

2021

Martinez-Cuevas V. Deruyter Brothers and COVID-19: Is it Time to Re-examine Farmworker Labor Protections?

Margaret Todd
University of Maryland

Sarah Everhart
University of Maryland

Follow this and additional works at: <https://scholarworks.uark.edu/jflp>



Part of the [Agriculture Law Commons](#), [Food and Drug Law Commons](#), [Food Security Commons](#), [Health Law and Policy Commons](#), [Human Rights Law Commons](#), and the [Labor and Employment Law Commons](#)

Recommended Citation

Todd, M., & Everhart, S. (2021). Martinez-Cuevas V. Deruyter Brothers and COVID-19: Is it Time to Re-examine Farmworker Labor Protections?. *Journal of Food Law & Policy*, 17(1). Retrieved from <https://scholarworks.uark.edu/jflp/vol17/iss1/9>

This Article is brought to you for free and open access by ScholarWorks@UARK. It has been accepted for inclusion in *Journal of Food Law & Policy* by an authorized editor of ScholarWorks@UARK. For more information, please contact scholar@uark.edu.

***Martinez-Cuevas v. DeRuyter Brothers* and COVID-19: Is it Time to Re-examine Farmworker Labor Protections?**

Margaret Todd & Sarah Everhart*

I. Introduction

In the fall of 2020, in the midst of the COVID-19 global pandemic, a closely divided (5-4) Washington Supreme Court, in *Martinez-Cuevas v. DeRuyter Bros. Dairy Inc.*,¹ held that dairy workers, despite a state wage and hour law² specifically exempting agricultural workers, are entitled to overtime pay. The Court based its decision, in part, on the dangerous nature of the work performed by the dairy workers.³ Although the decision was specific to dairy workers in Washington, the majority of U.S. farmworkers are not entitled to overtime wages while working jobs that are generally considered dangerous and have been made more so during COVID-19.

The federal Fair Labor Standards Act (FLSA) was passed in 1938,⁴ originally as part of the New Deal,⁵ and established numerous worker protections such as guaranteed wages and restrictions on child labor. Since its enactment, the FLSA has exempted agricultural workers from many of the FLSA's wage and hour protections, including but not limited to, overtime pay.⁶ Subsequently, states either passed wage and hour statutory frameworks similar to the FLSA from which agricultural workers were exempted or allowed the FLSA to govern the treatment of agricultural workers.⁷ Currently, only seven states offer any overtime wage protections for agricultural workers, and of the five, only California provides farm workers overtime pay after eight hours of work a day, or forty hours a week.⁸

* Margaret Todd, Research Assistant and Sarah Everhart, Senior Research Associate and Legal Specialist, University of Maryland Francis K. Carey School of Law.

¹ *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*, 475 P.3d 164 (Wash. 2020).

² WASH. REV. CODE ANN. § 49.46.005 (2017).

³ *Martinez-Cuevas*, 475 P.3d at 172.

⁴ Fair Labor Standards Act of 1938, 29 U.S.C.A. §§ 201-219 (West 1998).

⁵ Autumn Canney, *Lost in a Loophole: The Fair Labor Standard Act's Exemption of Agricultural Workers from Overtime Compensation Protection*, 10 DRAKE J. AGRIC. L. 355, 356 (2005).

⁶ Fair Labor Standards Act of 1938, § 213(b)(12).

⁷ *State Minimum Wage Laws*, U.S. DEP'T OF LABOR WAGE & HOUR DIV., <https://www.dol.gov/agencies/whd/minimum-wage/state> (last visited Sept. 10, 2021).

⁸ Hourly agriculture employees in Minnesota must be paid overtime at the rate of time and a half the employee's regular rate of pay for all hours worked in excess of forty-eight hours in a workweek. MINN. STAT. ANN. § 177.25 (West 2021). Agricultural workers in Maryland and New York are entitled to overtime pay for each hour of work over sixty hours in a workweek. MD. CODE ANN., LAB. & EMPL. § 3-420(c) (West 2021); N.Y. LAB. LAW § 163-a (West 2021) (Farm Laborers). In Hawaii, farm owners may select up to twenty weeks each year for which they will not be required to pay overtime to an agricultural employee until he

Although the less than equal treatment of farmworkers is hardly a new development, COVID-19 has highlighted and exacerbated these inequalities. At the outset of the global pandemic, farm workers were among those classified as “essential,” and despite the health and safety risks they have continued to work and fulfill their vital role in the U.S. food system. The U.S. food system is reliant on a comparatively low-paid workforce that legally receives less protections than other workers, however, given the *Martinez-Cuevas* decision and the heightened scrutiny of workplace health and safety related to COVID-19, it may be time for a reexamination of the equity of agricultural exemptions to state and federal labor laws.

II. An Examination of *Martinez-Cuevas*.

The State of Washington adopted the agricultural exemptions in the FLSA when it passed its Minimum Wage Act (MWA) in 1959, which establishes minimum wage, overtime pay requirements, and other labor standards.⁹ *Martinez-Cuevas* began as a class action filed in late 2016 by class representatives, Jose Martinez-Cuevas and Patricia Aguilar, and their 300-plus fellow workers at DeRuyter Brothers Dairy in Outlet, Washington (Yakima County).¹⁰ The case originally involved several claims¹¹ but, after a partial settlement, the only question remaining was whether the agricultural overtime exemption in the MWA was unconstitutional, thereby entitling the dairy workers to overtime pay.

A. *Privileges and Immunities and Fundamental Rights*

Martinez-Cuevas and Aguilar argued the agricultural overtime exemption¹² violated article I, section 12 of the Washington State

or she has worked for forty-eight hours in a week. HAW. REV. STAT. ANN. § 387-3(e) (West 2021). California and Washington are phasing in overtime protections for agricultural workers. CAL. LABOR CODE §§ 857-864 (West 2021); WASH. REV. CODE ANN. § 49.46.130 (West 2021). Colorado is promulgating rules to provide meaningful overtime to agricultural workers. COLO. REV. STAT. ANN. § 8-6-120 (West 2021).

⁹ WASH. REV. CODE ANN. § 49.46 (2017).

¹⁰ Adriana Hernandez, *Washington Supreme Court Rules State’s Exclusion of Dairy Workers from Overtime Pay Is Unconstitutional*, COLUMBIA LEGAL (Nov. 5, 2020), <https://columbialegal.org/washington-supreme-court-rules-states-exclusion-of-dairy-workers-from-overtime-pay-is-unconstitutional/>.

¹¹ In their complaint, plaintiffs alleged that the dairy failed to pay minimum wage to dairy workers, did not provide adequate rest and meal breaks, failed to compensate pre- and post-shift duties, and failed to pay overtime. The parties settled all the claims except for the overtime claims and the constitutionality of the exemption. *Martinez-Cuevas*, 475 P.3d at 167.

¹² The exact provision challenged was WASH. REV. CODE § 49.46.130(2)(g)1.

Constitution because it granted a privilege or immunity to agricultural employers.¹³ Washington state's privileges and immunities clause¹⁴ says:

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

Washington precedent indicates the intent of this clause is "preventing favoritism and special treatment for a few to the disadvantage of others,"¹⁵ but only laws implicating fundamental rights of state citizenship can be challenged on this basis.¹⁶ The dairy workers argued the exemption in the MWA granted a privilege or immunity from article II, section 35 of the Washington state constitution, which directs the state legislature to "pass necessary laws for the protection of persons working in mines, factories and other employments dangerous to life or deleterious to health,"¹⁷ and establishes the fundamental right of all workers in dangerous industries to receive workplace health and safety protections.

The dangers of farm work have been well-studied. Agricultural workers routinely labor long hours under difficult conditions in an industry with one of the highest fatal work injury rates; more than double the rate for mining and related industries.¹⁸ The DeRuyter workers, specifically, milked close to 3,000 cows per shift, 24 hours a day, 7 days a week.¹⁹ They averaged nine-hour days and 216 hours per month.²⁰ The injury rate for Washington's dairy industry was 121 percent higher than all other state industries combined and 19 percent higher than the entire agricultural sector. Consistent with state data, the injury rate at the DeRuyter facility was approximately 11 percent,

¹³ *Martinez-Cuevas*, 475 P.3d at 174.

¹⁴ WASH. CONST. art. I, § 12.

¹⁵ *Martinez-Cuevas*, 475 P.3d at 168–71. Much of the *dicta* in the opinion goes to great length to explain the historical evolution of the privileges and immunities analysis and how it is not used in Washington to bring challenges based on racial disparity.

¹⁶ *Martinez-Cuevas*, 475 P.3d at 171.

¹⁷ The full provision states: "The legislature **shall** pass necessary laws for the protection of persons working in mines, factories and other employments dangerous to life or deleterious to health; and fix pains and penalties for the enforcement of the same." (emphasis added) WASH. CONST. art. II, § 35.

¹⁸ Including repetitive exposure to musculoskeletal strains and sprains, respiratory hazards, toxic chemicals, illness, and mortality psychological stresses, and a variety of zoonotic diseases. *Martinez-Cuevas*, 475 P.3d 175–76 (González, J., concurring) (referencing Eric Hansen, MD & Martin Donohoe, MD, *Health Issues of Migrant and Seasonal Farmworkers*, 14 J. HEALTH CARE FOR POOR & UNDERSERVED, 153, 155–57 (2003)).

¹⁹ Gabe Guarante, *Washington Supreme Court Decisions Grants Farmworkers Overtime Pay*, SEATTLE EATER (Nov. 5, 2020), <https://seattle.eater.com/2020/11/5/21551773/dairy-farm-workers-overtime-pay>.

²⁰ Petitioners' Opening Brief at 10, *Martinez-Cuevas*, 475 P.3d 164 (Apr. 15, 2019) (No. 96267-7), <https://www.courts.wa.gov/content/Briefs/A08/962677%20Pet's%20Brief.pdf>.

exceeding the injury rate for all industries in Washington.²¹ The DeRuyter Bros. notably did not dispute that the dairy industry is dangerous to the health of dairy workers.²²

B. Equal Protection of the Law

Martinez-Cuevas and Aguilar also challenged the agricultural exemption to the MWA, on equal protection grounds; in other words, they argued the exemption should be struck down because it authorized unequal treatment of similarly situated people “absent a sufficient reason to justify disparate treatment.”²³ Specifically, they argued the exemption, based on the FLSA, was rooted in and motivated by racial bias and that, despite the racially neutral language of the law, the exemption had a disparately negative impact on the Latinx individuals who made up nearly all of Washington’s dairy workers.²⁴ A majority of the media coverage on this case centered on the equal protection challenge. Leading up to the decision, numerous articles detailed the racist history of agricultural labor law exemptions and pondered the vast implication for the agricultural industry that could follow equal protection challenges to other states’ wage and hours laws with similar agricultural worker exemptions. The Supreme Court’s ruling, however, was ultimately decided on the privileges and immunities grounds, and the court’s majority declined to address the equal protection claim.²⁵

C. Washington Supreme Court’s Decision and Rationale

After the initial partial settlement, the parties filed cross motions for summary judgment with the Yakima County Superior Court. DeRuyter and intervenors, which included the Washington State Dairy Federation and Washington Farm Bureau,²⁶ argued the agricultural exemption to the MWA implicated no fundamental right and did not benefit one class over another or violate equal protection.²⁷ The trial court granted partial summary judgment to the dairy workers based on a violation of the privileges and immunities clause but cited a different fundamental right than that argued by the dairy workers, namely the deprivation of the fundamental right to work and earn a

²¹ *Id.* at 5.

²² *Martinez-Cuevas*, 475 P.3d at 172.

²³ *Martinez-Cuevas*, 475 P.3d at 175 (J. Gonzalez, concurring).

²⁴ Petitioners’ Opening Brief, *supra* note 20, at 32–34, 41.

²⁵ *Martinez-Cuevas*, 475 P.3d at 174 n.4.

²⁶ The Washington State Dairy Federation and the Washington Farm Bureau requested and were granted leave to intervene, so they became parties in the case defending against the farmworkers’ challenge. 475 P.3d at 168.

²⁷ *Martinez-Cuevas*, 475 P.3d at 168. Defendants also argued that the overtime exemption did not violate equal protection laws, which the court did not discuss since their decision was based on the privileges and immunities violation. *Id.*

wage.²⁸ After the partial ruling, the state Supreme Court granted discretionary review.

Challenges to a law based on the Washington state constitution privileges and immunities clause are subject to a two-part analysis, requiring the court to ask (1) whether a challenged law grants a “privilege” or “immunity” for purposes of the state constitution; and, if the answer is yes, (2) whether there is a “reasonable ground” for granting that privilege or immunity.²⁹

The court concluded that article II, section 35, and the provision’s imperative “shall,”³⁰ established a fundamental right to statutory protection for citizens working in extremely dangerous conditions.³¹ Under the reasonable ground prong of the privileges or immunities test, the court needed to make a legal determination by “scrutiniz[ing] the legislative distinction to determine whether it in fact serves the legislature’s stated goal.”³² There was, however, no evidence in the legislative history during the drafting and passing of the MWA supporting DeRuyter and the intervenors’ claims that the exemption was based on seasonality of agricultural work, citing the changes in weather, crop growth, and commodity market prices as ample reasons for the legislature to decide agricultural work is ill-suited to the 40-hour workweek and overtime pay.³³ The court went on to compare the seasonal characteristics of agricultural work with other industries, such as retail, that also experience surges in demand for workers, but are not exempt from overtime requirements. DeRuyter Dairy only employed two seasonal workers and the majority of employees worked year-round in “constant, factory-like work . . . unlike that of piece-rate seasonal workers.”³⁴

The clear purpose behind the MWA—to protect the health and safety of Washington workers through wage and hour protections—combined with the empirical evidence of the severe hazards the dairy workers face, and the lack of reasonable grounds in the legislative history to exclude agricultural workers from constitutionally guaranteed protection, led the court to conclude the overtime exemption was, on its face, an impermissible grant of

²⁸ *Id.* at 174.

²⁹ *Id.* at 171. Both the questions for the reasonable ground review are questions of law, which courts review *de novo*.

³⁰ The court specifically noted the imperative “shall” creating a duty, as opposed to a discretionary power.

³¹ *Martinez-Cuevas*, 475 P.3d at 171. The dissent argued that despite “shall” in article II, section 35, the legislature still only intended to create a discretionary power as evidenced by their intentional omission of agricultural workers from the definition of “employee” in the MWA. *Id.* at 184–84 (Stephens, C.J., dissenting).

³² *Martinez-Cuevas*, 475 P.3d at 173 (quoting *Schroeder v. Weighall*, 316 P.3d 482, 486 (Wash. 2014)).

³³ *Martinez-Cuevas*, 475 P.3d at 173.

³⁴ *Id.*

privilege to agricultural employers.³⁵ Although the court declined to address whether its decision applied retroactively, it could impact overtime pay for over 200,000 farm workers across Washington State.³⁶

The court in *Martinez-Cuevas* could have created powerful legal precedent had it found the state's overtime exemption was based in racial discrimination and failed to provide workers with equal protection of the law.³⁷ A decision of that type could have been utilized to challenge overtime exemptions in numerous other states with labor laws modeled on the FLSA.³⁸ By affirming the lower court's decision based on the Washington constitution's right for worker protection as applied to the dairy industry, the impact of the *Martinez-Cuevas* decision on the U.S. food system may have less value as precedent than some labor advocates had hoped.³⁹ The court's decision, however, based on the importance of protecting farm workers from dangers by providing them with overtime pay, has arguably more power in the time of COVID-19 when the threat of food system disruptions has caused a societal-wide consideration of food system working conditions.

III. COVID-19 Has Highlighted the Unequal Treatment of Farm Workers.

It is undeniable that farm labor is hazardous⁴⁰ and has been made more so by the COVID-19 pandemic. The impact of COVID-19 on farm workers is acknowledged in Justice Gonzalez's concurrence in *Martinez-Cuevas* in which he points out that "Today we face a global pandemic, and while many others stay home, farm workers continue to go to work because they are recognized as essential. But they go to work on unequal terms. They deserve better."⁴¹

³⁵ *Id.* at 174.

³⁶ Hernandez, *supra* note 10.

³⁷ Marina Multhaupt, *Martinez-Cuevas: Reckoning with Labor Laws' Racist Roots*, ONLABOR (Aug. 20, 2020), <https://www.onlabor.org/martinez-cuevas-reckoning-with-labor-laws-racist-roots/>.

³⁸ *Id.*

³⁹ Gene Johnson, *Washington Supreme Court: Farmworkers to Get Overtime Pay*, AP NEWS (Nov. 5, 2020), <https://apnews.com/article/washington-agriculture-d4d155379061da6798e1790342093ed4#:~:text=Maryland%20and%20Minnesota%20also%20offer,court%20brief%20in%20the%20case> ("The ruling could provide a template for extending overtime in other states, said Charlotte Garden, a Seattle University Law School professor who worked on a friend-of-the-court brief in the case. '(President) Trump's remake of the federal judiciary means that federal courts are likely to be hostile to workers for the foreseeable future,' she wrote in an instant message. 'That means that in many states, workers and their advocates are going to be looking to state courts to vindicate their rights. The law in this case is obviously WA-specific, but it could still inspire new litigation strategies both inside and outside WA.'").

⁴⁰ *Agricultural Safety*, U.S. CENTER FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/niosh/topics/aginjury/default.html> (last visited Sept. 10, 2021).

⁴¹ *Martinez-Cuevas*, 475 P.3d at 178 (Gonzalez, J., concurring).

In the early days of the pandemic in March of 2020, the United States Department of Homeland Security designated farm workers as essential workers. As essential workers, farmworkers continued their work, which meant, travelling to and from farms, working, and living in close quarters with other workers.⁴² In June of 2020, the United States Center for Disease Control (CDC) issued safety recommendations specific to farmworkers, however, the safety recommendations were not mandated by the Occupational Safety and Health Administration. As of October 2020, eleven states, including Washington, had issued required safety standards for farmworkers meant to prevent the spread of COVID-19.⁴³

Despite on-farm safety precautions, COVID-19 has significantly impacted farm and food system workers. The most publicized COVID-19-related impacts to the U.S. food system were those suffered by 42,805 workers in over 700 meatpacking and food processing plants.⁴⁴ The Food & Environment Reporting Network estimates that at least 91,717 farm workers have contracted the virus, with at least 466 deaths.⁴⁵ Another estimate from Purdue University indicates more than 936,000 agricultural workers have tested positive for COVID-19 nationwide.⁴⁶

⁴² Monica Ramirez & Meena Harris, *Farmworkers Deemed 'Essential' but Are Left Unprotected During Coronavirus Pandemic*, FORTUNE (Apr. 3, 2020, at 3:00 PM), <https://fortune.com/2020/04/03/farmworkers-coronavirus-essential-workers-covid-19-agriculture/>.

⁴³ See, e.g., Wash. Proclamation No. 20-57 (May 28, 2020), *Concerning the Health of Agricultural Workers*, https://www.governor.wa.gov/sites/default/files/proclamations/20-57%20-%20COVID-19%20Concerning%20Agr%20Workers%20Health%20%28tmp%29_0.pdf. See also Miriam Jordan, *Migrant Workers Restricted to Farms Under One Grower's Virus Lockdown*, N.Y. TIMES (Oct. 19, 2020), <https://www.nytimes.com/2020/10/19/us/coronavirus-tomato-migrant-farm-workers.html>.

⁴⁴ Stephen Joyce & Megan U. Boyanton, *Reeling Midwest Farmers Look for Lawmakers' Plan B as Aid Stalls*, BLOOMBERG GOVERNMENT (Sept. 16, 2020), <https://about.bgov.com/news/reeling-midwest-farmers-look-for-lawmakers-plan-b-as-aid-stalls/>.

⁴⁵ The FERN Covid-19 Mapping project concluded on September 2, 2021 after almost 500 days of data collection. Leah Douglas, *Mapping Covid-19 Outbreaks in the Food System*, FOOD & ENV'T REPORTING NETWORK (Apr. 22, 2020), <https://thefern.org/2020/04/mapping-covid-19-in-meat-and-food-processing-plants/>; Leah Douglas, *FERN's Covid-19 Mapping Project Concludes*, FOOD & ENV'T REPORTING NETWORK (Sept. 2, 2021), https://thefern.org/blog_posts/ferns-covid-19-mapping-project-concludes/.

⁴⁶ *Purdue Food and Agriculture Vulnerability Index*, https://ag.purdue.edu/agecon/Pages/FoodandAgVulnerabilityIndex.aspx?_ga=2.49471334.1159720487.1600111458-250602208.1598985334 (last visited Sept. 17, 2021). This estimate may be undercounted as it excludes contracted, part-time, and temporary labor.

Essential farm workers, however, have not been provided the same support and protections offered to other workers during the pandemic. At least half⁴⁷ of farmworkers were ineligible to receive a direct stimulus check from the Coronavirus Aid, Relief, and Economic Securities (CARES) Act. The Families First Coronavirus Relief Act (FFCRA)⁴⁸ which required all employers with fewer than 500 employees to provide paid sick and family leave, applied to farm employees, but employers with 50 or fewer employees were exempt.⁴⁹ The vast majority (96.6%) of the nearly 106,200 farm operations in the United States had fewer than 50 employees on their payrolls in March 2019.⁵⁰ When FFCRA went into effect in April 2020, 71% of the 688,000⁵¹ farm employees were excluded.⁵² Unfortunately, the true extent of the pandemic's threat to farmworkers' health may never be revealed, partly because the CDC has no plans to track infections of farm workers and because workers often decline COVID-19 testing.⁵³

IV. A Reexamination of Wage and Hour Protections and Potential Impacts.

⁴⁷ Justin Hayes, *6 Ways the Biden Administration Should Protect Food and Farm Workers from COVID-19*, ENVIRONMENTAL WORKING GROUP (Dec. 8, 2020), <https://www.ewg.org/news-and-analysis/2020/12/6-ways-biden-administration-should-protect-food-and-farm-workers-covid-19>. Farmworker Justice estimates that at least half of the nation's roughly 2.4 million farmworkers are undocumented immigrants, but people without a valid Social Security number, or "mixed-status families" in which only one spouse had one, when filing 2018 or 2019 taxes were not issued stimulus checks.

⁴⁸ FFCRA is the second of the three coronavirus stimulus packages passed by Congress in response to the ongoing pandemic, enacted on March 18, 2020. Families First Coronavirus Response Act, H.R. Res. 6201, 116th Cong. (2020) (enacted).

⁴⁹ At the time of writing, no additional relief act has been passed by Congress to extend the paid sick leave and expanded FMLA protections.

⁵⁰ Daniel Costa & 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*, ECON. POL'Y INST. (Mar. 31, 2020, at 2:59 PM), www.epi.org/blog/9-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/.

⁵¹ *Farm Labor Survey Report*, U.S. DEP'T AGRICULTURE (May 28, 2020), https://www.nass.usda.gov/Publications/Todays_Reports/reports/fmla0520.pdf.

⁵² An unsuccessful attempt to cancel the November 2020 Farm Labor Survey delayed the release of more current data, but using data from 2019 (Costa & Martin, *supra* note 50) show that an additional 505,260 (63%) of late-hired workers were also potentially left out of FFCRA benefits. *Federal Court Overturns USDA Cancellation of Farm Labor Wage Survey That Protects Tens of Thousands of Farmworkers' Wages*, FARMWORKER JUSTICE, <https://www.farmworkerjustice.org/news-article/federal-court-overturns-usda-cancellation-of-farm-labor-wage-survey-that-protects-tens-of-thousands-of-farmworkers-wages/> (last visited Oct. 21, 2021).

⁵³ Laura Reiley & Beth Reinhard, *Virus's Unseen Hot Zone: The American Farm*, WASH. POST (Sept. 24, 2020, at 7:01 PM), <https://www.washingtonpost.com/business/2020/09/24/seasonal-farm-workers-coronavirus/>.

A consideration of the appropriate wage and hour protections for farm workers is a complex undertaking and a complete analysis would require an understanding of the potential positive and negative impacts on employers, workers, and consumers. Although at first blush, overtime protections may seem inherently positive for workers, the *Martinez-Cuevas* opposition cited a host of potential negative repercussions for both employers and workers if overtime exemptions are eliminated. Employers, when faced with increased labor costs, may choose to invest in expensive robotic production equipment, increasing capital expenses for farm employers and reducing the need for on-farm employment.⁵⁴ To avoid paying existing workers overtime wages, employers may choose to limit the hours of existing workers and hire additional workers to perform the required work.⁵⁵ If the hours offered to farm workers are limited in an effort to avoid triggering overtime pay, some workers will be forced to seek multiple jobs to make up the difference.⁵⁶ Agricultural groups in an amicus curiae brief filed in *Martinez-Cuevas* argued, “applying overtime protections would leave farms with three options: limiting their harvest and leaving crops to rot, absorbing the extra labor costs, or hiring additional workers to avoid incurring overtime expenses.”

Many of the anticipated impacts of requiring overtime wages for farmworkers cited in *Martinez-Cuevas* are being raised by agricultural industry groups in New York in an effort to maintain a newly established overtime protection for farm workers. In 2019 the New York state legislature passed the Farm Laborers Fair Labor Practices Act (the Act), which established overtime protections for farm workers who work more than 60 hours in a week or on their guaranteed day of rest as of this year.⁵⁷ Despite many involved in the process agreeing that the 60 hour a week threshold was reasonable and struck the right balance between employers and employees, a Farm Laborers Wage Board, authorized by the Act, decided to delay implementation until at least November 1, 2021, and will delay the study and evaluation on the impacts of further lowering the overtime threshold to the standard 40 hours a week.⁵⁸ Those in opposition to further increasing the

⁵⁴ Johnson, *supra* note 39.

⁵⁵ *Id.* See Richard Stup, *Overtime? Farm Employees May Be Seriously Hurt*, CORNELL UNIVERSITY, <https://agworkforce.cals.cornell.edu/2019/02/14/overtime-farm-employees-may-be-seriously-hurt/> (last visited Sept. 10, 2021).

⁵⁶ Brief of Amicus Curiae Washington State Tree Fruit Association and Hop Growers of Washington in Support of Respondents, No. 96267-7, 2019 Wash. S. Ct. Briefs LEXIS 592, *24 (Sept. 20, 2019).

⁵⁷ N.Y. LAB. LAW § 163-a (West 2020).

⁵⁸ *New York Panel Delays Reduction of 60-Hour Overtime Threshold*, VEGETABLE GROWERS NEWS (Dec. 31, 2020), <https://vegetablegrowersnews.com/news/new-york-state-ag-groups-call-for-the-60-hour-overtime-threshold-to-stay/>; James T. Mulder, *NY Board Delays Decision on Making It Easier for State Farmworkers to Get Overtime Pay*, SYRACUSE (Jan. 1, 2021, 10:32 AM), <https://www.syracuse.com/business/2021/01/ny-board-delays-decision-on-making-it-easier-for-state-farmworkers-to-get-overtime-pay.html>.

overtime protections for farm workers in New York warn the increased labor costs will lead to a transition from fruit and vegetable production to field crops which can be mechanically planted and harvested.⁵⁹

An expansion of wage and hour protections for farm workers will most likely also impact consumers through increased food prices. A recent economic study⁶⁰ about increasing farm workers' wages indicates that raising the average hourly earnings of U.S. field and livestock workers by 40% (to \$19.60 an hour) would amount to a 4% increase in the retail price of fresh fruits and vegetables, or about \$25 per year per household.⁶¹ Although there is evidence of a general willingness on the part of some consumers to pay more for foreign products that promote sustainable agriculture and living wages for workers in other countries, such as Fair Trade products, consumers have not been asked to do the same for food grown in the United States.⁶² The success of programs such as the Fair Food Program⁶³ in the tomato industry, however, may be indicative of a societal inclination to consider the treatment of farm workers as part of food buying decisions.⁶⁴

V. Conclusion

The *Martinez-Cuevas* decision in isolation will most likely not, as some had hoped, serve as the catalyst to afford all U.S. farmworkers with overtime pay. However, in combination with a renewed interest in workplace safety created by COVID-19, it may cause a reexamination of the wages of U.S. farmworkers. The global pandemic quickly became a divisive political issue, but one unifying concern was whether there would be empty grocery store shelves. Although the global pandemic did not result in wide scale food shortages, it has caused society to consider the people who produce our food,

⁵⁹ See Press Release, New York Farm Bureau, Letter to the Hon. Andrew Cuomo, Gov. of State of New York (Nov. 23, 2020), https://www.nyfb.org/application/files/7716/0614/7091/Governor_Letter_-_Final.pdf.

⁶⁰ Daniel Costa & Philip Martin, *How Much Would It Cost Consumers to Give Farmworkers a Significant Raise?*, ECONOMIC POLICY INST. (October 15, 2020), <https://epi.org/212615>.

⁶¹ *Id.* According to the study, a 40% wage increase for seasonal farmworkers would raise their average earnings from \$14,000 to \$19,600 — still below the federal poverty line for a family of four. For a farmworker employed year-round, earnings would increase from \$28,000 per year to \$39,200, allowing them to earn far above the poverty line.

⁶² In 2019 Fairtrade retail sales in the United States were estimated to be worth \$1,167,231,164, representing a growth of over 0.6% over the previous year. *2018 & 2019 Fairtrade Impact Report*, FAIR TRADE AMERICA (Dec. 21, 2020), <https://www.fairtradeamerica.org/why-fairtrade/global-impact/reports-trends/2018-2019-fairtrade-impact-report/>.

⁶³ *Fair Food Program Label Finds Its First Home at Whole Foods!*, COALITION OF IMMOKALEE WORKERS (Dec. 2, 2014), <https://ciw-online.org/blog/2014/12/first-label/>.

⁶⁴ Tracie McMillian, *Can We Afford to Pay U.S. Farmworkers More?*, NAT'L GEOGRAPHIC (Mar. 31, 2016), <https://www.nationalgeographic.com/culture/food/the-plate/2016/03/31/can-we-afford-to-pay-u-s-farmworkers-more/#close>.

and it highlighted the fragility of a food system dependent on workers who, despite dangerous working conditions, are typically denied basic wage and hour protections.