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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 (March 15, 2019). The case centered on the question of whether or not the employees should be exempted from overtime pursuant to the overtime exemption found at MGL c. 151, § 1A (19), which provides that overtime is "not ...applicable to any employee who is employed...as a laborer engaged in agriculture and farming on a farm." In applying the exemption to the work the plaintiffs engaged in, the SJC held that the definition of "Agricultural and farm work" provided in MGL c. 151, § 2 is controlling, and that widely-understood definitions of "agriculture and farming" under the Fair Labor Standards Act (FLSA) or elsewhere in Massachusetts law must be ignored.

Under MGL c. 151, § 2, "Agricultural and farm work" is defined as "labor on a farm and the growing and harvesting of agricultural, floricultural and horticultural commodities." Thus, the decision in *Chang & Sons* hinged on whether the plaintiff's labor fell within or without the parameters of this definition. Finding the plaintiffs' work to be neither "growing" nor "harvesting," the Court ruled in favor of the plaintiffs' rights to overtime and ignored any analysis of whether their labor constituted "labor on a farm" under the FLSA, other Massachusetts statutes, or even section 2 itself. The final footnote of the *Chang & Sons* decision suggests that the first "and" in MGL c 151, § 2 is *conjunctive*, while according to the body of the court's decision and common sense, the second and third "ands" must be read as *disjunctive*.

The Department of Labor Standards is now struggling to give guidance and clarity to farmers. Prior to the decision in *Chang & Sons*, DLS would have interpreted the broad term "labor on a farm" to be consistent with the more precise language found at MGL c. 128, § 1A¹, MGL c. 111, § 1², MGL c. 61A, § 1 and the FLSA. That is, DLS believed

¹ "Farming" or "agriculture" shall include farming in all of its branches and the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural, aquacultural, floricultural or horticultural commodities, the growing and harvesting of forest products upon forest land,
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that “farming” or “agriculture” included all “labor on a farm” ...”incident to or in conjunction with ... farming operations, including preparations for market.” And, despite being relegated to a footnote, the SJC’s determination that “labor on a farm” is only exempt from overtime when it is associated with “growing and harvesting” has placed farmers and DLS in the nearly impossible position of guessing which farm chores the court would now consider “growing” or “harvesting”. After hearing from farmers and employees of farms, and conducting much outreach including two extensive public hearings, DLS has been forced to the realization that in the wake of the *Chang & Sons* decision, in many instances it is impossible to draw a bright line between “harvesting” and “post harvesting,” or exempt and non-exempt activities. Those distinctions are especially elusive when—unlike the *Chang & Sons* plaintiffs, who were not involved at all in any of that employer’s “growing operations”—a farm’s employees engage in a broad range of tasks, including some that are indisputably “growing” or “harvesting.” Furthermore, because the SJC declined to examine the overtime exemption except as it applies to the farming of crops, matters are further complicated by inquiries from dairy farmers, oyster farmers, those who raise livestock, etc. From the extensive information DLS collected, it appears that no two farms operate alike. As one farmer explained, “The more you learn about farming on one farm, the more you learn about one farm.” That complicates the *Chang & Sons* inquiry even more, as the order in which tasks are performed, and the amount of time spent on particular tasks, varies significantly from farm to farm and therefore further blurs the line between tasks that are clearly “growing and harvesting” and obviously “post-harvest activities.”

The agricultural overtime exemption 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 breakdown of any step or process along the way will result in the total loss of a crop. Even if everything done perfectly, Mother Nature can still be a spoiler. Even if everything necessary is done right and, on a crop farm for example, the land is tilled, the tractor is fixed, the seeds are sewn, fertilizer and pesticides are applied properly, irrigation lines are plumbed, water is pumped, runoff is collected, and there are no droughts, floods, freezes, or heat spells, then, at just the pre-

the raising of livestock including horses, the keeping of horses as a commercial enterprise, the keeping and raising of poultry, swine, cattle and other domesticated animals used for food purposes, bees, fur-bearing animals, and any forestry or lumbering operations, performed by a farmer, who is hereby defined as one engaged in agriculture or farming as herein defined, or on a farm as an incident to or in conjunction with such farming operations, including preparations for market, delivery to storage or to market or to carriers for transportation to market.

²“Farming” or “agriculture”, farming in all of its branches and cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural, aquacultural, floricultural or horticultural commodities, the growing and harvesting of forest products upon forest land, the raising of livestock including horses, the keeping of horses as a commercial enterprise, the keeping and raising of poultry, swine, cattle and other domesticated animals used for food purposes, bees, fur-bearing animals, and any practices, including any forestry or lumbering operations, performed by a farmer, who is hereby defined as one engaged in agricultural or farming as herein defined, or on a farm as an incident to or in conjunction with such farming operations, including preparations for market, delivery to storage or to market or to carriers for transportation to market.

cise time, all the produce must be harvested, cleaned, sorted, packaged, and sent to market quickly before it rots.

Precisely because farmers' bounties are perishable, and their work-schedule sporadic, the legislature included farming on the list of twenty occupations exempted from overtime by MGL c. 151, § 1A. In examining the list, there is a common thread between many of the exempted occupations; that is, like farming, many of the exempted occupations are seasonal, for example, (9) seasonal businesses open for not more than 120 days a year, (18) summer camps, (6) fisherman, (10) seamen, and (20) amusement parks that operate for not more than 150 days in a year. In exempting farmers from overtime, the Legislature recognized the seasonal nature of a farmer's business and the importance of getting products to market before they spoil, and was fashioned after the similar federal overtime exemption for farmers.

DLS believes that the court's foot-noted assertion relative to the meaning of the first "and" in MGL c. 151, § 2 was material to its finding, as without it, the court's analysis would have necessarily continued to a determination as to whether the *Chang & Sons* plaintiffs were performing exempted "labor on a farm". At oral argument, however, Chief Justice Gants posed an important question to plaintiffs' counsel: "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'"? Plaintiffs' counsel was unable to answer that query, and, likely because none of the plaintiffs in *Chang & Sons* were involved in any growing or harvesting activities, the Court did not address it in its final decision.

Justice Gants's question and its answer are essential to our determination. Unless the overtime exemption for "a laborer engaged in agriculture and farming on a farm" is to mean nothing, the time spent performing exempt activities such as growing and harvesting must be taken into consideration. A helpful analogy is found in the federal regulations that define and delimit other overtime exemptions, namely those for Executive, Administrative, Professional, Computer and Outside Sales employees. *See* 29 CFR 541.700. There, in situations where an employee performs both exempt and non-exempt work in the same week, the regulations apply a "primary duty" test. To qualify for an overtime exemption under the test, an employee's primary duty must be the performance of exempt work. That is, an employee's "principal, main, major or most important duty" must involve the performance of exempt work. *Id.* While factors such as the proportion of time spent performing exempt work and the relative importance of the exempt duties compared to the non-exempt duties are useful in making determinations, under 29 CFR 541.700(a) the major emphasis is on the "character of the employee's job as a whole."

For example, under the "primary duty" test a farm worker who primarily plants and grows during April through July, and then primarily harvests August through October would be considered exempt. The "character of the employee's job as a whole" is clearly centered on tasks that are exempt even under *Chang & Sons*: *i.e.*, planting, growing, and harvesting crops. Even if for extended periods of the year the worker performs post-

harvest activities, the worker's primary duties are planting, growing, and harvesting, and he/she would therefore be exempt from overtime.

Similarly, if a farm worker typically spent the bulk of the morning on planting, growing, and harvesting activities, and then spent the rest of the morning on post-harvest activities, followed by a similar schedule in the afternoon, this employee would be exempt since his/her "primary duties" are planting, growing and harvesting.

Lastly, a comparison test may be used to help determine an employee's entitlement to overtime. As time spent planting, growing, and harvesting on a farm is exempted from overtime under any definition of M.G.L. c 151, s. 1A(19), such time may be weighed against time spent on non-exempt chores. "Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement." 29 CFR 541.700(b). The tipping of the scale, although not conclusive, is generally a good indicator of whether an employee's primary duties would classify him or her as exempt or non-exempt. Employees who do not spend 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the principal, main, major, or most important duty that the employee performs supports such a conclusion. "Time alone, however, is not the sole test, and nothing in this section requires that exempt employees spend more than 50 percent of their time performing exempt work." *Id.* In all cases, employees whose primary duties fall within the statutory farmers' overtime exemption are fully exempt for all hours worked.

- Exempt employee example: an employee works 60 hours in a week. 40 hours are spent on planting, growing, and harvesting, and 20 hours are spent on post-harvest activities, like sorting, sizing, and cleaning. In the spring and fall, the employee performs all those post-harvest duties in the field. In the heat of summer, however, the employee sorts, sizes, and cleans crops in the middle of the day, in a barn or under a shelter. In both situations, the employee spends more than 50 percent of her time performing exempt work. The primary duty of this employee is to plant, grow and harvest; therefore she is fully exempt for all hours since her primary duty is overtime-exempt pursuant to M.G.L. c 151, s. 1A(19).
- Primary Duty exempt employee example: an employee on a cattle and dairy ranch whose primary duties include raising and caring for beef cattle and dairy cows spends the majority of his time one 60 hour week repairing and painting the dairy stalls. Under the primary duty test, we need not determine whether working on the stalls was exempt or non-exempt work because the employee's primary, usual and most important duty is raising and caring for the farm's cows. Thus, his primary duty would fall within the exemption for labors engaged in agriculture and farming on a farm and he would be exempted from overtime even if more than 50% of a certain week's activities were deemed to be beyond the scope of that exemption.
- Non-exempt employee example: an employee works 60 hours. 10 hours are spent on planting, growing and harvesting; and 50 hours are spent on post-harvest activ-

ities. Using the primary duty test this employee would be non-exempt since his/her primary duty is post-harvesting.

I hope this information and this interpretation is helpful.

Sincerely,

Michael Flanagan, Director