

TESTIMONY IN SUPPORT OF LOWERING THE OVERTIME THRESHOLD FOR FARMWORKERS IN OREGON TO 40 HOURS PER WEEK

Hearing on HB 4002, Oregon House Committee on Business and Labor

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Testimony of Daniel Costa, Director of Immigration Law & Policy Research at the Economic Policy Institute

About EPI

The Economic Policy Institute (EPI) is a nonprofit, nonpartisan think tank established in 1986 to include the needs of low- and middle-income workers in economic policy discussions. EPI conducts research and analysis on the economic status of working America, proposes public policies that protect and improve the economic conditions of low- and middle-income workers—regardless of immigration status—and assesses policies with respect to how well they further those goals. EPI has researched, written, and commented extensively on farm labor and the U.S. employment-based system for migration—through publications, public comments, and testimony—including in particular, with respect to the wages and working conditions of farmworkers and on immigrant and nonimmigrant visa programs utilized by agricultural employers.

Dear Chair Holvey, Vice Chairs Grayber and Bonham, and members of the Committee:

As the Oregon legislature considers a state law to create an hourly overtime standard for farmworkers, I am writing to provide you testimony for the hearing on HB 4002, and more generally about the experience of California in implementing a law that phased in an hourly overtime standard for farmworkers of 8 hours per day or 40 hours per week. In sum, I urge the legislature to pass legislation that lowers the overtime threshold in Oregon to 40 hours per week.

I have researched and written about farm labor issues, including wages, labor standards, and worksite enforcement, for over 11 years at the Economic Policy Institute (EPI). Some of my past reports are included in the footnotes of this testimony. I am also a Visiting Scholar with the Global Migration Center at the University of California, Davis—a university located in California’s agricultural heartland, the Central Valley.

Despite numerous claims being made by agribusiness representatives that a more reasonable threshold of hours for overtime pay for farmworkers will negatively impact the agricultural industry, there is virtually no credible evidence to support such claims, and certainly no “smoking gun” evidence suggesting that overtime pay for farmworkers after 40 hours per week will hurt the industry or slash profits dramatically. In fact, the limited available evidence that does exist regarding the impact of overtime pay on the agricultural industry in the nation’s biggest and most important farm state,

California—strongly suggests that is not the case, and perhaps even the opposite may be true. In other words, data on agricultural employment and wages in California suggest that overtime pay for farmworkers has not corresponded with any negative impacts or shocks to the California farm economy or labor market.

In fact, the implementation of California’s overtime law has even corresponded with a small increase in the number of agricultural establishments and slower growth in the total wages paid to workers than in previous years. This testimony will present some of the relevant information about these realities, which suggests that overtime pay for farmworkers in Oregon after 40 hours per week will not lead to the negative outcomes that agribusiness representatives may claim—largely without evidence—will result.

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Farmworkers are a precarious workforce, with few rights or access to justice

The coronavirus pandemic and the ensuing economic collapse was a difficult time for many workers and families, with hundreds of thousands of deaths and widespread human suffering. While millions of workers were allowed to remain home and work remotely in order to stay safe, the vast majority of workers did not have a remote work option, either because employers did not permit it or because it was simply not feasible.¹ One key segment of the workforce that was expected to keep working in order to sustain the food supply chain—but at great risk to themselves and their families—were farmworkers.

Even before the pandemic, farmworkers were employed in one of the most hazardous jobs in the entire U.S. labor market,² and as EPI research has shown, they suffer very high rates of wage and hour violations.³ While the number of wage and hour inspections by the U.S. Department of Labor has recently dropped to the lowest levels ever, at about 100 inspections per month in agriculture, the vast majority of those investigations—70%—detect violations. The low number of inspections means that there's only about a 1% chance that any agricultural employer in the United States will ever be investigated in a given year, and may therefore reasonably assume that they can violate wage and hour laws with impunity.⁴ As a result, it is even more important to have robust labor standards in place to ensure farmworkers are paid fairly.

In addition, most farmworkers in the United States either lack an immigration status or are employed via a precarious, temporary status through the H-2A visa program. The lack of an immigration status, or having only a temporary status, means that unauthorized and H-2A farmworkers are even worse off because they have limited labor rights, which increases their vulnerability to wage theft and other abuses.⁵

Unauthorized immigrants who speak up about unfair treatment or abuse in the workplace risk employer retaliation in the form of deportation. In the case of temporary migrant farmworkers employed through the H-2A visa program, H-2A workers are not permitted to change employers

¹ Elise Gould and Heidi Shierholz, "[Not everybody can work from home: Black and Hispanic workers are much less likely to be able to telework](#)," *Working Economics* blog (Economic Policy Institute), March 19, 2020.

² U.S. Bureau of Labor Statistics, "[Table 1. Incidence rates of nonfatal occupational injuries and illnesses by industry and case types, 2019](#)," in *Injuries, Illnesses, and Fatalities*, U.S. Department of Labor.

³ Daniel Costa, Philip Martin, and Zachariah Rutledge, [Federal labor standards enforcement in agriculture: Data reveal the biggest violators and raise new questions about how to improve and target efforts to protect farmworkers](#), Economic Policy Institute, December 15, 2020.

⁴ Daniel Costa, Philip Martin, and Zachariah Rutledge, [Federal labor standards enforcement in agriculture: Data reveal the biggest violators and raise new questions about how to improve and target efforts to protect farmworkers](#), Economic Policy Institute, December 15, 2020.

⁵ See for example, David Cooper and Teresa Kroeger, [Employers steal billions from workers' paychecks each year. Survey data show millions of workers are paid less than the minimum wage, at significant cost to taxpayers and state economies](#), Economic Policy Institute, May 10, 2017.; Annette Bernhardt, Ruth Milkman, et al., [Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities](#), Center for Urban Economic Development, National Employment Law Project, and UCLA Institute for Research on Labor and Employment, 2009; Centro de los Derechos del Migrante, [Ripe for Reform: Abuses of Agricultural Workers in the H-2A Visa Program](#), April 2020.

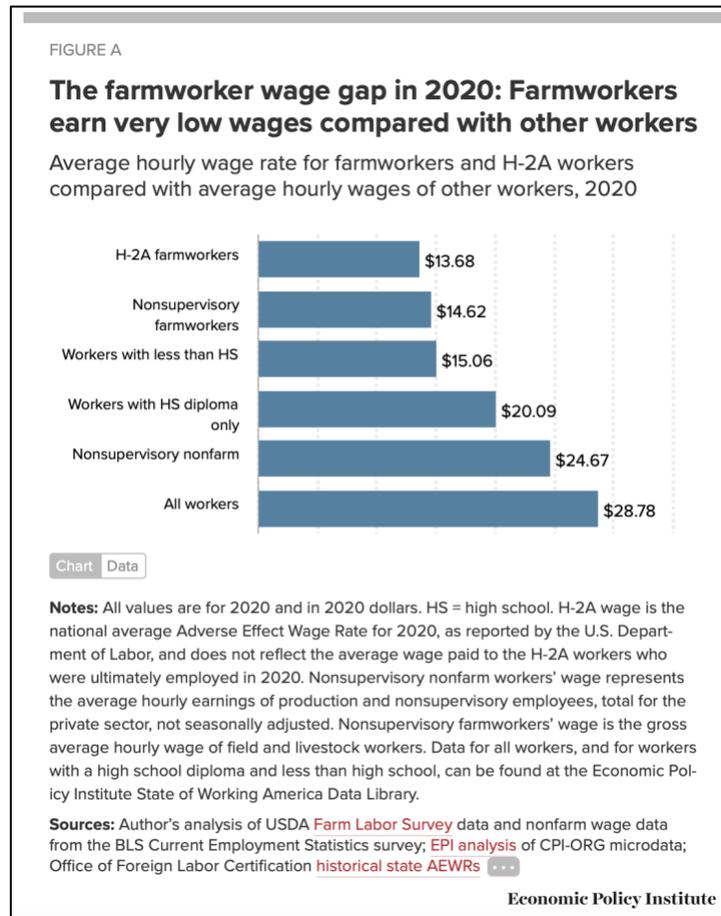
and are thus practically indentured to them.⁶ The half of farmworkers who are unauthorized plus 10% of farmworkers with H-2A visas mean that only 40% of the farm workforce are U.S. citizens and legal immigrants with full rights and agency in the labor market. Having the majority of the farm workforce employed without basic workplace rights in turn puts downward pressure on labor standards for all workers and has helped to keep wages low in agriculture for decades.

Farmworkers provide an essential service but are vastly underpaid

As EPI research has also demonstrated, farmworkers are among the lowest-paid workers in the entire U.S. workforce, even lower than other comparable low-wage workers. As **Figure A** below shows, farmworkers earned just \$14.62 per hour on average in 2020, which is just 60%—or three fifths—of what production and nonsupervisory *nonfarm* workers earned (\$24.67), who are the most appropriate cohort of workers outside of agriculture to compare with farmworkers.⁷

⁶ See for example, Mary Bauer and Meredith Stewart, [Close to Slavery: Guestworker Programs in the United States](#), Southern Poverty Law Center, February 19, 2013; Centro de los Derechos del Migrante, [Ripe for Reform: Abuses of Agricultural Workers in the H-2A Visa Program](#), April 2020.

⁷ Daniel Costa, [“The farmworker wage gap continued in 2020: Farmworkers and H-2A workers earned very low wages during the pandemic, even compared with other low-wage workers.”](#) *Working Economics* blog (Economic Policy Institute), July 20, 2021. For previous years comparing farmworkers with production and nonsupervisory nonfarm workers, see Economic Research Service, [“Wages of Hired Farmworkers”](#) in “Farm Labor,” U.S. Department of Agriculture, last updated August 18, 2021.



Farmworkers have very low levels of educational attainment, and compared to the two groups of workers with the lowest levels of education in the United States, farmworkers earn even less on average: Figure A also shows that nonsupervisory farmworkers at \$14.62 per hour earned 44 cents per hour less than the average wage earned by all workers without a high school diploma (\$15.06), and farmworkers earned roughly \$5 less per hour than the average wage earned by all workers with only a high school diploma (\$20.09).

Many farmworkers employed through the H-2A visas program fared even worse in 2020. Figure A shows that the wage paid to most farmworkers with H-2A visas—known as the Adverse Effect Wage Rate (AEWR)—was even lower, with a national average of \$13.68 per hour, according to the U.S. Department of Labor. But many H-2A farmworkers earned far less in some of the biggest H-2A states. In Florida and Georgia—where a quarter of all H-2A jobs were located in 2020—H-2A workers were paid the lowest state AEWR, at \$11.71 per hour.

These data prove that the claim which is often made and repeated by farm employers and agribusiness lobbyists and representatives—i.e., that wages are rising too quickly for farmworkers and that the AEWR for H-2A workers is too high and rising too quickly, and thus not consistent with labor market trends—is not credible and not based on any data or evidence.

Overtime protections for farmworkers in California: Current law requires overtime pay after 8 hours per day or 40 hours per week for farms with 26 or more employees

California's Assembly Bill (AB) 1066 (2016) created a timetable for workers employed in agriculture to receive overtime pay on the same basis as workers in most other industries—in other words, time and a half after 8 hours per day or 40 hours per week—but AB 1066 created a specified phase-in period so that employers could have time to adjust to the new rules. The law specifies that farmworkers employed on farms with 26 or more employees would gradually receive overtime pay between 2019 and 2022, based on a declining threshold of hours worked, eventually requiring time and a half after 8 hours per day or 40 hours per week in the fourth year after the phase-in period begins. Farms with 25 or fewer employees are subject to a delayed phase-in period, beginning on January 1, 2022 and ending on January 1, 2025 (meaning all employers of all sizes must pay time and a half after 8 hours per day or 40 hours per week beginning on January 1, 2025).

The preamble to AB 1066 summarizes the updated overtime rule for farmworkers:

This bill would remove the exemption for agricultural employees regarding hours, meal breaks, and other working conditions, including specified wage requirements, and would create a schedule that would phase in overtime requirements for agricultural workers, as defined, over the course of 4 years, from 2019 to 2022, inclusive. Beginning January 1, 2022, the bill would require any work performed by a person, employed in an agricultural occupation, in excess of 12 hours in one day to be compensated at the rate of no less than twice the employee's regular rate of pay. The bill would provide employers who employ 25 or fewer employees an additional 3 years to comply with the phasing in of these overtime requirements.⁸

The hours worked per day or per week before farmworkers are eligible for overtime pay, i.e. at a rate of one and one-half times the employee's regular rate of pay, is phasing-in according to the schedule shown in **Figure B**, which comes from the Labor Commissioner's Office in the California Department of Industrial relations.

⁸ AB-1066, [Agricultural workers: wages, hours, and working conditions](#) (2015-2016). From California Legislative Information website.

FIGURE B

Overtime for California farmworkers on farms with 26 or more employees was phased-in between 2019 and 2022

Smaller farms phased-in between 2022 and 2025

Schedule for Changes to Daily and Weekly Hours After Which Agricultural Workers Receive Overtime Pay		
Effective date for employers with 26 or more employees:	Effective date for employers with 25 or fewer employees	Overtime (1.5x regular rate of pay) required after the following hours per day / hours per workweek:
Jan. 1, 2019	Jan. 1, 2022	9.5 / 55
Jan. 1, 2020	Jan. 1, 2023	9 / 50
Jan. 1, 2021	Jan. 1, 2024	8.5 / 45
Jan. 1, 2022*	Jan. 1, 2025*	8 / 40

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

For pre-existing overtime requirements for agricultural workers, including on the 7th day of work in a workweek, please see [Wage Order 14](#).

Notes: The image in this figure is a copy of the original, created by the California Department of Industrial Relations (see Source).

Source: Labor Commissioner's Office, "Overtime for Agricultural Workers," California Department of Industrial Relations, January 2022.

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For nearly three years, farmworkers employed on farms with 26 or more employees in California have been entitled to overtime pay. On January 1, 2022, those workers became entitled to overtime pay on par with the overtime threshold in other industries, after 8 hours per day or 40 per week. In addition, as shown in Figure B, on that date, those same farmworkers who work more than 12 hours in one day must be paid twice the amount of their regular rate of pay.

The phase-in period for farm employers with 25 or fewer employees began on January 1, 2022, and now requires those employers to pay time and a half overtime to farmworkers who work more than 9.5 hours in a day or 55 hours in a week.

Due to gaps in available public data, it is impossible to know the share of employers in California who are now required to pay the full overtime rate of 8 hours per day or 40 hours per week. Data from the Quarterly Census of Employment and Wages (QCEW) from the Bureau of Labor Statistics, as well as the Farm Labor Survey (FLS) from the U.S. Department of Agriculture (USDA), provide statistics on the number of agricultural establishments by number of employees, but only at the national level. The Census of Agriculture (COA) from 2017 is somewhat outdated now, but nevertheless contains one table listing the number of farms by number of hired workers. However, the largest denomination of workers in the COA data is 10, making it impossible to know how many farms hire 25 or fewer workers or 26 or more workers, the employee threshold set in the AB 1066.⁹

National-level data from the FLS and QCEW suggest that anywhere between one-third and half of farms in the United States employ 26 or more workers.¹⁰ If we apply those shares to California, and assume that one-third to one-half of California’s farms employ 26 or more workers, that means that somewhere between 5,600 to 8,500 of California’s roughly 17,000 farms¹¹ have been required to pay overtime since 2019 and are now paying their employees time and a half after they have worked 8 hours per day or 40 hours per week.

California’s farm economy and labor market indicators have held steady since implementation of the state requirement that farmworkers be paid overtime

While there is limited available evidence regarding the impact of overtime pay in agriculture, basic data on the agricultural economy in the nation’s biggest and most important farm state—California—strongly suggests that overtime pay for farmworkers has not corresponded with any negative impacts or shocks to the California farm economy or labor market. This section discusses three key indicators.

1. Average hours worked by farmworkers in California have remained constant during the overtime phase-in period

The U.S. Department of Agriculture’s (USDA) Farm Labor Survey (FLS)¹² provides an important source of information on wages paid to U.S. farmworkers and hours worked by them. Data published by USDA on the average of hours worked per week by farmworkers on California farms—before and after enactment and implementation of the AB 1066 farmworker overtime

⁹ National Agricultural Statistics Service, “[Table 7. Hired Farm Labor – Workers and Payroll: 2017](#)” (listed by U.S. state), in *2017 Census of Agriculture*, U.S. Department of Agriculture.

¹⁰ See Tables 1 and 2 in Daniel Costa and Philip Martin, “[Nine in 10 farmworkers could be covered by the paid leave provisions of the Families First Coronavirus Response Act—but not if smaller employers are exempted.](#)” Working Economics blog (Economic Policy Institute), citing QCEW and Farm Labor Survey data.

¹¹ For the number of agricultural establishments in California, see Table 3 in this testimony.

¹² National Agricultural Statistics Service, *Farm Labor survey reports*, U.S. Department of Agriculture (various quarters).

law—shows that the number of hours worked remained relatively constant, dropping on average by less than one hour.

Table 1 shows that between 2014 and 2018, the five years preceding the overtime phase-in period mandated by AB 1066, California’s farmworkers worked an average of 42.8 hours per week. In the three years that AB 1066’s overtime provisions have been in effect, farmworkers worked an average of 41.9 hours per week, less than one hour difference from the preceding five years.

Thus, in the five years before AB 1066’s phased-in overtime provisions went into effect, as well as during the three years of 2019 to 2021, when the phased-in overtime law was in effect, hours worked have remained relatively steady, suggesting that California’s overtime pay requirement has not correlated with a drastic change in the number of hours worked by California’s farmworkers.

TABLE 1

USDA survey data shows average weekly work hours for California farmworkers remained relatively constant after implementation of state overtime law

Year	Hours worked per week
2014	42.8
2015	42.7
2016	43.3
2017	42.8
2018	42.6
2019	43.1
2020	41.5
2020	41.5
2021	41.3
Average hours worked per week, 2014-18	42.8
Average hours worked per week, 2019-21	41.9

Source: National Agricultural Statistics Service, "Annual Average Number of Hired Workers, Gross Wage, and Base Hours Worked – Regions and United States," *Farm Labor survey reports*, reports from years 2014-2020.

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A caveat about the USDA data is that the averages reported for hours worked do not provide enough context about the wide variation in hours worked by farmworkers, in terms of individual crops or commodities, and especially during peak harvest times. In addition, the USDA data also exclude workers employed by farm labor contractors and other crop support businesses that bring workers to farms. But the consistency in the average hours worked at least provides a baseline of information showing that there have been no major shifts in terms of average weekly hours worked in California.

2. Total wages paid by agricultural employers to farmworkers in California increased more slowly after passage of California's agricultural overtime law

Data from QCEW from the Bureau of Labor Statistics shows that in California—contrary to what agribusiness representatives may claim will happen in Oregon—total wages paid by employers have not increased at a rapid or extraordinary rate since the implementation of the phased-in overtime law in California. In fact, the total amount of wages paid by agricultural employers has grown at a slower rate in nominal terms than in the immediately preceding years. **Table 2** below shows the total wages paid by private agricultural employers in California under the North American Industry Classification System (NAICS) code 11 for Agriculture, between 2014 and 2020.

TABLE 2

Total wages paid by agricultural employers in California grew more slowly after state overtime law implemented

Total wages paid by agricultural employers in California (in thousands), 2014-20

Year	Annual wages
2014	\$11,944,321
2015	\$12,757,819
2016	\$13,699,376
2017	\$14,043,817
2018	\$14,611,339
2019	\$15,326,536
2020	\$16,046,490
<i>Average annual increase in total wages paid, 2014-18</i>	
	5.5%
<i>Average annual increase in total wages paid, 2018-20</i>	
	4.9%

Note: All values in nominal terms.

Source: Quarterly Census of Employment and Wages, Total Wages (in thousands) in Private NAICS 11 Agriculture, forestry, fishing and hunting for All establishment sizes in California -- Statewide, NSA. Series ID: ENU0600030511.

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According to QCEW data, in the five years leading up to beginning of the overtime phase-in period required by AB 1066 (2014-18), total wages paid increased in nominal terms by an average of 5.5% per year. When considering the year immediately before AB 1066's overtime provisions went into effect (2018) through the second full year of AB 1066's overtime phase-in (2020), wages increased on average by 4.9%.

3. The number of agricultural establishments in California remained constant after AB 1066's overtime provisions took effect

According to QCEW data, the number of agricultural establishments in California has remained constant over the past decade. Agribusiness representatives may claim that agricultural establishments in Oregon will be forced to close or will decide to move their operations to other U.S. states because of higher labor costs associated with farmworkers being entitled to overtime pay. But in California, this has not been the case: enactment of AB 1066 and the overtime phase in period which began in 2019 has not correlated with a decline in agricultural establishments.

Table 3 shows that the number of agricultural establishments in 2020 was 16,840, which is 168 more establishments than in 2011. The number of agricultural establishments in 2018—the year before AB 1066’s overtime provisions took effect—was 16,812. In 2020, after the second year of AB 1066’s overtime phase-in, the number of agricultural establishments in California had *increased* to 16,840, an increase of 28 establishments. While there was a small drop in the number of establishments between 2019 and 2020, of 26 establishments, preliminary data from the QCEW also show that in the second quarter of 2021, the number of agricultural establishments in California increased by a few hundred, and stood at 17,088.¹³

TABLE 3

Number of agricultural establishments in California held steady since passage and implementation of state overtime law

Year	Number of agricultural establishments
2011	16,672
2012	16,516
2013	16,500
2014	16,610
2015	16,408
2016	16,150
2017	16,252
2018	16,812
2019	16,866
2020	16,840
2021 (Q2)	17,088

Note: Annual average as reported by QCEW. Data for 2021 are preliminary and only for the second quarter of 2022 (Q2).

Source: [Quarterly Census of Employment and Wages](#), Number of Establishments in Private NAICS 11 Agriculture, forestry, fishing and hunting for All establishment sizes in California -- Statewide, NSA. Series ID: ENU0600020511.

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¹³ [Quarterly Census of Employment and Wages](#), Number of Establishments in Private NAICS 11 Agriculture, forestry, fishing and hunting for All establishment sizes in California -- Statewide, NSA. Series ID: ENU0600020511. Data cited in text for 2021 are preliminary and only for the second quarter of 2022 (Q2).

Conclusion: Oregon should provide equal rights to farmworkers by making them eligible for overtime pay after 40 hours per week

The historical injustices that have intentionally excluded farmworkers from basic worker protections and prevented them from being treated and paid fairly—on par with workers in other industries—is a stain on America’s history, one that continues to endure despite mountains of evidence proving that they are unjustified and irrational. The Oregon legislature has an opportunity to right this wrong, by passing legislation that will make farmworkers eligible for overtime pay after 40 hours per week. I urge the legislature to pass a law adopting a 40 hour threshold.

Thank you for your consideration,

A handwritten signature in black ink, appearing to read 'Dan Costa', with a long horizontal flourish extending to the right.

Daniel Costa, Esq.
Director of Immigration Law and Policy Research
Economic Policy Institute