

## Memorandum

**To:** Washington State Dairy Federation  
**From:** Stephanie P. Berntsen  
**Date:** November 9, 2020  
**Subject:** Impact and Recommendations Based Upon *Martinez-Cuevas v. DeRuyter Brothers Dairy* (Nov. 5, 2020)

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On November 5, 2020, the Washington Supreme Court issued its decision in *Martinez-Cuevas v. DeRuyter Brothers Dairy*. The court held that the agricultural overtime exemption (RCW 49.46.130(2)(g)) violated article I, section 12 of the Washington State Constitution *as applied to dairy workers*. While the decision does not invalidate the agricultural overtime exemption for all agricultural workers in Washington, it leaves open the ability for workers to argue that the exemption should not apply based on the level of danger or lack of safety associated with their particular agricultural job. Here, the majority found that dairy work is hazardous and that dairy workers have a fundamental right to laws that protect their health and safety.

The majority of the court chose not to address whether or not its decision should be applied retroactively. The issue will likely be raised in further proceedings in Yakima Superior Court. Even though the question of retroactivity was not decided, the decision most certainly applies going forward. We recommend that dairy producers immediately start paying overtime (at one-and-a-half times the hourly rate) to all dairy workers who work over 40 hours each week.

Because this decision may represent a significant impact on labor costs for producers, we have prepared the following frequently asked questions and responses to explore various options and questions your members may have.

**Can my dairy workers opt out from the new overtime rate of one-and-a-half times their hourly rate?** No. The court held that the exemption was unconstitutional as to dairy workers and, therefore, it is not a right an employee can voluntarily waive. Further, any requests by employers to employees to voluntarily waive this right, or any other statutory benefit (e.g. rest breaks) would be invalid and likely result in legal challenge.

**Am I required to pay the current hourly rate for my dairy workers, or can I adjust that hourly rate going forward?** Absent a contract setting a specific rate of pay, employers may

always adjust the hourly rate they pay employees so long as those hourly rates meet the minimum wage standard. Before any adjustments may be made, the employer must provide notice to the affected employees.

The current minimum wage in Washington is \$13.50, increasing to \$13.69 in 2021. Some cities have higher minimum wage rates, so be sure to check any local rates as well. If the dairy worker works more than 40 hours in a week, they will be entitled to an overtime rate of \$20.25; \$20.54 in 2021. Any compensation adjustment must still comply with the minimum wage statute.

Before making any compensation adjustment decision, we recommend that employers evaluate the business needs and ensure that all adjustments are applied consistently throughout the organization.

**Can I adjust my workweek schedule?** Yes. Employers can define a workweek as any 7 consecutive days beginning on the same day and time every week. The workweek schedule must be applied consistently for all employees. If you do not have a defined workweek schedule, the default is Sunday through Saturday.

**How should I provide notice of the compensation adjustment?** The notice should be provided in writing and in a language accessible to the employee. The text of the notice language can vary, but it could be as simple as:

[Employee Name:] Effective [DATE], your hourly rate will be [\$REGULAR RATE]. You will be paid time and a half for any hours worked over 40 hours per week.

Acknowledged: [Employee signature]

*Or*

[Employee Name:] Effective [DATE], your shift rate will be [\$RATE], which is based on a regular hourly rate of [\$REGULAR RATE]. You will be paid time and a half for any hours worked over 40 hours per week.

Acknowledged: [Employee signature]

Employees are not required to sign this notice for the compensation adjustment to be effective, but we do recommend asking for an employee's signature and that the acknowledgments are retained in the personnel files as a best practice.

**I pay a flat amount per shift. Am I required to switch from a shift rate practice to paying by the hour?** No, employers can still pay based on a shift rate, *but* the flat amount for the shift rate may likely need to be adjusted to ensure that the dairy workers are being paid an overtime rate of one-and-a-half times their regular hourly rate.

Typically, the regular hourly rate is determined by the amount paid divided by the number of hours worked. If a shift is typically 8 hours and the dairy worker is paid \$120 per shift, the regular hourly rate for that individual is \$15 per hour. If that individual works 6 shifts during a week rather than their normal 5 shifts (for a total of 48 hours), the individual would now be entitled to \$180 for the 8 hours of overtime.

Employers who pay on a flat rate or shift rate basis should continue to carefully track all hours actually worked and ensure that all rest and meal breaks are taken.

**If a dairy worker works 40 hours in one week and requests 6 hours of paid sick leave during that same week for a total of 46 hours, do I have to pay overtime for the 6 hours?**

No. If an employee uses paid sick leave for scheduled overtime hours, their normal hourly wage should be used, not the one-and-a-half times overtime rate.

**I have two separate companies. Can I pay a dairy worker a certain number of hours from one company and a certain number of hours from the other and avoid the new overtime premium?** Where there is common ownership and control, there is an increased risk that courts will find the two companies operate, in reality, it is one employer for purposes of complying with the minimum wage statute. The degree of risk really depends on the specific facts and relationship between the two companies. If, for example, one company is formed only to hold title to the land on which the second company operates a dairy, then a court will likely find that they are a single employer. However, if one company operates a dairy and the second company paints houses, there is less of a risk that the companies will be treated as one. The analysis can be somewhat complex and ripe for legal challenge. If you are considering paying the same dairy worker through two different companies, we strongly recommend you seek legal counsel before doing so.

**Do supervisors or managers, who also perform some dairy work, now get a new overtime rate?** It depends. If the supervisors or managers are paid on an hourly basis, they must now be paid at one-and-a-half times their current hourly rate for hours worked in excess of 40 hours per week.

If the supervisors or managers are paid on a salary basis, we recommend that employers review and evaluate whether or not those individuals qualify under the newly revised regulations regarding the executive, administrative or professional exemptions from the minimum wage act. This should be done on an annual basis because the minimum salary basis amounts are set to increase for the next several years.

Here are some key highlights for these salary-basis exemptions:

- Individuals must be paid a “predetermined monetary amount” or salary of at least \$35,100 per year, exclusive of any other benefits they may receive – like housing, bonuses or medical benefits. In 2021, the minimum annual salary basis amounts increase to \$42,712.80 (small employers – 1 to 50 employees) or \$49,831.60 (large employers –

51+ employees). The minimum annual salary amounts are set to increase for the next several years.

- Individuals must also perform certain types of qualifying work to establish they meet the requirements of either the executive, administrative, or professional exemptions.
  - Executive is an employee whose primary duty is the management of the entire enterprise or significant department; who customarily and regularly directs the work of two or more employees; who has the authority to hire and fire other employees; and who is compensated on a salary basis exclusive of board. An executive can also be an individual who owns a 20% equity interest in the enterprise and who actively engages in its management. Typical examples of executives would be President, CEO, CFO, or Directors of substantial divisions within the enterprise.
  - Administrative exemption applies to individuals whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or employer's customers; who exercises discretion and independent judgment with respect to matters of significance; and who is compensated on a salary basis exclusive of board. The regulations explain that working on a manufacturing production line or selling a product on a retail basis is not "directly related to management or general business operations." Clerical work, recording or tabulating data, or performing other mechanical or repetitive routine work is not "exercises discretion and independent judgment." Typically, the administrative exemption would apply to a Controller or Director of HR, but not a payroll specialist.
  - Professional is an individual whose primary duty consists of performing work requiring knowledge in an advanced type of field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, or requires invention, imagination, originality or talents in a recognized artistic field; and who is compensated on a salary basis exclusive of board. Typically, the professional exemption applies to doctors, lawyers, teachers, accountants, and scientists.

If the individuals do not meet both the salary basis test, which excludes housing, *and* duties tests under one of these exemptions, then the individual must be paid overtime for all hours worked over 40 per week.

**Is my herd manager exempt under these tests?** It depends. The analysis is highly fact specific for each individual and requires that the individual meet both the salary basis test (making at least \$35,100 in 2020 or between \$42,712.80 - \$49,831.60 depending on the size of the entity) *and* duties test for one of the above referenced exemptions. We recommend following

up with your legal counsel to review whether the position as performed with your specific entity would qualify for any of the exemptions listed above.

**I have some independent contractors and some employees; can I convert all remaining employees to independent contractors.** Likely not. Like the exemptions analysis, the independent contractor tests are highly fact specific. For example, if a worker provides more than just their own personal labor, e.g. brings their own employees to perform work and you have no control over the ultimate performance of the work, then they may be an independent contractor. If, however, the individual is providing their own personal labor, you must be able to show all of the following for that individual to be classified as an independent contractor:

- They are free from your control or direction; and
  - The work they perform is either (a) a service outside the usual course of your business; (b) is a service performed outside of all of the places of your business; or (c) they are responsible for the costs of their own principal place of business from which the service is performed; or
  - They (a) are customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service (e.g. a plumber) and (b) have a principal place of business that is eligible for a business deduction for IRS purposes.
- They are responsible for filing a schedule of expenses with the IRS.
- They have established an account with Washington's Department of Revenue and other state agencies as required.
- They maintain a separate set of books and records that reflect all items of income and expenses.

The risks and potential liability for misclassifying individuals as independent contractors is high. We recommend that you consult with your legal counsel before reclassifying any employees to independent contractor status.

**Additional Recommendations:**

- **Take the opportunity to carefully manage hours worked and overtime.**
- **Consider implementing a policy regarding the management of overtime. For example, the policy can state: “All overtime must be pre-approved by your supervisor or manager. If you work overtime without pre-approval, you may be subject to discipline.” Please note, however, that any overtime worked must be paid (at one-and-a-half times the regular rate) regardless if the overtime was preapproved.**

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- **Review your employment handbook to ensure compliance with other minimum wage requirements, including but not limited to paid rest breaks or paid time spent donning or doffing gear.**
- **Provide *prior* written notice to employees regarding any compensation adjustments.**
- **If an employee raises questions about their compensation or complains about their compensation, do not retaliate by terminating them or demoting them or any such adverse employment action. With this decision, we anticipate dairy workers, just like the producers, will be asking what does this mean to me. Use the opportunity to engage in a dialogue with your dairy workers.**

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