

WESTERN WASHINGTON AG REPORT

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WHAT THE FARM OVERTIME RULING MEANS

A conversation with the Washington Farm Bureau about next steps

The recent ruling by the Washington State Supreme Court in the Cuevas v. DeRuyter Overtime in Agriculture case has many western Washington farmers wondering if it affects them, and rightfully so. As our organization learns more about the ramifications and possible next steps, we are committed to getting accurate information out to our members and colleagues. While this case involves a dairy operation, we believe its impact could affect non-dairy agriculture in the future. The Washington Farm Bureau (WFB) served as intervenors in the case, which means they were an official party in the case along with the Washington Dairy Federation and DeRuyter Dairy. As an intervenor, they have the ability to hire attorneys to fight the decision.

To better understand the implications and next steps for farmers, we spoke with WFB Associate Director of Governmental Relations, Bre Elsey. Here are the major points of interest we covered.

WWAA: Let's back up a little. Can you

give us some of the background of this issue?

Elsey: The overall issue is confusing. There's a legislative component, and there's a constitutional component. In 1959, the state Legislature made an exemption for agriculture in overtime pay. Many other industries had similar exemptions. For agriculture, it's because of our seasonality. For example, during harvest, farmers are working long hours, but then later in the year, they have slower times with less hours needed. They simply don't fit the 9-5 box that the Legislature likes to fit all employment into. And the Legislature at the time recognized that, so they carved agriculture out. Not so that ag didn't have to follow employment laws, but so that it more accurately reflected the nature of our work. There's this idea that farms haven't been paying workers for their work over 40 hours. That's simply false. Farm workers have been paid for those extra hours, they just haven't been paid the "time and a half" overtime pay. That's the difference.

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WWAA: What exactly did the court decide in its ruling?

Elsey: The question that made its way to the State Supreme Court was "do farmworkers qualify for overtime pay?" This was a constitutional question. Did the state Legislature back in 1959 have the authority under the Washington constitution to offer an agriculture exemption to the minimum wage act? And, it's important for people to

WWAA MISSION

To represent agriculture by providing services to the entire agricultural community

WWAA COMMITMENTS

Engage in internal and external (economic, environmental, regulatory) pressures on agriculture

Interact with county, state, and federal legislators and regulators

Pest and nutrient management control

Network with and support of the agricultural research community

Seek out and develop opportunities and technologies for agriculture

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understand that this was a very split decision. And it was a decision made two days after the election, of which many of the justices were on the ballot. They ultimately voted 5-4 against DeRuyter Dairy and agriculture. They decided that the state Legislature did not have the authority to grant that exemption. They didn't say that the Legislature couldn't revisit this issue, they just said their intent to explain why the exemption should exist was flawed. And not only did the justices vote against it, in their concurring opinion, they really focused on inherent racism, which is pure baloney. In 1959, when the exemption was given, it is recorded that the majority of the farm workforce in Washington was white. And the justices acknowledge that. But that doesn't fit the rhetoric they want to pursue. They said the majority of workers now are not white. And they offered a lot of conflicting statements in the decision. That's what frustrates us. They are basically saying because this law was passed in the Jim Crow era, it's inherently racist, even though at the time, we had very few minority farm workers in 1959 in Washington. It's not only radical, but it sets a precedent of legislating from the bench, which is what you don't want. It's not based on fact. Again, the state Supreme Court didn't rule that the farm employers broke the law or acted incorrectly, they ruled that the state Legislature in 1959 didn't have the authority to offer the exemption.

It's also important to note, that our dairy workers are paid an average of \$17/hour. That's well above the state's minimum wage (\$13.69). If this decision holds, our farm workers will most likely get less hours and lower pay because of this ruling. Employers cannot afford time and a half on an already high wage. They will make cuts.

WWAA: So what happens now? Does this take effect immediately?

Elsey: Now the decision is sent back to the local Superior Court to be finalized and to determine finer points. That should happen in early December. At that point, the date will be set for applying this ruling prospectively (forward) and potentially retroactively (backward).

WWAA: Does this affect dairy and non-dairy agriculture alike?

Elsey: Sadly, that's the major unanswered question. For dairies, they must begin paying their employees overtime to workers that work over 40 hours in a work week. We do not yet know if this ruling will affect non-dairy agricultural employers. The decision left it open for other agriculture litigation. Our attorneys are looking into the ruling, and there are mixed opinions. We suggest that all non-dairy agricultural employers begin calculating the financial exposure for overtime. You should work with an accountant and legal counsel to explore your options. And remember, these lawsuits aren't led by your workers. They are being pursued by radical organizations who claim to represent the worker. The UFW represents less than 1 percent of the ag work force in Washington state. Yet, they are initiating these class-action lawsuits. Also keep in mind that Columbia Legal Services, who often represent the plaintiffs, are funded by government grants (Legal Foundation of Washington). At the end of the day, the attorneys are the only ones who benefit from these suits...the workers get very little. Or, they get less than what they started with in this case (less work hours and less pay). That's the tragedy.

WWAA: You mentioned potential for the court to apply this retroactively. Is that really possible?

Elsey: If the local Superior Court finds that workers are entitled to back pay, farms could face three (3) years of retroactive pay. The damages from that could be unsurvivable for most Washington farms. A medium-sized farm with 50 or less employees would pay about \$1 to \$1.5 million in retroactive wages. And this would be a penalty for following the law. Farm employers followed the law, and now they could be punished for that, which is completely absurd. A good analogy is if the state Legislature passed a law that made the speed limit 70 mph. Everyone followed the law. Then, years later, the court said, "no, the Legislature was wrong, and the speed limit is 40. Now everybody owes three years of penalties for going 70." The aver-

age Washingtonian would think that's ridiculous. But, unfortunately, that law is on the books that plaintiffs can seek three (3) years retroactive compensation. Again, the farm employers did nothing wrong. They followed the law, and this is where we feel we need to fight to ensure that retroactive pay isn't applied.

WWAA: How is WFB fighting this?

Elsey: We have two different paths to fight this: legally and legislatively. Both of them will be difficult. First, the legal action is to try and convince the state Supreme Court to reconsider their ruling. That's a long shot, but it's worth pursuing. There are questions they didn't answer. We only need one justice to change their mind. But, we are basically asking them to admit that they were wrong, so there's a very high bar we have to overcome to win that battle. This is our only legal recourse to take. Some have asked if this could be taken to the U.S. Supreme Court, but this unfortunately is a Washington constitutional issue not a U.S. constitutional issue. So, the state Supreme Court is the highest court for this case.

Next, there's a legislative piece. This is another difficult path, but this really is the Legislature's job...not the courts'. It's up to the Legislature to make these rules. If I were a legislator, I would be furious with this decision right now. And, I do think that there are some legislators who are willing to take this up, but I don't know if there's full political will for that to happen right now. Legislators overall have not been kind to agriculture, and they are very employee-sensitive right now. So, while this is a possibility, we feel that asking the court to reconsider is our first priority at this point.

WWAA: In the meantime, what should farmers do, and how can they help fight this issue?

Elsey: First of all, all agricultural employers (both dairy and non-dairy) who do not want to pay overtime should modify work schedules to minimize or eliminate shifts that exceed 40 hours per work week. Based on the ruling, you are now subject to paying overtime (time and a half), so make the necessary adjustments to schedules.

Also, we need farmers to share this information with their friends and

What does a listing under the Endangered Species Act mean?

In Washington, some of our Pacific salmon are protected by the Endangered Species Act (ESA). Chinook salmon, for example, have been listed as a "threatened" species in the Puget Sound since 1999. According to the U.S. Fish and Wildlife Service (USFWS), a species is added to the list when it is determined to be endangered or threatened because of any of the following factors:

- the present or threatened destruction, modification, or curtailment of its habitat or range;
- overutilization for commercial, recreational, scientific, or educational purposes;
- disease or predation;
- the inadequacy of existing regulatory mechanisms; or
- other natural or manmade factors affecting its survival.

It is the policy of Congress, stated under section 2 of the ESA, that all federal agencies shall seek to conserve endangered and threatened species and shall use their authorities to further the purposes of the ESA. Similarly, section 7 of the ESA directs federal agencies to use their legal authorities to carry out conservation programs for listed species. Among the conservation benefits authorized for threatened and endangered plants and animals that are listed under the ESA are:

- protection from being jeopardized by federal activities; protection of critical habitat being destroyed or adversely modified;
- restrictions on take and trade; a requirement that the Service develop and implement recovery plans for listed species under U.S. jurisdiction;
- authorization to seek land purchases or exchanges for important habitat; and
- federal aid to State and Commonwealth conservation departments with cooperative endangered species agreements.

Listing also lends greater recognition to a species' precarious status, encouraging conservation efforts by other agencies (foreign, federal, state, and local), independent organizations, and concerned individuals.

SOURCE: U.S. Fish and Wildlife Service, <https://www.fws.gov/>



Basics of the Clean Water Act that matter to us

The Clean Water Act (CWA) establishes the basic structure for regulating discharges of pollutants into the waters of the U.S. and regulating qual-

ity standards for surface waters. Congress enacted the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." The CWA prohibits the discharge of any "pollutant," which includes dredge spoils and fill, into waters of the United States except as authorized by other provisions of the Act.



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family. We need a very educated public on this issue. We also need farmers to talk with their CPAs and do the math. How will this affect their farms? Calculate the potential damage of retroactive pay. Send us that information, as it will help us better explain the true impact to the courts and Legislature. If we end up going to the legislature, show up to testify. We need to fill those virtual hearings with voices from the farm. And, if you want to contribute to helping us pay for our legal action on this, you can donate to the WFB Legal Foundation, which is 100% donation driven. You can find that online at <https://wsfb.com/legal-foundation/>.

WWAA launches new website

Throughout the summer and fall months, the WWAA staff has been developing new communication tools. This newsletter is one, and our new website design is another. The hope is to communicate better with our membership and partners. Visit westag.org to learn more about what we are doing on behalf of agriculture in western Washington.

Committee members needed

In addition to launching new tools, WWAA is also in need of more member involvement to face future challenges. Our board of directors is lean, and this summer they agreed to form a handful of necessary committees to help navigate specific issues without increasing too much workload or time strains. Current committees and members are:

- Natural Resources
Tyler Breum
Marty Coble
Owen Peth
- Legislative
Andy Schuh
Garrett Williams
- Research
Steve Strand
Marty Coble
- Communication
Tyler Breum
Jon Vanderkooy
Dan Gundersen
Jenn Smith

For more information on how to join a committee, please call the WWAA office at 360-424-7327 or reach out to a current director.

The history of WWAA

Our organization was created in 1944, when farmer representation was needed to negotiate and execute vegetable contracts with processing companies. While that has changed, our original role and mission remains in place. The difference between 1944 and today isn't what we offer to agriculture, but rather the services we provide, and those we negotiate with on behalf of our members.

WWAA supports local and statewide agricultural viability, through both direct leadership and indirect participation. Natural resources, agricultural research and extension, and agricultural preservation dominate our work on a daily basis. Our organization's diverse membership, coupled with this region's complexity, creates an immense and ongoing list of services needed.

We are the only organization in the region that serves all agricultural interests. We were formed by farmers for farmers. We build strategy and policy based on the values and priorities of our members. We need your input and financial contribution to continue serving farmers in the region. Please contact our office and consider joining our organization.