



Timothy J. Bernasek
Admitted in Oregon and Washington
tbernasek@dunn-carney.com
Direct 503.242.9608

January 18, 2022

Via E-Mail & First-Class Mail

Commissioner Val Hoyle
Oregon Bureau of Labor & Industries
800 NE Oregon St., Suite 1045
Portland, OR 97232

Val.Hoyle@boli.oregon.gov

Re: Agriculture Overtime
Our File No.: ORE117.0001

Dear Commissioner Hoyle,

This office represents the Oregon Farm Bureau Federation (“Farm Bureau”). I was asked to write to you regarding the above referenced matter. My understanding is that you have indicated that rulemaking will be initiated immediately to extend the requirement for agricultural employers to pay overtime in Oregon. It is also my understanding that you have conveyed to the Farm Bureau that such rulemaking is required, given the passage of HB 3458 in 2017, and that the requirement to pay overtime must apply to any time worked above 40 hours in any workweek. For the reasons expressed below, it is clear that you are not required to initiate rulemaking to apply overtime to agricultural employment and, should you decide to do so, there is no requirement that overtime apply to all hours worked over 40 in a workweek.

Rulemaking is Discretionary

As an initial matter, Oregon law makes it clear that you have discretion regarding which industries overtime payment requirements apply. 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. (Emphasis Added)

851 SW Sixth Ave., Suite 1500 Portland, OR 97204-1357 Main 503.224.6440 Fax 503.224.7324 DunnCarney.com

Dunn Carney Allen Higgins & Tongue LLP | Member of Meritas Law Firms Worldwide Meritas.org



So, as the statute makes clear, the Commissioner has discretion regarding 1) whether to adopt rules regarding overtime; 2) which occupations (industries) overtime will apply; and 3) the hours to which such overtime apply provided that there is a floor of 40 hours in a workweek and the overtime rate cannot exceed 1½ times the regular rate of pay.

Prior to the effective date of HB 3458, Oregon law made clear that the BOLI Commissioner could not regulate the hours worked in agriculture in what was formerly ORS 653.261(2). Accordingly, OAR 839-020-0135 expressly provides that Oregon's overtime regulations do not apply to agricultural employment. While the Farm Bureau strongly disagrees that the intent behind HB 3458 was to remove the exemption for agricultural overtime, at most the passage of HB 3458 would mean that BOLI is no longer prohibited from applying overtime to agricultural employment. However, just because there is no prohibition against applying overtime to agricultural employment does not mean that there is a requirement to do so. As explained above, ORS 653.261(1)(a) makes any such rulemaking discretionary. Any argument that the BOLI Commissioner is now required to initiate rulemaking regarding overtime in agriculture is simply incorrect.

In addition, several legislators have indicated that they intend for the Legislature to consider the issue of agricultural overtime in the upcoming 2022 Session convening in just two weeks. Last week, the interim House Business and Labor Committee discussed two different overtime concepts that might be submitted for consideration. Given the legislative interest in this issue and the myriad ways in which it may choose to address agricultural overtime, rulemaking at this time is premature.

Overtime pay is not required for all hours worked over 40 in a workweek

In spite of there being no requirement that rulemaking be applied to agricultural employment, should you decide to initiate such rulemaking, overtime is not required for all hours over 40 in a workweek. ORS 653.261(1)(a) provides that should the BOLI Commissioner decide to apply overtime to any industry (like agriculture), 40 hours are the minimum hours in a workweek that would be subject to any such rule. The statute specifically provides that "after 40 hours of work in one workweek overtime may be paid..." While, as explained above, much of the statutes' provisions are discretionary, ORS 653.261(1)(a) requires that overtime be applied only to hours over 40 in a workweek.

The fact that overtime may only be applied to hours over 40 in a workweek, does not, however, mean that overtime must be applied to every hour worked over 40. First, there is no express statutory provision requiring overtime to all hours over 40. In addition, Oregon administrative rules provide examples of occupations where overtime payment applies to hours well above 40 hours. For example, employers subject to the federal Fair Labor Standards Act (OAR 839-020-0125), public employees (OAR 839-020-0130), and resident managers of adult



foster homes (OAR 839-020-0150(1)) are either completely exempted from overtime or the regulations provide for payment of overtime to only hours well beyond 40 in a workweek.

Should you decide to pursue rulemaking to apply overtime to agricultural employment, the threshold should be above 40 hours per workweek and should account for agriculture's unique characteristics. Agriculture is different from most industries in that most farmers and ranchers are price takers with limited ability to pass on increased costs. In addition, due to weather and related seasonal harvest period peaks, agriculture is an industry not well suited for regular 40 hour workweeks. Many farmers growing fruits and vegetables have significant fluctuations in employment needs throughout the year. While such growers may only have a handful of year-round employees, during times of planting, pruning, and especially during harvest, their employment needs multiply significantly for a few weeks before returning to normal. Livestock producers have periods during the year when cattle or sheep are out on the range requiring in some circumstances 24-hour attention. An inflexible 40 hour per workweek overtime rule simply does not fit in such circumstances, and will have unintended consequences for both employees and employers.

If an inflexible 40-hour threshold is established, both farmers and farm employees will likely be worse off. Because of the agricultural sector's unique work schedule, it is common for farmers to provide good quality free housing to their employees, both permanent employees and seasonal employees. Many employers also provide free transportation. If a 40-hour threshold for overtime is implemented, most employers will have to cap hours under 40 and hire multiple shifts of workers because they simply cannot afford to provide overtime. They will likely be unable to provide employees with housing or may have to start charging rent due to increased labor costs.

As you are probably aware, only a handful of other states have decided to require overtime in agricultural employment. However, in doing so, the majority of these states provide for peak seasonal harvest exceptions, applied overtime to hours well over 40 hours per workweek or both. Oregon's overtime rules should similarly reflect the unique nature of agriculture's employment needs.

Finally, some have argued that Oregon's constitution requires that agricultural employment be treated just like other industries in order to comply with its privileges and immunities provisions. This argument is misplaced. First, as explained above, current administrative rules already provide some industries with exceptions to overtime. Also, privileges and immunities analysis requires a balancing of interests in order to determine if a privilege or immunity provided to a certain class (agricultural employees, in this instance) is lawful. Due to the unique nature of agriculture, there are significant and compelling justifications for either a complete exemption or overtime provisions that are different from other industries, as evidenced by the myriad of other states that have either retained a complete exemption or adopted a unique approach to agricultural overtime.



Commissioner Hoyle
January 18, 2022
Page 4

In conclusion, the agriculture industry in general and Farm Bureau in particular are watching developments regarding overtime very closely. Farm Bureau respectfully requests that you refrain from rulemaking regarding overtime in agriculture at this time. However, should you decide to initiate rulemaking, such rules should be developed with all stakeholders at the table and should begin with the question of whether overtime is appropriate for agriculture, not a 40-hour threshold. This will ensure that BOLI is meeting its obligation to ensure that the rules adopted account for the unique nature of agriculture and minimize the risk of future litigation. I hope this information is helpful to you. If I can be of any further assistance to you and/or your staff, please do not hesitate to contact me.

Very truly yours,

Timothy J. Bernasek

TJB:snp

Cc: Clients (E-mail only)