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**SENATE BILL 5476**

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**State of Washington 68th Legislature 2023 Regular Session**

**By** Senators King, Mullet, Torres, and Warnick

AN ACT Relating to authorizing an agricultural employer to select any 12 weeks in a calendar year as special circumstance weeks for labor demand, during which in each of the selected 12 weeks, the agricultural employer may employ agricultural employees for up to 50 hours before the requirement to pay overtime applies under RCW 49.46.130; amending RCW 49.46.130; creating a new section; and declaring an emergency.

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

NEW SECTION. **Sec.**  In 2021, the legislature repealed the statute that exempted agricultural workers from overtime pay which had been in effect since 1959. With this historic legislation, Washington state became the first state in the nation to impose an overtime pay requirement for agricultural workers working in excess of 40 hours a week. Recognizing that such a change would be a sizeable shift in practice for all farmers and agricultural workers across the state, the legislature adopted a phased-in approach, but did not address the seasonal needs of Washington agriculture given the time-sensitive nature of growing and harvesting mature field crops and perishable fruits and vegetables. The agricultural industry is unique from other types of industry because of pressures on farmers, ranchers, and workers caused by issues mainly out of their control such as uncertainty of weather, yields, calving, national and international shifts in trade policy, and transportation inconsistencies. Furthermore, farmers do not set their own prices and are price takers who cannot simply respond to increased production costs by increasing prices of their goods. Due to the tight margins that farms operate on, farm employers may be forced to limit overtime work, resulting in the full harvest not being collected and the worker being denied the opportunity to earn the wages for which they have become accustomed. The legislature believes it is reasonable to allow agricultural employers limited flexibility to shape work schedules during a narrow window of time to best fit the peaks of labor demand for their crops, thereby providing them some ability to weather the unpredictability of agricultural work and ensure that Washington's second largest industry remains vital and strong while also ensuring security for farm workers.

**Sec.**  RCW 49.46.130 and 2021 c 249 s 2 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 as an agricultural employee. This exemption from subsection (1) of this section applies only until December 31, 2021;

(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) 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) 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), "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.

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

(b) Beginning January 1, 2023, and except as provided in (d) of this subsection, any agricultural employee shall not be employed for more than 48 hours in any one workweek unless the agricultural employee receives one and one-half times that agricultural employee's regular rate of pay for all hours worked over 48 in any one workweek.

(c) Beginning January 1, 2024, and except as provided in (d) of this subsection, any agricultural employee shall not be employed for more than 40 hours in any one workweek unless the agricultural employee receives one and one-half times that agricultural employee's regular rate of pay for all hours worked over 40 in any one workweek.

(d)(i) An agricultural employer may select any 12 weeks in a calendar year as special circumstance weeks for labor demand. During each of the selected 12 weeks, the agricultural employer may employ agricultural employees for up to 50 hours before the requirement to pay overtime under this section applies.

(ii) In addition to the records required to be kept under RCW 49.30.020, an agricultural employer is responsible for maintaining records of which special circumstance weeks were utilized.

(iii) An agricultural employer must provide an annual initial disclosure of a good-faith estimate of the selected 12 weeks to their agricultural employees at least 30 days in advance of the first expected special circumstance week, or upon hiring for those who start work fewer than 30 days in advance. For agricultural employees employed under, and in compliance with federal requirements for, temporary work visas, the disclosure of a good-faith estimate must be made no later than the date of the worker's visa application, contemporaneous with required federal preemployment written disclosures to visa workers ordinarily due by the date of the worker's visa application.

(iv) An agricultural employee must be provided written notice, at least annually, of which weeks will be special circumstance weeks, no later than the seventh day before the first special circumstance week, or upon hiring for those starting work after the seventh day. The employer may change which are the special circumstance weeks after that notice if:

(A) The employer provides at least one week's written notice of any week being added or removed as a special circumstance week;

(B) The initial disclosure was the employer's good-faith, reasonable expectation of which weeks would be the special circumstance weeks; and

(C) The changes are based on circumstances not foreseeable at the time of the initial disclosure.

(7)(a) No damages, statutory or civil penalties, attorneys' fees and costs, or other type of relief may be granted against an employer to an agricultural or dairy employee seeking unpaid overtime due to the employee's historical exclusion from overtime under subsection (2)(g) of this section, as it existed on November 4, 2020.

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

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

(8) For the purposes of this section, "agricultural employee" means any individual employed: (a) 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; (b) 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 (c) ((~~[in]~~)) in 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. An agricultural employee does not include a dairy employee.

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

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

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