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Q&A - Proposed Elimination of Exemption from Overtime for Agricultural Employees under New York State Law

Question 1: Would paying a salary to agricultural workers under the proposals eliminate the need to pay them overtime?

Answer: No. Paying a salary would not eliminate the requirement to pay overtime to agricultural employees under the New York proposals.

Question 2: Would overtime under the proposals apply to H-2A visa holders?

Answer: Yes. There would be no legal basis not to apply the overtime requirements to H-2A visa holders or more broadly, even to employees without work authorization.

Question 3: Are other employees currently entitled to overtime after eight (8) hours a day under New York law?

Answer: Except in very limited circumstances, New York law does not mandate overtime for hours in excess of a specific number in a given workday. In general, New York law only requires overtime for hours worked over 40 in a workweek.

Question 4: Do the New York proposals allow an employee to volunteer to work more than six (6) days without a day of rest?

Answer: New York law generally does not allow employees to waive the right to one day of rest in seven; however, the pending proposals in New York currently specifically provide for voluntary waiver of this requirement as applied to agricultural employees.

Question 6: What is the response to claims made that the original overtime exemption for agricultural employees in the federal FLSA was based on racism?

Answer: While this may have been a motivating factor for some in Congress, the legislative history also reveals that there were legitimate concerns about extending overtime provisions to agriculture because of the unique seasonal nature of agricultural production, affecting both the total period when agricultural activities can be pursued and the days within the "season" when work can be performed.

Question 7: Did the law recently enacted in California go into effect immediately or was it phased-in over time?

Answer: The new California agricultural overtime law was enacted in 2016, but California agricultural employers had already been required to pay overtime after 10 hours in a day or over 60 hours in a week. Moreover, the 2016 law did not become effective at all until January 1, 2019, and it has a phased-in implementation that occurs over four years. Additionally, there is a further delayed implementation date for small employers.

Question 8: Are agricultural employees the only classification of employees excluded from the payment of overtime under state and federal law?

Answer: No. Both state and federal law contain numerous overtime exemptions for particular industries or types of employment, including many other forms of seasonal employment.

Question 9: Do any state or federal laws allow "averaging" of hours for seasonal workers over longer periods of time?

No. We are aware of no federal or state overtime provisions (and certainly none applicable to agriculture) that allow averaging of hours worked over workweeks in which the work was not actually performed. Each workweek stands alone.

Question 10: Do New York labor laws contain an exemption for family members?

Answer: The current New York Labor Law excludes from the definition of "employee" certain family members in agricultural occupations. If overtime is extended to agricultural employees, these exemptions for family members should be preserved.

Proposed Elimination of Exemption from Overtime for Agricultural Employees Under New York State Law

Detailed Discussion

Under current federal and state law, agricultural employees in New York are exempt from the payment of overtime wages. The federal Fair Labor Standards Act (FLSA) provides that its provisions requiring the payment of overtime do not apply to "any employee employed in agriculture." 29 U.S.C. § 213(b)(12). Similarly, New York's overtime provisions exclude from the definition of the word "employee," "any individual permitted to work…as…[l]abor on a farm." 12 NYCRR § 142-2.14(c)(3).

Currently, two virtually-identical proposals are pending in the New York State Legislature that propose to enact a "Farmworker Fair Labor Practices Act," that would, among other things, require agricultural employees to be paid overtime for work over eight (8) hours in a day or forty (40) hours in a calendar week. *See*, New York State Senate Bill S2837 and New York State Assembly Bill A02750, attached as Appendix pp. 1 through 15.

Specifically, each proposal seeks to add language to the New York Labor Law to provide that, "[N]o person or corporation operating a farm shall require any employee to work more than eight hours in any day or forty hours in any calendar week; provided, however, that overtime work performed by a farm laborer shall be at a rate which is at least one and one-half times the worker's normal wage rate."

The proposals also contain language that would require every person employed as a farm laborer to be "allowed at least twenty-four consecutive hours of rest in each and every calendar week."

This document discusses a number of legal and policy issues that should be considered so that any decision to rescind the current overtime exemption for agricultural employees is made in an informed manner and considers all of the possible implications of such a policy change.

1. Would paying a salary to agricultural workers instead of hourly wages permit an exemption of agricultural workers from State law provisions requiring the payment of overtime if New York State's overtime law changed to apply to such workers?

Short answer: No. Paying a salary would not eliminate the requirement to pay overtime to agricultural employees under the New York proposal.

Discussion: Regardless of how an employer chooses to compensate an employee (hourly, salary, piece-rate, commission, etc.), if, under state law (including New York), the employee is non-exempt, the employee still must be paid the applicable minimum wage and overtime.

This question is specifically addressed in an "Overtime Frequently Asked Questions" document prepared by the New York Department of Labor. "An overtime-eligible employee (paid a salary) who regularly works more than 40 hours per week [is] still entitled to overtime pay for hours worked over 40 hours."

Similarly, under federal law, merely paying a salary of a set amount per week to someone who is otherwise entitled to overtime premium payments for working more than 40 hours in a workweek does not excuse the payment of overtime premium wages unless the employee performs exempt work or duties. In addition, Section 13(a)(1) of the FLSA establishes exemptions for specified executive, administrative, professional and outside sales employees. In order to qualify as exempt from the payment of overtime wages, the employee must satisfy a three-part test – (a) a "duties" test, (b) a salary level test (minimum salary level required), and (c) a salary

basis test. A common misconception still exists that an employee can be made exempt from overtime payment under the FLSA merely by paying him or her a "salary." Under the FLSA, it is entirely possible that an employee could meet the requirements of the salary basis test and the salary level test and nonetheless not be exempt from the payment of overtime because the person does not perform exempt duties.

In theory, a state law could be adopted that says that overtime premium payments will not be owed to agricultural workers who receive a salary that meets or exceeds a specified level. In that case, if the worker received the requisite salary level and continued to meet the FLSA definition of working only in "agriculture," the person would not be owed overtime under either state law or Federal FLSA.

For example, agricultural employees are entitled to overtime compensation under Minnesota law after 48 hours in a workweek if they are paid by any means other than a "salary." The requirement to pay overtime does not apply to an individual employed in agriculture "who is paid a salary greater than the individual would be paid if the individual worked 48 hours at the state minimum wage plus 17 hours at 1-1/2 times the state minimum wage per week." Minnesota Stat. § 177.23 Subdivision 7(2).

Such an approach is currently not contemplated in the proposals pending in New York, and even if it were, the obligation to meet the salary requirement may be complicated for H-2A visa program workers because of the program requirement to pay at least the "adverse effect wage rate" (AEWR), an hourly wage rate, in effect at the time (as discussed in more detail below). Moreover, even if the H-2A program requirements could be overcome, the minimum salary rate might make the exemption too expensive to be useful.

Absent an exception from overtime for employees who are paid a salary under a state law, if overtime is otherwise owed under state law for hours over 40 in a workweek or for that matter

over 48 hours or over any number of hours, paying a salary would be possible, but an employer would still have to make a calculation to ensure that employees are being compensated properly for overtime hours and pay a premium extra wage for the overtime hours. Following federal FLSA law requirements, when overtime is required for an individual who is paid on a salary, the overtime "premium" rate for hours over 40 in a workweek is based on the resulting hourly amount calculated by dividing all hours worked that particular week into the salary paid for that workweek. That resulting amount is the "regular" hourly rate for that workweek, assuming that the salary is said to cover the regular or straight time rate for all hours worked in the workweek and meets the applicable hourly minimum wage for all hours worked.

Assuming that the resulting "regular" rate for that week meets the minimum hourly requirement, the overtime calculation would be "1/2 of the resulting "regular rate" X the "number of hours" for which the overtime rate would be paid. The regular rate would vary each workweek, based on the number of hours the person worked that week. *See Overnight Motor Co. v. Missel* 316 U.S. 572 (1942) ["Where the employment contract is for a fixed weekly wage and variable or fluctuating hours of work, the 'regular rate' in the statutory sense, for any particular week, is the quotient of the amount paid per week divided by the number of hours worked in that week.] *Also see* the attached formal Opinion Letter 2009-3 January 14, 2009. https://www.dol.gov/whd/opinion/FLSA/2009/2009_01_14_03_FLSA.pdf Appendix pp. 16-18.

Paying a salary might also complicate the employment of H-2A workers whose wages must be based on an hourly computed wage. The employer would similarly have to divide the salary by the hours worked during the week to ensure compliance with the minimum hourly wage requirement under the H-2A program if expressing pay as a salary amount were allowed. *See* the H-2A job orders of current H-2A employers in California, Hawaii, and Minnesota, all states that currently have overtime requirements applicable to agricultural employees who would be

exempt from an overtime requirement under the FLSA that are in Appendix pp. 16 through 35 and are discussed in the next section of this report. Note that each of these job orders promises a specified hourly wage and overtime premium payments for overtime hours as defined by the respective state law.

2. Would a New York State overtime law affecting agricultural employees cover H-2A visa holders in jobs that would be within the New York overtime requirements?

Short answer: Yes. There would be no legal basis to not apply the overtime requirement to H-2A visa holders or more broadly, even to employees without work authorization.

Discussion: There would be no legal basis to exclude H-2A visa holders from the overtime requirement, were it enacted into law. This issue has already arisen in California, which has long had an overtime requirement for agricultural workers in its Wage Order 14 (a 10/60 standard) and recently began implementation of a phase-in ultimately to require payment of overtime to agricultural workers after 8 hours in a day or 40 hours in a workweek. Currently in California, H-2A employers must include in their H-2A job orders an assurance of their compliance with the California Wage Order 14 and its overtime obligations applicable to employees engaged in agriculture who would be exempt from Federal FLSA overtime. See pertinent portions of currently filed H-2A job orders filed by California agricultural employers Carneros Creek Winery, Inc. and Talley Farms, (Appendix pp. 19 through 25), by Hawaiian agricultural employers Waikele Farms and Greenwell Farms, Inc. (Appendix pp. 26 through 30), and by Minnesota agricultural employers Coleman Farms and Untiedt's Vegetable Farm (Appendix pp. 31 through 34). These obligations to pay overtime are applicable to all of those respective employers' H-2A visa holder foreign workers and U.S. workers in corresponding employment.

H-2A employers would not only be subject to US Department of Labor and state law enforcement officials' enforcement of these overtime obligations. We are attaching portions of a recently filed suit against an H-2A employer on behalf of H-2A visa holders and US workers in which the worker advocate California Rural Legal Assistance organization (CRLA) sued for overtime under California Wage Order 14 and applicable regulations for overtime and penalties. See Appendix p. 35.

Attached is a recently issued US Department of Labor Wage and Hour Division Notice of "Potential H-2A Violations Checklist" in which the Wage Hour Division cited the H-2A employer that received the notice for having failed to pay overtime as required under California law to H-2A and US employees. (See Appendix checking box 27 under "Wage-Related Violations," pp. 36 through 37) Note that the employer could have been cited also under the heading "Legal Requirements" in box 40, the box for giving notice of a claim that the H-2A employer "failed to follow all applicable federal, state, and local laws and regulations," an obligation of H-2A employers under Federal H-2A regulations at 20 CFR 655.135(e).

Moreover, under basic DOL H-2A principles, the aim is to make sure that foreign H-2A visa holders do not depress the wages and working conditions for U.S. workers "similarly employed." Thus, at least the adverse effect wage rate "AEWR" must be paid to H-2A visa-holders *and* to U.S. workers in corresponding employment. In fact, U.S. workers must be recruited and paid based on "a wage that is the highest of the AEWR, the prevailing *hourly* wage or piece rate, the agreed-upon collective bargaining wage, or the Federal or State minimum wage…" (Emphasis supplied). 20 CFR 655.120(a). If a higher "prevailing hourly wage rate or piece rate" is established during the period of the job certification, the employer must immediately begin paying the higher rate. 20 CFR 655.120(b). These rates then must be paid to U.S. and H-2A visa holders.

Finally, under the Federal Affordable Care Act, the Department of Treasury said that H-2A and H-2B visa holders are not "generally exempted from the definition of employee" for purposes of Section 4980H of that law. 79 Fed. Reg. 8568 (third column) (Feb. 12, 2014). (See Appendix p. 38).

More broadly, existing case law rulings apply substantive federal and state law employment protections to all workers, including H-2A visa holders. *See, e.g.*, *Arriaga v. Florida Pacific Farms, LLC*, 305 F.3d 1228 (11th Cir. 2002) [Applying FLSA minimum wage requirements to H-2A visa program workers subject to visa, travel and recruiting expenses]; *Salazar-Martinez v. Fowler Bros., Inc.* 781 F. Supp. 2d 183 (W.D.N.Y. 2011) [H-2A visa holder's pre-employment travel and visa expenses required to be reimbursed under the FLSA and New York State law to the extent such expenses reduced wages below federal and State minimum wage]; *Teoba v. Trugreen Landcare LLC*, 769 F. Supp. 2d 175 (W.D.N.Y. 2011) [upholding federal and New York State wage claims of H-2A visa holders regarding recruiting, visa, and transportation costs]; *Centeno-Bernuy v. Becker Farms*, 564 F. Supp. 2d 166 (W.D.N.Y. 2008) [Considering, but granting summary judgment on H-2A visa holders claims for overtime under New York law because of the exemption for agricultural employees]; *Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892 (9th Cir. 2013) [Applying FLSA and Nevada state law to H-2A visa program holder wage and hour and minimum wage claims].

Moreover, New York labor and employment laws apply to individuals regardless of immigration status. The law defines an employee as "any individual employed or permitted to work by an employer in any occupation" and has been interpreted to provide protection to employees regardless of immigration status. *Garcia v. Pasquareto*, 11 Misc.3d 1, 812 N.Y.S.2d 216 (N.Y. Sup. App. Term 2004) [Employees who were undocumented and therefore could not be lawfully employed could nonetheless bring an action against their employer for unpaid wages

under New York Labor Law]; *Pineda v. Kel-Tech Construction, Inc*., 15 Misc.3d 176, 832 N.Y.S.2d 386 (N.Y. Sup. 2007) [Undocumented workers who worked on a municipal construction project were entitled to prevailing wages as mandated by State law; undocumented workers may seek unpaid wages for work they have already performed even if they allegedly proffered fraudulent documents to obtain employment].

Similarly, federal courts in New York have held that an employee's immigration status is not relevant to his or her claims under the FLSA. *Solis v. Cindy's Total Care, Inc.* (S.D.N.Y. 2012), 2011 WL 6013844.

In *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), the U.S. Supreme Court barred back pay awards and reinstatement to individuals who could not have been lawfully employed because of their immigration status where they were found to have been terminated in violation of the National Labor Relations Act. Courts construing *Hoffman* (including courts in New York) have consistently held that the ruling in that case has no effect on claims for wages earned but not paid and have not applied the *Hoffman* ruling to state law claims for work actually performed. *See, e.g. Flores v. Amigon*, 233 F. Supp.2d 462 (E.D.N.Y. 2002); *Balbuena v. IDR Realty,* LLC, 6 N.Y.3d 338 (2006); *Janda v. Michale Rienzi Trust*, 78 A.D.3d 899, 912 N.Y.S.2d 237 (2d Dept 2010). *See also, Madeira v. Affordable Housing Foundation, Inc.*, 469 F.3d 219 (2d Cir. 2006) [federal immigration law does not preempt state labor law].

3. Under the current New York State proposal, employers would be required to pay overtime after eight (8) hours worked in the day or after forty (40) hours in a workweek. How does the State of New York treat other categories of employees who are entitled to overtime premium compensation under State law? Is overtime ever required after eight (8) hours in a day?

Short answer: Except in very limited circumstances, New York law does not mandate overtime for hours in excess of a specific number in a given workday. In general, New York law only requires overtime for hours worked over 40 in a workweek.

Discussion: New York law provides that, unless otherwise exempt, employees who work in excess of 40 hours in a week must be compensated at an overtime rate of one and one-half times the employee's regular rate of pay. 12 NYCRR § 142-2.2; NYCRR § 146-1.4; NYCRR § 141-1.4. Residential employees are entitled to overtime for hours worked in excess of 44 hours in a given workweek. 12 NYCRR § 142-2.2. Except in very limited circumstances[1], New York law does not mandate overtime for hours in excess of a specific number in a given workday.

This is an important distinction from the recent legislative developments in California. California law already provided a generally applicable eight-hour day standard with overtime required thereafter for non-exempt employees. Therefore, proponents of the California legislation argued that agricultural employees should be treated like other non-exempt employees and

[1] Employees in a brickyard may not be required to work more than ten hours in any day or to commence work before 7 a.m.; such work may be performed by agreement between employer and employee for "extra compensation." NYLL § 163. Employees engaged in the operation of a street surface or elevated railroad owned or operated by a corporation whose main line or route of travel lies principally within a city of the first or second class, may not be employed more than ten consecutive hours in a day, except that in cases of accident or unavoidable delay, such work may be performed for "extra compensation." NYLL § 164. A signalman may not be employed by a railroad for more than eight hours a day, except in cases of extraordinary emergency caused by accident, fire, flood or danger to life or property, in which case the signalman must be paid for each hour of such overtime at least one-eighth of his daily compensation. NYLL § 166.

therefore be entitled to the same standard (leveling the playing field). Because New York does not mandate overtime based on the number of hours worked in a day (except in limited circumstances), this argument is inapplicable in New York. The current proposal would actually extend to agricultural employees a standard (8 hours) that generally does not apply to most other workers in the State.

4. The federal government discontinued the obligation of certain federal contractors to pay overtime after eight (8) hours in a day in 1986.

In 1985, the Reagan Administration amended rules that had previously been applicable to certain federal contractors. As of January 1, 1986, section 102 of the Contract Work Hours and Safety Standards Act, 40 U.S.C. § 328(a) (CWHSSA), was amended to provide that employees of government supply contractors are no longer required to receive daily overtime premium pay if they work in excess of eight hours a day. Pursuant to the provisions of the Department of Defense (DOD) Authorization Act of 1985, Pub. L. No. 99-145, 99 Stat.734, § 1241 (Nov. 8, 1985), the time-and-one-half overtime premium is now required only after forty hours of work in a workweek consisting of seven, twenty-four hour days.

Although the DOD provision specifically amended both the Walsh- Healey Act, see 41 U.S.C. § 35(c), and the Contract Work Hours and Safety Standards Act, the latter previously provided the only basis for an overtime premium for workers employed pursuant to the provisions of the Service Contract Act. As a result, the provisions of CWHSSA were applied to all government contracts and eliminated the eight-hour premium requirement under both laws.

5. The New York proposals contemplate requiring at least a day of rest in every seven (7)-day period. Question or concern: In states where a day of rest is required, may an employee volunteer to work more than six (6) days without a day of rest?

Short answer: Depending on the language of the state statute at issue, an employee may be allowed to volunteer to waive his or her day of rest. New York law generally does not allow for such a waiver, however, proposed Assembly Bill A02750 and Senate Bill S2837 specifically provide for voluntary waiver of this requirement as applied to agricultural employees.

Discussion: Whether a day or rest requirement may be voluntary waived by an employee will depend on the specific state statutory language at issue. Under current New York law, most employees are entitled to 24 hours of rest every calendar week. NYLL § 161. This day of rest requirement is not waiveable by the employee. New York Labor Law Opinion Letter, RO-08-0016. If, however, there are practical difficulties or unnecessary hardship in carrying out the provisions, the Labor Commissioner may make a variation from the law. NYLL § 161.

Proposed Assembly Bill A02750 and Senate Bill S2837 both use language that is significantly different from California law. Under the New York proposal: "Every person employed as a farm laborer **shall be allowed** at least twenty-four consecutive hours of rest in each and every calendar week." (Emphasis added). This language, were it not restricted in application, would likely be interpreted by a court to require an employer to provide one day's rest in seven; however, the current versions of the bills also provide, **"No provision of this paragraph shall prohibit a farm laborer from voluntarily refusing the rest required by the paragraph."** (Emphasis added). Therefore, the current versions of the New York proposal appear to allow an employee to waive his or her right to one day of rest.

By comparison, California Labor Code section 552 states that "no employer shall cause his employees to work more than six days in seven." In a recent case[2], the Federal Court of Appeals for the Ninth Circuit asked the California Supreme Court to clarify a number of questions, including what does it mean for an employer to "cause" an employee to work more than six days in seven?

The Court concluded that employers only "cause" an employee to work more than six consecutive days when they induce or encourage an employee to forgo his or her day of rest in a workweek. The Court said an employer is not liable if it passively allows an employee to work a seventh day. "[A]n employer's obligation is to apprise employees of their entitlement to a day of rest and thereafter to maintain absolute neutrality as to the exercise of that right…An employer may not encourage its employees to forgo rest or conceal an entitlement to rest, but is not liable simply because an employee chooses to work a seventh day….An employer cannot affirmatively seek to motivate an employee's forsaking rest, but neither need it act to prevent such forsaking."

As discussed above, the current versions of the New York proposal would authorize an employee to waive his or her right to one day of rest. If, however, this language is amended out of the proposals, the industry should advocate to amend the day of rest language only to forbid employers from "causing" or "requiring" employees to work without twenty-four consecutive hours of rest each calendar week or to adopt other language that would allow employees to choose to forego a day of rest. Such language would enable a court to interpret the language similar to the more favorable interpretation rendered by the California Supreme Court involving similar language.

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[2] The California Supreme Court decision was *Mendoza v. Nordstrom, Inc.* 2 Cal. 5th 1074 (2017). The subsequent Ninth Circuit decision was *Mendoza v. Nordstrom, Inc.* 865 F.3d 1261 (9th Cir. 2017).

6. What is the response to claims made that the original overtime exemption for agricultural employees in the federal FLSA was based on racism?

Proponents of eliminating the exemption in the FLSA for agricultural employees (or enacting state laws to extend state overtime law to such employees) often cite to the legislative history of the FLSA in arguing that the original exclusion was based primarily in racial bias. While this may have been a motivation for some in Congress, the legislative history does reveal that there legitimate concerns about extending overtime provisions to agriculture because of the limited seasonal nature of agricultural production, including the inability to work every day during the season for reasons of weather, crop readiness and other factors.

The legislative history of the specific reason for the agricultural exclusion from the FLSA is sparse, in part because earlier New Deal legislation had already excluded agricultural employees. In fact, the FLSA already contained an exclusion for agricultural workers when it was presented to Congress for consideration[3].

Moreover, the legislative history does demonstrate that many legislators were concerned that application of wage and hour regulations (including overtime) to agricultural workers would be extremely burdensome on farmers because of the seasonal nature of agriculture.

For example, one Senator stated:

> I call attention to the fact that there are some occupations which are of a peculiarly seasonal nature, as the Senator has said. For instance, in the case of tomatoes it is necessary that the work of canning or packing them be done quickly and rapidly or else they will spoil.[4]

Another Senator similarly stated:

[3] See 81 CONG. REC. 7648 (1937) (including the statement by Senator Black, "The bill specifically and unequivocally excludes certain industries and certain types of businesses from its scope and effect. It specifically excludes workers in agriculture of all kinds and of all types.").

[4] 81 CONG. REC. 7652 (1937) (Statement of Senator Black).

> For example, we all know that the tomato crop ripens perhaps at one particular time and frequently comes into the market all at once. So men go out and catch fish, and sometimes there is a large run of fish on a particular day, due to a flood or a freshet or what not, and the fish have to be canned. My reading of the bill leads me to believe that it is the intention of the bill that where a bona-fide case is made out for putting up perishable goods, whether they be products of the orchard or the farm or the fishery or what not, the maximum-hours provisions shall not apply where food where otherwise be lost if it should apply.[5]
>
> And finally:
>
> For instance, in the case of a cotton gin it might be necessary to go for some distance to get half a dozen persons to come in and work, and they might have to work very long hours for a few days, and then quit and not work again for weeks, and perhaps when their work was over they might not work again for 9 or 10 months. Those would be seasonal activities…[6]

Therefore, the legislative history of the FLSA indicates that there were legitimate reasons for the overtime exemption for agricultural employees based on concerns regarding the unique and seasonal nature of agriculture that may necessitate employees working longer hours during peak seasons to preserve agricultural product. These concerns still exist today and should be taken into account before considering imposing an overtime standard on such workers under New York law.

[5] 81 CONG. REC. 7652-3 (1937)(Statement of Senator Tydings). In fact, Congressional colloquy shows members actively worked to get the "fishery" industry, including processing of seafood, at least the same concessions promised to the agricultural industry *after* the provisions favorable to agriculture had been worked out because of the limited period within which such work could be performed and the need at times to work "long days" to "save" the harvest as in agriculture. *See, e.g.*, 83 CONG. REC. 7408 (May 24, 1938).

[6] 81 CONG. REC. 7654 (1937) (Statement of Senator Black).

7. Was the recently amended California overtime law implemented immediately or phased-in over time?

Short answer: The new California agricultural overtime law was enacted in 2016, but California agricultural employers had already been required to pay overtime after 10 hours in a day or over 60 hours in a week so their payroll processes and equipment were already set up to address both daily and weekly overtime requirements. Even so, the 2016 law did not become effective at all until January 1, 2019, and it has a phased-in implementation that occurs over four years. Moreover, there is a further delayed implementation for small employers.

Discussion: Before 1941, the California Labor Code was silent on the issue of overtime for agricultural workers. In 1941 the Legislature chose to exempt all agricultural employees from the statutory requirements of overtime, similar to the FLSA.

That exemption, however, did not prohibit the Industrial Welfare Commission (IWC) from legally instituting overtime provisions applicable to agricultural employees. In 1976, Wage Order 14 was amended to require the payment of overtime wages when an agricultural employee works longer than 10 hours in a single day and more than 6 days during any workweek.

This remained the state of the law for nearly forty years until AB 1066 was enacted in 2016. That bill implemented a phased-in approach to applying the eight-hour day standard to agricultural employees, beginning in 2019 for employers with 26 or more employees. This phase-in was delayed even further for employers with 25 or fewer employees and will not begin until 2022, as can be seen in the following schedule:

Schedule for Changes to Overtime Pay Under CA Law for Agricultural Employees

Effective Date for Employers with 26 or More Employees	Effective Date for Employers with 25 or Fewer Employees	Overtime Required After the Following (hours day/week):
Jan. 1, 2019	Jan. 1, 2022	9.5/55
Jan. 1, 2020	Jan. 1, 2023	9/50
Jan. 1, 2021	Jan. 1, 2024	8.5/45
Jan. 1, 2022	Jan. 1, 2025	8/40

Therefore, California adopted a gradual approach (that varied depending on the size of the business) to phasing-in the eight-hour day for agricultural employees, rather than implementing the new rule immediately. If the current proposals were adopted, New York agricultural employers would face significant challenges in shifting immediately from not having to track or provide overtime at all to having to track and calculate overtime on a daily basis as well as on a workweek basis. Agricultural employers would need additional time to make changes to manual and electronic recordkeeping and payroll systems in order to implement a new law requiring the payment of overtime, even leaving aside the economic consequences. At a minimum, the legislative proposal should take these challenges into consideration and include a delayed or phased-in implementation for these new requirements at least as generous as those enacted in California that already required daily and weekly overtime under certain circumstances.

8. Are agricultural employees the only classification of employees excluded from the payment of overtime under state or federal law?

Short answer: No. Both state and federal law contain numerous overtime exemptions for particular industries or types of employment, including many other forms of seasonal employment.

Discussion: Both New York law and the FLSA contain numerous complete exemptions from the obligation to compensate employees for overtime. Attached as appendices to this

document are lists of these complete exemptions under New York law and the FLSA. See Appendix pp. 39 through 43.

As can be seen, agricultural employees are by no means the only employees excluded from the payment of overtime under state or federal law. Many other types of workers (including others who work on a seasonal basis) are excluded from the payment of overtime based on the unique natures of their given industries. The exemption for agricultural employees is entirely consistent with this industry-by-industry approach which takes into account the particular issues affecting each particular industry.

9. Do any state or federal laws allow "averaging" of hours for seasonal workers over longer periods of time to determine the "regular rate" and overtime rate of pay?

Short answer: No.

Discussion: One of the hallmarks of the FLSA is the concept that each workweek stands alone. We are aware of no federal or state law overtime provisions (and certainly none applicable to agriculture) that allow averaging of hours worked over workweeks in which the work was not actually performed.

10. Do New York labor laws contain an exemption for family members?

Short Answer: The current New York Labor Law excludes from the definition of "employee" certain family members in agricultural occupations. If overtime is extended to agricultural employees, these exemptions for family members should be preserved.

Discussion: New York's minimum wage and labor laws exclude from the definition of "employee" individuals employed or permitted to work on a farm who are (1) the parent, spouse, child or other member of the employer's immediate family, and (2) a minor under seventeen years

of age employed as a hand harvest worker on the same farm as his or her parent or guardian and who is paid on a piece-rate basis at the same piece rate as employees seventeen years of age or over. New York Labor Law Section 671(2).

Even if New York overtime law is extended to agricultural employees generally, exemptions for specified family members should be maintained. The current legislative proposals do not appear to eliminate this overall exemption from state law; however, this should be clarified.

Appendix:

1. **New York State Senate Bill S2837:** https://www.nysenate.gov//legislation/bills/2019/S2837, **Appx. pp. 1 through 7.**
2. **State Assembly Bill A02750:** https://nyassembly.gov/leg/?bn=A02750&term=2019, **Appx. pp. 8 through 15.**
3. **Opinion Letter 2009-3 January 14, 2009 https://www.dol.gov/whd/opinion/FLSA/2009/2009_01_14_03_FLSA.pdf, Appx. pp. 16 through 18.**
4. **H-2A Job Order, Carneros Creek Winery, Inc. (California), Appx. pp. 19 through 22.**
5. **H-2A Job Order, Talley Farms (California) Appx. pp. 23 through 25.**
6. **H-2A Job Order, Greenwell Farms, Inc. (Hawaii), Appx. pp. 26 through 27.**
7. **H-2A Job Order, Waikele Farms, Inc. (Hawaii), Appx. pp. 28 through 30.**
8. **H-2A Job Order, Coleman Farms (Minnesota), Appx. pp. 31 through 32.**
9. **H-2A Job Order, Untied's Vegetable Farm (Minnesota), pp. 33 through 34.**
10. **Excerpt from recently filed law suit alleging failure by California H-2A employer to have paid overtime as required to employees engaged in agriculture under California law to H-2A visa holders and US workers, Appx. p. 35.**

11. Recent redacted WH Division Notice of Potential H-2A Violations provided to California H-2A employer on Form WH-601 alleging in item 27 under Wage-Related Violations, "Failed to pay required rate(s) of pay," which in that case involved a claim that the employer had failed to pay overtime to H-2A and US employees who had performed agricultural work that would have been exempt from overtime requirements under the FLSA, 29 USC 213(b)(12), Appx. pp. 36 through 37.

12. 79 Fed. Reg. 8568 (Feb. 12, 2014) (discussing coverage of H-2A and H-2B visa holders in the ACA "employee" definition), Appx. p. 38.

13. List of New York Labor Law Overtime Exemptions, Appx. pp. 39 through 40.

14. List of FLSA Complete Overtime Exemptions, Appx. pp. 41 through 43.