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EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
DEPARTMENT OF LABOR STANDARDS

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To Interested Parties:

The Supreme Judicial Court recently held that a group of workers at a mostly automated hydroponic bean sprout grower, harvester, packager, and distributor were entitled to overtime pay where they "cleaned, inspected, sorted, weighed, and packaged . . . bean sprouts [and]. . . cleaned the facility and discarded waste" for as many as seventy hours a week. *Arias-Villano v. Chang & Sons Enterprises, Inc.,* 481 Mass. 625, 626 (2019). The case centered on the definition of "agriculture and farming", as such activities would not be subject to overtime under MGL c. 151, section 1A nor basic minimum wage under MGL c. 151, section 1.[1] In narrowly interpreting the definition of "agricultural and farm work" found at MGL c. 151, section 2, the Court determined that Massachusetts' agriculture and farming exemption is different and narrower than a similar overtime exemption under the federal Fair Labor Standards Act (FLSA). Specifically, under *Chang & Sons*, Massachusetts law exempts planting, growing, and harvesting from overtime but it does not exempt post-harvesting activities such as cleaning, inspecting, sorting, weighing, packaging, cleaning a facility, and discarding waste.

In this letter the Department of Labor Standards (DLS) attempts to make clearer the line between harvesting and post-harvesting activities, and to answer the question Chief Justice Gants posed to plaintiffs' counsel at oral argument in *Chang & Sons*: "What is the overtime obligation of a farmer to a farm-worker who has performed half of his weekly hours growing and harvesting and the other half performing post harvesting activities?"

After hearing from farmers, employees of farms, attorneys, and a variety of advocates, and after conducting much outreach including two public hearings on the matter, DLS has been forced to the realization that although some clear distinctions exist, in many instances it is impossible to draw a bright line between "harvesting" and "post-harvesting." As President Dwight Eisenhower remarked in an address at Bradley University in September 1956, "Farming looks mighty easy when your plow is a pencil and you're a thousand miles from the corn field." From the extensive information DLS collected, it appears that no two farms operate alike. As one farmer explained to us, "The more you learn about farming on one farm, the more you learn about one farm."

[1] *In 1967, a separate sub-basic-minimum-wage rate was established for agriculture and farming, which until that time were not subject to any minimum hourly-rate.*

Mindful that the SJC in the *Chang & Sons* decision has set certain parameters for the definition of "agricultural and farm work" in MGL c. 151, section 2, and understanding our obligation to conform this opinion letter to that decision, it seems clear that overtime-exempted activities include plowing, tilling, fertilizing, irrigating, sowing, planting, germinating, growing, picking, and harvesting. And, although the court in *Chang & Sons* left unanswered the question of how that definition applies to agricultural operations that do not involve crops, DLS recognizes that the plain meaning of "agriculture" includes the keeping and raising of livestock and other activities. Thus, activities like grazing, feeding, milking, inseminating, breeding, hatching, clipping, and shoeing done on a farm would also be exempted agricultural activities. Post-harvesting activities such as sorting, cleaning, packaging and shipping are not exempt from either basic minimum wage under MGL c. 151, section 1, or overtime under MGL c. 151, section 1A. The *Chang & Sons* decision has also made it clear that activities not directly associated with growing and harvesting are not exempt simply because they are 'labor on a farm". For example, under the logic of the SJC's decision, activities such as building a barn, painting a horse stall, working on a loading dock, and loading boxes onto a truck all require minimum wage and overtime if applicable.

Massachusetts law has always distinguished between "agriculture and farm work" and "occupations". In this way the law recognizes the gamble farmers take to produce the food and other products we all need. Until product reaches the market, a farmer earns nothing on his or her investment of time, technology, labor, and money. "Farming" encompasses multiple steps and processes and the failure or even delay of any step or process along the way will result in the total loss of the commodity. Even if everything is done perfectly, Mother Nature can still be a spoiler. After the land is tilled, the tractor is fixed, the seeds are sewn, fertilizer and pesticides are applied, irrigation lines are plumbed, water is pumped, runoff is collected, animals are raised, housed and cared for, livestock is fed and there are no droughts, floods, freezes, or heat spells, then, at just the precise time, all the products of the farmers efforts must be harvested, collected, cleaned, sorted, packaged, and sent to market quickly before it spoils.

Precisely because farmers' bounties are perishable and their work-schedules sporadic, the legislature has historically treated farming differently from "occupations" as defined in MGL c. 151, section 2. As Justice Budd astutely pointed out in her *Chang & Sons* decision, "When originally enacted in 1947, the minimum wage statute was explicitly inapplicable to 'domestic service in the home of the employer or <u>labor on a farm</u>' (emphasis added). See St. 1947, c. 432. The overtime statute, which was enacted in 1960 and worked in tandem with the minimum wage statute, similarly excluded farm labor.[6] See St. 1960, c. 813; G. L. c. 151, §§ 1A, 2, as amended through St. 1959, c. 190 … . Both the minimum wage and overtime requirements applied to those employed only in an 'occupation,' which the Legislature had defined in 1947 to exclude 'labor on a farm'. See St. 1947, c. 432. See also St. 1960, c. 813." *Chang & Sons, supra,* at 629 and FN 6.

As expressly provided in MGL c. 151, section 2, and as clarified in *Chang & Sons,* "agricultural and farm work" is not subject to basic minimum wage or overtime even today, as those requirements are still limited to individuals employed in "occupations". *See* MGL c. 151, section 1 ("It is hereby declared to be against public policy for any employer to employ any person <u>in an occupation</u> in this commonwealth at an oppressive and unreasonable wage . . .")(emphasis

supplied) and section 1A ("no employer in the commonwealth shall employ any of his employees in an occupation, as defined in section two, for a work week longer than forty hours, unless such employee receives compensation for his employment in excess of forty hours at a rate not less than one and one half times [his] regular rate . . .")(emphasis supplied). It should be noted that the express exclusion of agricultural and farm work from the definition of "occupation" has survived every statutory amendment by the legislature since the inception of the minimum wage law. This includes the recent amendment to the definition of "occupation" on July 1, 2017. At that time, the law was amended to explicitly exclude "work by seasonal camp counselors and counselor trainees" from the definition of "occupation". Thus, since July 1, 2017 "seasonal camp counselors and counselor trainees" are also not subject to basic minimum or overtime. See MW-2018-01-23-18.

To answer Justice Gants' hypothetical question, which went unanswered at oral argument and in the *Chang & Sons* decision[2], we must first look to MGL c. 151, section 1A, as it provides the statutory requirement for overtime. As noted above, section 1A states in relevant part "Except as otherwise provided in this section, no employer in the commonwealth shall employ any of his employees in an occupation, as defined in section two, for a work week longer than forty hours, unless such employee receives compensation for his employment in excess of forty hours at a rate not less than one and one half times the regular rate at which he is employed." (Emphasis supplied.)

As recognized by the court in *Chang & Sons*, and reiterated above, the minimum fair wage law's applicable definition of "occupation" does not include "agricultural and farm work." *See* MGL c. 151, section 2. Rather, such work is addressed in a different section of the law that specifically addresses "agriculture and farming", MGL c. 151, section 2A. While section 2A provides for a minimum wage of $8.00 per hour for those employed in "agriculture and farming" and includes provisions regarding the fair value and appropriate allocation of room and board provided to them, it does not mention overtime. Thus, neither section 2A nor section 1A provide for agriculture and farming overtime.

An employer only triggers the obligation to pay overtime when he employs someone in an "occupation" for longer than forty hours in a work week. Thus, hours spent doing something that doesn't qualify as an "occupation" does not factor into the overtime calculation.

The Supreme Judicial Court instructs that "planting, growing and harvesting" fall within the definition of "agricultural and farm work". Consequently, activities such as these must be excluded from the count of hours that an employee was employed in an "occupation". The SJC has made it clear, on the other hand, that post-harvesting activities such as those the plaintiffs in *Chang & Sons* engaged in fall outside the MGL c. 151, section 2 definition of "agricultural and farm work". Therefore, hours engaged in those sorts of activities are hours engaged in an "occupation" and not exempted from overtime or basic minimum wage.

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[2] *Undoubtedly, the court did not answer its own question because none of the Plaintiffs in the case were involved in any planting, growing or harvesting for any part of the week and thus a determination was unnecessary to decide the case on the facts before it.*

Chief Justice Gants asked, "What is the overtime-obligation of a farmer to a farm-worker who has performed half of his weekly hours growing and harvesting and the other half performing post harvesting activities?" If in a particular week the hypothetical farm worker worked thirty hours growing and harvesting and thirty hours performing post-harvesting non-exempt activities, that farm worker would not be entitled to statutory overtime as he would have only performed thirty hours "in an occupation, as defined in section two" MGL c. 151, section 1A. As MGL c. 151, section 1A, does not impose an overtime burden on hours spent performing "agricultural and farm work", those hours must not be counted toward the weekly total for the purposes of determining overtime eligibility. If, however, a worker on a farm worked 60 hours and only ten of them were for "agricultural and farm work" as defined by the court, then fifty hours would be counted for overtime purposes and the employee would be entitled to ten hours of overtime. If an employee on a farm worked sixty hours in one week and none of his tasks that week qualified as "agricultural and farm work" as defined by the court in *Chang & Sons*, then the employee, having been employed in an "occupation" for all sixty hours, would be entitled to 20 hours of overtime. Put into a mathematical formula, the calculations are as follows:

Example	Total Hours Worked		Hours Performing Agricultural and Farm Work (i.e., Not In An "Occupation")		Hours For Overtime Purposes	Notes
1	60	-	30	=	30	No overtime due. Less than 40 hours in an occupation
2	60	-	10	=	50	50 hours in an occupation. Time and a half for 10 hours.
3 *Chang & Sons* Scenario	60	-	0	=	60	Time and a half for 20 hours. Worker performed no agricultural and farm work. All 60 hours in an occupation.

The above examples are not a "blended rate". That is a different situation and calculation. In any week where a worker is paid at different rates for varying tasks, an employer is obligated to keep accurate records delineating the time performed on each task and to pay one and one half times the "regular rate of pay" for all hours employed in an occupation. For example, a farmer and worker could agree on a pay structure whereby the worker would be paid $8.00 per hour for agricultural and farm work, $15.00 per hour for painting and $20.00 per hour for roofing the barn. If at the end of the week the worker spent 18 hours in the field growing and harvesting crops, 20 hours painting and 32 hours roofing then that worker would have 52 "occupational hours" and 18 "non-occupational hours", and would entitled to 12 hours of overtime at a blended rate. To calculate the regular rate of pay for the 52 occupational hours one would take the total

pay for those hours and divide it by 52. Thus, one would add $300 (20 hrs. painting at $15 per hour = $300) to $640 (32 hrs. roofing at $20 per hour = $640) and get the total occupational pay for the week, $940. The total occupational pay for the week would then be divided by the total occupational hours to obtain the regular rate of pay for overtime purposes of $18.08 ($940 divided by 52 hours = $18.08). In order to compensate the worker correctly, the farmer would then add the additional half time pay for the 12 overtime hours (12 hrs. X $9.04 = $108.48) onto the $940 straight time pay, plus the $144 agricultural and farm work pay (18 hrs. at $8.00 per hour = $144) for a total weekly amount of $1,192.48.

Example	Total Hours Worked		Hours Not In An Occupation		Hours For Overtime Purposes	Notes
4	70	-	18	=	52	12 hours over 40 in an occupation. Time and a half for 12 hours.

$144 Agricultural pay + $300 Painting + $640 Roofing + $108.48 OT pay =$1,192.48

I hope this information and this interpretation is helpful.

Sincerely,

Michael Flanagan, Director