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New Overtime Requirements for Washington Agricultural Workers

In response to last year's groundbreaking decision by the Washington State Supreme Court in *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*,^[1] the state legislature recently passed Engrossed Substitute Senate Bill 5172 (SB5172),^[2] amending the state's Minimum Wage Act (MWA) as it relates to agricultural workers and adopting a phased approach for imposing overtime requirements on agricultural employers. The amendments were signed into law by Governor Jay Inslee on May 11, 2021.

Long exempt from the overtime provisions of the MWA, agricultural workers will be eligible for overtime pay beginning in 2022, and by 2024 agricultural workers will be on par with all other nonexempt employees under the act. The amendments also address retroactivity of the *DeRuyter Bros.* decision, effectively eliminating any unpaid overtime liability for agricultural employers under the historical exemption.

The *DeRuyter Bros.* Decision

When Washington state first enacted the MWA in 1961, the state equivalent (in many ways) of the federal Fair Labor Standards Act (FLSA), it included an overtime pay exemption for agricultural workers similar to the exemption found in the FLSA, but as described in the MWA, the exemption applied to traditional farmworkers and any workers who package, store, deliver, can, freeze, or process any agricultural or horticultural commodities for market distribution. Thus, even after implementation of modern wage-and-hour standards, agricultural employers in Washington state were never required to pay a significant portion of their workforce overtime.

That is, until last year, when the Washington State Supreme Court took up a challenge to the MWA's agricultural worker exemption under the state constitution. In *DeRuyter Bros.*, a group of dairy workers brought a class action claiming, among other things, failure to pay overtime. The dairy workers argued that the agricultural worker exemption was unconstitutional under the state's privileges and immunities clause as applied to their work. Although most of the dairy workers' claims were ultimately settled, the constitutional challenge to the overtime exemption eventually made it all the way to the state supreme court. In the end, the [court agreed](#) with the dairy workers.

The Legislature's Response

Although the *DeRuyter Bros.* decision resolved the specific dispute between the parties, it also raised serious questions for the rest of the state's agricultural workers and employers alike. The court's narrow opinion applied only to year-round dairy workers, otherwise leaving the exemption intact. This left the rest of the state's agricultural workers to wonder what the decision might mean for them. From the employers' perspective, the decision appeared to leave them potentially exposed to significant liability from challenges by similarly situated employees. There was a legitimate concern that the decision would lead to a flurry of litigation, clogging an already crowded state court docket, as the exemption was challenged piecemeal by different classes of works.

SB5172 is the legislature's response to this uncertainty and represents a bipartisan effort to provide clarity to the stakeholders affected by the *DeRuyter Bros.* decision. The amendments address these concerns in three ways, by (1) eliminating the agricultural worker exemption in the MWA, (2) adopting a phased approach to imposing overtime pay obligations on agricultural employers, and (3) addressing the question of retroactive liability for

unpaid overtime under the historical exemption.

Eliminating the Exemption

The most significant result of SB5172 is the elimination of the agricultural exemption from the MWA. The exemption officially sunsets on December 31, 2021, giving agricultural employers a little more than six months to prepare.

In the meantime, and to deal with the unconstitutional as-applied ruling for dairy workers in *DeRuyter Bros.*, the amended statute clarifies that the exemption still applies to all agricultural workers except dairy workers until it officially sunsets. The amended exemption provision notes that the exemption will sunset for agricultural workers but adopts a definition of "agricultural employee" that specifically excludes "dairy employees." It then defines dairy employees as anyone engaged in dairy cattle and milk production per [NAICS Code 112120](#).

This means the amendments do not change the effect of the *DeRuyter Bros.* decision on agricultural employers who employ dairy workers. As of November 5, 2020, when the *DeRuyter Bros.* decision was issued, dairy workers were no longer exempt from the overtime provisions of the MWA and are eligible for time-and-a-half premium pay for any hours worked beyond 40 hours in a workweek.

Phasing in Overtime Requirements

As part of the bipartisan compromise, which ultimately led to the passage of SB5172, the legislature developed a phased approach to imposing overtime requirements for all remaining agricultural workers. After the exemption officially sunsets on December 31, 2021, the following requirements will apply:

- From January 1, 2022, to December 31, 2022, agricultural workers must be paid time-and-a-half for any hours worked beyond 55 hours in a workweek.
- From January 1, 2023, to December 31, 2023, agricultural workers must be paid time-and-a-half for any hours worked beyond 48 hours in a workweek.
- Beginning January 1, 2024, agricultural workers must be paid time-and-a-half for any hours worked beyond 40 hours in a workweek.

This approach provides agricultural employers time to assess the impact of overtime requirements on their business practices and make necessary adjustments. Ultimately, though, by 2024, this approach will align agricultural workers with dairy workers and all other nonexempt employees under the MWA.

Addressing Retroactive Liability for Overtime Pay

Despite the narrow ruling in *DeRuyter Bros.*, agricultural employers were justifiably concerned because the *DeRuyter Bros.* court declined to address the issue of retroactivity, concluding that the employer's request to limit any adverse decision to prospective-only application was not properly before the court. This left open the possibility that all other dairy workers, and similarly situated agricultural employees who also successfully challenged the exemption, would potentially be entitled to three years of back overtime compensation. The legislature addressed this concern in SB5172 by prohibiting relief against any employer in any proceeding commenced on or after November 5, 2020, for overtime claims based on the historical application of the agricultural worker exemption prior to that date. The amendments specifically exclude the *DeRuyter Bros.* plaintiff class from this prohibition. This effectively limits the *DeRuyter Bros.* decision to prospective

application for any dairy workers not included in that case's plaintiff class and eliminates all liability for claims raised by other agricultural workers under the old exemption.

Possible Future Challenges to SB5172

It is unclear if this legislative compromise, especially the prohibition of retrospective relief for dairy workers or similarly situated agricultural workers, could withstand the scrutiny of the current Washington State Supreme Court. Only four of the five justices in the *DeRuyter Bros.* majority are still on the court, but so too are only three of the four dissenters. Thus, should the provisions of SB5172 be challenged on similar grounds, the constitutional question would likely turn on the two newest additions to the court, Justices Whitener and Montoya-Lewis. Additionally, per Justice Johnson's separate dissent, at least three of the current justices would have limited the *DeRuyter Bros.* decision to prospective-only application on equitable grounds, had the question be properly before the court. It is unclear if all four of the still sitting justices from the majority would have agreed on this issue if it had been properly raised. What is clear is that *DeRuyter Bros.* provides a roadmap for a challenge under the state's privileges and immunities clause for any worker-side stakeholders who are not satisfied with this compromise.

Key Takeaways

SB5172 provides much-needed clarity for agricultural workers and employers in the wake of the *DeRuyter Bros.* decision. That said, the amendments represent a significant shift in the law with very real consequences for the state's agricultural sector. Agricultural employers should take the time to carefully examine their workforce and pay practices to ensure compliance with their new overtime obligations. In any event, employers should keep an eye out for any constitutional challenges to the amendments once they take effect in late July.

Endnotes

[1] See *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*, 196 Wn.2d 506, 475 P.3d 164 (2020).

[2] <http://lawfilesexext.leg.wa.gov/biennium/2021-22/Pdf/Bills/Session%20Laws/Senate/5172-S.SL.pdf>

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