

IN THE COURT OF APPEALS OF THE STATE OF OREGON

Mano a Mano Family Center, a  
domestic non-profit corporation  
Javier Ceja, an individual, and  
Anita Santiago, an individual,

PETITIONERS,

v.

Bureau of Labor and Industries and  
Val Hoyle, its Commissioner,

RESPONDENTS.

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**PETITION FOR JUDICIAL REVIEW OF AGENCY RULES**

Petitioners file this petition to seek judicial review of the validity of two administrative rules pursuant to ORS 183.400.

The parties to this review are:

Mano a Mano Family Center  
Javier Ceja  
Anita Santiago

*Petitioners*

State of Oregon  
Bureau of Labor and Industries  
Commissioner Val Hoyle

*Respondents*

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## INTRODUCTION

A. Attached to this Petition as Exhibits A and B are copies of the rules for which review is sought: Bureau of Labor and Industries administrative rules OAR 839-020-0125(3)(k) and OAR 839-020-0135 (collectively the “Rules”), which arbitrarily deny overtime to agricultural workers. Attached to this letter as Exhibit C is a memorandum sent to the Bureau of Labor and Industries requesting that the Rules be changed.

B. Petitioner Mano a Mano Family Center (“Mano a Mano”) is a domestic non-profit corporation based in Salem, Oregon, that has been serving farmworkers and their families since 1988. Mano a Mano operates two food banks as part of its Family Wellness Program and operates Youth Empowerment Programs, among other efforts. Mano a Mano concentrates on providing access to basic needs, supporting parents, and community health. Mano a Mano works to improve the occupational safety and health of farmworkers because of the many risk factors associated with agriculture and the harms experienced by farmworkers. A central focus of its mission is reducing stress among its constituents. In its work, Petitioner Mano a Mano often encounters client farmworkers who are experiencing occupational risks and stress due to being expected to work very long hours while still attempting to meet the needs of their families. Consistent with its mission,

Petitioner Mano a Mano seeks a determination that OAR 830-020-0125(3)(k) and OAR 839-020-0135 are invalid. Mano a Mano is a “person” with standing to seek review under ORS 183.400.

C. Petitioner Javier Ceja is an individual who has worked in Oregon agriculture for forty years, mostly doing field work. He and others whom he has observed have had to work long hours—often 11 or 12 hours per day—without the benefit of receiving overtime due to a historical exclusion of agricultural workers from state and federal overtime protections. His experience has taught him that the long hours and lack of financial security that result from being denied overtime pay lead to poor health outcomes—personally, that has meant high blood pressure and stomach issues. He sees many co-workers experience similar stress and health issues, including mothers and fathers who both must work long hours to survive but get no rest because they must care for children when they arrive home late at night, often after having waked early to begin work. Now in his 70s, when many people are retired and spending time with a spouse or grandchildren, Petitioner Ceja still works in the fields, harvesting fruit and vegetables. Petitioner Ceja seeks a determination that OAR 839-020-125(3)(k) and OAR 839-020-135 are invalid. He is a “person” with standing to seek review under ORS 183.400.

D. Petitioner Anita Santiago is an individual who has fifteen years of experience as an agricultural worker in Oregon, mostly in Washington County.

Petitioner Santiago speaks *Zapoteco* as her first language. She has often worked long hours without receiving overtime pay for hours over 40 in a week. Petitioner Santiago balances her work and childcare responsibilities as best she can and takes each seriously, but feels it is unjust that she and other farmworkers shoulder the personal expense of working long hours without overtime pay while her employer enjoys the benefit of her work in added revenue. She has little control over her work hours – she has often begun her workday believing she will work for only eight hours, but then the supervisor demands that the workers finish the field that day no matter how many hours it takes. This leads to overtime work for which she is not fully or fairly compensated. The long hours and lack of adequate compensation contribute to her mental stress, adversely impact her physical health, increase her childcare costs and family expenses, and adversely affect the wellbeing of her children. Petitioner Santiago seeks a determination that OAR 839-020-125(3)(k) and OAR 839-020-135 are invalid. She is a “person” with standing to seek review under ORS 183.400.

E. Oregon has more than 86,000 agricultural workers.<sup>1</sup> The agricultural worker population is overwhelmingly Hispanic; according to the most recent relevant data, more than 88% of Northwest region agricultural workers identify as

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<sup>1</sup> Rahe, Mallory, "Estimates of Migrant and Seasonal Farmworkers in Agriculture, 2018 Update," Department of Applied Economics, Oregon State University Extension Service.

Hispanic.<sup>2</sup> The median and average total annual family income for our region's agricultural workers is between \$20,000 and \$24,999.<sup>3</sup> Conservative estimates show that more than 27% of agricultural workers live below the federal poverty level.<sup>4</sup> This is more than twice the poverty rate in Oregon as a whole.<sup>5</sup> Oregon's agricultural workers are diverse, including women, older workers, and children. Farmworker families often live permanently in our communities. More than one-third of northwest agricultural workers are female. The percentage of agricultural workers who are 45 years old and older is 37%; 7% of the workers are under 18 years old; 39% of the workers are married parents.<sup>6</sup> Oregon's agricultural workers grow, process, harvest and tend a variety of products in a number of agricultural industries, including nurseries, dairies, fruit and vegetable crops, livestock ranches, Christmas tree farms and many other products. Oregon is first in the nation in production of Christmas trees. Oregon is fourth in the nation in both nursery

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<sup>2</sup> Table 7, "Hired Crop Worker Demographic Characteristics, Northwest Estimates, Seven Time Periods," National Agricultural Worker Survey, U.S. Department of Labor, Employment and Training Administration. NAWS provides statistically reliable demographic data for U.S. agricultural workers and is the best available data.

<sup>3</sup> Table 7, "Hired Crop Worker Demographic Characteristics, Northwest Estimates, Seven Time Periods," National Agricultural Worker Survey, U.S. Department of Labor, Employment and Training Administration.

<sup>4</sup> Table 7, "Hired Crop Worker Demographic Characteristics, Northwest Estimates, Seven Time Periods," National Agricultural Worker Survey, U.S. Department of Labor, Employment and Training Administration.

<sup>5</sup> Center for Public Policy, *A Portrait of Poverty in Oregon* (August 20, 2020).

<sup>6</sup> Table 7, "Hired Crop Worker Demographic Characteristics, Northwest Estimates, Seven Time Periods," National Agricultural Worker Survey, U.S. Department of Labor, Employment and Training Administration.

production and fruit, tree, nut and berry production.<sup>7</sup> Almost all of these products rely heavily on hand harvest labor requiring long hours.

F. Oregon’s agricultural workers face many risks to their physical and emotional health. A recent report by Oregon Health and Science University’s Institute of Occupational Health Sciences, “Mandated but not Compensated: Exploring the Multifaceted Impacts of Overtime on Farm Workers’ Health, Safety, and Well-being” (“OHSU Report”),<sup>8</sup> states that “[a]gricultural workers are at an elevated risk for the development of chronic musculoskeletal pain resulting from repetitive motion injuries/re-injuries, poor availability of workplace safety and ergonomic tools and overtime hours.” (*Id.*, at 6.) The OHSU Report notes that agricultural workers in Oregon “display significantly worse mental health than is seen in the general population,” (*Id.*) with high degrees of depression, anxiety, and stressors including financial strain. (*Id.*) Overexertion (22%) and slips/falls (33%) account for most workers’ compensation claims filed by agricultural workers in Oregon and the OHSU Report notes that, for both, “Occupational Health and Safety research has shown, [these] can be caused by health and psychological issues including poor sleep, high job demands, and financial strain.” (*Id.*, at 7.) Agricultural workers have little control in their jobs and, as the OHSU Report

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<sup>7</sup> 2017 Census of Agriculture, U.S. Summary and State Data, U.S. Department of Agriculture.

<sup>8</sup> Authored by Krista Brockwood, PhD, Lindsey Alley, MS, David Hurtado, PhD, Sam Greenspan MPH, Anjali Rameshbabu, PhD, Sara Wild, MPH, and Leslie Hammer, PhD.

notes, this “can bear even more heavily on their health and well-being.” (*Id.*, at 12.) Financial concerns may “lead [agricultural workers] to work through injury and pain, and their strenuous work is linked with higher prevalence of mental health issues....” (*Id.*, at 13.)

G. Petitioners seek a determination pursuant to ORS 183.400(4)(a)-(c) invalidating OAR 839-020-0125(3)(k) and OAR 839-020-0135 because they were adopted without compliance with applicable rulemaking procedures, exceed BOLI’s statutory authority, and violate Article I, Section 20 of the Oregon Constitution. Commissioner Hoyle and BOLI (collectively “BOLI”) have an interest in asserting that the rules are valid.

The parties’ interests are adverse, and a justiciable controversy exists.

THE RULES ARE INVALID UNDER ORS 183.400(4)(a), (c)

H. Pursuant to ORS 183.400, this Court shall invalidate an administrative rule if it finds that the rule exceeds the statutory authority of the agency or was adopted without compliance with applicable rulemaking procedures. ORS 183.400(4)(a), (c).

I. An administrative rule exceeds the agency’s statutory authority if it departs from a statutory policy or directive. *Nay v. Dept. Of Human Resources*, 360 Or. 668, 681, 385 P3d 100,1, 1008 (2016). A rule is adopted without compliance with applicable rulemaking procedures if the agency fails to evaluate

statutorily mandated factors. *W. States Petroleum Ass'n. v. Env'tl. Quality Commission*, 296 Or App 298, 309-10, 439 P3d 459, 466 (2019).

J. The Legislature has declared a “policy of the State of Oregon to establish minimum wage standards for workers at levels consistent with their health, efficiency and general well-being.” ORS 653.040. The Legislature also has recognized that regulation of hours and conditions of work, including overtime pay, are necessary to workers’ health and physical wellbeing. ORS 652.010(1); ORS 653.261(1)(a).

K. BOLI has general statutory authority to “adopt such reasonable rules as may be necessary to administer and enforce any statutes over which it has jurisdiction.” ORS 651.060(4). In particular, BOLI has statutory authority to “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.” ORS 653.261(1)(a). This specific grant of rulemaking authority includes the ability to limit hours of work and to require the payment of overtime for work exceeding 40 hours per workweek[.]” *Id.*

L. BOLI’s statutory authority to limit hours of work and require payment of overtime is subject to exceptions listed in ORS 653.261. Before 2017, one of those statutory exceptions was for “employees engaged in production, harvesting, packing, curing, canning, freezing or drying any variety of agricultural crops,



livestock, poultry, or fish.” *Former* ORS 653.261(2). That categorical exception for agricultural workers was removed in 2017 by House Bill 3458. 2017 Oregon Laws, Chapter Ch. 685, Section 7.

M. Both OAR 839-020-0125(3)(k) and OAR 839-020-0135 exempt agricultural workers from coverage under OAR 839-020-0030, a rule promulgated by BOLI that generally requires overtime pay for employees who work more than 40 hours per week in Oregon.

N. OAR 839-020-0125(3)(k) states that it was adopted to implement ORS 653.261 and cites ORS 653.261 and 653.040 as statutory authority;<sup>9</sup> it provides:

(3) The provisions of OAR 839-020-0030 do not apply when Section 13(b) of the Fair Labor Standards Act [29 U.S.C. §213(b)] apply to employees as follows:

...

(k) Any employee with respect to the employee's employment in agriculture by a farmer, notwithstanding other employment of such employee in connection with livestock auction operations in which such farmer is engaged as an adjunct to the raising of livestock, either on the farmer's own account or in conjunction with other farmers, if such employee is primarily employed during the employee's workweek in agriculture by such farmer, and if such employee is paid for the operations at a wage rate not less than that prescribed by ORS 653.025 [the Oregon minimum wage statute]. OAR 839-020-0125(3)(k).

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<sup>9</sup> OAR 839-020-0125 also cites 2015 Or. Laws Chapter 457 as its statutory authority and the statutes it implements; this 2015 bill, the Domestic Workers’ Protection Act, does not apply to agricultural workers.

OAR 839-020-0135 states that it was adopted to implement ORS 653.261, Section (2) and cites ORS Chapter 653 in general as its statutory authority. It provides:

“Pursuant to the provisions of ORS 653.261(2), OAR 839-020-0030 does not apply to individuals employed in agricultural employment.” BOLI has comprehensively defined agricultural employment to include employment in:

. . . farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities, the raising of livestock, bees, fur-bearing animals, or poultry and any practices performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. OAR 839-020-0004.

Thus, both Rules purport to exempt nearly all agricultural workers from Oregon overtime protections.

O. The statute which OAR 839-020-0135 states it was intended to implement – ORS 653.261(2) – was repealed by the Oregon Legislature in 2017.<sup>10</sup>

*Former* Section (2) of ORS 653.261 read:

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.

Although OAR 839-020-0125 does not state explicitly that it was issued to implement *former* Section (2) of ORS 653.261, that repealed statute is the underpinning for this Rule as well. No other provision of ORS 653.261 mentions

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<sup>10</sup> See 2017 Or. Laws Chapt. 685, Section 7 (2017 H.B. 3458).

agricultural workers or otherwise suggests that, after 2017, the Oregon Legislature intended that BOLI categorically exempt agricultural workers from overtime pay.<sup>11</sup>

P. Another provision of ORS 653.261, Section (1)(a), confirms that the Oregon Legislature intended overtime pay to protect employees' health:

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 . . . 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. ORS 653.261(1)(a) (emphasis added).

In ORS 653.015, the Legislature stated that “[i]t is the declared policy of the State of Oregon to establish minimum wage standards for workers at levels consistent with their health, efficiency, and general well-being.” Accordingly, both ORS 653.261(1)(a) and 653.015 provide explicitly that the Legislature intended Oregon minimum wage and working conditions laws – including laws allowing overtime

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<sup>11</sup> Currently, only one Oregon statute exempts certain limited categories of agricultural workers from BOLI's authority to enact overtime rules; ORS 653.020(1) exempts the following five types of agricultural workers: those working on a piece-rate basis employed by an employer who did not use more than 500 piece-rate-work days of agricultural labor in the prior year; those closely-related to the employer; hand harvesters or pruning laborers paid on a piece-rate basis who commute from a permanent residence and who were employed in the farm industry for less than 13 weeks during the year prior; those who are 16 years old or younger, employed as a hand harvest laborer, and paid on a piece-rate basis at the same rate as those employed on the farm who are over 16 years of age; or those principally engaged in the range production of livestock who are paid on a salary basis.

pay – to preserve the health and well-being of Oregon workers and that BOLI’s rulemaking authority was designed to implement that purpose.

Q. BOLI never has evaluated whether overtime pay is necessary to the health and wellbeing of agricultural workers in Oregon, either when the Rules were adopted initially or when the statutory exception on which the Rules were based was repealed. The failure to consider those factors mandated by the Legislature constitutes noncompliance with applicable rulemaking procedures and renders the Rules invalid pursuant to ORS 183.400(4)(c).

R. In the alternative, the Rules are inconsistent with statutory directives in that they arbitrarily exclude nearly all agricultural workers in Oregon from overtime protections, without regard to the effect on their health, safety, and wellbeing. Because OAR 839-020-0125(3)(k) and OAR 839-020-0135 depart from the current policies expressed by the Legislature in Oregon’s minimum wage and working conditions laws, they are invalid pursuant to ORS 183.400(4)(b).

THE RULES ARE INVALID UNDER ORS 183.400(b).

S. Pursuant to ORS 183.400, this Court shall invalidate an administrative rule if it finds that the rule violates constitutional provisions. ORS 183.400(4)(b).

T. Article I, Section 20 of the Oregon Constitution prohibits laws “granting to any citizen or class of citizens privileges or immunities, which upon

the same terms, shall not equally belong to all citizens.” This provision protects against disparate treatment of “suspect true classes” of citizens, even by laws that are facially neutral; it does not require proof of intentional discrimination. *Tanner v. OHSU*, 157 Or App 502, 521, 524, 971 P2d 435, 445,447 (1998).

U. Overtime pay is a privilege granted by law to protect the health, safety, and wellbeing of most classes of workers in Oregon, but not to agricultural workers.

V. Agricultural workers are members of a true class subject to protection under Article I, Section 20, in that they have an identity apart from the classification made in the statutes and Rules regarding overtime pay.

W. As shown above, the overwhelming majority of agricultural workers in Oregon who are subjected to disparate treatment are Hispanic. Hispanic workers historically have been discriminated against in housing and access to public facilities; harassed by law enforcement and other officials; subjected to violence in communities throughout Oregon; subjected to slurs and stereotypes such as “wetbacks,” “un-American,” and “illegals;” characterized as “ignorant,” “lazy,” violent,” “alcoholics,” “on welfare without paying taxes,” or “not to be trusted;” and denigrated as persons “biologically built to be well adapted for squat labor.”<sup>12</sup>

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<sup>12</sup> C. Loprinzi, *Hispanic Migrant Labor in Oregon 1940-1991*, at 31-38 (1991).

X. Agricultural workers also have been identified historically by common characteristics defining a distinct, socially recognized group that has been the subject of adverse social or political stereotyping or prejudice. *Tanner*, 157 Or App at 522-23, 971 P2d at 446.

Y. In legislative hearings regarding expansion of Oregon's minimum wage laws, for example, agricultural workers were characterized as a "residue" of the labor force, as "unskilled" persons who "cannot or will not hold a regular job," as "unemployables in other industries and business," and as persons who otherwise would be "a full time ward of the government." Hearing on HB 1340 before Senate Committee on Labor and Industries, April 24, 1967 (Testimony of Gilliam County Pomona Grange; Testimony of Gilliam County Farm Bureau) and April 26, 1967 (Testimony of Oregon Farm Bureau). As a result of these and similar attitudes, agricultural workers historically have been denied or the last to receive basic protections available to other workers such as minimum wages and overtime pay; robust enforcement of occupational health and safety laws such as protection from pesticides, heat, and smoke; rights to bargain collectively and protest peacefully; Social Security benefits; mandated rest breaks; and basic needs in the workplace or at employer provided housing to flush toilets, ready and immediate access to sufficient potable water, and indoor cooking facilities.

Z. Agricultural workers are a suspect true class based on national origin and because they are a “distinct, socially-recognized” group that has “been the subject of adverse social or political stereotyping or prejudice.” *Tanner*, 157 Or App at 523.

AA. Working long hours without overtime pay has the same or a greater effect on agricultural workers as those conditions have on other classes of workers in Oregon. (OHSU Report at 4.) Whether or not they are a suspect class, the denial of overtime pay to agricultural workers is not rational and cannot be justified by genuine differences between them and those to whom the privilege of overtime pay has been granted.

BB. Because the Rules violate Article I, Section 20 of Oregon’s Constitution, they are invalid pursuant to ORS 183.400(4)(b).

REQUEST FOR RELIEF/DESIGNATION OF RECORD

CC. Petitioners are not willing to stipulate that the agency record may be shortened. They designate that the record include, but not be limited to: copies of all data and reviews received by BOLI or its predecessor agencies concerning adoption of the Rules or adoption or consideration of proposed Amendments to the Rules; evidence of any hearing conducted concerning the Rules or any proposed amendments to the Rules; the recommendations of any advisory committee or fiscal impact advisory committee appointed to consider adoption or consideration

of proposed amendments to the Rules; copies of notices or statements with respect to the Rules or any proposed amendments; copies of all documents filed with the Archives Division of the Secretary of State regarding the Rules or any proposed amendments; documents demonstrating that the Rules were submitted to Legislative Counsel; and all internal or external correspondence regarding the Rules, proposed Amendments to the Rules, and the 2017 Legislature’s deletion of *former* ORS 653.261(2).

DD. Petitioners request that the Court enter an order determining that the Rules are invalid for the reasons set out above; and

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EE. Pursuant to ORS 20.107 and 183.497(1) and 2(c), Petitioners request that they be awarded and receive their costs and reasonable attorney fees.

DATED this 30th day of November 2021.

Respectfully submitted,

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LII > State Regulations > Oregon Administrative Rules  
> CHAPTER 839 - BUREAU OF LABOR AND INDUSTRIES (839-001-0000 to 839-051-0020)  
> DIVISION 20 - RULES REGULATING MINIMUM WAGE, OVERTIME AND WORKING CONDITIONS (839-020-0000 to 839-020-1020)  
> **839-020-0125 - Overtime Exemptions Pertaining to Employers Regulated Under the Federal Fair Labor Standards Act**

## 839-020-0125 - Overtime Exemptions Pertaining to Employers Regulated Under the Federal Fair Labor Standards Act

### State Regulations

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#### **839-020-0125. Overtime Exemptions Pertaining to Employers Regulated Under the Federal Fair Labor Standards Act**

(1) This rule applies to employers and employees subject to OAR 839-020-0030, Overtime Generally, by virtue of the repeal of ORS 653.020(7) by Section 2, Chapter 446, 1989 Oregon Laws....

(3) The provisions of OAR 839-020-0030 do not apply when the provisions of Section 13(b), of the Fair Labor Standards Act apply to employees as follows:..

(k) Any employee with respect to the employee's employment in agriculture by a farmer, notwithstanding other employment of such employee in connection with livestock auction operations in which such farmer is engaged as an adjunct to the raising of livestock, either on the farmer's own account or in conjunction with other farmers, if such employee is primarily employed during the employee's workweek in agriculture by such farmer, and if such employee is paid for the operations at a wage rate not less than that prescribed by ORS 653.025; or ....

- LII > State Regulations > Oregon Administrative Rules
  - > CHAPTER 839 - BUREAU OF LABOR AND INDUSTRIES (839-001-0000 to 839-051-0020)
    - > DIVISION 20 - RULES REGULATING MINIMUM WAGE, OVERTIME AND WORKING CONDITIONS (839-020-0000 to 839-020-1020)
      - > **839-020-0135 - Agricultural Employees**

## 839-020-0135 - Agricultural Employees

### State Regulations

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#### **839-020-0135. Agricultural Employees**

Pursuant to the provisions of ORS 653.261(2), OAR 839-020-0030 does not apply to individuals employed in agricultural employment.

(BL 5-1989(Temp), f. 8-18-89, cert. ef. 9-1-89, (and corrected by BL 10-1989(Temp), f. 12-4-89, cert. ef. 9-1-89); BL 1-1990, f. 2-27-90, cert. ef. 2-28-90)

Stat. Auth.: ORS 653

Stats. Implemented: ORS 653.261(2)



812 SW Washington, Ste. 225, Portland, OR 97205 | 503-525-8454 | [www.nwjp.org](http://www.nwjp.org)

*Memorandum*

Date: October 1, 2021  
To: Commissioner Val Hoyle, Oregon Bureau of Labor & Industries  
From: Northwest Workers' Justice Project, Oregon Trial Lawyers Association and Meyer Stephenson Employment Law  
Re: Farmworker Overtime

Dear Commissioner Hoyle,

We write to you in the interest of one of your priorities: protecting agricultural workers. Specifically, we write regarding overtime protections for Oregon's farm workers.

As you know, under Oregon law, the Commissioner of Labor and Industries has the authority to make overtime rules.<sup>1</sup> Until 2017, that legal grant of authority was subject to an explicit exception:

Nothing contained in ORS 653.010 to 653.261 shall be construed to confer authority on 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>2</sup>

Therefore, the Commissioner could not enact rules requiring overtime pay for farm workers, and BOLI's current overtime rule, OAR 839-20-0030, specifically excludes farm workers. See OAR 839-20-0135.

However, the statutory framework changed in 2017. On June 20, 2017, the House Rules Committee proposed amendments to House Bill 3458, including an amendment that removed the exception to the Commissioner's authority with respect to overtime for agricultural workers

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<sup>1</sup> OR. REV. STAT. § 653.261 (2019).

<sup>2</sup> OR. REV. STAT. § 653.261(2) (2015).

altogether.<sup>3</sup> The proposed amendment was passed by the House and Senate, and was signed into law by Governor Kate Brown on August 8, 2017.<sup>4</sup> With this limitation removed, your authority now includes the power to enact rules regarding employment conditions, including overtime, for farm workers.<sup>5</sup>

Although there is little other legislative history, in Oregon, a court’s “role in construing a statute [is] ‘simply to ascertain[] and declar[e] what is, in terms or in substance, contained’” in a statute, and “‘not to insert what has been omitted, or to omit what has been inserted[.]’”<sup>6</sup> Based on a plain reading of the law, you have been entrusted with the power to “[m]ake such rules as [you] consider[] appropriate to carry out the purposes of ORS 653.010 to 653.261, or necessary to prevent the circumvention or evasion of ORS 653.010 to 653.261 and to establish and safeguard the minimum wage rates provided for under ORS 653.010 to 653.261.”<sup>7</sup> As Oregon’s declared policy for minimum wage and employment is “to establish minimum wage standards for workers at levels consistent with their health, efficiency and general well-being,”<sup>8</sup> you have been entrusted to make any rules regarding farm worker overtime that you consider appropriate for farm workers’ health, efficiency and general well-being.<sup>9</sup>

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<sup>3</sup> H. Amendments, H.B. 3458, § 5, 79th Leg., 2017 Reg. Sess. (Or. 2017), <https://olis.oregonlegislature.gov/liz/2017R1/Downloads/MeasureDocument/HB3458/House%20Amendments%20to%20Introduced>

<sup>4</sup> *2017 Regular Session, HB 3458 Enrolled: Amendments*, OR STATE LEGISLATURE, <https://olis.oregonlegislature.gov/liz/2017R1/Measures/ProposedAmendments/HB3458> (last visited Sept. 13, 2021) (showing the House Committee on Rules adopted the -7 amendment on June 22, 2017 at 1:51 PM); *2017 Regular Session, HB 3458 Enrolled: Overview*, OR STATE LEGISLATURE, <https://olis.oregonlegislature.gov/liz/2017R1/Measures/Overview/HB3458> (showing the bill’s measure history).

<sup>5</sup> OR. REV. STAT. § 653.040(3) (2019); OR. REV. STAT. § 653.261(1)(a) (2019) (providing “after 40 hours of work in one workweek overtime may be paid”).

<sup>6</sup> *Young v. State*, 161 Or. App. 32, 983 P.2d. 1044 (Or. App. 1999) (citing *PGE v. BOLI*, 317 Or. 606, 611, 859 P.2d 1143, 1146). This admonition is reiterated in OR. REV. STAT. § 174.010 (2019), “In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible to be adopted as will give effect to all.”

<sup>7</sup> OR. REV. STAT. § 653.040(3) (2019).

<sup>8</sup> OR. REV. STAT. § 653.015 (2019).

<sup>9</sup> With the exception of farm workers included in the relatively small group still exempted by ORS 653.020: Those working on a piece-rate basis employed by an employer who did not use more than 500 piece-rate-work days of agricultural labor in the year prior; those closely-related to the employer; hand harvesters or pruning laborers paid on

Given your understanding of the hard work performed by the essential workers who put food on our tables and your understanding that “a worker is a worker,”<sup>10</sup> we write to ensure that you are aware of the recent change in Oregon law that grants you the authority to enact overtime rules to protect farm workers, and urge that you do so, just as has been done to protect other Oregon workers. Indeed, failure to do so may well violate the Privileges and Immunities Clause of the Oregon constitution. *Cf. Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*, 475 P.3d 164, 196 Wash.2d 506 (Wash. 2020).

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a piece-rate basis who commute from a permanent residence and who were employed in the farm industry for less than 13 weeks during the year prior; those who are 16 years old or younger, employed as a hand harvest laborer, and paid on a piece-rate basis at the same rate as those employed on the farm who are over 16 years of age; or those principally engaged in the range production of livestock who are paid on a salary basis. OR. REV. STAT. § 653.020 (2019).

<sup>10</sup> Val Hoyle, *What’s Cookin’ with Val Hoyle, Ep 6 – Farmworkers & Kale Caesar with Reyna Lopez*, YOUTUBE, at 5:56 (May 16, 2020), <https://youtu.be/b86AgtO8TzI>.

## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on November 30, 2021, I directed the original

**PETITION FOR JUDICIAL REVIEW OF AGENCY RULES** to be filed

electronically with the Appellate Court Administrator, Appellate Records Section,

and served on the following by United States Postal Service, ordinary First-Class

Mail:

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

Attorney General of the State of Oregon  
Office of the Solicitor General  
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Salem OR 97301-4096

DATED this 30<sup>th</sup> day of November 2021

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