

MAINE LEGISLATURE
131st Legislature, Second Regular Session

Testimony of Michael Guare, Pine Tree Legal Assistance
In Support of L.D. 2273:

“An Act to Establish a Minimum Hourly Wage for Agricultural Workers”

Senator Tipping, Representative Roeder and Members of the Committee:

I am an attorney at Pine Tree Legal Assistance in Bangor. I work in Pine Tree’s Farm Worker Unit and I have been representing farm workers in Maine for over 20 years.

I would first like to take this opportunity to express my gratitude to Governor Mills, Speaker Talbott-Ross and all the sponsors of this bill, the members of this Committee and all those who have been working so hard over the last few years to ensure that farm workers receive the same minimum wage as all other workers in Maine. Enactment of this legislation would be a significant step forward in erasing the historical legal inequities regarding the protection of the rights of those who harvest our food.

There are a few ways in which I would suggest that LD 2273 could be improved.

First, a private right of action for workers who have not been paid the legally-required minimum wage should be added. As drafted, the bill does not include a private right of action and commits all enforcement authority to the Department of Labor. Under that scenario, a worker who has not been paid the minimum wage has no control or ability to decide whether any action is taken to enforce the payment of those wages. This is radically different from federal law – which does allow a private right of action for unpaid minimum wages – as well as many other state laws in Maine which, in allowing for private rights of action, recognize the basic truth that without an adequate remedy there is no real right even if it exists on paper.

There is another reason why the lack of a private right of action for farm workers to enforce payment of the minimum wage is very concerning. I had the privilege of serving on the Committee to Develop and Implement a Minimum Wage Bill for Agricultural Workers established by Governor Mills. Throughout the process in which the Committee engaged, one of the most frequently mentioned concerns was the desire to avoid legislation which would have unintended consequences; in fact, that concern was one of the reasons cited by Governor in the Executive Order establishing the Committee. There is one potential unintended consequence which could easily occur if LD 2273 is passed without a private right of action which I would like to highlight.

In construing statutes, the courts have developed a number of rules. Two of those rules are:

- A specific statutory provision on a particular subject controls over a generally-applicable provision on the same subject.

- When construing two statutory provisions which conflict with each other, the courts will attempt to construe them, if possible, in such a way that they both have at least some effect.

Considering LD 2273 in light of these principles, there is a substantial possibility that the enactment of LD 2273 without a private right of action would actually have the result of curtailing one of the few legal remedies regarding the payment of wages which are available to farm workers. Under existing state law, all workers have the right to file a private right of action to obtain payment of unpaid wages; 26 M.R.S.A. §§621-A, 626 and 626-A. If LD 2273 is enacted without a private right of action, we will have created a statutory scheme in which there is one provision which allows all workers to sue for unpaid wages and another, more specific provision which provides that farm workers cannot sue for unpaid minimum wages. The unintended consequence which could occur is illustrated by the following two scenarios:

- First, LD 2273 is enacted and farm workers are entitled to the minimum wage of \$14.15 per hour, but there is no private right of action to enforce payment of the minimum wage
 - The employer hires a worker but pays the worker \$12.00 per hour
 - The worker complains to MDOL but MDOL decides that it cannot take action on the worker's behalf
 - Having no specific private right of action to seek payment of unpaid minimum wages, the worker seeks to recover the unpaid wages of \$2.15 per hour under 26 M.R.S.A. §§626 and 626-A.
 - The court is then faced with a situation where one statute provides that all workers can sue for unpaid wages, but another statute specifically provides that a farm worker cannot sue to recover unpaid minimum wages. In order to give effect to the principle that a specific statutory provision takes precedence over a generally-applicable one, the court could conclude that a farm worker cannot use §§626 and 626-A to obtain payment of unpaid wages, at least to the extent that those unpaid wages include the amount of the minimum wage.
 - The court could also conclude that the only way in which the two statutes can be construed together in such a way that they both have effect would be to hold that most workers can sue for unpaid wages – minimum wages or not – under §§626 and 626-A but farm workers cannot sue for unpaid minimum wages under those provisions. For a court to hold that a farm worker can sue for unpaid minimum wages under §§626 and 626-A would essentially mean that the court has overridden the Legislature's express decision to allow enforcement of the minimum wage for farm workers through actions brought by the Department of Labor, and only the Department of Labor.
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- In the second scenario, LD 2273 passes as described in the first scenario.
 - A worker is recruited by an employer who promises to pay the worker \$15.00 per hour
 - The employer actually pays the worker \$12.00 per hour.
 - The worker complains to MDOL but MDOL decides that it cannot take action on the worker's behalf

- Having no specific private right of action to seek payment of unpaid minimum wages, the worker seeks to recover the unpaid wages of \$3.00 per hour under 26 M.R.S.A. §§626 and 626-A.
- Once again, the court must give precedence to the specific statutory provision over the generally-applicable one and could conclude that a farm worker cannot use §§626 and 626-A to obtain payment of unpaid wages, at least to the extent that those unpaid wages include the amount of the minimum wage.
- In this scenario, the court could decide that both statutes can be given effect by holding that while a farm worker cannot sue under §§626 and 626-A to obtain payment of unpaid *minimum* wages, a farm worker can sue for unpaid wages in excess of the minimum – or, in this case, 85¢ per hour.

In sum, enactment of LD 2273 without a private right of action would not only leave farm workers without the specific right to sue for unpaid minimum wages but could also result in farm workers losing their existing right to sue for any unpaid wages unless – and only to the extent that – they are paid more than the minimum wage. This would be a major step backward and would further increase the already great disparity between the rights of farm workers and the rights of all other workers.

It should also be noted that the protections against retaliation for workers who make a complaint in LD 2273 are inadequate. As drafted, the only sanctions which can be imposed on an employer who fires a worker who complains about unpaid minimum wages to the Department of Labor are a fine of \$200 at the most and an injunction against repeated conduct in the future. To be sure, this is the same set of remedies which is provided for non-farmworkers who complain about unpaid minimum wages; see 26 M.R.S.A. §671. The difference is that those workers do at least have a private right of action to obtain payment of unpaid minimum wages; see 26 M.R.S.A. §670. If LD 2273 is enacted without a similar private right of action for farm workers, the law will allow the following scenario to occur:

- a farm worker to complains to the Department of Labor that they have not been paid the minimum wage
- for whatever reason (which could include a lack of resources, differing administrative or enforcement priorities in future administrations, etc.) the Department does not pursue a claim against the employer
- the employer fires the worker in retaliation for making the claim
- the employer pays a fine of \$200 (and maybe less) and if the AG goes to court seeking injunctive relief against future violations, essentially receives a warning not to do it again
- at the end of the day, the worker has lost their job and wasn't even able to recover their unpaid minimum wages

Obviously, since the remedial scheme in LD 2273 is drawn from the remedial scheme applicable to all workers, whether it should be strengthened raises questions which are beyond the scope of LD 2273. However, the scenario described above – showing what could happen to farm workers who complain about non-payment of minimum wages – underscores all the more strongly why a private right of action is needed. We should not create a statutory scheme under which a farm

worker can be fired for making a complaint with very little consequence to the employer *and* never receives the legally-required minimum wage about which they complained in the first place.

Second, and lastly, I would suggest one minor change in the language of LD 2273. In order to ensure that farm workers are provided with sufficient information to be able to determine if they have been paid properly, I would suggest that on Page, Line 2 of the existing draft of LD 2273 the following language be added after “the hours,”: “the number of piecework units earned, if paid on a piecework basis.” This language is identical to the language of the Migrant and Seasonal Agricultural Worker Protection Act at 29 U.S.C. §1821(d)(1)(B), the federal statute which already requires almost all agricultural employers in Maine to record that information.