

SENATE BILL REPORT

SB 5172

As Reported by Senate Committee On:
Labor, Commerce & Tribal Affairs, February 15, 2021

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

Brief Description: Concerning the retroactivity of overtime claims in exceptional cases.

Sponsors: 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].

Brief Summary of First Substitute Bill

- Establishes an affirmative defense for employers to certain claims or causes of action for recovery of wages and related damages, penalties, and fees, based solely upon the employer's failure to pay an employee overtime due under the overtime law, if the liable party pays the compensation owed.
- Removes the agricultural overtime exemption from the overtime law.
- Creates an agricultural overtime pay reimbursement account with related provisions on payments.

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 Bill (First Substitute): Affirmative Defense. In any cause of action filed in court on or after October 11, 2017, and before June 30, 2024, seeking overtime pay under state law, the employer and any other person alleged to be liable for overtime pay shall have an affirmative defense to any claim or cause of action for recovery of wages and related damages, penalties, and fees, if the liable party pays the compensation owed under the act.

To establish an affirmative defense, agricultural employers (employers) may elect to make payments, including statutory interest, to employees for previously unpaid overtime for the three years before the effective date of the act. Employers must make reasonable and good faith efforts to make the specified payments. If employers cannot locate the employees owed, employers may pay the overtime owed to L&I, with supporting documentation. An employer who elects to pay overtime owed, but through good faith error fails to do so, shall not be held liable for certain overtime claims if the employer pays the overtime owed to the employee within 30 days of discovering the error.

Account. The agricultural overtime pay reimbursement account (account) is created. If an employer pays overtime owed to L&I through the process above, the funds must be deposited into the account. An employer may apply to L&I to received overtime owed. As of June 30, 2024, any funds in the account must be distributed on behalf of agricultural workers as directed by a committee selected and chaired by L&I.

Other. The statute of limitations tolling in certain overtime pay cases is extended until the employer completes payment of all overtime owed. The agricultural exemption contained in the Minimum Wage Act is removed.

EFFECT OF CHANGES MADE BY LABOR, COMMERCE & TRIBAL AFFAIRS COMMITTEE (First Substitute):

- Removes the substantially inequitable result test to be used by courts when determining whether to award retroactive pay.
- Removes the agricultural overtime exemption from the overtime law.
- Establishes an affirmative defense for employers to any claim or cause of action for recovery of wages and related damages, penalties, and fees, filed between October 11, 2017 and June 30, 2024, based solely upon the employer's failure to pay an employee overtime due under the overtime law, if the liable party pays the compensation owed under the act.
- Provides a process by which agricultural employers may pay previously uncompensated overtime, with statutory interest, to agricultural workers for overtime worked up to three years prior to the effective date of the act to establish an

affirmative defense. This includes locating and paying employees overtime owed and if unable to locate, paying such overtime owed to L&I, both of which shall satisfy the remedies under the act.

- Requires disbursements from a newly-created agricultural overtime pay account.
- Provides that an employer who elects to pay overtime owed, but through good faith error fails to pay such overtime, shall not be held liable for certain overtime claims if the employer pays the overtime owed to the employee within 30 days of discovering the error.
- Extends the statute of limitations tolling in certain overtime cases filed against an employer who elects to pay overtime owed until the employer completes the payment.

Appropriation: None.

Fiscal Note: Available.

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

Effective Date: The bill contains an emergency clause and takes effect immediately.

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 Lenssen, Lenssen 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.