
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; adding a new section to
3 chapter 49.46 RCW; adding new sections to chapter 49.48 RCW; and
4 creating a new section.

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

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

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

18 NEW SECTION. **Sec. 2.** A new section is added to chapter 49.46
19 RCW to read as follows:

1 In any cause of action filed in court on or after October 11,
2 2017, and before June 30, 2024, seeking overtime pay under the
3 provisions of RCW 49.46.130 or other provision of state or local law,
4 the employer and any other person alleged to be liable for overtime
5 pay shall have an affirmative defense to any claim or cause of action
6 for recovery of wages, damages, statutory penalties, or civil
7 penalties, actual damages, and attorneys' fees and costs based solely
8 upon the employer's failure to pay an employee overtime pay due under
9 RCW 49.46.130 if the employer or person alleged to be liable elects
10 the remedies and pays the compensation as described in section 4 of
11 this act.

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

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

20 (2) This section does not apply to:

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

25 (b) Employees who request compensating time off in lieu of
26 overtime pay;

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

29 (d) Seasonal employees who are employed at concessions and
30 recreational establishments at agricultural fairs, including those
31 seasonal employees employed by agricultural fairs, within the state
32 provided that the period of employment for any seasonal employee at
33 any or all agricultural fairs does not exceed fourteen working days a
34 year;

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

38 (f) An individual employed as a truck or bus driver who is
39 subject to the provisions of the Federal Motor Carrier Act (49 U.S.C.

1 Sec. 3101 et seq. and 49 U.S.C. Sec. 10101 et seq.), if the
2 compensation system under which the truck or bus driver is paid
3 includes overtime pay, reasonably equivalent to that required by this
4 subsection, for working longer than forty hours per week;

5 ~~(g) ((Any individual employed (i) 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; or (ii) 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 (iii) 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 ~~(h))~~ Any industry in which federal law provides for an overtime
23 payment based on a workweek other than forty hours. However, the
24 provisions of the federal law regarding overtime payment based on a
25 workweek other than forty hours shall nevertheless apply to employees
26 covered by this section without regard to the existence of actual
27 federal jurisdiction over the industrial activity of the particular
28 employer within this state. For the purposes of this subsection,
29 "industry" means a trade, business, industry, or other activity, or
30 branch, or group thereof, in which individuals are gainfully employed
31 (section 3(h) of the Fair Labor Standards Act of 1938, as amended
32 (Public Law 93-259));

33 ~~((i))~~ (h) Any hours worked by an employee of a carrier by air
34 subject to the provisions of subchapter II of the Railway Labor Act
35 (45 U.S.C. Sec. 181 et seq.), when such hours are voluntarily worked
36 by the employee pursuant to a shift-trading practice under which the
37 employee has the opportunity in the same or in other workweeks to
38 reduce hours worked by voluntarily offering a shift for trade or
39 reassignment; and

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

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

11 (a) The regular rate of pay of the employee is in excess of one
12 and one-half times the minimum hourly rate required under RCW
13 49.46.020; and

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

17 In determining the proportion of compensation representing
18 commissions, all earnings resulting from the application of a bona
19 fide commission rate is to be deemed commissions on goods or services
20 without regard to whether the computed commissions exceed the draw or
21 guarantee.

22 (4) No employer of commissioned salespeople primarily engaged in
23 the business of selling automobiles, trucks, recreational vessels,
24 recreational vessel trailers, recreational vehicle trailers,
25 recreational campers, manufactured housing, or farm implements to
26 ultimate purchasers shall violate subsection (1) of this section with
27 respect to such commissioned salespeople if the commissioned
28 salespeople are paid the greater of:

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

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

35 (5) No public agency shall be deemed to have violated subsection
36 (1) of this section with respect to the employment of any employee in
37 fire protection activities or any employee in law enforcement
38 activities (including security personnel in correctional
39 institutions) if: (a) In a work period of twenty-eight consecutive
40 days the employee receives for tours of duty which in the aggregate

1 exceed two hundred forty hours; or (b) in the case of such an
2 employee to whom a work period of at least seven but less than
3 twenty-eight days applies, in his or her work period the employee
4 receives for tours of duty which in the aggregate exceed a number of
5 hours which bears the same ratio to the number of consecutive days in
6 his or her work period as two hundred forty hours bears to twenty-
7 eight days; compensation at a rate not less than one and one-half
8 times the regular rate at which he or she is employed.

9 NEW SECTION. **Sec. 4.** A new section is added to chapter 49.48
10 RCW to read as follows:

11 (1) In any action seeking overtime compensation from agricultural
12 employers due under RCW 49.46.130, section 3, chapter . . ., Laws of
13 2021 (section 3 of this act), eliminating the exceptional historical
14 exception from overtime obligations, is curative and operates
15 retroactively.

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

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

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

38 (3) An agricultural employer who elects the remedies in
39 subsection (2) of this section, but who solely through good faith

1 error fails to make a payment to one or more employees or to the
2 department of labor and industries shall not be held liable for any
3 claim or cause of action arising under this chapter or chapter 49.46
4 RCW, based solely upon the employer's failure to pay overtime pay
5 during the three-year period before the effective date of this
6 section, if the employer, within thirty days of discovery or notice
7 of the error, pays the compensation to the employee.

8 (4) When a claim or cause of action based solely upon the
9 employer's failure to pay overtime compensation due under RCW
10 49.46.130 is filed after November 5, 2020, against an employer who
11 elects the remedies in subsection (2) of this section, the statute of
12 limitations shall be tolled until the employer completes payment of
13 all overtime owed.

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

16 The agricultural overtime pay reimbursement account is created in
17 the custody of the state treasurer. All receipts from employers under
18 section 4(2) of this act must be deposited in the account.
19 Expenditures from the account may be used only for the purposes of
20 subsections (1) and (2) of this section. Only the director of the
21 department of labor and industries or the director's designee may
22 authorize expenditures from the account. The account is subject to
23 allotment proceedings under chapter 43.88 RCW, but an appropriation
24 is not required for expenditures.

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

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

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