

Testimony of Paul K. Sonn

National Employment Law Project

In Support of H. 1979/S.1205 The Fairness for Farmworkers Act

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Thank you, chairpersons Jehlen and Cutler, and members of the committee for the opportunity to testify today in support of H. 1979/S.1205—The Fairness for Farmworkers Act. My name is Paul Sonn, and I am the State Policy Program Director at the National Employment Law Project (NELP). I myself am a native of Massachusetts and am especially pleased to be able to appear before you today and speak on this important topic.

NELP is a nonprofit research, policy, and capacity building organization that for more than 50 years has sought to strengthen protections and build power for workers in the U.S. NELP regularly engages on worker rights issues pending in the Commonwealth. NELP has long advocated for inclusion of farmworkers and other workers denied labor protections as the result of racially discriminatory exclusions. NELP's executive director Rebecca Dixon addressed the shameful history of denying equal labor protections to farmworkers this spring at a U.S. House of Representatives subcommittee hearing titled, "From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers, Domestic Workers, and Tipped Workers from the Fair Labor Standards Act," from which some of my testimony today is adapted.¹

The Fairness for Farmworkers Act is part of a long overdue wave of national action to end the unfair and racially discriminatory exclusion of farmworkers from fundamental labor protections that most other workers have enjoyed for decades. In my testimony I will make the following points. First, the discriminatory exemption of farmworkers from basic wage and hour protections like overtime and the minimum wage is, in the words of President Biden, an "unconscionable race-based exclusion[] put in place generations ago" that must be ended.² Its historical origins are in Jim Crow compromises by Congress aimed at preserving the plantation economy in the South by carving out the then largely Black agricultural workforce from New Deal labor protections. Today in Massachusetts it operates to deny equal protection to the Commonwealth's largely Latinx farmworkers and must be ended.

Second, agriculture is one of the most dangerous industries, and long hours of work are associated with higher injury rates. Stronger overtime protections are badly needed to protect farmworkers from overwork and injury.

Third, the proposed 55-hour overtime standard is very modest and far weaker than what other progressive states are adopting. California and Washington State, for example, are now fully ending overtime discrimination against farmworkers by phasing in a 40-hour overtime standard.

Fourth, in light of how modest the proposed 55-hour overtime standard is, it is the other overtime components of the proposal—40-hour overtime for year-round, non-seasonal farmworkers, and overtime for work on the weekly day of rest—that are crucial for protecting farmworkers from dangerous overwork.

Fifth, ending the discriminatory exclusion of farmworkers from the full minimum wage is also important—and not difficult for employers since most are paying the full minimum wage already.

Exclusion of Farmworkers from the Basic Wage and Hour Protections that Most Other Laborers Have Enjoyed for Decades Is a Legacy of Jim Crow and Structural Racism and Must Be Ended

The exclusion of farmworkers from the basic overtime protections that most other laborers have enjoyed in Massachusetts and nationally for decades is a legacy of Jim Crow rooted in structural racism and must be ended.

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, respectively. 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.”³

The legislative history is clear that Southern lawmakers were adamant that setting a floor on wages, as the FLSA proposed, would attack this lingering plantation system. From 1930-1940, 57 percent of U.S. farm labor lived in the South and 51 percent of those workers were Black.⁴ By cutting across and reducing wage disparities between Black and white workers in underpaid sectors, Georgia Democratic Representative Edward Cox argued that the FLSA would allow for the “elimination and disappearance of racial and social distinctions, and... throw into question the determination of the standards and customs which shall determine the relationship of our various groups of people in the South.”⁵ As Florida Representative James Mark Wilcox explained:

“[T]here is another matter of great importance in the South, and that is the problem of our Negro labor. There has always been a difference in the wage scale of white and colored labor. So long as Florida people are permitted to handle the matter, the delicate and perplexing problem can be adjusted; but the Federal Government knows no color line and of necessity it cannot make any distinction between races. We may rest assured, therefore, that when we turn over to a federal bureau or board the power to fix wages, it will prescribe the same wage for the Negro that it prescribes for the white man. Now such a plan might work in some sections of the United States but those of us who know the true situation know that it just will not work in the South. You cannot put the Negro and the white man on the same basis and get away with it.”⁶

Black organizations, such as the NAACP Legal Defense Fund and the Urban League, aware of the exclusions that were being used as a proxy for excluding Black workers in the Social Security Act, NLRA, and the NIRA, testified during the FLSA hearings

about the disparate impact on Black workers, who would be excluded from the minimum wage. The NAACP Legal Defense Fund argued that the combination of employment discrimination and the lack of a minimum wage would serve as a “double penalty” for Black workers.⁷

Thus, it was against a backdrop of political disenfranchisement, the segregation of Black workers in the South into specific occupations based on the legacy of slavery, and the extraordinarily powerful Southern Democrats’ commitment to preserving the exploitation of Black workers in the South that the FLSA was constructed and passed.

And while many of the racially motivated exclusions from New Deal legislation have gradually been reversed over the decades, farm workers are one of the only large categories of blue-collar workers who remain entirely shut out of FLSA’s maximum hours and overtime protections.⁸

In the years that followed, civil rights activists continued to press for expansion of the FLSA. In 1955, the NAACP’s national convention adopted a resolution calling for the expansion of minimum wage coverage to agricultural workers.⁹

In 1966, the FLSA was finally expanded to cover some farmworkers with the minimum wage (but not overtime protections), and expanded to also cover workers in previously excluded service industries including restaurants and nursing homes. Nearly one third of Black workers were at that time employed in these newly covered industries. Economists have concluded that more than 20 percent of the reduction of the racial earnings and income gaps between 1965 and 1980 is due to the 1966 FLSA amendments extending these basic (though still incomplete) FLSA protections to agriculture, restaurants, nursing homes, and more.¹⁰ Extending these protections was particularly important in reducing the Black-white wage gap in the newly covered industries, accounting for more than 80 percent of the impact the FLSA had in reducing the economy-wide racial earnings gap.¹¹ And the 1966 amendments are also correlated with a significant reduction in the poverty rate for Black children in families—that rate fell from 65.6 percent in 1965 (pre-amendments) to 39.6 percent in 1969 (post-amendments).¹²

The history has been similar in Massachusetts. When the Commonwealth’s minimum wage was expanded and updated in 1947, farmworkers were expressly carved out.¹³ A subsequent 1956 amendment continued this discriminatory treatment by excluding farmworkers from the definition of “occupation” used in the state’s minimum wage and overtime laws.¹⁴ In 1967, farmworkers were finally covered by a minimum wage in the Commonwealth, but at a grossly inadequate subminimum wage level, which has been raised just once in the intervening 54 years. As a result, it has remained frozen at a paltry \$8.00 an hour since 2015 and now lags far behind the full \$13.50 Massachusetts minimum wage.¹⁵

On overtime, the history is even worse. Farmworkers have remained almost entirely excluded from the right to premium pay for work over 40 hours in a week that virtually all other blue-collar workers in Massachusetts enjoy. In 2019, a

Massachusetts Supreme Judicial Court ruling, *Arias-Villano v. Chang & Sons Enterprises, Inc.*, effectively extended 40-hour overtime to some workers previously classified as excluded farmworkers, by limiting the definition of farmworker to persons who are employed “planting, raising, and harvesting crops.”¹⁶ As a result, workers not engaged in those activities – for example, workers who pack or process agricultural products – are now entitled to 40-hour overtime. But this small narrowing interpretation leaves most of the harmful exclusion intact.

These unfair exclusions today consign Massachusetts’ disproportionately Latinx farmworker workforce to overwork and substandard pay—and the high poverty rates that come with them. It is time to redress this inequity by finally guaranteeing to farmworkers the same overtime pay protections that most all other laborers have long enjoyed.

Agriculture Is One of The Most Dangerous Industries and Long Hours of Work Are Associated with Higher Injury Rates; Stronger Overtime Protections Are Needed to Protect Farmworkers from Overwork and Injury

One of the many reasons it is urgent to extend overtime to farmworkers is to protect them against the increased incidence of injuries and deaths that result from excessive hours and overwork. Farmworkers labor under dangerous conditions that expose them to extreme temperatures, require them to work with heavy machinery and carry burdensome loads, and expose them to dangerous chemicals and pesticides.¹⁷ But the continued exclusion of farmworkers from overtime pay enables and incentivizes farms to require farmworkers to labor from sunrise to sunset, regardless of the hours required or the toll that that places on farmworkers’ bodies and family lives.

Agriculture is one of the most dangerous industries in the country, with far higher injury rates than virtually all others. According to the Centers for Disease Control, every day 100 farmworkers across the country suffer a lost-work-time injury.¹⁸ Similarly, the industry suffers a high fatality rate of 21.4 deaths per 100,000 workers.¹⁹ By contrast, the all-industries average is just 3.5 fatalities per 100,000 workers.²⁰ Significant numbers of farm workers suffer chronic musculoskeletal pain from repeated tasks like pruning, harvesting, and machine operation.²¹

Research shows that as weekly work hours increase, mortality rates rise by nearly 20 percent.²² Studies have also shown that being required to work overtime hours is associated with significantly higher injury hazard rates.²³

The health and safety implications of denying farmworkers 40-hour per week overtime protection were also recently recognized by the Washington Supreme Court, which held that Washington State’s exclusion of farmworkers from overtime denied the workers the fundamental right to workplace health and safety protection, as guaranteed by the Washington State constitution.²⁴

Stronger overtime protection is one of our nation’s key safeguards against overwork and the risk of injuries that comes with it. There is no justification for denying protection to farmworkers who labor in our most dangerous industry.

The Proposed 55-Hour Overtime Standard Is Very Moderate and Weaker Than What Other Progressive States Have Adopted

The proposed 55-hour overtime standard for farmworkers is very modest and is weaker than what other progressive states are now adopting. In recent years there has been a long overdue movement in the states to finally extend to farmworkers many of the fundamental labor protections that they have long been denied. This movement includes action to extend overtime protection – and progressive states such as California and Washington State are finally extending equal, 40-hour overtime to farmworkers. Massachusetts should plan to do the same and view this legislation as simply a first step.

This recent wave of state action started in 2016 when California approved legislation to gradually phase in 40-hour weekly overtime for farmworkers— together with daily overtime for work beyond eight hours in a day.²⁵ In California, for employers with more than 25 employees, the weekly overtime threshold phased down to 55 hours in 2019, to 50 hours in 2020, to 45 hours this year, and will reach 40 hours in 2022. For small employers, it will reach 40 hours by 2025.²⁶

In 2020, the Washington State Supreme Court ruled that the exclusion of dairy workers from Washington’s overtime law was unconstitutional. Washington’s legislature this year then expanded that ruling to extend 40-hour overtime to all farmworkers in the state,²⁷ and provided for a gradual phase-in by 2024.²⁸

President Biden and Vice President Harris are both strong supporters of 40-hour overtime for farmworkers. Vice President Harris, as a U.S. Senator, co-sponsored the federal Fairness to Farmworkers Act, which would extend 40-hour overtime under the Fair Labor Standards Act.²⁹ And President Biden praised the California and Washington State 40-hour overtime laws, calling the exclusion of farmworkers from 40-hour overtime an “unconscionable race-based exclusion[]”:

For too long—and owing in large part to unconscionable race-based exclusions put in place generations ago—farmworkers have been denied some of the most fundamental rights that workers in almost every other sector have long enjoyed, including the right to a forty-hour work week and overtime pay. I was proud to stand with farmworkers during the Obama-Biden Administration, when California passed the nation’s first farmworker overtime bill, and I am proud to stand with the farmworkers of Washington State today. It is long past time that we put all of America’s farmworkers on an equal footing with the rest of our national workforce when it comes to their basic rights³⁰

California’s overtime standard has been phasing in for several years and there is no evidence that it has been hurting the state’s agricultural employers.

New York in 2019 also passed a comprehensive Farm Laborers Fair Labor Practices Act extending long overdue protections to farmworkers, such as collective bargaining rights, unemployment insurance, workers compensation, disability insurance, paid family leave, and a day of rest each week.³¹ On overtime, the New York law (1) required overtime pay on the day of rest – a requirement identical to the Massachusetts H.1979/S.1205 proposal; (2) set an initial 60-hour weekly overtime standard; and (3) instructed the New York State Department of Labor to determine whether to lower the weekly overtime standard further to 40 hours.³² New York’s Labor Department is expected to hold hearings later this year, after which it will announce a final overtime standard. It is expected that they will reduce the standard below 60 hours and there is substantial momentum for New York to join California and Washington in extending to farmworkers the same 40-hour standard all other workers enjoy.

Finally, Colorado this year passed a comprehensive Agricultural Workers’ Rights Law, which extended a wide range of protections to farmworkers, including: full minimum wage coverage; meal and rest breaks; labor peace and anti-retaliation protection; and access to transportation. It also instructed the Colorado labor agency to issue regulations establishing an overtime standard and heat protections for farmworkers.³³ The agency published a proposed overtime rule in September outlining a very weak standard: 56 hours per week for seasonal workers, and 48 hours per week for non-seasonal workers.³⁴ Advocates filed comments protesting the proposal to entrench the discriminatory denial of 40-hour overtime to farmworkers. If the rule is finalized as proposed, we expect litigation challenging it as violating the Colorado Agricultural Workers’ Rights Law and the state constitution.

With other states successfully equalizing overtime protections for farmworkers at the 40-hour level, the proposed Massachusetts legislation setting a 55-hour standard is very, very modest. It should be viewed as just a first step, and the legislature should plan to build on it with further action to eventually extend to farmworkers the same overtime protections all other workers enjoy.

In Light of How Modest the 55-Hour Overtime Proposal Is, It Is the Other Overtime Components of the Bill—40-Hour Overtime for Non-Seasonal Farmworkers, and for Work on the Day of Rest — That Are Crucial for Protecting Farmworkers from Dangerous Overwork

In light of how modest the 55-hour overtime proposal is, it is the other overtime protections contained in the legislation that would provide the more meaningful protections for farmworkers. These are: (1) clarifying that non-seasonal workers are not farmworkers and are entitled to full 40-hour overtime; and (2) guaranteeing overtime pay for all farmworkers for work on a day of rest.

First, the provision guaranteeing year-round, non-seasonal workers regular 40-hour overtime is crucial. It would ensure that year-round agricultural workers -- like dairy workers or greenhouse workers such as those in the cannabis industry --

would be guaranteed regular 40-hour overtime. These year-round segments of agriculture differ little in their labor needs from factories or construction or other blue-collar jobs. They generally do not face seasonal labor spikes such as those associated with a fall harvest. There is therefore absolutely no reason why they shouldn't be subject to the same 40-hour overtime standard under which those industries have operated for decades.

Second, and equally important, is the provision guaranteeing farmworkers a day of rest every seven days—and time-and-a-half overtime pay for any work voluntarily performed on the day of rest. It is essential for providing a modicum of protection against dangerous overwork. New York adopted a similar day-of-rest overtime requirement, which took effect in 2020, and there is no evidence that it has posed a hardship for employers. These two overtime provisions are both crucial components of the bill and must be retained in the final version.

Ending the Minimum Wage Exclusion Is Also Important, and Not Difficult for Employers Since Most Are Paying the Full Minimum Wage Already

Finally, ending Massachusetts' sub-minimum wage for farmworkers is also important—but also quite easy for employers given that most of them are already paying the full \$13.50 Massachusetts minimum wage. Massachusetts is one of very few states that excludes farmworkers from the full minimum wage. This discriminatory treatment of farmworkers has been an anomaly in Massachusetts—a progressive state that is otherwise a leader in minimum wage policy. It is therefore critical that it be ended. But it should be recognized that doing so does not require much change by employers, who are generally already paying the full minimum wage, especially now with the tight labor market and the fact that the federal prevailing wage applicable to H2A agricultural guestworkers in Massachusetts is already \$14.99.³⁵ This explains why industry opposition to the subminimum wage provision of the bill has been minimal.

Conclusion

For the foregoing reasons, NELP urges that the legislature act swiftly to pass the Fairness for Farmworkers Act—and that this already very modest measure not be weakened further in any way. It represents a long overdue first step towards dismantling the shameful exclusion of farmworkers from fundamental labor protections. We would urge the legislature to then build on it in the future with the goal of ultimately extending to farmworkers the same 40-hour overtime protection that virtually all other blue-collar workers in the Commonwealth have long enjoyed.

Endnotes

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¹⁴ Id., citing An Act to Clarify the Definition of “Occupation” Under the Minimum Fair Wage Act as it Applies to Work on a Farm, H.R. No. 731 (1956).

¹⁵ Id.

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¹⁷ See Eric Hansen & Martin Donohoe, *Health Issues of Migrant and Seasonal Farmworkers*, 14 J. Health Care for the Poor & Underserved 153, 155-60 (2003). Available at

<http://phsj.org/files/Migrant%20and%20Seasonal%20Farm%20Worker%20Health/Migrant%20and%20Seasonal%20Farm%20Workers%20-%20JHCPU.pdf>.

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¹⁹ Id.

²⁰ AFL-CIO, “Death on the Job: The Toll of Neglect, 2021. Available at

<https://aflcio.org/reports/death-job-toll-neglect-2021>

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