

## **Testimony of M. Patricia Smith**

National Employment Law Project

# **In Support of the Farmworker Fair Labor Practices Act, S.2837(Ramos)/A.2750(Nolan)**

---

## **Hearing before the New York State Senate**

Committees on Labor and Agriculture

State University of New York – Sullivan

Loch Sheldrake, New York

May 2, 2019

**M. Patricia Smith**

Senior Counsel

---

**National Employment Law Project**

90 Broad Street, Suite 1100

New York, NY 10004

(202) 579-0644

psmith@nelp.org

Chairwoman Metzger, Chairwoman Ramos and honorable members of the Senate Standing Committee on Agriculture and Labor, thank you for the opportunity to address the committee regarding the Farmworkers Fair Labor Practices Act.

My name is M. Patricia Smith and I am currently Senior Counsel at the National Employment Law Project. I have been involved in issues regarding farmworker labor rights for the last 40 years. I was the Solicitor of the US Department of Labor from 2010 to 2017. Prior to that, I was the Commissioner of Labor here in New York from 2007 to 2010. I was in the Labor Bureau of the New York State Attorney General's Office for almost 20 years, serving as Chief of that Bureau for 8 years. I was an employment lawyer for Legal Services of Indiana, working with the Migrant Farmworker program for 9 years.

The Farmworkers Fair Labor Practices Act gives New York State lawmakers the opportunity to rectify an eighty-year-old unjust and biased exclusion, and to reaffirm that all workers deserve basic protections no matter their job or their race. In the 1930's, when lawmakers first drafted the National Labor Relations Act, they excluded farmworkers from its protections. Many historians have noted the racist origins of that exclusion as many early 20th century lawmakers were committed to maintaining unfair conditions in fields that had just a generation earlier been worked by Black slaves.<sup>1</sup> When the New York State legislature drafted its own State Labor Relations Act, it too passed over farmworkers.

When the Fair Labor Standards Act was first passed in the 1930's it excluded many categories of work overwhelming done by workers of color and women. The same was true in New York. In 1944, New York expanded its minimum wage law to cover more than women and children. Even so, it excluded from its protections occupations that hired significant numbers of workers of color and/or women such as personal service occupations, building service workers, caregivers, retail workers, and agricultural workers.<sup>2</sup> Over the years, the legislature has redressed most of these biases in labor protections. Yet, farmworkers continue to be deprived of many basic labor rights including the right to bargain collectively, the right to overtime and the right to a day of rest, to name a few. Farmworkers are just about the only category of blue-collar workers in New York who are shut out of these protections. I am by no means suggesting that New York farm owners are racist or biased – only that the business model under which they operate has troubling origins and no sound economic basis. It is time to redress this.

The fear that this act will harm New York's small family farms is unfounded. Despite the fact that there are official estimates of anywhere from 40,000 to 80,000 farmworkers in New York State every year,<sup>3</sup> most New York farms are small and most do not employ any paid workforce at all. USDA data shows that only 26 percent of New York farms employ paid farm labor.<sup>4</sup> Moreover, over

---

<sup>1</sup> Ira Katznelson, "When Affirmative Action was White," quoted in Juan F. Perea, "The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act," 72 Ohio St. L.J. 95(2011).

<sup>2</sup> Isador Lubin and Charles Pearce, "New York's Minimum Wage Law: the First Twenty Years." *Industrial and Labor Relations Review* 11, no. 2 (1958): 203-19.

<sup>3</sup> New York State Department of Labor, Division of Immigrant Policies and Affairs, "Who are Migrant and Seasonal Farmworkers?" web page, accessed March 6, 2019. <https://labor.ny.gov/immigrants/state-monitor-advocate.shtm>

<sup>4</sup> USDA, National Agricultural Statistics Service, 2017 Census of Agriculture, Table 7 "Hired Farm Labor – Workers and Payroll: 2017," page 315, [https://www.nass.usda.gov/Publications/AgCensus/2017/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/New\\_York/nyv1.pdf](https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_State_Level/New_York/nyv1.pdf)

76 percent of employed farmworkers work on large farms with 59 percent working on very large farms.<sup>5</sup>

New York's farmworkers are primarily low wage immigrant workers. 83 percent of New York farmworkers surveyed by the USDA reported they were Hispanic.<sup>6</sup> Despite stereotypes to the contrary, New York farmworkers today, unlike in the past, are not a highly transitory workforce. Farmworkers are increasingly settling in New York. Most are long-term residents of the state, many with families and children. Dairy farms make up the largest proportion of the State's overall agricultural production and they are year-round operations. 42 percent of New York farmworkers surveyed reported that they worked for the same employer for more than 5 years, and 20 percent reported working more than 10 years with their employer.<sup>7</sup>

Farmworkers are low wage workers. According to the NYS Department of Labor they have a median income of between \$28,810 and \$30,060 with entry-level wages as low as \$21,632.<sup>8</sup> Low hourly wages are exacerbated by the fact these workers are exempt from overtime pay laws while being asked to perform arduous physical labor for many hours a week, thus increasing their risk of bodily harm. Farmworkers are paid no more for the 41st or the 51st hour of work in a week than they are for their first hour, and yet their base pay is so low that the choice between pushing through long weeks and taking time to rest is an impossible one. Despite their low wages, they play an important part in New York's economy. Some New York agricultural communities have been pulled from the brink of obscurity by immigrant newcomers who keep farms afloat, act as consumers for local businesses, support an aging local population, go on to establish businesses, and revive shrinking school systems.<sup>9</sup> For example, the typical dairy farmworker spends 20 percent of their pay on food from local supermarkets.<sup>10</sup>

Clearly, to protect farmworkers from poor working conditions and shoddy employment practices they need stronger protections such as a right to overtime pay and a day of rest, but they also need the right to advocate for themselves, without fear of retaliation. Being able to organize and collectively bargain is extraordinarily important in order to improve conditions on New York's farms. When workers have a union, it improves wages and conditions not only for workers covered by that agreement, but also for unorganized workers in the same industry.

---

<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> Findings from the National Agricultural Workers Survey (NAWS) 2015-2016: A demographic and Employment Profile of US Farmworkers," Research Report No 13, JBS International for the US Department of Labor, Employment, and Training Administration, Office of Policy Development and Research, p. 315. [https://www.doleta.gov/naws/pages/research/docs/NAWS\\_Research\\_Report\\_13.pdf](https://www.doleta.gov/naws/pages/research/docs/NAWS_Research_Report_13.pdf)

<sup>8</sup> According to the New York State Department of Labor, farmworkers have a median income of between \$28,810 and \$30,060 depending on the nature of the agricultural work performed. Reported entry level wages are as low as \$21,632. Reporting wages on an annual basis for these workers may not accurately reflect the reality of their working year, but extrapolating the regional wage of approximately \$14 an hour over a standard full-time work year yields an annual wage of \$29,120, in line with this state estimate. New York State Department of Labor, 2018 Occupational Wages, <https://labor.ny.gov/stats/lswage2.asp#45-0000>

<sup>9</sup> "A New American Dream: The Rise of Immigrants in Rural America," Civil Eats, March 22, 2019, <https://civileats.com/2019/03/22/a-new-american-dream-the-rise-of-immigrants-in-rural-america/>

<sup>10</sup> Emily Hamilton and Mary Jo Dudley, "The 'Yogurt Boom,' Job Creation, and the Role of Dairy Farmworkers in the Finger Lakes Regional Economy," November 2013, : <https://cardi.cals.cornell.edu/sites/cardi.cals.cornell.edu/files/shared/documents/CFP/The-Yogurt-Boom.pdf>

Even if a formal collective bargaining agreement is never negotiated on a New York farm, collective bargaining rights are still important and necessary. Collective bargaining rights protect farmworkers from retaliation and possible repercussions for complaining about, or speaking to their fellow workers about, working conditions even without a formal agreement. Without these rights, farmworkers can be legally retaliated against and even fired for asking for a raise; pointing out unsafe working conditions; or attempting to remedy poor working conditions. This is not a theoretical concern; stories abound of farmworkers who were fired or otherwise retaliated against for trying to improve the conditions on farms. One of the most visible examples is that of Crispin Hernandez who is the lead plaintiff in the lawsuit challenging the constitutionality of the farmworker exclusion from the State Labor Relations Act. Along with a co-worker, he tried to organize a workers' committee to address health and safety issues in their workplace. Within a week, both were summarily fired.<sup>11</sup> Another type of retaliation involved Alberto a dairy worker from Mexico. After not being paid for the full number of hours he was working, he quit. After giving notice, he spoke to a few of his co-workers to educate them about the wage underpayments that they, too, were experiencing. One of them tipped off the owner that Alberto had spoken to his co-workers and when Alberto went to retrieve his final paycheck, the owner refused to give it to him.<sup>12</sup>

I know that the overtime provisions of the Act are controversial. However, every time the legislature has considered improving the labor rights or wages of workers in the state it has been controversial. This is especially true when farm workers are the subject of proposed protections. Overtime pay requirements are intended to shields workers from substandard wages and oppressively long working hours. Farmworkers are one of the very few categories of blue-collar workers who are not entitled to be paid overtime under New York Law.<sup>13</sup> While opposition to the overtime requirements in the bill focus on their costs, farm owners are already paying for long working hours in the form of lost productivity and increased injury levels. According to the CDC, every day 100 farmworkers across the country suffer a lost-work-time injury, and the industry suffers a high fatality rate of 21.4 deaths per 100,000 workers.<sup>14</sup> Significant numbers of farm workers suffer chronic musculoskeletal pain from repeated tasks like pruning, harvesting, and machine operation.<sup>15</sup> As weekly work hours increase, mortality rates rise by nearly 20 percent.<sup>16</sup> Workers are stuck between bad choices when they are compelled to work excessive hours without additional pay, because to say no to those hours means lower paychecks. However, increased risk of injury or even death may mean that in subsequent weeks, they may have to go without pay altogether, and the farm owner may be deprived of needed labor.

The arguments against paying overtime to farmworkers do not stand up to scrutiny. Farm work is not unique. Yes, farm work can be seasonal, although given the preponderance of dairy farms, the

---

<sup>11</sup> Carly Fox, Rebecca Fuentes, Fabiola Ortiz Valdez, Gretchen Purser, and Kathleen Sexsmith, "Milked: Immigrant Dairy Farmworkers in New York State," A report by the Workers Center of Central New York and the Worker Justice Center of New York, May 2017, p. 16, [https://milkedny.files.wordpress.com/2017/05/milked\\_053017.pdf](https://milkedny.files.wordpress.com/2017/05/milked_053017.pdf)

<sup>12</sup> Id at p 39.

<sup>13</sup> A small subset of building service workers, janitors in residential building buildings, are not entitled to overtime. 12 NYCRR Section 141. <https://www.labor.ny.gov/formsdocs/wp/CR141.pdf>

<sup>14</sup> Centers for Disease Control and Prevention, National Institute for Occupational Safety and Health, "Agricultural Safety," viewed April 16, 2019. <https://www.cdc.gov/niosh/topics/aginjury/>

<sup>15</sup> Hong Xiao, Stephen A. McCurdy, Maria Stoecklin-Marois, Chin-Shang Li, and Marc B. Schenker, "Agricultural work and chronic musculoskeletal pain among Latino farm workers: the MICASA study," *Am J Ind Med*: 56 (3) February 2013.

<sup>16</sup> Goh, J, Pfeffer, J, & Zenios, S. (2015) Workplace stressors & health outcomes: health policy for the workplace. *Behavioral Science & Policy*, 1(1), pp 43-52.

bulk of New York's is not. Other occupations like landscaping, construction and retail are also seasonal. Yet those workers are entitled to overtime. Yes, some farm products are perishable, but other workers who work with perishable items are entitled to overtime. Workers in the food supply chain get overtime and food is just as perishable when it is being shipped as when it is being harvested. Workers in canneries get overtime and yet the food they process is just as perishable. Garment workers are also entitled to overtime. However, I can assure you that the garment that is any given year's "fashion rage" is, in its own way, just as perishable as food. Yes, hours of work can be unpredictable in agriculture, at least on any given day and the work schedule can be influenced by the weather. Construction workers' schedules are also unpredictable and influenced by the weather. Other workers, such as retail and fast food workers also have unpredictable schedules – so unpredictable that some states and localities are beginning to regulate the unpredictability of these schedules. Yet these workers are entitled to overtime.

It is difficult to generalize about the number of hours a week farmworkers work. Many operations such as dairy are year round, others are more seasonal. A Cornell College of Agriculture and Life Sciences online survey found that the average farm employee in New York and neighboring states worked 56 hours per week, though respondents included middle managers and some farm owners.<sup>17</sup> Some respondents reported a much longer workweek, which the authors noted "is not supportive of good health and quality work."<sup>18</sup> A 2011 study found that 35 percent of workers on New York state fruit and vegetable farms worked less than 40 hours per week, with just 10 percent of fruit workers and 8 percent of vegetable workers putting in more than 70 hours in the same period.<sup>19</sup>

It is impossible to predict what overtime pay will cost any given farm because farm owners have a number of options available to them in responding to any new overtime requirements.<sup>20</sup> In addition, the final overtime requirements could differ from those in the current bill. Each of these factors would affect a calculation of cost increases.

Opponents of this bill have cited the Farm Credit East report as showing that the proposed overtime pay requirements would result in unmanageably high cost impacts for New York's agricultural employers. However, careful review of the report reveals that it actually indicates that the impact of overtime pay would not be that large – and would be comparable to or smaller in its scale than the impact of other labor standards that New York has implemented in past decades.

---

<sup>17</sup> 2017 Farm Employee Compensation Benchmark," Cornell College of Agriculture and Life Sciences, February 2019, <https://cpb-us-e1.wpmucdn.com/blogs.cornell.edu/dist/7/8192/files/2019/02/2017-Farm-Employee-Compensation-Report-1uksiu2.pdf>

<sup>18</sup>Id at

<sup>19</sup> Thomas Maloney and Nelson Bills, "Survey of New York Fruit and Vegetable Farm Employers 2009," College of Agriculture and Life Sciences, Cornell University, August 2011, p. 19 <http://publications.dyson.cornell.edu/research/researchpdf/rb/2011/Cornell-Dyson-rb1102.pdf>

<sup>20</sup> Each Farm owner would have to make a decision about how to structure their business with overtime pay requirements in place. Farm owners could simply pay overtime for overtime hours worked. Some could reduce (and in certain circumstance eliminate) the number of overtime hours worked by hiring additional labor. Other employers could legally reduce the hourly wage rate paid to workers, so long as it did not reduce the rate below the minimum.

The report's findings that opponents have cited are that agricultural labor costs are \$688 million per year, and the report projects "agricultural labor costs in New York to increase by \$299 million"<sup>21</sup> – a figure that the report describes as a 44 percent increase.

However, review of the report reveals that that figure reflects not simply the projected cost of the proposed overtime pay requirement but also includes the cost of future wage increases. Those future wages increases that the report factors in include both the projected impact of the state minimum wage increase that the legislature approved in 2016, along with projections that agricultural employers who pay above the minimum wage will continue to raise their average wages voluntarily in the coming years from \$14.79 in 2019 to \$16.05 in 2021.<sup>22</sup>

More careful review of the report shows that its projection for the impact of increased overtime pay requirements on agricultural employers is a good deal lower – \$118 million – a figure that the reports describes as amounting to a 17 percent increase in labor costs. However, that percentage overstates the actual scale of the overtime increase since the report calculates it by comparing the \$118 million overtime projection to the \$688 million in current labor costs, disregarding the already phasing in minimum wage increases. Once those already approved minimum wage increases (which total \$181 million) are included in future labor cost assumptions that figure becomes \$869 million. Using that figure as the correct denominator, the projected \$118 million overtime cost, in fact, represents less than a 14 percent increase. Moreover, as a share of net farm income, it reflects just a 9 percent increase.

A labor cost increase of under 14 percent, which could be phased in over several years, is simply not exceptionally large. When New York periodically updates its labor standards, the resulting cost increases are typically that large or larger. For example, under the \$15 minimum wage that the legislature approved in 2016, the state's minimum wage rate will increase by 67 percent – from \$9.00 to \$15.00 over a period of a number of years. Similarly, the previous state minimum wage increase approved by the legislature in 2013 boosted the state minimum wage rate by 24 percent – from \$7.25 to \$9.00 over several years. In addition, in 1999 when the full state minimum wage was extended to farmworkers for the first time, the minimum wage rate applicable to farmworkers increased to \$5.15 – a large increase for categories of farmworkers who previously had not been covered by either the full state or federal minimum wage rates.

Moreover, other assumptions in the report suggest that its projection of \$118 million a year in increased overtime costs is likely an overestimate. Specifically, the report assumes that typical agricultural employees will work 15 hours a week of overtime. It bases that assumption on the fact that the average hours worked a week on New York farms is, according to the USDA, 56, and it assumes that agricultural employers will engage in very little new hiring of workers to reduce overtime costs. In light of the state's tight labor market in agriculture, I too assume that agricultural employers, when faced with overtime costs, will engage in less new hiring than in other industries. However, that said, it seems unlikely there will be so little new hiring that current employees will work just one hour less per week if the overtime law is enacted. In fact, the possibility of getting overtime pay may give New York Farm employers a competitive advantage over farm owners in surrounding states, helping them recruit additional workers. The USDA has cautioned farm owners "it is imperative for farmers to compensate good employees competitively to help keep them on the

---

<sup>21</sup> Farm Credit East, "The Economic Impact of Mandatory Overtime Pay for New York State Agriculture," February 2019, p.7, Table 3.

<sup>22</sup> Farm Credit East report, p.5, Table 2.

job and performing well.”<sup>23</sup> Thus, I suspect that the projected average of 55 hours a week for agricultural employees under an overtime system is an over-estimate and that actual average weekly hours will be somewhat lower.

I acknowledge that overtime requirements will increase costs on many farms. Moreover, they could well be approximately the 14 percent figure suggested by the data in the Farm Credit East report. However, that does not necessarily translate to a reduction in net Farm income. In any event, it is surely not the dollar-to-dollar reduction that the report assumes. The USDA has found that increases in farm wages are “offset by rising productivity and/or output prices.”<sup>24</sup> Farm operators in four other states manage to operate successfully while paying overtime, and many other businesses in New York that similarly once enjoyed exclusions from overtime protections have adapted and prospered without those exemptions. Legislators should evaluate this bill on social justice grounds because it rectifies an eighty-year-old unjust and biased exclusion. Passing this bill will ultimately be good for the economy since promoting their labor rights will not only make farmworkers a stronger, more stable workforce, it will help build local communities where farmworkers work and reside.

---

<sup>23</sup> USDA, National Agricultural Statistics Service, 2017 Census of Agriculture, Id. at 4 p. 1.

<sup>24</sup> USDA, National Agricultural Statistics Service, 2017 Census of Agriculture, [https://quickstats.nass.usda.gov/?source\\_desc=CENSUS#C067E6C8-2770-39D7-8E94-E2504C8706B4](https://quickstats.nass.usda.gov/?source_desc=CENSUS#C067E6C8-2770-39D7-8E94-E2504C8706B4)