
ENGROSSED SUBSTITUTE SENATE BILL 5172

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 49.46.130; adding a new
3 section to chapter 49.46 RCW; adding a new section to chapter 49.48
4 RCW; creating a new section; providing an effective date; and
5 providing expiration dates.

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

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

12 The legislature intends to address the historical exceptions of
13 agricultural work from overtime standards from both the federal fair
14 labor standards act and the state minimum wage act when they were
15 enacted over 70 years ago. Excluded from the opportunity to earn
16 overtime pay, farmworkers across our state remain among our state's
17 poorest workers. A United States department of labor study in 2016
18 found that nationally, 30 percent of farmworker families live below
19 the poverty line, almost double the poverty rate of American families
20 overall. The state department of health found that the current novel
21 coronavirus pandemic has had a significant and disproportionate

1 impact on farmworkers. The virus' risks to essential farmworkers from
2 potential workplace exposures are compounded by systemic barriers to
3 testing, prevention measures, and medical care.

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

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

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

27 (1) Except as otherwise provided in this section and section 4 of
28 this act, no employer shall employ any of his or her employees for a
29 workweek longer than forty hours unless such employee receives
30 compensation for his or her employment in excess of the hours above
31 specified at a rate not less than one and one-half times the regular
32 rate at which he or she is employed.

33 (2) This section does not apply to:

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

38 (b) Employees who request compensating time off in lieu of
39 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~~) Except as otherwise provided in section 4 of this
19 act, any individual employed (i) on a farm, in the employ of any
20 person, in connection with the cultivation of the soil, or in
21 connection with raising or harvesting any agricultural or
22 horticultural commodity, including raising, shearing, feeding, caring
23 for, training, and management of livestock, bees, poultry, and
24 furbearing animals and wildlife, or in the employ of the owner or
25 tenant or other operator of a farm in connection with the operation,
26 management, conservation, improvement, or maintenance of such farm
27 and its tools and equipment; or (ii) in packing, packaging, grading,
28 storing or delivering to storage, or to market or to a carrier for
29 transportation to market, any agricultural or horticultural
30 commodity; or (iii) commercial canning, commercial freezing, or any
31 other commercial processing, or with respect to services performed in
32 connection with the cultivation, raising, harvesting, and processing
33 of oysters or in connection with any agricultural or horticultural
34 commodity after its delivery to a terminal market for distribution
35 for consumption;

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 **Sec. 3.** RCW 49.46.130 and 2013 c 207 s 1 are each amended to
24 read as follows:

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

31 (2) This section does not apply to:

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

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

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

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

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

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

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

33 ~~(h))~~ Any industry in which federal law provides for an overtime
34 payment based on a workweek other than forty hours. However, the
35 provisions of the federal law regarding overtime payment based on a
36 workweek other than forty hours shall nevertheless apply to employees
37 covered by this section without regard to the existence of actual
38 federal jurisdiction over the industrial activity of the particular
39 employer within this state. For the purposes of this subsection,
40 "industry" means a trade, business, industry, or other activity, or

1 branch, or group thereof, in which individuals are gainfully employed
2 (section 3(h) of the Fair Labor Standards Act of 1938, as amended
3 (Public Law 93-259));

4 (~~(i)~~) (h) Any hours worked by an employee of a carrier by air
5 subject to the provisions of subchapter II of the Railway Labor Act
6 (45 U.S.C. Sec. 181 et seq.), when such hours are voluntarily worked
7 by the employee pursuant to a shift-trading practice under which the
8 employee has the opportunity in the same or in other workweeks to
9 reduce hours worked by voluntarily offering a shift for trade or
10 reassignment; and

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

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

21 (a) The regular rate of pay of the employee is in excess of one
22 and one-half times the minimum hourly rate required under RCW
23 49.46.020; and

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

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

32 (4) No employer of commissioned salespeople primarily engaged in
33 the business of selling automobiles, trucks, recreational vessels,
34 recreational vessel trailers, recreational vehicle trailers,
35 recreational campers, manufactured housing, or farm implements to
36 ultimate purchasers shall violate subsection (1) of this section with
37 respect to such commissioned salespeople if the commissioned
38 salespeople are paid the greater of:

39 (a) Compensation at the hourly rate, which may not be less than
40 the rate required under RCW 49.46.020, for each hour worked up to

1 forty hours per week, and compensation of one and one-half times that
2 hourly rate for all hours worked over forty hours in one week; or

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

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

19 NEW SECTION. **Sec. 4.** A new section is added to chapter 49.46
20 RCW to read as follows:

21 (1) The overtime requirements of RCW 49.46.130 apply to hours
22 worked by an agricultural employee for an employer engaged in dairy
23 cattle and milk production activities described in code 112120 of the
24 North American industry classification system.

25 (2) Beginning January 1, 2022, any agricultural employee other
26 than employees described in subsection (1) of this section shall not
27 be employed for more than 55 hours in any one workweek unless the
28 agricultural employee receives one and one-half times that
29 agricultural employee's regular rate of pay for all hours worked over
30 55 in any one workweek.

31 (3) Beginning January 1, 2023, any agricultural employee other
32 than employees described in subsection (1) of this section shall not
33 be employed for more than 48 hours in any one workweek unless the
34 agricultural employee receives one and one-half times that
35 agricultural employee's regular rate of pay for all hours worked over
36 48 in any one workweek.

37 (4) Beginning January 1, 2024, any agricultural employee other
38 than employees described in subsection (1) of this section shall not
39 be employed for more than 40 hours in any one workweek unless the

1 agricultural employee receives one and one-half times that
2 agricultural employee's regular rate of pay for all hours worked over
3 40 in any one workweek.

4 (5) For the purposes of this section, "agricultural employee"
5 means any individual employed: (a) On a farm, in the employ of any
6 person, in connection with the cultivation of the soil, or in
7 connection with raising or harvesting any agricultural or
8 horticultural commodity, including raising, shearing, feeding, caring
9 for, training, and management of livestock, bees, poultry, and
10 furbearing animals and wildlife, or in the employ of the owner or
11 tenant or other operator of a farm in connection with the operation,
12 management, conservation, improvement, or maintenance of such farm
13 and its tools and equipment; (b) in packing, packaging, grading,
14 storing or delivering to storage, or to market or to a carrier for
15 transportation to market, any agricultural or horticultural
16 commodity; or (c) commercial canning, commercial freezing, or any
17 other commercial processing, or with respect to services performed in
18 connection with the cultivation, raising, harvesting, and processing
19 of oysters or in connection with any agricultural or horticultural
20 commodity after its delivery to a terminal market for distribution
21 for consumption.

22 (6) The payment of compensation or provision of compensatory time
23 off in addition to a salary required under this section shall not be
24 a factor in determining whether a person is exempt under RCW
25 49.46.010(3)(c).

26 NEW SECTION. **Sec. 5.** A new section is added to chapter 49.48
27 RCW to read as follows:

28 (1) No damages, statutory or civil penalties, attorneys' fees and
29 costs, or other type of relief may be granted against an employer to
30 an agricultural employee seeking unpaid overtime due to the
31 agricultural employee's historical exclusion from overtime under RCW
32 49.46.130(2)(g), as it existed on November 4, 2020.

33 (2) This section applies retroactively to claims filed after
34 November 5, 2020, and before the effective date of this section.

35 (3) This section does not apply to agricultural employees
36 entitled to backpay or other relief as a result of being a member in
37 the class of plaintiffs in *Martinez-Cuevas v. DeRuyter Bros. Dairy*,
38 196 Wn.2d 506 (2020).

1 (4) (a) For the purposes of this section, "agricultural employee"
2 means any individual employed: (i) On a farm, in the employ of any
3 person, in connection with the cultivation of the soil, or in
4 connection with raising or harvesting any agricultural or
5 horticultural commodity, including raising, shearing, feeding, caring
6 for, training, and management of livestock, bees, poultry, and
7 furbearing animals and wildlife, or in the employ of the owner or
8 tenant or other operator of a farm in connection with the operation,
9 management, conservation, improvement, or maintenance of such farm
10 and its tools and equipment; (ii) in packing, packaging, grading,
11 storing or delivering to storage, or to market or to a carrier for
12 transportation to market, any agricultural or horticultural
13 commodity; or (iii) in commercial canning, commercial freezing, or
14 any other commercial processing, or with respect to services
15 performed in connection with the cultivation, raising, harvesting,
16 and processing of oysters or in connection with any agricultural or
17 horticultural commodity after its delivery to a terminal market for
18 distribution for consumption.

19 (b) For the purposes of this section, "agricultural employee"
20 does not include any employee exempt under RCW 49.46.010(3)(c).

21 NEW SECTION. **Sec. 6.** (1) Section 2 of this act expires January
22 1, 2024.

23 (2) Section 4 of this act expires January 1, 2025.

24 NEW SECTION. **Sec. 7.** Section 3 of this act takes effect January
25 1, 2024.

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