S-1085.2

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**SUBSTITUTE SENATE BILL 5172**

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**State of Washington 67th Legislature 2021 Regular Session**

**By** Senate Labor, Commerce & Tribal Affairs (originally sponsored by Senators King, Brown, Fortunato, Honeyford, Muzzall, Schoesler, Short, and Wagoner)

AN ACT Relating to the retroactivity of overtime claims in exceptional cases; amending RCW 49.46.130; adding a new section to chapter 49.46 RCW; adding new sections to chapter 49.48 RCW; and creating a new section.

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

NEW SECTION. **Sec.**  (1) The legislature recognizes that the numerous cases in Washington state have addressed the application of the prospective and retroactive effect of the courts' decisions, and that the courts have established a general rule favoring retroactivity. The legislature finds that recent decisions relating to overtime wage claims create exceptional cases requiring unique legislative action.

(2) The legislature intends to address the retroactive effect of court decisions concerning overtime wage claims by removing an exceptional constitutionally suspect historical exemption and by creating an affirmative defense for employers which are affected by the elimination of the exceptional historical exemption.

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

In any cause of action filed in court on or after October 11, 2017, and before June 30, 2024, seeking overtime pay under the provisions of RCW 49.46.130 or other provision of state or local 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, damages, statutory penalties, or civil penalties, actual damages, and attorneys' fees and costs based solely upon the employer's failure to pay an employee overtime pay due under RCW 49.46.130 if the employer or person alleged to be liable elects the remedies and pays the compensation as described in section 4 of this act.

**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 49.48 RCW to read as follows:

(1) In any action seeking overtime compensation from agricultural employers due under RCW 49.46.130, section 3, chapter . . ., Laws of 2021 (section 3 of this act), eliminating the exceptional historical exception from overtime obligations, is curative and operates retroactively.

(2)(a) To encourage and expedite full compensation of agricultural workers for overtime work performed before the effective date of this section, agricultural employers may elect to make payments, including interest at the rate of 12 percent per annum from the effective date of this section, to each of its employees for previously uncompensated overtime for the three years before the effective date of this section.

(b) Employers must make reasonable and good faith efforts to locate and pay employees the overtime pay due under this section, and if, after reasonable and good faith efforts, employers are unable to locate any employees entitled to overtime pay under this section, employers must pay the amount due the employees under (a) of this subsection to the department of labor and industries, with the supporting records of the employees entitled to this compensation, which, if paid, shall have the same effect as though the compensation was paid to the employees entitled to that compensation and shall satisfy the remedies under (a) of this subsection as to those employees.

(c) Employers must provide to the department of labor and industries records supporting the direct payments to employees entitled to overtime that were made were sufficient to satisfy the remedies under (a) of this subsection as to those employees.

(3) An agricultural employer who elects the remedies in subsection (2) of this section, but who solely through good faith error fails to make a payment to one or more employees or to the department of labor and industries shall not be held liable for any claim or cause of action arising under this chapter or chapter 49.46 RCW, based solely upon the employer's failure to pay overtime pay during the three-year period before the effective date of this section, if the employer, within thirty days of discovery or notice of the error, pays the compensation to the employee.

(4) When a claim or cause of action based solely upon the employer's failure to pay overtime compensation due under RCW 49.46.130 is filed after November 5, 2020, against an employer who elects the remedies in subsection (2) of this section, the statute of limitations shall be tolled until the employer completes payment of all overtime owed.

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

The agricultural overtime pay reimbursement account is created in the custody of the state treasurer. All receipts from employers under section 4(2) of this act must be deposited in the account. Expenditures from the account may be used only for the purposes of subsections (1) and (2) of this section. 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.

(1) An employee may apply to the director of the department of labor and industries or the director's designee to receive payments owed under this section.

(2) Any moneys in the agricultural overtime pay reimbursement account as of June 30, 2024, shall be distributed on behalf of agricultural workers as directed by a committee selected and chaired by the director of the department of labor and industries or the director's designee.

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