

Testimony of Paul Sonn

National Employment Law Project

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

**Video Hearing before the New York State
Department of Labor
Farm Laborers Wage Board
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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 the State Policy Program Director of the National Employment Law Project (NELP). NELP is a national research and policy organization focused on workforce issues. Headquartered in New York, we work at the federal, state, and local levels on a wide array of employment policy issues, ranging from minimum wages and overtime pay, to unemployment insurance, workers' compensation, and 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 and Washington State's lead and phase in for farmworkers the same right to overtime pay after 40 hours per week that virtually all other laborers in New York have long enjoyed.

In this testimony I make the following key points:

First, the fact that California and Washington State are now phasing in 40-hour overtime for farmworkers, and that Oregon is considering doing the same, show how New York can similarly transition its agricultural economy to 40-hour overtime.

Second, as the Economic Policy Institute's Daniel Costa testified today, California's economic indicators show no evidence that the overtime transition there has been significantly disruptive or unmanageable. In particular, California is experiencing no increase in farm closures, calling into question predictions of such effects made by opponents and in the report by Cornell's Christopher Wolf, Rich Stup, and Jason Karszes.¹

Third, in New York's top agricultural sectors—dairy, miscellaneous crops, and apples—California and Washington State, two states that are now phasing in 40-hour overtime and that have higher minimum wages than New York's upstate minimum wage, are among the top national producers. Indeed, New York's apple industry competes directly with national leader Washington State. The fact that these market leaders and competitors are adopting 40-hour overtime demonstrates the economic feasibility of New York doing the same.

Fourth, evidence from California, and closer examination of incentives facing farmworkers, show that opponents' predictions that 40-hour overtime will either lead New York farmworkers to seek employment in other states or, alternatively, lead employers to hire more guestworkers, are both unlikely to occur.

Fifth, examination of the evidence from California suggests that opponents' prediction that 40-hour overtime will result in lower net compensation for farmworkers is similarly unlikely to occur. While average weekly hours worked would be expected to drop somewhat, because of the farm labor shortage, employers are unlikely to be able to eliminate overtime hours entirely. The net

impact is thus likely to be that farmworkers will work fewer overtime hours but receive higher pay for them.

Sixth, experiences with New York's new 60-hour farmworker overtime standard, and with past minimum wage increases, suggest that farm employers can transition to 40-hour overtime through strategies such as productivity enhancements, price adjustments, and trimmed profit margins.

Seventh, the fact that fruit and vegetable farming involves seasonal spikes in labor needs around harvest time does not set it apart from other industries. A wide range of other sectors including retail, landscaping, and construction have widely fluctuating seasonal labor needs, yet they have operated with 40-hour overtime for decades. And industries ranging from emergency services to hospitals, which, like dairy farming, must staff their operations around the clock, seven days a week, also manage with 40-hour overtime. This shows that agriculture can and should make the transition as well—as other states are doing.

Eighth, agriculture is one of the nation's most dangerous industries with a workplace fatality rate six times the national average. Excessive work hours have been shown to increase injuries and deaths for farmworkers. Forty-hour overtime is thus needed to protect farm laborers from overwork and injury.

New York State has long been a progressive national beacon in protecting workers. In the same way that we joined with California to lead the nation in adopting the \$15 minimum wage, New York should now join California, Washington, and the other states that are doing the same for 40-hour farmworker overtime.

1. The Fact That California and Washington State—and Possibly Soon Other States—Are Phasing in 40-Hour Overtime for Farmworkers Shows That It Is Feasible to Do So in New York

California and Washington State are now phasing in 40-hour overtime for farmworkers, and Oregon is considering doing the same. These actions show how New York can and should similarly transition its agricultural economy to operating under 40-hour overtime.

California. California has been phasing in 40-hour overtime since January 2019, as follows:

California Agricultural Overtime Phase-In (Source: CA Labor Commissioner's Office, " Overtime for Agricultural Workers ," California Department of Industrial Relations, Jan. 2019)		
26 or more employees:	25 or fewer employees	Overtime (1.5x regular rate of pay) required after the following hours per workweek / per day
Jan. 1, 2019	Jan. 1, 2022	55 / 9.5
Jan. 1, 2020	Jan. 1, 2023	50 / 9
Jan. 1, 2021	Jan. 1, 2024	45 / 8.5
Jan. 1, 2022*	Jan. 1, 2025*	40 / 8

*Double the regular rate of pay required after 12 hours in a day.

For large employers, 40-hour overtime took effect this month. For employers with more than 25 employees, these standards are being phased in more slowly, and will reach 40 hours by 2025.² Moreover, as noted, California has gone far beyond what is being proposed in New York and has also extended to farmworkers daily overtime for work beyond eight hours in a day, and double-time for work beyond twelve hours in a day.³

As noted below and explained in greater detail in the testimony of Daniel Costa from the Economic Policy Institute, economic indicators from California during this phase-in have been positive.

Washington State. Following California’s action, in 2021, Washington State approved a similar but more rapid phase-in of 40-hour overtime for farmworkers. It started this month and will fully phase in for employers of all sizes by 2024:⁴

Washington State Agricultural Overtime Phase-In (Source: WA Dep’t of Labor & Indus., " Overtime for Agricultural Workers ")	
Effective Date	Overtime (1.5x regular rate of pay) required after the following hours per day
Jan. 1, 2022	55
Jan. 1, 2023	48
Jan. 1, 2024	40

Oregon. Oregon is the next state that may adopt 40-hour farmworker overtime this year. A campaign for legislation to extend overtime is gaining momentum in the state legislature.⁵ In addition, a legal complaint has recently been filed challenging the exclusion of farmworkers under the state labor department’s existing overtime regulations.⁶

President Biden has praised the California and Washington State 40-hour overtime laws and urged other states to follow their lead:

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 rights⁷

2. As California Has Phased in 40-Hour Overtime, Economic Indicators for the Agricultural Economy Have Remained Steady and There Has Been No Evidence of Increased Farm Closures

Since California is the first state to have phased in 40-hour overtime, its experiences are especially instructive. As you heard in the testimony of Daniel Costa from the Economic Policy Institute (EPI), review of key economic indicators for California’s agricultural sector shows no evidence that the transition to the lower overtime threshold has been significantly disruptive or unmanageable.

This evidence from California casts serious doubt on the predictions contained in the report by Christopher Wolf, Rich Stup, and Jason Karszes of Cornell⁸ that 40-hour farmworker overtime in New York would lead to widespread farm closures. This is not surprising. The report’s predictions about farm closures were based solely on a survey of farm employers—group that by-and-large opposes farmworker overtime and has a natural tendency to exaggerate their likely responses to it.

The Economic Policy Institute’s analysis of California shows that:

- The number of agricultural establishments in California has held steady during this period at approximately 16,000—and there has therefore been no evidence of increased farm closures.⁹
- Average hours worked by farmworkers have declined slightly from about 43 hours a week to about 41 hours, as one would expect.¹⁰
- Total annual farmworker compensation has increased moderately by about 5% a year.¹¹ Note that California’s minimum wage, like New York’s, has been phasing up during this same period.

3. In New York’s Top Agricultural Sectors—Dairy, Miscellaneous Crops, and Apples—California and Washington State, Which Have Adopted 40-Hour Overtime, Are Among the Top Market Share Competitors

Dairy, miscellaneous crops, and apples are among New York’s largest agricultural sectors, making up 70% of New York’s farm production:

Top 5 agricultural commodities in NYS, 2020 (Source: USDA Economic Research Service)				
Rank	Commodity	Cash Receipts (in \$1,000’s)	Percent of New York production	New York production as percent of US
1	Dairy products, Milk	\$ 2,703,498	50.7	6.7
2	Miscellaneous crops	\$ 734,396	13.8	3.4
3	Corn	\$ 336,188	6.3	0.7
4	Apples	\$ 328,142	6.2	11.2
5	Cattle and calves	\$ 290,503	5.4	0.5
	<i>All commodities</i>	\$ 5,332,564		

In these top agricultural sectors, California and Washington State—two states that are now phasing in 40-hour overtime and have higher minimum wages than New York’s upstate minimum wage—are among the top national producers. This demonstrates the economic feasibility of New York similarly transitioning to 40-hour overtime.

- In dairy, New York’s largest agricultural sector, California is the nation’s largest producer. While New York does not directly compete with California in the regional dairy market, that fact demonstrates the feasibility of dairy transitioning to 40-hour overtime, which took full effect in the California this month. While opponents at the hearings argued that California’s experience is not relevant to New York because California has a longer growing season, the growing season is not relevant for dairy. Moreover, California’s minimum wage is \$15 an hour (\$14 for small employers)¹² —a good deal higher than New York’s \$13.20 upstate minimum wage. And under a proposed ballot initiative that voters will likely vote on this November, California’s minimum wage may increase further to \$18 by 2025.¹³
- In miscellaneous crops, New York’s second largest agricultural sector, California again has the nation’s largest market share, followed by Oregon—another state which is considering adopting 40-hour overtime this year.
- In apples—one of New York’s major agricultural sectors—Washington State, is the market share leader and New York’s major competitor.¹⁴ As discussed,

Washington State is phasing in 40-hour overtime and also has a \$14.49 minimum wage¹⁵ —which is a good deal higher than New York’s \$13.20 upstate minimum wage. This means that New York’s apple industry can phase in 40-hour overtime without being undercut by Washington. Puzzlingly, apple industry witness Kevin Bowman of Bowman Orchards testified at the January 18th hearing that if New York adopted 40-hour overtime, it would be put at a competitive disadvantage as compared to Washington State. In fact, the opposite is true.

State Ranking, Market Share and Cash Receipts as Percent of U.S. (Source: USDA Economic Research Service)				
Dairy Products	Miscellaneous Crops	Apples	Corn	Cattle and Calves
#1 - CA (18.4)	#1 - CA (23.3)	#1 - WA (71.3)	#1 - IA (17.2)	#1 - NE (15.3)
#2 - WI (14.2)	#2 - OR (7.6)	#2 - NY (11.2)	#2 - IL (14.5)	#2 - TX (13.5)
#3 - ID (7.3)	#3 - FL (5.6)	#3 - MI (9.2)	#3 - NE (12.8)	#3 - KS (13.2)
#4 - TX (6.8)	#4 - NY (3.4)		#4 - NE (8.7.)	#34 - NY (0.5)
#5 - NY (6.7)			#5 - IN (6.9)	
			#23 - NY (0.7)	

4. Predictions That 40-Hour Overtime Will Make It Difficult for New York Farms to Recruit Workers Are Not Plausible and Have Not Been Borne Out by Experiences in California

Opponents of 40-hour overtime have predicted that, if it is adopted, it will lead farmworkers to seek employment in other states, worsening New York’s farm labor shortage. Others have argued, conversely, that 40-hour overtime will lead employers to hire more guestworkers, displacing non-guest farmworkers, leaving them worse off. However, experiences in California and closer examination of incentives facing farmworkers show why neither outcome is likely to occur:

- In California, as farmworker overtime has phased in, farmworker employment has generally held steady. In particular, H-2A guestworker employment has instead increased from 19,000 to 32,000 per year.¹⁶ This rebuts opponents’ predictions, including in the Wolf, Stup, and Karszes report,¹⁷ that H-2A workers will avoid states with 40-hour overtime.

- That said, employment of H-2A workers is a good deal more expensive for farm employers than non-guest workers, since employers must provide housing, transportation, and other services for them—as well as paying such workers the mandated H-2A Adverse Effect Wage Rate (AWER) —which is a good deal higher than the minimum wage. That reality makes it unlikely that expanded use of guestworkers will lead to significant displacement of non-guestworkers.
- For industries such as dairy that are not eligible for H-2A guestworkers, it is similarly unlikely that 40-hour overtime will lead farmworkers to leave New York for neighboring states like Pennsylvania. New York’s minimum wage upstate is \$13.20—about \$6 per hour more than Pennsylvania’s \$7.25 minimum wage (although most Pennsylvania farm employers pay well above that level). Economic evidence suggests that the likely worker flow is in the opposite direction: that workers tend to cross state lines to seek jobs in states with higher minimum wages.¹⁸
- Moreover, a 2019 analysis by researchers at the Federal Reserve Bank of New York of the impact of New York’s higher minimum wage on employment in low-wage industries along the New York-Pennsylvania border found that New York’s higher wage increased earnings in New York without reducing employment.¹⁹ That finding is consistent with the bulk of recent research on the impact of higher minimum wages and similar labor standards.

5. 40-Hour Overtime Can Be Expected to Reduce Overwork without Significantly Reducing Farmworker Earnings

Opponents argue, on the one hand, that 40-hour overtime will lead to a reduction in farmworker earnings, because employers will hire many more workers and cap hours for all of them at 40. And contradictorily, they argue that 40-hour overtime will lead to excessive costs for farm employers, forcing them out of business. Both of these contradictory contentions cannot be true. Examination of the evidence suggests that neither is true.

Instead, the impact on farmworkers of 40-hour overtime coverage is likely to be the following:

- To the degree that they can, farm employers will endeavor to hire more workers in order to spread work across a larger workforce and reduce overtime hours and costs. This is one of the intended effects of overtime, to reduce overwork, and is a welcome development. The Economic Policy Institute analysis shows that this has happened in California, where average farmworker weekly hours have dropped slightly from 42.8 to approximately 41.9.²⁰
- But because of the perennial farm labor shortage, employers will not be able to eliminate all overtime hours, and farmworkers will receive time-and-a-half premium pay for the hours over forty that they work. This is the experience we see in California.

- The net impact for farmworkers of these reduced hours but higher overtime pay should be roughly comparable net earnings.

6. Farm Employers Can Transition to 40-Hour Overtime Through Strategies Such as Productivity Enhancements and Price Adjustments

Opponents argue that farm employers cannot transition to the 40-hour overtime protections that virtually all other industries have operated under for decades. As noted earlier, the California data shows no evidence of increased farm closures as overtime has phased in. Evidence from the experiences with New York's new 60-hour overtime standard and with past minimum wage increases suggest how employers will be able to make the same transition here.

As David Kallick from the Immigration Research Initiative explained in his testimony to the wage board, employers typically adjust to higher labor standards through a combination of productivity improvements, price adjustments, and trimmed profit margins.

We see have seen this when the minimum wage in New York has gone up: employers typically find ways to increase productivity, for example through enhanced training, or investment in new equipment or technology. In part these productivity gains are generated by the higher labor standards themselves: evidence shows that when workers are paid more and treated better, they have lower turnover rates, less absenteeism, and are more motivated, which all translate to cost savings for employers.²¹

The Wolf, Stup, and Karszes report finds that New York's current 60-hour overtime standard has already spurred such productivity enhancements, by leading dairy farms to invest in labor-saving technology, and fruit and vegetable farms to tighten up their management systems.²²

A second adjustment channel we typically see is price increases. When the minimum wage goes up, typically a portion of that is passed on in the form of marginally higher prices. While some witnesses claimed that New York farms have little ability to raise prices, the fact that New York's major apple competitor, Washington State, is already phasing in 40-hour overtime, and additionally has a higher minimum wage than New York, indicates that in the apple sector there would be latitude for New York producers to adjust prices. While dairy employers' ability to raise prices may be more constrained, it is also true that labor costs in dairy are a good deal lower as a portion of operating costs than they are for the rest of agriculture, and lower than they are in many other low-wage industries—just 17% according to the Wolf, Stup, and Karszes report. That means that labor cost increases in dairy translate to much smaller overall operating cost increases. Finally, research generally shows that a portion of higher labor costs are typically absorbed by employers through trimmed profit margins. Through all of these channels, and with the additional assistance of various forms of state support that are available to the industry, New York's

agricultural employers can make the transition to 40-hour overtime, as employers in other states are successfully doing.

7. Other Industries Face Conditions Like Those in Agriculture—Such as Seasonal Spikes In Demand, Vulnerability to Weather, the Need for Seven-Day-A-Week Staffing Over Long Hours, and Work With Living or Perishable Commodities—Yet Have Long Operated Successfully Under 40-Hour Overtime

Opponents have argued at these hearings that 40-hour overtime is not feasible for agriculture because it faces conditions unlike those facing other industries that operate successfully under such standards. Indeed, the legislature specifically instructed that “The wage board shall consider existing overtime rates in similarly situated industries in New York state”²³ in determining whether to lower the farmworker overtime threshold below 60 hours. However, examination of the conditions facing agriculture reveals that other industries that have long operated under 40-hour overtime face similar conditions—showing that agriculture can make the transition as well.

For example, the fact that fruit and vegetable farming involves a seasonally intense need for labor hours around harvest time does not set it apart from other industries. Industries like retail, construction, landscaping, and resort hotels also face seasonal spikes in their labor needs but have all operated under 40-hour overtime for decades. Moreover, New York’s largest agricultural sector, dairy farming, is not substantially seasonal at all.

It is true that the dairy industry requires staffing seven-days-a-week over long hours as cows must be regularly milked and cared for. But the same is true for many other industries such as hospitals and emergency response services, yet they operate successfully under 40-hour overtime. And while some farm products are perishable, other workers in the supply chain—from packing house and cannery workers to delivery workers—also work with perishable items yet are entitled to overtime.

In addition, the fact that hours of work in agriculture can be unpredictable, and on any given day can be influenced by the weather, does not set it apart. Construction workers’ schedules are also unpredictable and influenced by the weather. And other workers, such as retail and fast-food workers, also have unpredictable schedules—so unpredictable that states and localities are beginning to regulate the unpredictability of these schedules. Yet these industries all operate with 40-hour overtime.

Instead, what sets agriculture apart is the fact that it has long operated under this unfair overtime exemption—and that as a result, the industry has grown accustomed to a staffing model based on overwork and substandard pay. It is long past time to help the industry in New York transition away from that model, as other states are now doing.

8. 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

One of the many reasons it is urgent to extend 40-hour 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, carry burdensome loads, and expose them to dangerous chemicals and pesticides.²⁴ The continued exclusion of farmworkers from overtime pay enables and incentivizes farms to require farmworkers to labor from sunrise to sunset, regardless of the toll that such hours place 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.²⁵ Similarly, the industry suffers a high fatality rate of 21.4 deaths per 100,000 workers.²⁶ By contrast, the all-industries average is just 3.5 fatalities per 100,000 workers.²⁷ Significant numbers of farmworkers suffer chronic musculoskeletal pain from repeated tasks like pruning, harvesting, and machine operation.²⁸

Research shows that as weekly work hours increase, mortality rates rise by nearly 20 percent.²⁹ Studies have also shown that being required to work overtime hours is associated with significantly higher injury hazard rates.³⁰

The health and safety implications of denying farmworkers 40-hour per week overtime protection were recently recognized by the Washington State Supreme Court, which held that Washington State's exclusion of farmworkers from such overtime protections denied the workers the fundamental right to workplace health and safety protection, as guaranteed by the state constitution.³¹

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 equal overtime protection to farmworkers who labor in our most dangerous industry.

Conclusion

For the foregoing reasons, NELP urges that the wage board extend 40-hour overtime to farmworkers.

Endnotes

- ¹ Christopher Wolf, Rich Stup and Jason Karszes, “[Effects of NY Overtime Laws on Agricultural Production Costs and Competitiveness](#)” (Nov. 2021).
- ² Calif. Dep’t of Indus. Rel., [Overtime for Agricultural Workers](#).
- ³ Ibid.
- ⁴ Wash. State Dep’t of Labor & Indus, [Agricultural Overtime](#).
- ⁵ Statesman Journal, [Oregon farmworkers don't get overtime pay. Some want to change that](#), Nov. 17, 2021.
- ⁶ Salem Reporter, [Long hours without overtime pay for farmworkers lead to health problems, less family time, OHSU report says](#) (Dec. 16, 2021).
- ⁷ The White House, “[Statement by President Joseph R. Biden, Jr. in Support of Washington State’s Overtime Bill for Farm Workers](#)” (May 11, 2021).
- ⁸ Christopher Wolf, Rich Stup and Jason Karszes, “[Effects of NY Overtime Laws on Agricultural Production Costs and Competitiveness](#)” (Nov. 2021).
- ⁹ Daniel Costa, Economic Policy Institute, Testimony to the New York State Department of Labor, Farm Laborers Wage Board (Jan. 20, 2022), Table 3.
- ¹⁰ Ibid. Table 1.
- ¹¹ Ibid. Table 2.
- ¹² Cal. Dep’t of Indus. Rel., [Minimum Wage](#).
- ¹³ Ballotpedia, [California Minimum Wage Initiative \(2022\)](#).
- ¹⁴ Times Herald-Record, [Cornell fruit school to focus on apples](#) (July 17, 2020).
- ¹⁵ Wash. State Dep’t of Labor & Indus., [History of Washington State’s Minimum Wage](#).
- ¹⁶ Testimony of Daniel Costa, Economic Policy Institute, Table 4. Note that the increase in H-2A employment is believed to be in part due to increased border enforcement (which is preventing new unauthorized workers from arriving), as well as the aging of the domestic farm workforce.
- ¹⁷ Wolf, Stup and Karszes.
- ¹⁸ NY Times, [Crossing Borders and Changing Lives, Lured by Higher State Minimum Wages](#) (Feb. 15, 2014).
- ¹⁹ Jason Bram, Fatih Karahan, and Brendan Moore, Fed’l Reserve Bank of NY, Liberty Street Economics, [Minimum Wage Impacts along the New York-Pennsylvania Border](#) (Sept. 25, 2019).
- ²⁰ Testimony of Daniel Costa, Economic Policy Institute, Table 1.
- ²¹ N.Y. Times, [How a Raise for Workers Can Be a Win for Everybody](#) (June 18, 2020).
- ²² Wolf, Stup and Karszes.
- ²³ N.Y. Labor Law § 674-a.
- ²⁴ Eric Hansen & Martin Donohoe, [Health Issues of Migrant and Seasonal Farmworkers, 14 J. Health Care for the Poor & Underserved](#) 153, 155-60 (2003).
- ²⁵ Centers for Disease Control and Prevention, National Institute for Occupational Safety and Health, “[Agricultural Safety](#).”
- ²⁶ Ibid.
- ²⁷ AFL-CIO, “[Death on the Job: The Toll of Neglect, 2021](#).”
- ²⁸ 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.
- ²⁹ J. Goh, J. Pfeffer & S. Zenios, [Workplace stressors & health outcomes: health policy for the workplace](#). *Behavioral Science & Policy*, (2015) 1(1), pp 43-52.
- ³⁰ A.E. Dembe et al., [The impact of overtime and long work hours on occupational injuries and illness: new evidence from the United States](#), 62 *J. Occupational & Environmental Medicine* 588 (2005).
- ³¹ *Martinez-Cuevas v. DeRuyter Bros. Dairy*, 196 Wn.2d 506, ¶¶ 22, 27-35 (2020).