

CERTIFICATION OF ENROLLMENT  
**SUBSTITUTE SENATE BILL 5569**

Chapter 203, Laws of 1997  
(partial veto)

55th Legislature  
1997 Regular Session

OVERTIME COMPENSATION FOR COMMISSIONED SALES PERSONS

EFFECTIVE DATE: 7/27/97

Passed by the Senate March 13, 1997  
YEAS 33 NAYS 16

BRAD OWEN

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**President of the Senate**

Passed by the House April 16, 1997  
YEAS 61 NAYS 36

CLYDE BALLARD

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**Speaker of the  
House of Representatives**

Approved April 24, 1997, with the  
exception of sections 1 and 5, which  
are vetoed.

GARY LOCKE

\_\_\_\_\_  
**Governor of the State of Washington**

CERTIFICATE

I, Mike O Connell, Secretary of the  
Senate of the State of Washington, do  
hereby certify that the attached is  
**SUBSTITUTE SENATE BILL 5569** as passed  
by the Senate and the House of  
Representatives on the dates hereon  
set forth.

MIKE O'CONNELL

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**Secretary**

FILED

April 24, 1997 - 4:42 p.m.

**Secretary of State  
State of Washington**

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**SUBSTITUTE SENATE BILL 5569**

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Passed Legislature - 1997 Regular Session

**State of Washington                      55th Legislature                      1997 Regular Session**

**By** Senate Committee on Commerce & Labor (originally sponsored by  
Senators Schow, Sellar and Wood)

Read first time 02/12/97.

1            AN ACT Relating to overtime compensation for commissioned  
2 salespersons; amending RCW 49.46.130 and 49.46.010; adding a new  
3 section to chapter 49.46 RCW; creating a new section; and declaring an  
4 emergency.

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

6            ***\*NEW SECTION.** Sec. 1. A new section is added to chapter 49.46 RCW*  
7 *to read as follows:*

8            *Section 3, chapter 289, Laws of 1975 1st ex. sess., codified as RCW*  
9 *49.46.130, was adopted for the purpose of creating conformity between*  
10 *state overtime pay standards and the federal fair labor standards act.*  
11 *RCW 49.46.130(2)(h) was intended to incorporate alternative federal*  
12 *premium guarantee standards for retail commissioned salespersons, found*  
13 *at 29 U.S.C. 207(i), into the state wage and hour law.*

14            *The legislature finds that retail sales typically peak during*  
15 *holiday seasons and events such as product promotions and new product*  
16 *arrivals. Retail commissioned salespersons can maximize their incomes,*  
17 *and are therefore most benefited, by maximizing the hours they work*  
18 *during periods when the sales per hour ratio is high. Employment*  
19 *policies that penalize employers for working retail commissioned*

1 *salespersons more than forty hours in a peak sales work week are*  
2 *detrimental to the well-being of Washington's retail commissioned*  
3 *salespersons.*

4 \*Sec. 1 was vetoed. See message at end of chapter.

5 **Sec. 2.** RCW 49.46.130 and 1995 c 5 s 1 are each amended to read as  
6 follows:

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

12 (2) This section does not apply to:

13 (a) Any person exempted pursuant to RCW 49.46.010(5). The payment  
14 of compensation or provision of compensatory time off in addition to a  
15 salary shall not be a factor in determining whether a person is  
16 exempted under RCW 49.46.010(5)(c);

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

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

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

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

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

35 (g) Any individual employed (i) on a farm, in the employ of any  
36 person, in connection with the cultivation of the soil, or in  
37 connection with raising or harvesting any agricultural or horticultural  
38 commodity, including raising, shearing, feeding, caring for, training,

1 and management of livestock, bees, poultry, and furbearing animals and  
2 wildlife, or in the employ of the owner or tenant or other operator of  
3 a farm in connection with the operation, management, conservation,  
4 improvement, or maintenance of such farm and its tools and equipment;  
5 or (ii) in packing, packaging, grading, storing or delivering to  
6 storage, or to market or to a carrier for transportation to market, any  
7 agricultural or horticultural commodity; or (iii) commercial canning,  
8 commercial freezing, or any other commercial processing, or with  
9 respect to services performed in connection with the cultivation,  
10 raising, harvesting, and processing of oysters or in connection with  
11 any agricultural or horticultural commodity after its delivery to a  
12 terminal market for distribution for consumption;

13 (h) Any industry in which federal law provides for an overtime  
14 payment based on a work week other than forty hours. However, the  
15 provisions of the federal law regarding overtime payment based on a  
16 work week 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 (3) No employer shall be deemed to have violated subsection (1) of  
25 this section by employing any employee of a retail or service  
26 establishment for a work week in excess of the applicable work week  
27 specified in subsection (1) of this section if:

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

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

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

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

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

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

14       (~~((4))~~) (5) No public agency shall be deemed to have violated  
15 subsection (1) of this section with respect to the employment of any  
16 employee in fire protection activities or any employee in law  
17 enforcement activities (including security personnel in correctional  
18 institutions) if: (a) In a work period of twenty-eight consecutive  
19 days the employee receives for tours of duty which in the aggregate  
20 exceed two hundred forty hours; or (b) in the case of such an employee  
21 to whom a work period of at least seven but less than twenty-eight days  
22 applies, in his or her work period the employee receives for tours of  
23 duty which in the aggregate exceed a number of hours which bears the  
24 same ratio to the number of consecutive days in his or her work period  
25 as two hundred forty hours bears to twenty-eight days; compensation at  
26 a rate not less than one and one-half times the regular rate at which  
27 he or she is employed.

28       **Sec. 3.** RCW 49.46.010 and 1993 c 281 s 56 are each amended to read  
29 as follows:

30       As used in this chapter:

31       (1) "Director" means the director of labor and industries;

32       (2) "Wage" means compensation due to an employee by reason of  
33 employment, payable in legal tender of the United States or checks on  
34 banks convertible into cash on demand at full face value, subject to  
35 such deductions, charges, or allowances as may be permitted by rules of  
36 the director;

37       (3) "Employ" includes to permit to work;

1 (4) "Employer" includes any individual, partnership, association,  
2 corporation, business trust, or any person or group of persons acting  
3 directly or indirectly in the interest of an employer in relation to an  
4 employee;

5 (5) "Employee" includes any individual employed by an employer but  
6 shall not include:

7 (a) Any individual (i) employed as a hand harvest laborer and paid  
8 on a piece rate basis in an operation which has been, and is generally  
9 and customarily recognized as having been, paid on a piece rate basis  
10 in the region of employment; (ii) who commutes daily from his or her  
11 permanent residence to the farm on which he or she is employed; and  
12 (iii) who has been employed in agriculture less than thirteen weeks  
13 during the preceding calendar year;

14 (b) Any individual employed in casual labor in or about a private  
15 home, unless performed in the course of the employer's trade, business,  
16 or profession;

17 (c) Any individual employed in a bona fide executive,  
18 administrative, or professional capacity or in the capacity of outside  
19 salesman as those terms are defined and delimited by rules of the  
20 director. However, those terms shall be defined and delimited by the  
21 Washington personnel resources board pursuant to chapter 41.06 RCW;

22 (d) Any individual engaged in the activities of an educational,  
23 charitable, religious, state or local governmental body or agency, or  
24 nonprofit organization where the employer-employee relationship does  
25 not in fact exist or where the services are rendered to such  
26 organizations gratuitously. If the individual receives reimbursement  
27 in lieu of compensation for normally incurred out-of-pocket expenses or  
28 receives a nominal amount of compensation per unit of voluntary service  
29 rendered, an employer-employee relationship is deemed not to exist for  
30 the purpose of this section or for purposes of membership or  
31 qualification in any state, local government or publicly supported  
32 retirement system other than that provided under chapter 41.24 RCW;

33 (e) Any individual employed full time by any state or local  
34 governmental body or agency who provides voluntary services but only  
35 with regard to the provision of the voluntary services. The voluntary  
36 services and any compensation therefor shall not affect or add to  
37 qualification, entitlement or benefit rights under any state, local  
38 government, or publicly supported retirement system other than that  
39 provided under chapter 41.24 RCW;

1 (f) Any newspaper vendor or carrier;

2 (g) Any carrier subject to regulation by Part 1 of the Interstate  
3 Commerce Act;

4 (h) Any individual engaged in forest protection and fire prevention  
5 activities;

6 (i) Any individual employed by any charitable institution charged  
7 with child care responsibilities engaged primarily in the development  
8 of character or citizenship or promoting health or physical fitness or  
9 providing or sponsoring recreational opportunities or facilities for  
10 young people or members of the armed forces of the United States;

11 (j) Any individual whose duties require that he or she reside or  
12 sleep at the place of his or her employment or who otherwise spends a  
13 substantial portion of his or her work time subject to call, and not  
14 engaged in the performance of active duties;

15 (k) Any resident, inmate, or patient of a state, county, or  
16 municipal correctional, detention, treatment or rehabilitative  
17 institution;

18 (l) Any individual who holds a public elective or appointive office  
19 of the state, any county, city, town, municipal corporation or quasi  
20 municipal corporation, political subdivision, or any instrumentality  
21 thereof, or any employee of the state legislature;

22 (m) All vessel operating crews of the Washington state ferries  
23 operated by the department of transportation;

24 (n) Any individual employed as a seaman on a vessel other than an  
25 American vessel((--))i

26 (6) "Occupation" means any occupation, service, trade, business,  
27 industry, or branch or group of industries or employment or class of  
28 employment in which employees are gainfully employed;

29 (7) "Retail or service establishment" means an establishment  
30 seventy-five percent of whose annual dollar volume of sales of goods or  
31 services, or both, is not for resale and is recognized as retail sales  
32 or services in the particular industry.

33 NEW SECTION. **Sec. 4.** Nothing in this act shall be construed to  
34 alter the terms, conditions, or practices contained in any collective  
35 bargaining agreement in effect at the time of the effective date of  
36 this act until the expiration date of such agreement.

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

5        ***\*Sec. 5 was vetoed. See message at end of chapter.***

        Passed the Senate March 13, 1997.

        Passed the House April 16, 1997.

        Approved by the Governor April 24, 1997, with the exception of  
        certain items that were vetoed.

        Filed in Office of Secretary of State April 24, 1997.

1        Note: Governor's explanation of partial veto is as follows:

2        "I am returning herewith, without my approval as to sections 1 and  
3 5, Substitute Senate Bill No. 5569 entitled:

4        "AN ACT Relating to overtime compensation for commissioned  
5 salespersons;"

6        Section 1 of SSB 5569 is an attempt to interpret the legislative  
7 intent of the state wage and hour law, passed in 1975, and to thereby  
8 influence pending litigation. This is not only unfair and unjust, but  
9 also it raises constitutional questions. The power to interpret  
10 legislative intent rests with the judiciary. It is my opinion that a  
11 legislative body should not attempt to usurp that duty or interpret the  
12 intent or thoughts of a legislative body which met over twenty years  
13 ago.

14        The possibility of abuse by unscrupulous employers also concerns  
15 me. Under the auspices of this bill, an employer might attempt to  
16 assign commissioned sales person to non-sales duties in order to avoid  
17 paying overtime. I will direct the Department of Labor and Industries  
18 to assess the implementation of this statute and report its impact to  
19 both the legislature and my office.

20        Section 5 is an emergency clause, and is unnecessary.

21        For these reasons, I have vetoed sections 1 and 5 of Substitute  
22 Senate Bill No. 5569.

23        With the exceptions of sections 1 and 5, Substitute Senate Bill No.  
24 5569 is approved."