



STATE OF OREGON  
LEGISLATIVE COUNSEL COMMITTEE

February 11, 2022

Representative Daniel Bonham  
900 Court Street NE H390  
Salem OR 97301

Re: BOLI Commissioner authority to adopt overtime rules for agricultural workers

Dear Representative Bonham:

You asked three questions about the rulemaking authority of the Commissioner of the Bureau of Labor and Industries: Does the commissioner have statutory authority to adopt rules establishing overtime for agricultural workers? If the commissioner does have such authority, is exercising that authority discretionary or compulsory? And, regardless of whether exercising that authority is discretionary or compulsory, if the commissioner has that authority and elects to adopt rules establishing overtime for agricultural workers, is the commissioner required to use 40 hours per workweek as the hourly threshold to trigger application of overtime?<sup>1</sup>

Based upon our analysis, conducted under time constraints, we conclude that the commissioner has statutory authority to adopt rules establishing overtime for certain nonexempt agricultural workers; that the commissioner's statutory authority is discretionary, not compulsory; and that if the commissioner exercises the statutory authority to adopt rules establishing overtime for nonexempt agricultural workers, the commissioner probably can trigger application of overtime at any reasonable hourly threshold above 40 hours per workweek that the commissioner deems is necessary to preserve the health of the nonexempt agricultural workers.<sup>2</sup>

As you know, litigation is pending before the Oregon Court of Appeals that directly concerns the subject of this opinion. The case is *Mano a Mano Family Center v. BOLI*, A177408. Petitioners are challenging two of the commissioner's existing rules, OAR 839-020-0125(3)(k) and OAR 839-020-0135, exempting agricultural workers from overtime. Petitioners argue that the rules exceed the commissioner's statutory authority, were adopted without compliance with applicable rulemaking procedures and violate Article I, section 20, of the Oregon Constitution.<sup>3</sup> On February 9, 2022, the court granted the commissioner's second motion for extension of time to assemble and file with the court the agency record for the

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<sup>1</sup> Following submission of your opinion request on February 5, 2022, we discussed your inquiry by telephone on February 5, 2022. As a result of our conversation, we distilled your original opinion request into these three questions.

<sup>2</sup> Although we are confident in our analysis, because your questions present issues of first impression for Oregon courts, our conclusions cannot be entirely free from doubt.

<sup>3</sup> A person may seek judicial review of a rule by filing a petition with the Oregon Court of Appeals. ORS 183.400 (1). A court's review is limited to examining "[t]he rule under review," "[t]he statutory provisions authorizing the rule," and "[c]opies of all documents necessary to demonstrate compliance with applicable rulemaking procedures." *Id.* at (3). A court will invalidate a rule upon finding that the rule "[v]iolates constitutional provisions," "[e]xceeds the statutory authority of the agency" or "[w]as adopted without compliance with applicable rulemaking procedures." *Id.* at (4).

challenged rules. The commissioner now has until March 7, 2022, to file the agency record with the court. The case is in a formative stage, and the commissioner has not yet filed a responsive brief on the merits.

## Analysis

Oregon law grants the commissioner general authority to adopt rules to carry out the state's labor laws.<sup>4</sup> The commissioner also has specific authority to adopt overtime rules.<sup>5</sup> ORS 653.261 (1)(a) provides:

The Commissioner of the Bureau of Labor and Industries may adopt rules prescribing such minimum conditions of employment, excluding minimum wages, in any occupation as may be necessary for the preservation of the health of employees. The rules may include, but are not limited to, minimum meal periods and rest periods, and maximum hours of work, but not less than eight hours per day or 40 hours per workweek; however, after 40 hours of work in one workweek overtime may be paid, but in no case at a rate higher than one and one-half times the regular rate of pay of the employees when computed without benefit of commissions, overrides, spiffs and similar benefits.

Under ORS 653.261 (1)(a), the commissioner is authorized to adopt rules establishing minimum employment conditions for any occupation<sup>6</sup> that the commissioner deems necessary to preserve the health of employees. The provision provides a nonexclusive list of the minimum employment conditions subject to the commissioner's rulemaking authority. Significantly, the commissioner's authority under ORS 653.261 (1)(a) is permissive, not compulsory. It is bedrock statutory interpretation that "may" describes a permissible legal action and "shall" a compulsory legal action.<sup>7</sup> Accordingly, the commissioner has discretion to adopt or not to adopt overtime rules for agricultural workers.

The commissioner's authority under ORS 653.261 (1)(a), however, is not without limits. Five categories of agricultural workers remain exempt from the commissioner's authority to adopt overtime rules.<sup>8</sup> The commissioner cannot adopt rules on minimum wages. And, if the

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<sup>4</sup> ORS 653.040 (3), 651.060 (4).

<sup>5</sup> As background, the commissioner once arguably lacked authority under ORS 653.261 (2) (2015 Edition) to establish overtime rules for agricultural workers. However, the Legislative Assembly in 2017 repealed that limitation. Section 7, House Bill 3458 (2017); section 7, chapter 685, Oregon Laws 2017. Before January 1, 2018, ORS 653.261 (2) (2015 Edition) stated: "Nothing contained in ORS 653.010 to 653.261 shall be construed to confer authority upon the commissioner to regulate the hours of employment of employees engaged in production, harvesting, packing, curing, canning, freezing or drying any variety of agricultural crops, livestock, poultry or fish."

<sup>6</sup> ORS 653.010 (5) states: "'Occupation' means any occupation, service, trade, business, industry, or branch or group of industries or employment or class of employment in which employees are gainfully employed."

<sup>7</sup> *Scott v. Dep't of Revenue*, 358 Or. 795, 801 (2016) (discussing the difference between permissive and mandatory language in statutes); see also *Scovill v. City of Astoria*, 324 Or. 159, 167 (1996) (explaining that the use "of the permissive verb 'may' establishes that the actions are authorized, but are not required.").

<sup>8</sup> ORS 653.020 (1) exempts:

An individual employed in agriculture if:

(a) Such individual is employed as a hand harvest or pruning laborer and is paid on a piece-rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece-rate basis in the region of employment and is employed by an employer who did not, during

commissioner adopts overtime rules, the rules must meet two substantive requirements. First, the rule may not establish an overtime compensation rate that exceeds one and one-half times an employee's regular compensation rate minus certain benefits. Second, the rule cannot trigger application of overtime at a number of hours worked in a workweek that is equal to or less than 40 hours.<sup>9</sup> Said differently, the phrase "however, after 40 hours of work in one workweek overtime may be paid" establishes a 40-hour floor below which the commissioner may not establish overtime.

Arguably, the phrase "after 40 hours of work in one workweek overtime may be paid" is ambiguous. On one hand, a narrow interpretation of that phrase is that an overtime rule adopted by the commissioner must provide employees overtime for all hours worked in a workweek in excess of 40 hours. That is, if overtime is instituted by rule, the forty-first and all subsequent hours worked in a workweek must be subject to the overtime compensation rate. On the other hand, a broader interpretation is that the commissioner has discretion to establish the overtime eligibility threshold at any reasonable number of hours worked in a workweek in excess of 40 hours. That is, overtime could be triggered after 48 hours of work in a workweek. We conclude that the broader interpretation is the better reading of the provision. In addition to being the most natural reading, the broader interpretation is supported by ORS 653.261 (1)(a)'s permissive language, nonexclusive list of minimum employment conditions and use of the delegative term "necessary."<sup>10</sup>

To summarize, the commissioner has clear authority to establish overtime rules that the commissioner deems are necessary to preserve the health of nonexempt agricultural workers.

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any calendar quarter during the preceding year, use more than 500 piece-rate-work-days of agricultural labor;

(b) Such individual is the parent, spouse, child or other member of the employer's immediate family;

(c) Such individual:

(A) Is employed as a hand harvest or pruning laborer and is paid on a piece-rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece-rate basis in the region of employment;

(B) Commutes daily from a permanent residence to the farm on which the individual is so employed; and

(C) Has been employed in agricultural labor less than 13 weeks during the preceding calendar year;

(d) Such individual, other than an individual described in paragraph (c) of this subsection:

(A) Is 16 years of age or under and is employed as a hand harvest laborer, is paid on a piece-rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece-rate basis in the region of employment; and

(B) Is paid at the same piece-rate as employees over 16 years of age on the same farm; or

(e) Such employee is principally engaged in the range production of livestock and earns a salary and is paid on a salary basis.

<sup>9</sup> ORS 653.261 (1)(b) states:

As used in this subsection, "workweek" means a fixed period of time established by an employer that reflects a regularly recurring period of 168 hours or seven consecutive 24-hour periods. A workweek may begin on any day of the week and any hour of the day and need not coincide with a calendar week. The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade overtime requirements.

<sup>10</sup> Where the Legislative Assembly uses delegative terms in statute, a court will normally show considerable deference to agency interpretation, provided that the agency interpretation is within the range of reasonable interpretations. *Springfield Education Ass'n v. Springfield School Dist. No. 19*, 290 Or. 217 (1980).


That authority is unambiguously discretionary, not compulsory. And, if the commissioner elects to exercise that authority, the commissioner probably can trigger application of overtime at any reasonable hourly threshold above 40 hours that the commissioner deems is necessary to preserve the health of the nonexempt agricultural workers.

We hope this opinion satisfactorily answers your questions. Please let us know if you would like any further assistance.

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Very truly yours,

DEXTER A. JOHNSON  
Legislative Counsel

A handwritten signature in black ink, appearing to read "V. S. Reuther". The signature is fluid and cursive, with a large initial "V" and "R".

By  
Victor S. Reuther  
Staff Attorney