

CERTIFICATION OF ENROLLMENT  
**ENGROSSED SUBSTITUTE SENATE BILL 5172**

67th Legislature  
2021 Regular Session

Passed by the Senate April 15, 2021  
Yeas 42 Nays 6

---

**President of the Senate**

Passed by the House April 9, 2021  
Yeas 91 Nays 7

---

**Speaker of the House of  
Representatives**

Approved

---

**Governor of the State of Washington**

CERTIFICATE

I, Brad Hendrickson, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **ENGROSSED SUBSTITUTE SENATE BILL 5172** as passed by the Senate and the House of Representatives on the dates hereon set forth.

---

**Secretary**

FILED

**Secretary of State  
State of Washington**

---

**ENGROSSED SUBSTITUTE SENATE BILL 5172**

---

AS AMENDED BY THE HOUSE

Passed Legislature - 2021 Regular Session

**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)

READ FIRST TIME 02/15/21.

1            AN ACT Relating to the retroactivity of overtime claims in  
2 exceptional cases; amending RCW 49.46.130; and creating a new  
3 section.

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

5            NEW SECTION.    **Sec. 1.**    In order to stabilize, strengthen, and  
6 protect our state's agricultural workforce and economy, it is the  
7 intent of the legislature to pass the laws necessary to protect  
8 farmworkers and to provide agricultural employers with certainty and  
9 predictability.

10           The legislature intends to address the historical exceptions of  
11 agricultural work from overtime standards from both the federal fair  
12 labor standards act and the state minimum wage act when they were  
13 enacted over 60 years ago. Excluded from the opportunity to earn  
14 overtime pay, farmworkers across our state remain among our state's  
15 poorest workers. A United States department of labor study in 2016  
16 found that nationally, 30 percent of farmworker families live below  
17 the poverty line, almost double the poverty rate of American families  
18 overall. The state department of health found that the current novel  
19 coronavirus pandemic has had a significant and disproportionate  
20 impact on farmworkers. The virus' risks to essential farmworkers from

1 potential workplace exposures are compounded by systemic barriers to  
2 testing, prevention measures, and medical care.

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

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

24 **Sec. 2.** RCW 49.46.130 and 2013 c 207 s 1 are each amended to  
25 read as follows:

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

32 (2) This section does not apply to:

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

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

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

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

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

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

18 (g) Any individual employed (~~((i) on a farm, in the employ of any~~  
19 ~~person, in connection with the cultivation of the soil, or in~~  
20 ~~connection with raising or harvesting any agricultural or~~  
21 ~~horticultural commodity, including raising, shearing, feeding, caring~~  
22 ~~for, training, and management of livestock, bees, poultry, and~~  
23 ~~furbearing animals and wildlife, or in the employ of the owner or~~  
24 ~~tenant or other operator of a farm in connection with the operation,~~  
25 ~~management, conservation, improvement, or maintenance of such farm~~  
26 ~~and its tools and equipment; or (ii) in packing, packaging, grading,~~  
27 ~~storing or delivering to storage, or to market or to a carrier for~~  
28 ~~transportation to market, any agricultural or horticultural~~  
29 ~~commodity; or (iii) commercial canning, commercial freezing, or any~~  
30 ~~other commercial processing, or with respect to services performed in~~  
31 ~~connection with the cultivation, raising, harvesting, and processing~~  
32 ~~of oysters or in connection with any agricultural or horticultural~~  
33 ~~commodity after its delivery to a terminal market for distribution~~  
34 ~~for consumption)) as an agricultural employee. This exemption from  
35 subsection (1) of this section applies only until December 31, 2021;~~

36 (h) Any industry in which federal law provides for an overtime  
37 payment based on a workweek other than forty hours. However, the  
38 provisions of the federal law regarding overtime payment based on a  
39 workweek other than forty hours shall nevertheless apply to employees  
40 covered by this section without regard to the existence of actual

1 federal jurisdiction over the industrial activity of the particular  
2 employer within this state. For the purposes of this subsection,  
3 "industry" means a trade, business, industry, or other activity, or  
4 branch, or group thereof, in which individuals are gainfully employed  
5 (section 3(h) of the Fair Labor Standards Act of 1938, as amended  
6 (Public Law 93-259));

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

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

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

24 (a) The regular rate of pay of the employee is in excess of one  
25 and one-half times the minimum hourly rate required under RCW  
26 49.46.020; and

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

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

35 (4) No employer of commissioned salespeople primarily engaged in  
36 the business of selling automobiles, trucks, recreational vessels,  
37 recreational vessel trailers, recreational vehicle trailers,  
38 recreational campers, manufactured housing, or farm implements to  
39 ultimate purchasers shall violate subsection (1) of this section with

1 respect to such commissioned salespeople if the commissioned  
2 salespeople are paid the greater of:

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

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

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

23 (6) (a) Beginning January 1, 2022, any agricultural employee shall  
24 not be employed for more than 55 hours in any one workweek unless the  
25 agricultural employee receives one and one-half times that  
26 agricultural employee's regular rate of pay for all hours worked over  
27 55 in any one workweek.

28 (b) Beginning January 1, 2023, any agricultural employee shall  
29 not be employed for more than 48 hours in any one workweek unless the  
30 agricultural employee receives one and one-half times that  
31 agricultural employee's regular rate of pay for all hours worked over  
32 48 in any one workweek.

33 (c) Beginning January 1, 2024, any agricultural employee shall  
34 not be employed for more than 40 hours in any one workweek unless the  
35 agricultural employee receives one and one-half times that  
36 agricultural employee's regular rate of pay for all hours worked over  
37 40 in any one workweek.

38 (7) (a) No damages, statutory or civil penalties, attorneys' fees  
39 and costs, or other type of relief may be granted against an employer  
40 to an agricultural or dairy employee seeking unpaid overtime due to

1 the employee's historical exclusion from overtime under subsection  
2 (2)(g) of this section, as it existed on November 4, 2020.

3 (b) This subsection applies to all claims, causes of actions, and  
4 proceedings commenced on or after November 5, 2020, regardless of  
5 when the claim or cause of action arose. To this extent, this  
6 subsection applies retroactively, but in all other respects it  
7 applies prospectively.

8 (c) This subsection does not apply to dairy employees entitled to  
9 backpay or other relief as a result of being a member in the class of  
10 plaintiffs in Martinez-Cuevas v. DeRuyter Bros. Dairy, 196 Wn.2d 506  
11 (2020).

12 (8) For the purposes of this section, "agricultural employee"  
13 means any individual employed: (a) On a farm, in the employ of any  
14 person, in connection with the cultivation of the soil, or in  
15 connection with raising or harvesting any agricultural or  
16 horticultural commodity, including raising, shearing, feeding, caring  
17 for, training, and management of livestock, bees, poultry, and  
18 furbearing animals and wildlife, or in the employ of the owner or  
19 tenant or other operator of a farm in connection with the operation,  
20 management, conservation, improvement, or maintenance of such farm  
21 and its tools and equipment; (b) in packing, packaging, grading,  
22 storing or delivering to storage, or to market or to a carrier for  
23 transportation to market, any agricultural or horticultural  
24 commodity; or (c) commercial canning, commercial freezing, or any  
25 other commercial processing, or with respect to services performed in  
26 connection with the cultivation, raising, harvesting, and processing  
27 of oysters or in connection with any agricultural or horticultural  
28 commodity after its delivery to a terminal market for distribution  
29 for consumption. An agricultural employee does not include a dairy  
30 employee.

31 (9) For the purposes of this section, "dairy employee" includes  
32 any employee engaged in dairy cattle and milk production activities  
33 described in code 112120 of the North American industry  
34 classification system.

--- END ---