

## **Testimony of Paul Sonn**

National Employment Law Project

# **In Support of Lowering the Overtime Threshold for Farmworkers to 40 Hours Per Week**

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**Hearing before the New York State  
Department of Labor  
Farm Laborers Wage Board**  
New York State Museum  
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Thank you Board Members McDuffie, Hughes and Fisher for the opportunity to testify today before the Farm Laborers Wage Board on the question of whether the overtime threshold for farm laborers in New York should be lowered from 60 hours.

My name is Paul Sonn and I am State Policy Program Director at the National Employment Law Project (NELP). NELP is national research and policy organization focused on workforce issues. We work at the federal, state and local levels on a wide range of employment policy issues, ranging from minimum wages and overtime pay, to unemployment insurance and workers' compensation, to access to jobs for disadvantaged workers. NELP has submitted testimony to most of the New York State Department of Labor (DOL) Wage Boards that have been convened in recent years, including wage boards on fast food workers, and tipped workers.

NELP urges the wage board to follow California's lead and establish a schedule for gradually phasing down the new 60 hour per week overtime threshold until it reaches 40 hours per week – the level above which virtually all other laborers in New York are entitled to time-and-a-half overtime pay.

First, the exclusion of farmworkers from 40-hour overtime protections had racially discriminatory origins – and finally ending it is important for securing equal treatment for the largely of-color farm workforce.

Second, the fact that fruit and vegetable farming involves seasonally intense needs for labor hours around harvest time does not set it apart from other industries. A wide range of other sectors including retail, landscaping and construction have fluctuating seasonal labor needs yet they have operated with 40-hour overtime for decades.

Third, excessive work hours have been shown to increase injuries and deaths for farmworkers. Forty-hour overtime is needed to protect farm laborers from overwork and injury.

Fourth, New York should follow the lead of California and other states that are showing that it is feasible to phase in overtime standards comparable to what workers in other industries in the state receive.

Fifth, Contrary to stereotypes, most New York farmworkers work on large farms, and are struggling low-wage workers who are long-term, full-year residents of the state. They deserve the same 40-hour overtime protections that most other blue collar workers have long enjoyed.

New York State has long been a progressive national leader in protecting workers. In the same way that New York under Governor Cuomo joined with California to lead the nation in adopting the \$15 minimum wage, New York should now also lead in extending basic 40-hour overtime protections to farmworkers, as California and other states are doing. We therefore recommend that the Wage Board adopt a multi-year plan for phasing down the farmworker overtime threshold from the current 60 hours to eventually reach 40 hours. A multi-year phase-in like California is currently implementing will give industry adequate lead time to plan and adjust, and finally secure for farmworkers this long overdue basic protection.

## **1. The Origins of the Exclusion of Farmworkers from the Forty Hour Overtime That Virtually All Other Laborers Enjoy in New York and Nationally Is Discriminatory**

The Farm Laborers Wage Board gives New York State 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 federal Fair Labor Standards Act, they excluded farm work and domestic work -- categories of work overwhelming done by workers of color and women. As Marc Linder explains in "Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal," farmworkers were, in fact, excluded from protection under virtually all New Deal legislation, as a concession by President Franklin D. Roosevelt to powerful Southern powerbrokers. The exclusion of farmworkers "preserved the social and racial plantation system in the South – a system resting on the subjugation of blacks and other minorities."<sup>1</sup> And while many of the racially motivated exclusions from New Deal legislation have gradually been reversed over the decades, "Farm workers on large farms constitute the only numerically significant group of adult minimum-wage workers [that remains] wholly excluded from the maximum hours and overtime provision of the Fair Labor Standards Act (FLSA)."<sup>2</sup>

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>3</sup>

Over the years, the legislature has redressed most of these biases in labor protections. Yet, farmworkers until last year continued 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. 2019's historic Farmworkers Fair Labor Practices Act ended many of those exclusions, finally extending to farmworkers most of the basic labor protections that other workers have enjoyed for a generation.

However, overtime protection remains the last area where farmworkers continue to be second class citizens. They remain excluded from the right to premium pay for work over 40 hours in a week that virtually all other blue collar workers in New York enjoy. It is time to redress this inequity by finally guaranteeing to farmworkers the same 40-hour overtime pay protections that most all other laborers have long enjoyed.

## **2. The Arguments for Excluding Farmworkers from the Same Overtime Protections That Other Laborers Enjoy Do Not Stand Up to Scrutiny**

Second, the fact that fruit and vegetable farming involves seasonally intense needs for labor hours around harvest time does not set it apart from other industries. Yes, farm work can be seasonal, although given the preponderance of dairy farms, the bulk of New York's is not. Other occupations like landscaping, construction and retail are also seasonal, requiring long hours during peak times of the year. 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

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<sup>1</sup> Linder, Marc, "Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal." 65 Texas L. Rev. (1986): 1335-93.

<sup>2</sup> Id.

<sup>3</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.

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, a 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.

### **3. Farm Work Is Exceptionally Dangerous and Very Long Hours Have Been Shown to Increase Injuries and Deaths; Stronger Overtime Protection Are Needed to Protect Farm Laborers from Overwork and Injury**

According to the Centers for Disease Control, 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>4</sup> Significant numbers of farm workers suffer chronic musculoskeletal pain from repeated tasks like pruning, harvesting, and machine operation.<sup>5</sup> As weekly work hours increase, mortality rates rise by nearly 20 percent.<sup>6</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. Forty-hour overtime protection is one of our nation's key safeguards against overwork and the risk of injuries that come with it.

### **4. New York Should Follow the Lead of California and Other States That Are Moving to End the Discriminatory Exclusion of Farmworkers from the Basic Overtime Protections That Nearly All Other Laborers Have Enjoyed for Eighty Years**

New York's action last year to pass the Farmworkers Fair Labor Practices Act and convene this wage board is part of a new national wave of action to finally end the unfair exclusion of farmworkers from the basic overtime protections that most other laborers have enjoyed for eighty years.

Minnesota has long guaranteed overtime to farmworkers after 48 hours; Hawaii has a hybrid system that guarantees farmworkers overtime after 40 hours, but raises it to 48 hours during harvest times; and California and Maryland for decades have had 60-hour overtime.<sup>7</sup> There is no evidence that these standards have proven unmanageable for agricultural employers.

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<sup>4</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>5</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>6</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.

<sup>7</sup> "New York may join 4 states requiring farmworker overtime pay." *American Agriculturalist* (May 15, 2019). Available at <https://www.farmprogress.com/farm-policy/new-york-may-join-4-states-requiring-farmworker-overtime-pay>

However, in recent years there has been a new national wave of action to finally extend full 40-hour overtime to farmworkers. In 2016, California approved legislation to gradually phase in 40-hour weekly overtime for farmworkers (in fact, the California legislation is also phasing in a daily overtime standard of time-and-a-half for hours longer eight hours in a day).<sup>8</sup> In California, for employers with more than 25 employees, the weekly overtime threshold phased down to 55 hours in 2019 and to 50 hours in 2020. It will continue reducing 5 hours each year until it reaches 40 hours in 2022. For small employers, it will reach 40 hours by 2025.<sup>9</sup>

In Washington State, the State Supreme Court this year is hearing a case challenging the constitutionality of the exclusion of farmworkers from the state's 40-hour overtime law.<sup>10</sup> If the court strikes it down, as many predict, Washington State will become yet another state phasing in 40-hour overtime for farmworkers.

And federally, Senator Kamala Harris and other U.S. Senators have introduced the federal Fairness to Farmworkers Act, which would finally end the exclusion of farmworkers from 40-hour overtime under the Fair Labor Standards Act.<sup>11</sup>

New York State has long been a progressive national leader in protecting workers. In the same way that New York under Governor Cuomo joined with California to lead the nation in adopting the \$15 minimum wage, New York should now also lead in extending basic 40-hour overtime protection to farmworkers, as California and other states are doing.

## **5. Most New York Farmworkers Work on Large Farms, and Are Struggling Low-Wage Workers Who Are Long-term, Full-Year Residents of the State; They Deserve the Same 40-Hour Overtime Protections That Most Other Blue Collar Workers Have Long Enjoyed**

Contrary to stereotypes, most New York farmworkers work on large farms, and are struggling low-wage workers who are long-term, full-year residents of the state. They deserve the same 40-hour overtime protections that most other blue collar workers have long enjoyed.

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>12</sup> Instead, over 76 percent of employed farmworkers work on large farms with 59 percent working on very large farms.<sup>13</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>14</sup> Despite stereotypes to the

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<sup>8</sup> Calif. Dep't of Indus. Relations, Overtime for Agricultural Workers. Viewed Feb. 27, 2020. <https://www.dir.ca.gov/dlse/Overtime-for-Agricultural-Workers.html>

<sup>9</sup> Ibid.

<sup>10</sup> Capital Press. "Washington Supreme to hear case on overtime pay for farmworkers." (June 28, 2019). Viewed Feb. 27, 2020. [https://www.capitalpress.com/ag\\_sectors/dairy/washington-supreme-to-hear-case-on-overtime-pay-for-farmworkers/article\\_464f4f54-98f7-11e9-a13b-db2db0795d58.html](https://www.capitalpress.com/ag_sectors/dairy/washington-supreme-to-hear-case-on-overtime-pay-for-farmworkers/article_464f4f54-98f7-11e9-a13b-db2db0795d58.html)

<sup>11</sup> Sen. Kamala Harris. "Harris Reintroduces Legislation to Strengthen Labor Protections for Farm Workers." (Feb. 7, 2019). <https://www.harris.senate.gov/news/press-releases/harris-reintroduces-legislation-to-strengthen-labor-protections-for-farm-workers>

<sup>12</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)

<sup>13</sup> Id.

<sup>14</sup> Ibid.

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>15</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>16</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 51<sup>st</sup> 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>17</sup> For example, the typical dairy farmworker spends 20 percent of their pay on food from local supermarkets.<sup>18</sup>

Every time the state has considered improving the labor rights or wages of workers in the state it has been controversial. This is especially true when farmworkers are the subject of proposed protections. Overtime pay requirements are intended to shield 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 40-hour overtime under New York Law.<sup>19</sup>

## Conclusion

Farm operators in 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. The Wage Board should follow California's example and extend 40-hour overtime to farmworkers, phasing it in gradually in order to give industry adequate lead time to plan and adjust. Doing so will rectify an eighty-year-old unjust and

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<sup>15</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>16</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>17</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>18</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>

<sup>19</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>

biased exclusion, and 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. Thank you for the opportunity to submit this testimony.