

Date of Hearing: April 8, 2021

ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT

Ash Kalra, Chair

AB 857 (Kalra) – As Introduced February 17, 2021

SUBJECT: Employers: Labor Commissioner: required disclosures

SUMMARY: Requires H-2A visa employers to provide notice of specified state and federal employment rights in Spanish, and if requested, in English, to all H-2A farm workers on their first day of work or when they are transferred to another employer. Specifically, **this bill:**

- 1) Requires an employer to include in their written notice to all employees at the time of hiring, health and safety information regarding the issuance, as specified, of a federal or state emergency or disaster declaration applicable to the county or counties in which the employee will be employed.
- 2) Prohibits an employer from retaliating against an employee for raising questions about the declarations' requirements or recommendations that may relate to employment, housing, or working conditions.
- 3) Requires an employer to provide an H-2A employee, as defined, on the day the employee begins work in the state, or begins work for another employer after being transferred, a written notice in Spanish and, if requested by the employee, in English, regarding an H-2A employee's rights pursuant to federal and state law, to include, among other things:
 - a) The applicable overtime wage rate.
 - b) Required pay periods.
 - c) Required rest and meal periods.
 - d) Compensation for travel time from employer-provided housing to the worksite when the employee must take the transportation provided by the employer.
 - e) Housing protections and tenant rights.
 - f) The right to be free from retaliation.
 - g) Required health and safety protections and training.
 - h) Coverage under workers' compensation.
- 4) Requires the LC to prepare a template for H-2A employers, in Spanish and English, with substantially the same information as set forth in (3) above in a separate and distinct section of the template titled: "Summary of Key Legal Rights of H-2A Workers under California Laws." This information shall be combined with the notice template required under current law.
- 5) Provides that the template shall describe the right to compensation for travel time as declaratory of existing law and state the following: An H-2A employee is required to be

compensated by an H-2A employer at their regular rate of pay for time spent while being transported by the employer or its agents to or from the housing provided by the employer or its agents to or from the employer's or agent's worksite when the H-2A employee:

- a) has no personal vehicle;
 - b) cannot take public transportation to or from the worksite(s); and
 - c) has no other real alternative than to take the transportation provided by the employer or agent; or
 - d) when the H-2A employee is required by the employer or agent to take transportation provided or paid for by the employer or agent.
- 6) Requires that the template be made available to employers in a manner determined by the LC, but shall be posted on the LC's internet website commencing January 2, 2022.
 - 7) Requires the LC to revise language in the template as necessary, to do all of the following:
 - a) Provide, update, or expand useful agency contact information.
 - b) Correct inconsistencies with current laws or regulations, including, adding, deleting, or changing information because of new developments in case law pertinent to any provision referenced in the template.
 - c) Add any other information that the LC deems material and necessary.
 - d) Add or delete information because of the enactment of new laws or regulations or because of the repeal of existing laws or regulations.
 - 8) Codifies night work safety standards for agriculture that obligate an employer to provide, among other things, reflective garments, specified lighting, and daily safety meetings.
 - 9) Exempts from the provision of compensation for travel time, as specified, H-2A employees who are covered by a collective bargaining agreement that meets certain criteria.

EXISTING STATE LAW:

- 1) Establishes the LC within the Department of Industrial Relations (DIR), to enforce, among other things, wage and hour law, anti-retaliation provisions, and employer notice requirements.
- 2) Requires that employers, at the time of hire, provide to each employee a written notice, in the language the employer normally uses to communicate employment-related information to the employee, containing, among other things, the following information:

- a) The rate(s) of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or otherwise, including any applicable overtime rate.
 - b) Allowances, if any, including meal or lodging allowances.
 - c) The regular payday designated by the employer.
 - d) The name of the employer, including any "doing business as" names used.
 - e) The physical address of the employer's main office or principal place of business, and a mailing address, if different, and the telephone number of the employer.
 - f) The name, address, and telephone number of the employer's workers' compensation insurance carrier.
 - g) The right to accrue and use sick leave.
- 3) Requires the LC to prepare, and make available to employers, a template with the above information.
- 4) Specifies that an employer shall notify its employees in writing of any changes to the information set forth in the notice within seven calendar days after the time of the changes, unless one of the following applies:
- a) All changes are reflected on a timely wage statement, as defined.
 - b) Notice of all changes is provided in another writing required by law within seven days of the changes.
- 5) Establishes the Division of Occupational Safety and Health (Cal/OSHA) within the DIR to protect and improve the health and safety of workers by setting and enforcing standards, providing outreach, education, and assistance, and issuing permits, licenses and registrations.
- 6) Requires an employer to ensure a safe and healthful workplace by providing, among other things, bathroom access, meal and rest break areas to its employees, and protections against high heat or pesticide exposure.

EXISTING FEDERAL LAW:

Establishes the federal H-2A Program for Temporary Agricultural Workers allowing U.S. employers or U.S. agents who meet specific regulatory requirements to bring foreign nationals to the United States to fill temporary agricultural jobs. Among other things, existing federal law specifies that as a condition for approval of such a petition, the Secretary of Labor must certify that:

- 1) There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and
- 2) The employment of the foreign agricultural worker in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

FISCAL EFFECT: Unknown

COMMENTS: More than 25,000 H-2A farm workers came to California last year to support our agricultural industry. These workers are admitted through a federal program that temporarily allows them to work in the United States, provided local workers are not available to fill these positions. The H-2A program requires that a worker be tied to a specific employer, thereby giving the worker little control over their housing, transportation, or working conditions. Their jobs are low-wage, with 14 percent of H-2A workers in the U.S. making less than \$10,000 a year.¹ In addition, working in agriculture is highly dangerous compared to other industries and the COVID-19 pandemic has elevated the risks associated with overcrowded and largely unsanitary working conditions. In June of 2020 there was a significant outbreak of the virus at farm worker housing in Ventura County with nearly a hundred workers testing positive.² Such an outbreak is extremely serious given that few farm workers have health insurance, the means to obtain medical care, or paid sick leave available for a two-week quarantine.

Other factors contribute to the precarious nature of H-2A farm work. A 2020 study by the Centro De Los Derechos Del Migrante found that many workers are subject to economic coercion by their employer-sponsor. The majority of surveyed H-2A workers reported that they started their employment in debt and forty-three percent reported that the salary they received was less than what they were promised.³ Over sixty percent had to take out a loan just to come to the United States.⁴

According to the author, “AB 857 will help advise H-2A workers of their rights under California law by ensuring adequate notice on their first day of work or when they are transferred to another employer. The notice shall include information on employment rights such as the right to meal and rest periods, overtime, rest period compensation for piece rate workers, compensable transportation time, prohibited deductions, worker health and safety protections, sexual harassment training, and timely payment of wages.

The written notice would also inform H-2A workers of their right to report a violation of California law, how to report violations, and their right to be free from retaliation. In doing so, AB 857 will create safer, more legally compliant workplaces and reduce any incentive unscrupulous H-2A employers may have to hire workers who they can underpay and mistreat because the workers are not aware of their rights or how to have them enforced.”

Arguments in Support

A coalition of worker advocates, including the California Rural Legal Assistance Foundation, argues in support, “The purpose of AB 857 is to provide these vulnerable farm workers with a timely, informative notice that allows them to independently determine whether their employer is complying with applicable California laws. For example, nothing in the federal H-2A contract given to workers by their employer requires this specific state law information to be disclosed in writing on their first day of work in California:

¹ National Agricultural Worker Survey. Fiscal years 2015-2016.

https://www.doleta.gov/news/research/docs/NAWS_Research_Report_13.pdf.

² Press Release: County of Ventura, Public Health Department, “COVID-19 Outbreak in Farmworker Community in Oxnard,” June 29, 2020.

³ “Ripe for Reform: Abuses of Agricultural Workers in the H-2A Visa Program,” Centro De Los Derechos Del Migrante, Inc., p. 5 (updated in 2020 to reflect the COVID-19 pandemic).

⁴ Id. at 7.

- Whether a national or state emergency or disaster has been declared in the county where they will work;
- How to determine, every year between now and 2025, the proper phase-in overtime rate they're entitled to receive each year, for H-2A employees of both small and large employers;
- That they are entitled to a paid rest period of 10 minutes for each 4 hours worked;
- That they may not be charged for meals not taken;
- That they're entitled to travel time compensation at their regular rate of pay for time spent while being transported by the employer or its agents from the housing provided by the employer to the employer's worksite(s) when the H-2A workers i) have no personal vehicle; ii) cannot take public transportation; and iii) have no real other option than to take the employer's transportation;
- That they have rights as tenants while residing in the employer's housing, and can receive guests of their choosing, and shall not be subjected to unannounced searches of their homes;
- That they are entitled to receive training in sexual harassment prevention and how to report it;
- That they have the right to toilets, hand washing facilities and cool, potable water at each work site;
- That they are entitled to be trained in recognizing and preventing heat illness during high heat work periods;
- That if they are exposed to pesticides they have to be promptly transported to a medical facility;
- That if they work between sunset and sunrise, they have the right to headlamps, reflective garments or to be provided other lighting, as well as have a daily briefing at each worksite and,
- That if injured they have a right to be given a workers' compensation claim form within one day."

Arguments in Opposition

A coalition of agricultural employers, including the Western Growers Association, argues in opposition, "Agriculture in California is a diverse industry that provides food and fiber to our state, nation, and the world. Our employees are the heart of our industry and their workplace safety and health is our top concern.

Unfortunately, the reality of continued rising employer costs has made competing with other states and nations even more challenging for our industry. California's ongoing increases to the minimum wage, overtime rules, nitrate/irrigated land program mandates, loss of crop protection tools, and regulatory restrictions on water supply threaten the survival of our family farms. The COVID-19 pandemic has further compounded the challenges that we face as an industry and has caused economic devastation for far too many. At a time when the industry is struggling most, AB 857 proposes unnecessary and costly changes in law.

Travel Time: AB 857 changes law and creates a right that is contrary to long established judicial precedence. AB 857 falsely states that it is 'is declaratory of existing law.' In reality, this bill attempts to change the law by expanding the definition of 'voluntary' and 'mandated' travel time, as decided by the California Supreme Court in *Morillion v. Royal Packing (2000)*.

Therefore, AB 857 adds new situations whereby travel time would be required to be paid to H-2A employees.

Additionally, this bill goes well beyond existing court decisions by requiring that the travel time be paid at the regular rate of pay. This is not a notice of existing rights since current law requires that travel time pay be compensated at no less than the minimum wage, which for H-2A workers is \$16.05 per hour in 2021. For H-2A employees earning on a piece rate basis, the regular rate of pay could easily exceed \$16.05 per hour – for voluntarily sitting on a bus.”

Committee Comments

The Compensability of Travel Time

Supporters and opponents of AB 857 disagree on the legal standard for compensating H-2A employees for time spent on employer-provided transportation to and from the worksite. Opponents point out that the standard for compensable travel time, as established by the *Morillion*⁵ decision, is that only *mandated* employer-provided transportation is compensable. They argue further that the transportation they provide is voluntary and that some farm workers choose alternate means to get to the worksites.

Conversely, the bill’s sponsor argues that employer-provided transportation that *controls* the workers is “mandated” and therefore, compensable. They contend that an employer’s characterization of travel time as voluntary does not tell the whole picture because it fails to acknowledge key aspects of the H-2A employee-employer relationship. They point out that a typical H-2A worker is entirely dependent on their employer for their basic necessities, such as housing, meals, transportation, and wages. Therefore, the compensability question, they contend, rests on the extent of control exercised by the employer over the worker in their transportation options. In the U.S. District Court case *Rodriguez v. SGLC, Inc.*,⁶ H-2A workers’ travel time on employer buses was deemed compensable as “they did not know where they were going ahead of time and had no other means of transportation.” Similarly, if an employer determines “when, where, and how” workers commute to work, the workers are not “choosing” how they get to work, and the time is deemed compensable.⁷

In addition, committee staff is aware that the California Rural Legal Assistance Foundation reviewed nearly 300 H-2A farm worker contracts, known as job orders, which have been approved or were pending in California between January and July of last year. Of these 300, 174 contained statements that transportation of H-2A farm workers by their employer to his/her worksites was “voluntary.” By characterizing employer-provided transportation as voluntary before a worker has even begun their employment, one must conclude that some employers are ignoring current case law and are suggesting that travel time is not compensable regardless of the presence of conditions indicating employer control over the means of transport.

Related and Prior Legislation

AB 364 (Rodriguez) of 2021 would extend licensing requirements to foreign labor contractors who recruit or solicit agricultural workers. The bill is scheduled to be heard by this committee.

⁵ *Morillion v. Royal Packing Company*, 22 Cal. 4th 575, 588 (2000).

⁶ 2012 U.S. Dist. LEXIS 164383, *56.

⁷ *Alcantar v. Hobart Services* (9th Cir. 2015) 800 F.3d 1047, 1055, interpreting the *Morillion* decision.

SB 1102 (Monning) of 2020 was substantially similar to this bill. It was vetoed by Governor Newsom.

AB 469 (Swanson) Chapter 655, Statutes of 2011, requires an employer to provide each employee, at the time of hiring, with a notice that specifies the rate and the basis, whether hourly, salary, commission, or otherwise, of the employee's wages.

REGISTERED SUPPORT / OPPOSITION:

Support

California Rural Legal Assistance Foundation, INC. (Sponsor)
California Alliance for Retired Americans
California Employment Lawyers Association
California Immigrant Policy Center
California Labor Federation
California Teamsters Public Affairs Council
Central Coast Alliance United for a Sustainable Economy
Centro de los Derechos del Migrante
Coalition to Abolish Slavery & Trafficking
Consumer Attorneys of CA
Equal Rights Advocates
Farmworker Justice
United Farm Workers
Worksafe

Oppose

Agricultural Council of California
California Association of Winegrape Growers
California Chamber of Commerce
California Citrus Mutual
California Farm Bureau Federation
California Fresh Fruit Association
California Food Producers
California Women for Agriculture
Family Winemakers of California
Ventura County Agricultural Association
Western Growers Association

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