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Opinion

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Our View

These bills would launch litigation Armageddon

Democrats in Oregon and Washington are proposing legislation that would allow workers and other private parties to sue employers in the name of the state for wage and safety violations.

Stand clear, if these measures pass, lest you be run down by the trial bar rushing to the courthouse.

Such actions, known as *qui tam* complaints, have a long history stretching back to English common law. *Qui tam* is shorthand for a much longer Latin phrase that translates to “he who sues in this matter for the king as well as for himself.”

In a *qui tam* suit, a private party sues on behalf of the government in exchange for a share of any settlement.

In the United States the concept dates to the Civil War, at time when fraud was common but government oversight was not. That led to the False Claims Act, which encouraged individuals with knowledge of fraud on the part of government contractors to take the matter to court.

The False Claims Act attempted to check rampant corruption at a time when there wasn’t an extensive network of government investigators and prosecutors. The backers of these bills suggest that neither of their respective states maintain a robust regulatory enforcement apparatus.

“Passing these laws is important. And it’s even more important to make sure they’re enforced. Our state agencies do work hard and their staff are extremely dedicated, but they

cannot be everywhere at once,” Rep. Barbara Smith-Warner, a Portland Democrat, said.

They are not everywhere, but they are responsive to complaints filed by aggrieved workers.

A key component to both House Bill 2005 in Oregon and House Bill 1076 in Washington are provisions that would cut the state in on any money recovered in the case.

That would prove a boon to state coffers without any effort or expense on the part of regulators — a “positive” outcome, according to one of the Oregon measure’s supporters. It would also be a boon to the trial bar, which would be incentivized to file even marginal cases in the hopes the potential expense of protracted litigation would prove more expen-

sive to defendants than paying out settlements.

Are these bills about winning justice for injured workers or deputizing private parties to use the courts to extort payments from employers? Two birds with one stone, or one outcome being the accidental outcome of the other?

We agree with Washington State Dairy Federation labor analyst Scott Dillely that this is a “categorically bad idea.”

“We already have agencies and regulations and processes set up for investigations and enforcement,” he said.

These bills would lead to litigation Armageddon, and make the business climate in Oregon and Washington even worse than it is now.

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The Oregon State Capitol.

Oregon Capital Insider

Employment Department covers its backside

When Gov. Kate Brown took office in 2015 amid the scandals that brought down her predecessor, John Kitzhaber, she promised that her administration would be transparent.

The definition of transparency has been squishy ever since. So, we weren’t surprised last week when the acting director of the Oregon Employment Department declined to tell reporters how much the state has paid out in fraudulent claims during the pandemic.

David Gerstenfeld said putting a number on it could trigger a wave of attempted thefts that could

drain the state’s unemployment funds.

That horse is out of the barn. The U.S. Justice Department estimates criminals using stolen personal information have made off with \$63 billion nationwide since March. An audit in Washington state found \$600 million was lost to fraud in the Evergreen State.

Putting a figure on Oregon’s losses would likely only trigger justifiable outrage for thousands of unemployed Oregonians who waited months for benefit checks while the department allegedly vetted their claims.

CYA — the abbreviation for keeping embarrassing information secret.

Ag is fighting for survival in Washington state

Some moments lend themselves to hyperbole. That amazing fishing trip from seven years ago; the winning free throw at a high school basketball game; the marriage proposal when time stood still.

Or 2020, when Washington agriculture was fighting for its life after a court ruling forced the dairy sector to begin paying time-and-a-half and left the specter of retroactive pay lingering in the background like an unwanted flu just before vacation.

In our state, we are waging a war about how best to determine what “just” compensation looks like in the wake of the *Martinez-Cuevas v. DeRuyter Brothers Dairy* court decision of November 2020. The dairy sector has its answer from the courts: dairy producers must pay time-and-a-half for any hours worked after 40. The rest of the agricultural community will have to wait and see what comes of the legislative session to determine how to move forward on the question of what constitutes a “work-week” in agriculture.

The ruling, however, left open the possibility of payment of more wages for past work. To be clear, the plaintiffs in the case were paid in full for their work. Any “back pay” would be applying the current law — time-and-a-half rules — to work done in the past. Specifically, it would be imposing a retroactive punishment against the DeRuyter Brothers Dairy for following the law at the time.

A bill in Olympia, SSB 5172, would make farmers pay again for work done three years ago, with 12% annual interest added on as a punishment. Any funds that could not be distributed to former employees by employers would be placed in an escrow account for six years while the Washington State Department of Labor and Industries attempted to locate the individuals involved in the claims. This is not a fix.

The original language of SSB 5172 — “the legislature intends to limit the retroactive effect of court decisions concerning overtime wage claims by delineating factors that establish inequitable results. When considering whether to award retroactive pay in a cause of action seeking overtime pay ... the court is prohibited from making such an award when the award would create a substantially inequitable result” — acted as a pro-

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protective mechanism for all overtime exempt employers; effectively banning lawsuits seeking retroactive payments. That is a fix. A fix for all overtime exempt employers, not just agricultural employers, because it wouldn’t punish employers for following the law.

As lawsuits pile up — more than 30 at last count — the rest of the agricultural community must entertain the very real possibility of paying time-and-a-half just as the dairy sector is doing now.

The prospect of retroactive pay creates an urgent existential crisis for the dairy sector in Washington state. Conservative estimates for the economic effect on the industry suggest it would cost our dairy producers \$120 million should nothing be done to stop this egregious injustice.

There is no more symbiotic relationship than the one between agricultural employers and their employees. It is based upon both parties working in harmony. Without farmworkers, farms would cease to be the cost-effective, efficient marvels they are in today’s economy. Without farms, farmworkers would cease to find themselves with reliable work at wages well above the state’s minimum wage.

Odd-numbered years are 105-day legislative marathons in Washington state. The long session is the saving grace for agriculture this time around. There is still time to negotiate, still time to make our voices and stories heard.

It is not the natural habit of farmers to discuss their business with the public. That is, in part, what got us into this mess in the first place. But it is absolutely essential that we put our habits aside and fight for our employees and our businesses by telling the truth about what we do.

Farmers and ranchers and their employees are a family, a community, and in this moment, when we need each other the most, we must make our voices heard and tell our individual and collective stories to anyone who will listen.

Pam Lewison is a fourth-generation farmer in Eastern Washington and the ag research director for the Washington Policy Center. You can read more of her work and more about SSB 5172 at washington-policy.org.

Cultivating a farm state of mind about mental health

For farmers and ranchers, stress is a way of life. We depend on many factors that are out of our control, like weather, commodity prices, availability of labor, trade markets, and a lot more. With the impacts of the COVID-19 pandemic, our stress levels have gone even higher and in many cases are reaching the breaking point.

A new survey from the American Farm Bureau found that more than half of rural adults and farmers/farmworkers say they are personally experiencing more mental health challenges than they were a year ago. Two in three farmers/farmworkers say the COVID-19 pandemic has impacted their mental health, and two in three have experienced feeling nervous, anxious, or on edge during the pandemic.

The percentage of farmers/farmworkers who say social isolation impacts farmers’ mental health increased 22% since April 2019, a significant finding given the long hours many farmers work alone.

This should be a wake-up call for everyone in the agriculture community, and we should all be

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doing our part to help.

As part of Agricultural Safety Awareness Week (Feb. 28-March 6), Oregon Farm Bureau encourages everyone to learn to recognize the warning signs of chronic stress, engage in conversations, and lend a helping hand.

When loved ones, neighbors, or others we care about are experiencing mental health challenges, they may not even realize it, so it’s important to look for signs that they may be at risk. These include things like changes in routines or social activities, decline in appearance of the farm or the care of domestic animals, increase in farm accidents, increase in illnesses or other chronic conditions, or decreased interest in activities or events.

If you see any of these signs, it’s time to show you care.

It may feel like it’s out of your comfort zone, but there are sim-

ple ways to start a conversation. Remind them of something they’ve said about what’s concerning them, and express interest.

Acknowledge what they’re going through. Share a habit you’ve seen change. And if you’re concerned, don’t wait for them to ask for help. Offer to help connect them to the many resources that are available for support.

What matters most is showing genuine care and empathy, and listening.

It’s time we all took a stand to help those around us who may be experiencing the effects of chronic stress. Visit the Farm State of Mind website at farmstateofmind.org for more information about the warning signs of stress, tips for helping someone in emotional pain, ways to start a conversation, crisis hotlines, treatment locators, and additional resources for managing stress, anxiety or depression.

If we all do our part to help, we can strengthen our rural and farming communities and shine a ray of hope on those we care about.

Cory Stengel chairs the Oregon Farm Bureau Health and Safety Committee.