

Ag Overtime Rules

Jared King, C.P.A.

Leffel, Otis & Warwick, P.S.

Davenport, Washington

(509) 725-3251

Agriculture and Overtime

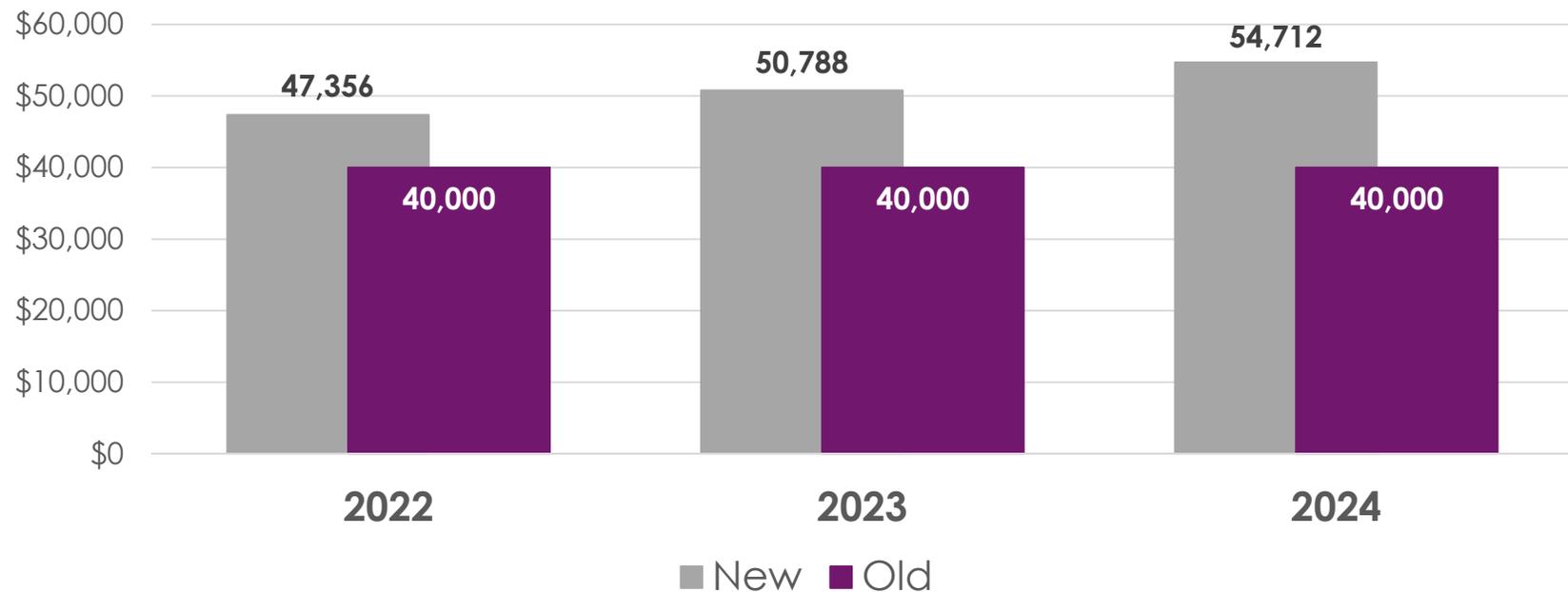
- ▶ Ag employees have historically been exempt from receiving overtime pay
- ▶ November 2020 Supreme Court case paved the way for significant change to this exemption (*Martinez-Cuevas vs. DeRuyter Bros*)
- ▶ 2021 State legislative session passed ESSB 5172 that extends overtime rights to all agricultural workers in Washington State

ESSB 5172

- ▶ Takes effect July 25, 2021
- ▶ Timeline of changes:
 - ▶ Overtime for “dairy workers working over 40 hours per week is effective immediately
 - ▶ Other agricultural workers will be phased in over three years
 - ▶ Over 55 hours in 2022
 - ▶ Over 48 hours in 2023
 - ▶ Over 40 hours in 2024 and later
- ▶ Ag and dairy employees are not entitled to retroactive overtime prior to November 5, 2020

If Nothing Were to Change

- ▶ Employee works 40 hours per week for 8 months of year (35 weeks)
- ▶ Employee works 70 hours per week for 4 months of year (17 weeks)
- ▶ Total hours for year: 2,590
- ▶ Originally salaried at \$40,000 per year



Exemptions From Overtime

- ▶ Some employees are not required to receive overtime in Washington
 - ▶ Common exemptions apply to “white collar” salaried workers
 - ▶ Executive, administrative, professional, computer professional or outside sales
 - ▶ Employees must meet strict requirements defined by Federal and State law
 - ▶ Minimum rate of pay must be met
 - ▶ Primary duties test must be met
- ▶ Per Federal guidelines this overtime exemption does not apply to:
 - ▶ “manual laborers and other ‘blue collar’ workers who perform work involving repetitive operations with their hands, physical skills or energy”
- ▶ Paying an employee a salary does not in itself exempt them from overtime pay! They must meet all exemption requirements

Executive Exemption

- ▶ Is the employee's duty managing the enterprise or managing a customarily recognized department or subdivision of the enterprise?
- ▶ Does the employee customarily and regularly direct the work of at least two or more full-time employees?
- ▶ Does the employee have the authority to hire or fire other employees?
 - ▶ Or are the employee's suggestions and recommendations as to hiring, firing, advancement or any other change of status of other employees given particular weight?
- ▶ Is the employee paid on a salary basis equal to or greater than the required salary threshold?

Administrative Exemption

- ▶ Is the employee's primary duty the performance of office or non-manual work directly related to the management or general business operations of the employer's customers?
- ▶ Does the employee's primary duty include the exercise of discretion of independent judgement with respect to matters of significance?
- ▶ Is the employee paid on a salary basis equal to or greater than the required salary threshold?

Professional Exemption

- ▶ Is the employee's primary duty the performance of work requiring advanced knowledge that is predominately intellectual in character or requires the consistent exercise of direction and judgement?
- ▶ Does the employee have advanced knowledge in a field of science or learning?
- ▶ Is the employee's advance knowledge customarily acquired by a prolonged course of specialized intellectual instruction?
 - ▶ Is that knowledge a standard prerequisite for entrance into the profession?
- ▶ Is the employee paid on a salary basis equal to or greater than the required salary threshold?

Salary threshold implementation schedule

Salary thresholds for overtime exempt workers are a multiplier of state minimum wage for a 40-hour workweek

2022 Salary thresholds

- Small businesses: \$1,014.30/week (\$52,743.60/year)
- Large businesses: \$1,014.30/week (\$52,743.60/year)

When the rule takes effect		July 1, 2020	Jan. 1, 2021	Jan. 1, 2022	Jan. 1, 2023	Jan. 1, 2024	Jan. 1, 2025	Jan. 1, 2026	Jan. 1, 2027	Jan. 1, 2028
For employers with 1-50 employees	Multiply minimum wage by ...	1.25x	1.5x	1.75x	1.75x	2x	2x	2.25x	2.25x	2.5x
	Projected salary threshold Weekly (Annual)	\$675 (\$35,100)	\$821.40 (\$42,712)	\$1,014.30 (\$52,744)	\$1,041* (\$54,132)	\$1,210* (\$62,920)	\$1,233* (\$64,116)	\$1,414* (\$73,528)	\$1,443* (\$75,036)	\$1,635* (\$85,020)
For employers with 51 or more employees	Multiply minimum wage by ...	1.25x	1.75x	1.75x	2x	2x	2.25x	2.25x	2.5x	2.5x
	Projected salary threshold Weekly (Annual)	\$675 (\$35,100)	\$958.30 (\$49,831)	\$1,014.30 (\$52,744)	\$1,189* (\$61,828)	\$1,210* (\$62,920)	\$1,387* (\$72,124)	\$1,414* (\$73,528)	\$1,603* (\$83,356)	\$1,635* (\$85,020)

Note 1: Salary thresholds after 2022 are projections based on forecasted changes in the Consumer Price Index. These projections have been updated from previous versions.

Note 2: This table does not apply to computer professionals paid by the hour who have higher minimum wage multipliers.

- ▶ NOTE: All three of the above exemption have the requirement to be paid at a level at or above the required salary threshold!

Independent Contractors

- ▶ An independent contractor is exempt from overtime rules as they are not employees
- ▶ Designating someone as an “independent contractor” does not avoid overtime. They must be a bona fide independent contractor
- ▶ Several factors determine if the person is an employee or an independent contractor. These include (but are not all):
 - ▶ Whether the worker is set up as an active business with the State Dept. of Revenue
 - ▶ The degree of control the business has over the worker
 - ▶ The workers profit or loss is dependent on their managerial skill
 - ▶ The workers investment in equipment or material
 - ▶ The degree of skill required for the job
 - ▶ The degree of permanence of the working relationship
 - ▶ The degree to which the services rendered by the worker are an integral part of the business

Hourly Compensation

- ▶ If the employer compensates the employee solely at a single, hourly rate, the hourly rate is the “regular rate”.
- ▶ If the employee works more than 40 hours in the workweek, the employer must pay the employee at least 1.5 time the regular rate for each hour worked over 40
- ▶ The hourly rate is not the regular rate if the employee earns any additional compensation or incentive pay during the workweek

Hours Worked Each Day						
Sun	Mon	Tue	Wed	Thu	Fri	Sat
31-Jan	1-Feb	2-Feb	3-Feb	4-Feb	5-Feb	6-Feb
Off	8	8	8	8	8	4

Single, Hourly Rate = \$20.00				
Hours worked	Hourly Rate	Unpaid OT Hrs	OT Rate (1.5 Hourly Rate)	Overtime Owed
44	\$20.00	4	\$30.00	\$120.00

Salaried Compensation

- ▶ The “regular rate” for an employee paid a salary for a specified number of hours per week must be calculated
 - ▶ Divide the salary by the number of hours for which the salary is intended to compensate
 - ▶ A salary usually covers up to 40 hours per week, unless the employer and employee clearly and mutually agree that the salary covers a different number of hours
- ▶ If the agreement is for up to 40 hours per week, the employee is due the full salary plus 1.5 times the regular rate for each hour worked over 40

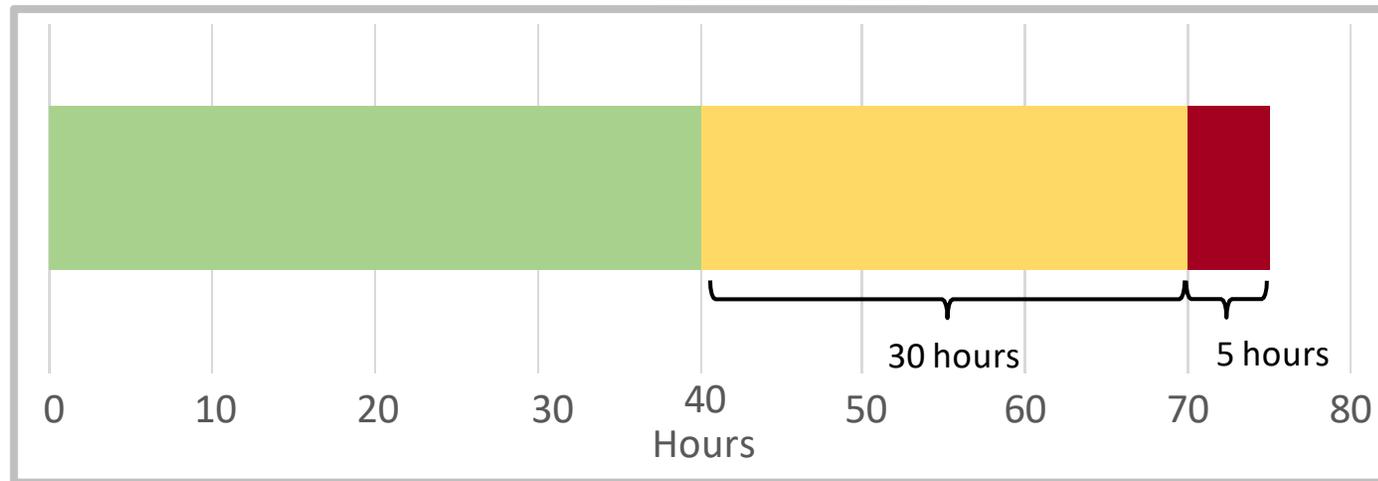
Salaried Compensation With Agreement

- ▶ If the agreed-upon hours are greater than 40 hours per week and the employee works in excess of the agreed-upon hours, 1.5 times the regular rate is due for hours above the agreed number
- ▶ If an employer and employee fail to establish a specific number of hours per week, a 40 hour workweek is assumed
 - ▶ Thus 1.5 time the worker's regular rate will be due for all hours worked in excess of 40 in each workweek
- ▶ If certain conditions are met, an employment agreement may allow a salary to include hours that fluctuate each week
 - ▶ The salary must still be sufficient to meet the minimum wage for every hour worked in that workweek

Salaried Compensation with Fluctuating Hours

- ▶ Hours worked under a fluctuating workweek salary are considered paid at straight time for whatever number of hours are worked in a workweek
- ▶ Calculate the “regular rate” by dividing the salary by the number of hours actually worked each week
 - ▶ After arriving at the figure, the employer must pay *one-half* time the regular rate for each hour worked over 40, in addition to the base salary
 - ▶ Since the salary pays the straight time for all of the hours worked, it is only the remaining “one-half” portion of paying 1.5 time that is still due
- ▶ This “one-half” time overtime method is only available if all conditions are met:
 - ▶ There is a clear and mutual understanding between the employer and the employee that:
 - ▶ The salary is straight pay for all hours worked in the week
 - ▶ Overtime will be compensated at one-half time the regular hourly rate
 - ▶ The overtime is paid contemporaneously with straight-time pay
 - ▶ This means overtime pay is received in the same pay period as the regular pay

Hours worked



- ▶ **Absent agreement on hours worked in excess of 40 –**
 1. **Green** has no overtime – salary only.
 2. **Yellow** and **red** are at 1.5x the pay rate (salary + 1.5 times rate).
- ▶ **Qualifying agreement for 70 hours per week – Employee actually works 75 hours.**
 1. Salary agreement covers straight time for first 70 hours.
 2. Overtime owed on hours **over 40 and up to salary agreement (70)** at ½ the pay rate.
 3. Hours worked above salary agreement (**5 hours**) are paid at 1.5 times the pay rate.

Hours Allowed Under Different Salary Levels

- ▶ An employees weekly salary must meet minimum wage for hours covered under their employee agreement. (weekly salary/hours under employee agreement must be equal to or greater than \$14.49)

Maximum Hours Allowed Under Employment Agreement

Annual Salary	35,000	40,000	45,000	50,000	55,000	60,000	65,000	70,000	75,000	80,000
Maximum Hours Allowed (per week)	46	53	60	66	73	79	86	92	99	106

New Overtime Rules – Example #1 - Hourly

- ▶ *Employee works 40 hours per week for 8 months of year (35 weeks)
- ▶ *Employee works 70 hours per week for 4 months of year (17 weeks)
- ▶ *Total hours for year: 2,590
- ▶ *Hourly rate of \$22 per hour

Old Rules	New Rules	Difference
35 weeks @ 40 hrs x \$22 = \$30,800	35 weeks @ 40 hrs x \$22 \$30,800	
17 weeks @ 70 hrs x \$22 = <u>26,180</u>	Overtime weeks:	
	40 hrs straight-time x \$22 = \$880	
	30 hrs overtime x \$33 = 990	
	Weekly amount <u>1,870</u>	
	X 17 weeks <u>31,790</u>	
Total \$56,980	\$62,590	\$5,610

New Overtime Rules – Example #2 – Salaried, no Written Agreement

- ▶ *Employee works 40 hours per week for 8 months of year (35 weeks)
- ▶ *Employee works 70 hours per week for 4 months of year (17 weeks)
- ▶ *Total hours for year: 2,590
- ▶ *Hourly rate of \$22 per hour

Old Rules		New Rules		Difference
\$4,750 x 12 months	\$57,000	35 wks, 40 hrs (\$1,096.15 x 35 wks)	\$38,365	
		Overtime weeks:		
		Regular pay (\$1,096.15 x 17 weeks)	\$18,635	
		OT (70-40=30 hrs x \$27.50* x 1.5 x 17 wks)	<u>20,961</u> <u>39,596</u>	
		*Hourly computation: \$57,000/52 wks - \$1,096.15/40 hrs - \$27.40)		
Total	\$57,000	Total	\$77,961	\$20,961

New Overtime Rules – Example #3 – Salaried with Written Agreement

- ▶ *Employee works 40 hours per week for 8 months of year (35 weeks)
- ▶ *Employee works 70 hours per week for 4 months of year (17 weeks)
- ▶ *Total hours for year: 2,590
- ▶ *Hourly rate of \$22 per hour

Old Rules		New Rules		Difference
\$4,750 x 12 months	\$57,000	52 wks, 40 hrs (\$1,096.15 x 52 wks)	\$57,000	
		Overtime weeks:		
		OT pay (17 weeks x 30 hrs) x (\$15.66*/2)	<u>3,993</u>	
		*Hourly computation: \$57,000/52 wks - \$1,096.15/70 hrs worked (per agreement) - \$15.66)		
Total	\$57,000	Total	\$60,993	\$3,993

New Overtime Rules – Comparison of Pay Options (\$22 per hour)



Areas of Concern

- ▶ Documentation of hours worked- from employee
 - ▶ L & I will favor the employee
- ▶ Is the son home working on the farm exempt?
 - ▶ Needs to be an owner

Conclusion

- ▶ Salaried employees come with risk and at a high cost
- ▶ Be careful about using one of the exemptions
- ▶ If you do not qualify for exemptions and plan to pay overtime on salaried employees, *Do It Right!*
- ▶ Exposure is *Huge!*
- ▶ Example: assume a farmer has 10 employees identical to the facts we've presented
 - ▶ Farmer thinks he can make one of the exemptions work
 - ▶ A disgruntled employee challenges him on the exemption and the employee wins
 - ▶ What does it cost the farmer?

Cost of Doing it Wrong

Overtime owed for one employee per above	\$20,961
Can go back 3 years	X 3
Total overtime owed	<u>\$62,883</u>
Penalty doubles it	X 2
Total for one employee	<u>\$125,766</u>
You have 10 employees	X 10
Total cost of back overtime pay and penalties*	<u><u>\$1,257,600</u></u>

**this does not include interest at 12% plus both side's attorney fees!*