder of the title and insert "amending RCW 49.46.130 and 49.46.130; adding a new section to chapter 49.46 RCW; adding new sections to chapter 49.48 RCW; creating a new section; providing an 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 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.