



## TESTIMONY

### Senate Committee on Workforce

April 10, 2017

### SB 299 and the -1 Amendment

Thank you for the opportunity to submit comments on the -1 amendments to SB 299. On behalf of our 7,000 farming and ranching member families, the Oregon Farm Bureau Federation (OFB) respectfully asks the Committee to pass SB 299 out of Committee with an amendment to provide Oregon's farmers and ranchers with clarity in implementing the Oregon Sick Time law.

#### **Clarify that employers and family members are not counted as employees**

When SB 454 passed in 2015, it exempted the parents, spouses and children of employers from the employee count that is used to determine whether the business qualifies for paid or unpaid sick leave. The statute established a threshold of 10 or more employees (six or more in Portland) to qualify for paid sick leave. In exempting family members from the definition of employee, the bill recognized that the unique structure of family businesses could inadvertently put them over the sick time threshold and increase their financial burden.

OFB believes that the legislative intent as expressed in 2015 was clear. During the Joint Subcommittee on Human Services' work session on the final version of the bill, the dialogue between legislators confirmed that family members were not intended to be included in employee counts.<sup>1</sup> No distinction was made concerning business entity type. And Senator Dembrow's summary of the final amendment distributed in committee explained that the definition of employee "*excludes family members, independent contractors, and interns. Section 2(1)(c).*"<sup>2</sup>

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<sup>1</sup>Joint Subcommittee on Human Services, Committee Discussion between Representatives Duane Stark, Paul Holvey, Andy Olson, and Senator Michael Dembrow at 24:33 to 26:26 (June 1, 2015), [http://oregon.granicus.com/MediaPlayer.php?clip\\_id=9852](http://oregon.granicus.com/MediaPlayer.php?clip_id=9852)

<sup>2</sup> Joint Subcommittee on Human Services, Senator Michael Dembrow, *Senate Bill 454-A39 Dembrow Testimony* (June 1, 2015), <https://olis.leg.state.or.us/liz/2015R1/Downloads/CommitteeMeetingDocument/76567>

Additionally, during his floor speech as the House co-carrier of SB 454 (2015), Representative Paul Holvey, stated: *“If a family member is working for another family member, are they covered under this bill? And that, they are not. That’s explicit in the bill. There is no confusion about that.”*<sup>3</sup>

As you may be aware, subsequent interpretations of SB 454 (2015) have applied the family member exemption only to Sole Proprietorships, pushing many family businesses organized as LLCs, S-Corps or C-Corps over the 10-employee threshold. This runs counter to legislative intent and the plain language of the sick time law. When the law passed in 2015, the family member exemption was a key provision to reduce the regulatory burden on family businesses. Many farm families were burdened when this provision was reversed.

Last month, the Committee held a public hearing on SB 779, which would exempt business owners and their parents, spouses, and children from the 10-employee threshold under the Oregon Sick Time law. During the hearing, opponents expressed concern about a potential “LLC loophole” that would allow family farmers and ranchers to exclude additional employees (other than family members) from the sick time threshold. It was not OFB’s intent to open a loophole with regard to LLCs.

Section 2(2)(c)(A-C) of -1 amendment to SB 299 attempts to address concerns raised during the March 2017 hearing. However, as drafted, the language is not workable for many family operations. Under a 51% threshold, a couple with joint 50% ownership in an LLC, S-Corp or C-Corp would both be counted as employees for the purposes of qualifying for paid sick leave. Similarly, a family of four would each have 25% ownership in the business, disqualifying each of the four owners and their family members from the exemption for family members.

We suggest alternative language to narrow the LLC provision as it applies to the 10-employee threshold:

(B) A member of a limited liability company **who is entitled to vote on or consent to any matter submitted to a vote or consent of the members**, including members who are managers, as defined in ORS 63.001.

We believe this language will sufficiently narrow the provision to apply to business owners and their parents, spouses, and children.

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<sup>3</sup> House Floor Debate on Senate Bill 454-B, Representative Paul Holvey Closing Floor Speech (June 12, 2015), 4:13:58 to 4:14:10, [http://oregon.granicus.com/MediaPlayer.php?clip\\_id=9990](http://oregon.granicus.com/MediaPlayer.php?clip_id=9990)

## **Clarify paid sick leave for piece-rate employees**

Sick leave pay for piece-rate work was addressed both in statute and through legislative intent at final passage of SB 454 (2015). As background, piece-rate work is unique to certain sectors, but most commonly agriculture. Under a piece-rate pay system, workers are provided with the opportunity to earn more than the stated hourly rate, based on a ‘productivity incentive.’ This pay structure is well-suited to repetitive crew work, such as cherry picking.

Under ORS 653.606(5)(c)(B), an employee doing piece-rate work must be paid for sick time *“at the employee’s regular rate of pay,”* or if they do not have a *“previously established regular rate of pay, the employer shall pay the employee at a rate equal to at least the minimum wage.”* We believe that the plain language of the bill is clear—a worker receiving a piece-rate productivity incentive while picking a crop would receive a rate for paid sick leave that is equal to the worker’s rate of pay when they are not picking a crop, or the state minimum wage if they had no other hourly work on the farm. This interpretation was confirmed during BOLI technical assistance workshops hosted by Linn County Farm Bureau in March and April of 2016.

Legislative intent is also clear on this issue. During his floor speech as the Senate carrier of SB 454 (2015), Senator Michael Dembrow stated:

*“We heard a lot of concern that seasonal workers, who are badly needed during harvest time, will prefer to stay home and get paid their sick leave. Well, nearly all these workers are being paid at a piece-rate that is much higher than the minimum wage that they would receive when sick. They are not gonna want to take the financial hit that staying home will create.”<sup>4</sup>*

This was consistent with the summary of the final amendment that Senator Dembrow distributed in committee, where he wrote that *“For piece-rate workers, compensation is at their ‘regular’ wage (i.e., wage when they do non-piece-rate work, at least minimum wage.) Section 3(5)(c)(B).”<sup>5</sup>*

Similarly, during his floor speech as the House co-carrier of SB 454 (2015), Representative Paul Holvey echoed that intent, stating:

*“We recognized that piece-rate workers don’t necessarily have a regular rate of pay, but all employers are required to track the number of hours employees work,*

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<sup>4</sup> Senate Floor Debate on Senate Bill 454-B, Senator Michael Dembrow Floor Speech (June 10, 2015) at 1:30:50 to 1:31:15, [http://oregon.granicus.com/MediaPlayer.php?clip\\_id=9969](http://oregon.granicus.com/MediaPlayer.php?clip_id=9969)

<sup>5</sup> Joint Subcommittee on Human Services, Senator Michael Dembrow, Senate Bill 454-A39 Dembrow Testimony (June 1, 2015), <https://olis.leg.state.or.us/liz/2015R1/Downloads/CommitteeMeetingDocument/76567>; See also Senate Committee on Workforce, Senator Michael Dembrow, Sen. Michael Dembrow Info packet: Effect of -3 (March 23, 2015), <https://olis.leg.state.or.us/liz/2015R1/Downloads/CommitteeMeetingDocument/55398>

*including agriculture. And the law currently states that piece-rate workers have to make at least the minimum wage to follow the law, so they know how many hours they're working. So they, if they, just work piece rate, under this bill, and they go to take paid sick time, if they're eligible for it, and I do say if, they get paid at the minimum wage rate. That's under this bill, which is a lot less money than what they make at piece-rate...Those workers aren't gonna want to stay home sick. They can't afford to. But when they are sick, and they have to stay home, they can and at least get the minimum wage. They are gonna want to be at work and make that piece-rate work.<sup>6</sup>*

Implementation of this provision changed in a November 22, 2016 response to Senator Ted Ferrioli and Representative Mike McLane, where the Bureau of Labor and Industries (BOLI) wrote: *“For employees paid on a commission or piece-rate basis, the agreed upon commission or piece-rate is their regular rate of pay.”* This runs counter to legislative intent and the plain language of the bill as understood at the time of passage. The statutory context of the term “rate” in ORS 652.210 as it relates to piece-rate pay was not addressed when SB 454 passed in June 2015.<sup>7</sup> Instead, the provision concerning piece-rate pay was discussed to help lessen workforce availability concerns at the critical time of harvest. This most recent interpretation threatens agriculture’s ability to get crops out of the ground in a timely manner, layers costs on farmers, and pushes many unsuspecting farm families out of compliance with the law.

OFB asks for your support of Section 2(5)(c)(B-C) in the -1 amendment to realign piece-rate pay requirements with legislative intent.

### **Fix for temporary farm stands in Portland**

SB 454 (2015) and subsequent rules failed to clarify that a business with operations within the city of Portland on a temporary basis is not subject to the six-employee threshold for determining whether sick time will be paid or unpaid.

OFB asks for your support of Section 1(3)(b) of the -1 amendment, which clarifies that farms located outside of the City of Portland are eligible for Oregon Sick Time, not Portland Sick Time. This is important for farmers who sell goods direct market to Portland through a temporary farm stand but who live outside of the city limits.

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<sup>6</sup> House Floor Debate on Senate Bill 454-B, Representative Paul Holvey Closing Floor Speech (June 12, 2015) at 4:10:19 to 4:11:36, [http://oregon.granicus.com/MediaPlayer.php?clip\\_id=9990](http://oregon.granicus.com/MediaPlayer.php?clip_id=9990)

<sup>7</sup> Letter in Response to Senator Ted Ferrioli and Representative Mike McLane (November 22, 2016), <https://olis.leg.state.or.us/liz/2017R1/Downloads/CommitteeMeetingDocument/104969>

Thank you for the opportunity to submit testimony today concerning SB 299 and the -1 amendment. OFB looks forward to working with the Committee towards a solution to provide farm families with clarity in implementing Oregon Sick Time. We appreciate your attention to this matter and the work of BOLI and stakeholders to find a solution.

Please do not hesitate to direct questions to Jenny Dresler at the Oregon Farm Bureau Federation ([jenny@oregonfb.org](mailto:jenny@oregonfb.org)).