

SENATE BILL REPORT

SB 5720

As of February 16, 2017

Title: An act relating to payment of production-based compensation wages for the employment and use of labor in agricultural activities and in the production, handling, and storage of farm products.

Brief Description: Addressing the payment of production-based compensation wages for the employment and use of labor in agricultural activities and in the production, handling, and storage of farm products.

Sponsors: Senators Hawkins, Hobbs, Takko, Baumgartner, Sheldon, King, Brown and Schoesler.

Brief History:

Committee Activity: Agriculture, Water, Trade & Economic Development: 2/14/17.

Brief Summary of Bill

- Allows an employer to elect to pay production-based safe harbor compensation (PBSH Compensation) to their employees.
- Establishes that an employer that elects to pay PBSH Compensation may pay remedial compensation to their employee, which may be used as an affirmative defense under certain circumstances.

SENATE COMMITTEE ON AGRICULTURE, WATER, TRADE & ECONOMIC DEVELOPMENT

Staff: Karen Epps (786-7424)

Background: The Minimum Wage Act (MWA) sets forth overtime in addition to minimum wage requirements. The Industrial Welfare Act deals with wages, hours, and working conditions, including child labor, work apparel, and other matters. Under prevailing wage provisions, contractors and subcontractors on public works projects and public building service maintenance contracts must pay their workers prevailing wages. The Wage Payment Act provides for administrative or court action to collect wages under the MWA and other wage laws, as well as establishes other requirements. It is unlawful to make certain deductions from wages and to otherwise fail to pay wages under other laws.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

In 2015, the state Supreme Court was asked to answer two certified questions arising from a class action employment lawsuit pending in federal district court, specifically:

1. Does an agricultural employer have an obligation under Washington's administrative code or the MWA to separately pay piece-rate workers for the rest breaks to which they are entitled?
2. If the answer is "yes," how must Washington agricultural employers calculate the rate of pay for the rest break time to which piece-rate workers are entitled?

The state Supreme Court described piece rate wages as wages, "tied to an employee's output (for example, per pound of fruit harvested) and is earned only when the employee is actively producing." The state Supreme Court held that employers must pay employees for rest breaks separate and apart from piece rate wage payments and the rate of pay for the rest break time must equal at least the applicable minimum wage or the employee's regular rate, whichever is greater. (*Demetrio v. Sakuma Brothers Farms, Inc.*, 183 Wn.2d 649, 653. (2015), considering whether employers that pay piece rate wages must separately pay piece-rate workers for rest breaks under the agricultural rest break regulation requiring employers to provide workers a 10-minute rest period in each 4-hour period of work.)

Summary of Bill: An employer may elect to pay production-based safe harbor compensation (PBSH Compensation) to their employees. PBSH Compensation must not be less than 108 percent of applicable state minimum wage in effect for the period of time within which the production-based activity is being performed, as measured using an authorized weekly averaging calculation method. At all times during which PBSH compensation is being paid, the employee is provided all required breaks or rest periods.

PBSH Compensation is defined as a wage rate that may be paid to employees in connection with work related to the growing, production, handling, or storage of farm products or in performing agricultural activities based upon the employee's job performance as measured through the number of:

- units picked, packed, or manufactured;
- tasks performed;
- events completed; or
- other measurable recurring circumstances produced, completed, or performed.

When calculating the PBSH Compensation, all hours during which the employee is authorized or required to be on duty or at the work location, inclusive of breaks, rest periods, and time spent on activities directly and indirectly associated with the activity must be included in the calculation. The employee is deemed compensated by payment of the greater of the PBSH compensation or 108 percent of the applicable state minimum wage in effect.

To encourage and expedite full compensation of employees for break times, rest and recovery periods, and time spent on activities directly and indirectly associated with the activity on which the PBSH Compensation is calculated that occurred prior to the effective date of this act, employers may elect to pay employees remedial compensation under either of the following remedies:

- the employer may make payments to each of its employees for previously uncompensated or undercompensated break times, rest and recovery periods, time

- spent on activities directly and indirectly associated with the activity and other nonproductive time for the prior three years; or
- the employer may pay each employee an amount equal to 4 percent of the employee's gross earnings for work performed on a production basis or piece work compensation basis during the previous three years, less the amounts previously paid to that employee for break times, rest and recovery periods, time spent on activities directly and indirectly associated with the activity, and other nonproductive time, if any.

Employers must make reasonable and good faith efforts to locate and pay employees the remedial compensation. If after reasonable and good faith efforts, employers are unable to locate an employee entitled to the remedial compensation, employers may pay the remedial compensation due the employees to the Department of Labor and Industries. Employers must include records of the employees entitled this remedial compensation and this will have the same effect as though the remedial compensation was paid to the employees entitled to the remedial compensation.

Employers that have paid the remedial compensation within 12 months of the effective date of this act have an affirmative defense to any claim or cause of action based solely upon the employer's failure to timely pay the employee compensation for break times, rest and recovery periods, and time spent on activities directly and indirectly associated with the activity on which piece rate wages were calculated. An employer who makes a reasonable and good faith effort to pay the remedial compensation, but who solely through good faith error fails to pay remedial compensation to an employee, does not lose the affirmative defense as a result of that good faith error if the employer, within 30 days of discovery or notice of the error, pays the remedial compensation to the employee.

Appropriation: None.

Fiscal Note: Requested on February 13, 2017.

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: PRO: Tree fruit growers have been struggling with the challenges and the confusion created from a 2015 state Supreme Court decision. This bill is designed to provide clarity for employers and the workers. The bill provides a mechanism for employers to compensate workers for past rest periods. Washington's piece rate laws are lacking clarity and making it difficult for Washington's growers, large or small, to offer piece rate jobs for their employees. If the law stays ambiguous, it will force growers to only be able to offer to pay hourly rates in order to avoid potential legal problems. Growers thought they were following the law before the Supreme Court decision, but that ended up not being the case. Growers are happy to pay the wages, but they would like guidance from the Legislature to go back and pay those wages and also to provide clarity going forward so that growers know when they are paying piece rate wages, and know what they are paying for. Growers want to be able to pay employees without the veil of complications and lawsuits. Employers need to know how to pay employees in order to comply with the law. This bill provides clear rules for small farmers to follow when paying their employees fully and fairly.

This bill resolves some of the potential liability for prior issues related to piece rate or production-based compensation and break pay. This bill reduces many of the administrative burdens facing a small farmer. This bill is needed so that growers can pay employees retroactively for rest breaks without the threat of class action lawsuits.

CON: Farmworkers need the opportunity to take a break after working outside all day. Farmworkers are not machines, they are people who deserve rest breaks. The court decision says farmworkers should take a rest break and they should be paid at the hourly rate they are picking piece rate. This bill will make things more complicated for farmworkers and employers. The legislation denies agricultural workers their right to recover a full amount on their unpaid wages for work that they have already performed. This bill gives employers protection if they are sued as a way to avoid paying a penalty for shorting their workers. This bill provides a path for agricultural employers who have been sued and have cases pending before the Washington Supreme Court to avoid liability. This bill helps these companies avoid their legal obligations by providing a defense to the claims in those cases.

Persons Testifying: PRO: Senator Brad Hawkins, Prime Sponsor; Armando Escareno, Flor Maldonado, Kershaw Companies; Chris McCarthy, Auvil Fruit Company; West Mathison, Stemilt Growers; Jim Colbert, Jim Colbert Orchards, LLC; Richard Clyne, WA Farm Bureau; Bob Battles, Assoc of WA Business.

CON: Ramón Torres, Familias Unidas por la Justicia; Rosalinda Guillen, Community to Community Development; Antonio Ginatta, Columbia Legal Services; Eric Gonzalez, WA State Labor Council, AFL-CIO.

Persons Signed In To Testify But Not Testifying: No one.