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Agricultural Employment Law Update November 12, 2015

“Hot Topics” Outline

Piece Rate Employers:

Demetrio v. Sakuma Brothers Farms, Inc. (Washington Supreme Court) payment for 10 minute break and implications for Oregon Employers.

Pick Tickets- implications failure to enforce one worker per ticket requirement.

Proper monitoring of start/stop times.

Use of Farm Labor Contractors:

Joint employment issues- audit, indemnification, transportation.

Overtime- Application of Farm Exemption

H-2A- Corresponding Employment:

20 CFR §655-103- Corresponding employment. The employment of workers who are not H-2A workers by an employer who has an approved H-2A *Application for Temporary Employment Certification* in any work included in the job order, or in any agricultural work performed by the H-2A workers. To qualify as corresponding employment the work must be performed during the validity period of the job order, including any approved extension thereof.

“Local” workers must be paid same rate (AEWR) as “foreign” worker when engaging in corresponding employment.

Tips for dealing with compliance investigations:

Use off season to help insure compliance- reputable consultants can help.

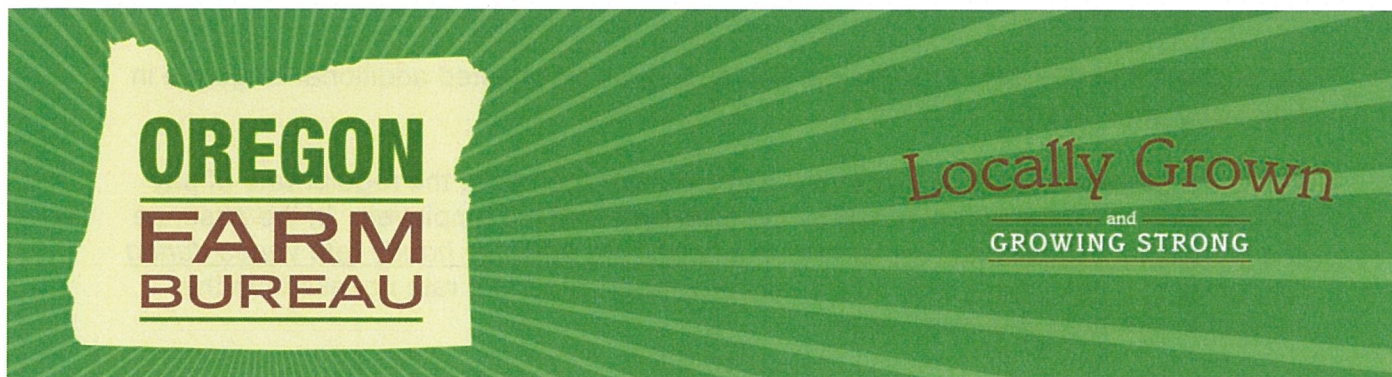
Train supervisors on how to deal with non-farm individual’s access to property.

Discuss where to check in- office or phone?

Check identification

“Open fields” issues.

Questions?



October 30, 2015

Ms. Marcia Ohlemiller
Rules Coordinator
Bureau of Labor and Industries
marcia.l.ohlemiller@state.or.us

Re: Oregon Farm Bureau's comments on proposed rules implementing SB 454 (paid sick leave).

Thank you for the opportunity to comment on the proposed Paid Sick Leave rules put forward by the Bureau of Labor and Industries (BOLI). As a reference, the Oregon Farm Bureau Federation (OFB) is the state's largest general agriculture association, representing over 7,000 families actively engaged in farming and ranching and 60,000 members statewide. We ask for clarification on several key issues:

839-007-0000 Definitions

Calculating Regular Rate of Pay for Piece Rate

It is unclear in the rules how farmers will calculate a regular rate of pay for a worker taking sick leave who is paid a piece rate that might fluctuate during harvest. There must be an objective measure of an hourly rate to avoid uncertainty and potential legal liability for the farmer employer.

Subsection (4)(e) provides, "For employees paid on a piece-rate or fee-for-service basis, the regular rate of pay means the rate of pay agreed upon by the employer and the employee. In the absence of a previously established regular rate of pay, sick time shall be compensated at the applicable statutory minimum wage." Our understanding of this language is that if an employee works at a regular rate of pay for any time during the year for an employer, that regular rate of pay would be the rate of pay used for sick leave even if they later worked, even a significant amount of time, under a piece-rate. Similarly, we understand that if an employee works only at the piece-rate, and the piece-rate changes throughout the term of employment (as is often the case during harvest), that the applicable regular rate of pay would be the minimum wage, not an averaging of pay under the piece-rate. This should be clarified in the rules.

We suggest 839-007-000(4)(e) be clarified as follows (suggested additional language in *italics and underlined*):

(e) For employees paid on a piece-rate or fee-for-service basis, the regular rate of pay means the rate of pay agreed upon by the employer and the employee. In the absence of a previously established regular rate of pay or if the effective hourly rate varies during the period of employment, sick time shall be compensated at a rate no less than the applicable statutory minimum wage.

Align “Undue Hardship” with Legislative Intent

The Legislative record does not reflect that financial hardship and financial resources were ever part of the intent of this section. We recommend that BOLI remove all references to difficulty or expense to an employer’s business, cost of complying, and overall financial resources of the employer in the proposed rules (suggested deletions are ~~crossed-out~~):

~~(6) “Undue hardship” means significant difficulty or expense to an employer’s business and includes consideration of the impracticability of permitting sick time to be taken in hourly increments. Factors to consider in determining whether the use of sick time in hourly increments imposes an undue hardship on the employer include, but are not limited to:~~

~~(a) The employer’s cost of complying with the requirement to provide sick time in hourly increments;~~

~~(b) The overall financial resources of the employer;~~

Clarify that “Undue Hardship” includes “Perishable Crops during Harvest”

The proposed rules define “undue hardship” as the significant difficulty or expense to an employer’s business and include consideration of the impracticability of permitting sick time to be taken in hourly increments. Subsection (6)(d) of the proposed rules includes consideration of “perishable nature of materials used on the job” as an “undue hardship” but fails to recognize “perishable crops at the critical time of harvest.” The harvest period requires “all hands on deck” with all employees present to ensure that crops are picked at the optimal time. Perishable crops have a short window between being ready to be picked and being over ripe. Any paid sick leave time taken during this period would be an undue hardship on growers, and we ask that this be addressed in the proposed rules.

839-007-0005 Liability for Jointly Employed Employees

Remove Joint Liability for Employers and Contract Labor

The proposed rules require employers that hire temporary or contract labor to track and accrue paid sick leave time for another company’s employees. This is costly and unnecessarily duplicative for farmer employers and farm labor contractors. Employees of a staffing or contracting agency should not be considered jointly employed by both the staffing agency and the farmer contracting for the employee’s services. As the primary employer, the staffing agency has the duty to track accrual and the use of leave. The secondary employer would only be responsible for accepting the employee

returning from sick leave if they continue to utilize an employee from the staffing agency and the agency chooses to place the employee with the secondary employer. This is consistent with FMLA's treatment of jointly employed employees and BOLI's position that OFLA follows this FMLA regulation. See 29 CFR § 825.106.

Additionally, the proposed rules indicate that should an employer eventually hire the temporary employee, they are required to roll the newly hired employee into an active paid sick leave bank. This was not considered in the legislature and is contrary to the 90-day waiting period for new hires.

Clarify Farm Labor Contractor

We assume the "staffing agency" includes a farm labor contractor and ask that this be made explicit in the rules. If true, then this section must clarify that the normal joint several liability rules that would hold a farmer liable for the misdeeds of a farm labor contractor would not apply in a situation where the farm labor contractor should have been calculating and providing the paid sick leave for its employees.

**839-007-0015 Calculating the Numbers of Employees Employed
*Accounting for Temporary Labor***

Subsection (2) requires an employer to include all temporary labor when determining whether or not they meet the 10-employee threshold. This seems counter to the legislative intent of specifically exempting independent contractors from the definition of employee and including hourly and piece-rate paid employees. We ask you to align this provision with legislative intent and clarify that temporary employees are not counted twice.

We also ask for clarification that the calculation of employees employed is limited to employees within Oregon for an Oregon employer and not employees in other offices or locations outside Oregon.

Exempt Spouse-owners from the Definition of Employee

The rules do not address the circumstances of whether a spouse-owner is counted towards the total number of employees. For family farms, this is typical business set up. BOLI must clarify the rules to exempt both spouse-owners from the definition of employee for employee calculation purposes. For example, would a family farm owned by a husband and wife, who both work for the company and have eight non-owner employees be subject to the paid sick leave requirement? Please clarify that spouse-owners, not just owner's spouse, is exempted from the definition of employee.

**839-007-0040 Employee Notice Policy and Procedures
*Require Reasonable Employee Notification***

Subsection (5) requires an employee to notify the employer prior to the start of a shift. However, it also allows "or as soon as practicable." Even if the need for sick time is unforeseeable, employers must be able to replace and adjust based on the absence of an employee. In agriculture, there are situations that require "all hands on deck" and

even with notice, it will be difficult to find a replacement employee. It is reasonable that the employee be required to provide notice prior to the start of a scheduled shift.

839-007-0045 Verification and Certification for Sick Time Use

Employee Documentation

This section covers what documentation might be appropriate for confirmation that a person is in fact sick. Subsection (3)(c) provides that “documentation from an attorney, law enforcement officer, ...” is qualified. We suggest clarifying that it is not any attorney but, specifically, that employee’s attorney (suggested additional language in *italics and underlined*):

(c) Documentation from an *employee’s personal* attorney, law enforcement officer, ...

839-007-0055 Substantial Equivalency

Redefine Substantial Equivalency

We ask you to redefine “substantial equivalency” to lessen the burden on family farmers who may already have equivalent paid sick leave policies in place. We believe this was the legislative intent when SB 454 passed. This provision should state that “substantially equivalent” means that the employer’s policy provides for at least the same total amount of sick time hours per year that an employee would earn under Chapter 653, Oregon Laws, 2015, and may be used for the purposes outlined in Section 6 of this law.

Thank you for the opportunity to provide comments. Please do not hesitate to contact us with any questions.

Sincerely,



Jennifer Dresler
Director of State Public Policy
Oregon Farm Bureau

cc: Paloma Sparks, paloma.sparks@state.or.us