

Pay: Small growers may be safer from class-action lawsuits

Continued from Page 1

with no notice. It’s disruptive and creates uncertainty and additional stress,” said Jon DeVaney, president of the Washington State Tree Fruit Association.

“I think it would be best for the industry and our employees to continue to be able to use piece rate because we get a high level of productivity and employees are able to earn a higher wage,” said Sean Gilbert, co-owner of Gilbert Orchards in Yakima.

Last year, his pickers on piece-rate averaged the equivalent of \$18 to \$19 per hour, he said. That’s significantly more than the \$11.50 per hour state minimum wage in effect then or the \$14.12 per hour minimum wage that was required for foreign guestworkers.

Court rulings

In 2015, the state Supreme Court ruled that piece-rate farmworkers are entitled to separate pay for 10-minute rest breaks.

In the subsequent Carranza v. Dovex ruling last May, the court said that piece-rate farmworkers must also be paid separately and at least at the state’s minimum wage for time on the job when they’re not picking fruit because of weather delays, training, meetings and travel between orchards. It’s generally referred to as down time or non-productive time.

The 5-4 court majority ruled that not paying workers separately for down time conceals not paying them for all the hours they work and violates the state’s minimum wage law. The court left open the question of whether down time such as climbing up and down ladders and emptying picking bags into bins was included.

Justice Debra Stephens, one of the court’s four dissenters, said the majority disregarded that piece-rate pay is calibrated to include down time. She argued the court was rewriting the minimum wage law.

Brendan Monahan, a Yakima attorney versed in tree fruit and labor litigation, said the court made an “unforced error” by prohibiting work-week averaging, the practice of adjusting a worker’s hourly and piece-rate wages in a week to ensure the worker receives at least the minimum wage.

The court ruled piece-rate workers must receive at least the minimum wage for each hour worked and that averaging is no longer permissible. That, Monahan said, is at odds with industry practice, federal law and state Department of Labor & Industries guidance.

“The uncertainty is that the court did not say what is down time. Is it five minutes or 10 minutes or 15 minutes? And the court didn’t



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Roberto Castillo, right, and another worker use pole saws to prune the tops of cherry trees at Griggs Orchards, Orondo, Wash., on Dec. 31. They were being paid \$14.12 per hour and like piece rate when picking fruit because it usually equates to more money per hour.

say what all types of things are included. Therefore it’s too hard to calculate,” said Dan Fazio, executive director of the farm labor association WAFLA.

Since the ruling, more than 50 companies have been sued in class action suits, most of them brought by a Tacoma attorney, India Lin Bodien, who has advertised for and solicited workers willing to sue, Fazio said.

Lin Bodien did not respond to requests for comment, but her website states that “since starting her law firm in 2013, India has represented over 35,000 workers in Washington state in class action wage and hour cases....”

Monahan said he’s aware of more than 20 such lawsuits but would not say how many he is helping growers defend against.

“Every one of these are potential million-dollar-plus lawsuits. The defendant must pay all the legal bills for the plaintiff and that’s why they settle so quickly,” Fazio said.

Most growers don’t have the depth of records to prove how much time piece-rate workers spent in non-picking tasks going back three years, so it’s “far more economical to negotiate the best settlement you can,” Fazio said.

The settlements are costly. For example, Stemilt Ag Services, a subsidiary of Stemilt Growers LLC in Wenatchee, reached a \$464,000 settlement in a class action suit a year ago over back pay for the rest breaks of piece-rate workers. Stemilt Growers also is the parent company of Dovex Fruit Co.

Recommendations

WAFLA facilitated the hiring of 13,848 H-2A-visa foreign guestworkers out of the 24,862 that worked in Washington last year. Like domestic workers, most H-2A workers are paid piece

rate for picking, thinning and sometimes pruning and an hourly minimum for tree training and other chores.

Since watching piece rate come under attack in California in 2013, Fazio has been recommending growers switch to the state or H-2A hourly minimum with bonuses for certain amounts of fruit picked.

He also recommends growers require workers to sign arbitration agreements as a condition of employment. The agreements allow individual arbitration but bar class-action lawsuits.

Most employers are implementing arbitration agreements with new hires but it’s tricky to do it with current employees, Fazio said.

The “vast majority” of growers continue to use piece rate because it costs them less for the volume of fruit picked than the hourly minimum wage, he said.

Small growers with fewer than 40 employees are probably safer from class-action lawsuits than larger employers, Fazio said.

One grower, Monahan said, has switched to “super-premium” hourly rates of \$18 to \$20 with strict enforcement of minimum production levels.

All of the various pay methods carry their own risks, he said.

Not all settle

Gilbert and many other growers were sued the day after the May 10 Carranza v. Dovex ruling, which he said seemed to be orchestrated. While many growers settled quickly, Gilbert has not.

“Most of the things we were sued on did not pertain to us. Meaning we were already doing the things they were alleging we weren’t doing,” Gilbert said. “Things like education and training we had already been paying

for and continue to do so. It’s an ongoing suit. We are leaning on our records and policies.”

Gilbert Orchards has about 800 year-round employees, and the number peaks at 1,100 with seasonal workers added during Gala and Honeycrisp harvest, he said.

“Our cost per unit, lug in cherries or bin in apples, is lower when we do piece rate. It increases the productivity per person,” Gilbert said. “Most growers would like to continue using piece rate. All we need is clarity on what is meant by non-productive time.”

The court ruling is vague enough that the legal basis for the lawsuits is not clear, DeVaney said. Because of that the burden is on the plaintiffs, and many settlements are being reached for smaller amounts than are being sought, he said.

“If you have a clearly defined internal policy on how you compensate for non-production time, then your legal risk is significantly reduced even in the absence of a clearly defined definition by the court,” DeVaney said.

The main options for growers, he said, are to continue using piece rate with clear policy and documentation of pay for non-production or to switch to hourly pay or to hourly with a bonus. Most are trying to stay with piece rate, he said.

In California, non-productive time was more clearly defined in law, DeVaney said.

Two years ago, he discussed seeking legislative clarification of non-productive time but dropped it when farmworker advocates resisted.

“I think there will be more discussion,” he said. “When we are in a strong labor market there is upward pressure



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