

Next on the Chopping Block: In Light of Recent Removals of the Agricultural Exemption from State Wage and Hour Laws, Employers Are Wondering Which Employees Are Exempt and for How Much Longer?

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by Michael Droke

Agricultural employers are often at the mercy of nature which causes constant fluctuations in labor needs. Given the unique nature of the agricultural industry, their workers have historically been exempt from minimum wage and overtime requirements. These requirements differ from state to state, and employers are noting a change in the agricultural exemption. Some states have removed, or are considering removing, the exemption for agricultural workers from their wage and hour laws. This generates legitimate concerns from employers faced with new compliance issues and increased labor costs. **Many employers may be wondering: Are my agricultural employees still exempt from wage and hour laws, to what extent, and will my state's exemption be the next to go?**

The Fair Labor Standards Act (FLSA) establishes federal regulations regarding wages, hours, and child labor within interstate commerce. These regulations set the federal minimum wage and provide that employees must be paid time and one-half of their regular rate for any hours worked in excess of forty hours a week. However, the FLSA exempts certain employees from the minimum wage provisions, the overtime provisions, or both. One of those exemptions applies to agricultural workers.

Who is exempt from the FLSA and from which provisions?

To fall within the agricultural exemption, an individual must be “employed in agriculture.” This includes individuals who: are employed by a farmer, work on a farm, or who are otherwise engaged in agriculture. The FLSA defines agriculture to “include farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities, the raising of livestock, bees, fur-bearing animals, or poultry, and any practices performed by a farmer or on a farm as an incident to or in conjunction

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with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.” To determine whether a particular activity is considered agricultural work, it must be carried on as a part of the agricultural function rather than an independent productive activity.

Any employer who did not engage more than 500 person-days of agricultural labor during any calendar quarter during the preceding calendar year is exempt from both the minimum wage and overtime provisions. Additionally, employees who are immediate family members of the employer and certain hand harvest laborers are also exempt from both provisions. Exempt from only the overtime provision are employees who are employed in agriculture, as defined above, or in irrigation. While there are some limitations and additional exemptions provided by the FLSA, generally, employees who are employed in agriculture will be exempt from the federal overtime requirements and may also be exempt from the minimum wage requirements. eCFR :: 29 CFR Part 780 -- Exemptions Applicable to Agriculture, Processing of Agricultural Commodities, and Related Subjects Under the Fair Labor Standards Act.

However, just because employees fall under an exemption to federal wage and hour regulations, does not mean that employers do not have to comply with state wage and hour laws.

But what about the States? Should I be concerned? And how do I prepare?

States may adopt their own versions of the FLSA so long as their regulations are equally protective or greater than those defined federally – and most have done so. Following the FLSA’s example, many states have included an agricultural exemption to their wage and overtime provisions. Some of these exemptions completely exempt agricultural workers from either or both the state minimum wage and overtime provisions or provide standards more protective than the federal regulations but less stringent than those that apply to other types of workers within the state. A full list of state overtime and minimum wage provisions for agricultural workers can be found at [Overtime & Minimum Wage Compilation - National Agricultural Law Center \(nationalaglawcenter.org\)](https://www.nationalaglawcenter.org/resources/state-laws/agricultural-workers/).

It is important to note that a recent trend has emerged in which states are removing the agricultural exemption from their wage and hour laws. So far, seven states have removed their agricultural exemption to some degree including California, Colorado, Hawaii, Maryland, Minnesota, New York, and Washington. These removals have been prompted by legislation, as in [California](#), or through case law invalidating the agricultural exemption itself, as in [Washington](#). Generally, once the exemption is removed, the changes in requirements are implemented in phases. This allows employers time to adjust to new scheduling and pay practices. However, many employers are still finding it difficult to comply with the new requirements.

Whether employers are located in a state which is considering removing its exemption, such as Massachusetts, or are worried about how much longer their exemption will be in place, there are a few things that can be done in preparation of a change.

- **Review pay practices.** Employers should periodically review their pay practices to ensure compliance with both the FLSA and current state wage and hour laws. While an exemption may apply to one type of employees, it may not apply to another. Employers should review compliance by type of employee as well as consider how state regulations may differ if they employ agricultural workers in multiple states. Additionally, farmers utilizing the services of farm labor contractors should ensure that the contractor's pay practices are also compliant given the potential for joint employer liability.
- **Plan for the possibility of removal.** A removal of the agricultural exemption brings with it increased labor costs. Therefore, employers may consider preparing for a change in scheduling practices to avoid overtime or invest in mechanized agriculture to offset the added labor costs. This includes obtaining time and attendance software, gathering pay information, and updating policies.
- **Remain up to date.** Now more than ever, it is imperative that agricultural employers are in the know regarding their state's agricultural exemption and the risk of its removal. Subscribe to the [Quirky Questions blog](#) to receive updates regarding changes in labor and employment law or contact your Dorsey employment attorney for guidance.