SENATE COMMITTEE ON LABOR, PUBLIC EMPLOYMENT AND RETIREMENT
Senator Dave Cortese, Chair
2021 - 2022 Regular

Bill No:	AB 857	**Hearing Date:**	June 7, 2021
Author:	Kalra		
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Urgency:	No	**Fiscal:**	Yes
Consultant:	Alma Perez-Schwab		

SUBJECT: Employers: Labor Commissioner: required disclosures

KEY ISSUES

Should the workplace rights notice currently requiring employers to notify employees of labor rights and obligations include a requirement that they notify employees of the existence of either federal or state emergency or disaster declarations that may affect their health and safety?

Should employers of agricultural employees coming to work in California under the federal H-2A Program for Temporary Agricultural Workers be required to give each employee an H-2A employee specific written notice on labor rights and obligations under federal and state law, including notice of emergency or disaster declarations?

Should H-2A employees be compensated for time spent while being transported to and from the employer provided housing to the employer worksite?

ANALYSIS

Existing law:

1) Promotes and develops the welfare of wage earners in California to improve their working conditions and advance their opportunities for profitable employment. Among other things, these rights and protections include specified requirements for agricultural employees such as overtime pay, rest and meal periods, high heat protections, workers' compensation, pesticide exposure and sexual harassment protections. (Labor Code)

2) Empowers the Labor Commissioner's (LC) office, within the Department of Industrial Relations (DIR), with ensuring a just day's pay in every workplace in the State and promote economic justice through robust enforcement of labor laws. The LC enforces labor law through the following units: Wage Claim Adjudication, Public Works, Retaliation Complaint Investigations Unit, Bureau of Field Enforcement, Licensing and Registration, and the Legal Unit. (Labor Code §79-107)

3) 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:

a. 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
b. 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.
(Title 8 U.S. Code Section §1188)

4) 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.
   (Labor Code §2810.5)

5) Specifies that an employer shall notify his or her employees in writing of any changes to the information set forth in the notice (per above) 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.
   [Labor Code §2810.5(b)]

6) Requires the Labor Commissioner to prepare, and make available to employers, a template with the information specified above. (Labor Code §2810.5)

7) Specifies that a tenant who is an agricultural employee residing in employee housing has all rights applicable to a person residing in employee housing, including the following:

   a. The right to file a verified complaint with the Department of Fair Employment and Housing alleging a violation of housing discrimination, or to assert any other right, under the California Fair Employment and Housing Act.
   b. Any protections for tenants or lessees under the Civil Code or the Labor Code, except as otherwise provided in Section 17031.6.
   c. Any protection or right under the Alatorre-Zenovich-Dunlap-Berman Agricultural Labor Relations Act of 1975.
   (Health and Safety Code §17008.5)

This bill:

1) Requires the workplace rights notice under Labor Code Section 2810.5, which applies to employers in *all industries*, to also include notifying employees of federal or state emergency or disaster declarations applicable to the county or counties where the employee is employed that may affect their health and safety during their employment.

2) Enacts "The California Legal Rights Disclosure Act for H-2A Farmworkers" requiring employers of H-2A employees to provide, on the first day of work with the original petitioner or transferred employer, a written notice in Spanish that includes information on H-2A employee's rights pursuant to federal and state law, including, among other things:

   a) Mandatory Wage Rate (per Code of Federal Regulations, 20 CFR § 655.120)
   b) Overtime Wage Rates (per LC § 857-864)
   c) Required Pay Periods (per LC §205-205.5)
   d) Required Rest and Meal Periods (per LC §512)
   e) Travel time while transported by H-2A employer from the employee's housing to the employer's worksite, when specified criteria is met, must be compensated at their regular rate of pay.
   f) Housing Protections and Tenant Rights (per 20 CFR § 655.120; Healthy and Safety Code §17008.5)
   g) No Retaliation for Exercise of Labor Rights (per LC §96-98.6)
   h) Itemized Wage Statements for Hourly/Piece-Rate Employees (per LC §226, §226.2)
   i) Required Sexual Harassment Training (per LC §1684)
   j) Required Toilets, Handwashing Facilities and Drinking Water (per CCR Title 8, Section 3457. Field Sanitation).
   k) Protections from High Heat Working Conditions (per CCR, Title 8, Section 3395. Heat Illness Prevention in Outdoor Places of Employment).
   l) Required Pesticide Exposure Protections (per LC §6300-6721)
   m) Required Workplace Safety Training (per CCR, Title 8, Section 3203. Injury and Illness Prevention Program)
   n) Transportation in Defined "Farm Labor Vehicles." (per 20 CFR 655.102)
   o) No Employer Charges Permitted for Tools or Equipment. (per 20 CFR 655.122)
   p) Workers' Compensation for Injuries or Illness (per LC §3700)
   q) Mandatory night time work protections (*codified with this bill*).

3) Requires the LC to prepare a template for H-2A employers, in Spanish and English, with substantially the same information as set forth 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.

4) Requires employers to also notify H-2A employees of any federal or state emergency or disaster declaration and recommendations applicable to the county/counties where they are employed that may affect their health and safety, as specified.

5) Prohibits an H-2A employer from retaliating against an H-2A employee for raising questions about the declarations' requirements or recommendations.

6) Codifies night work safety standards for agriculture that obligate an employer to provide, among other things, reflective garments, specified lighting, and daily safety meetings.

7) 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.

8) Exempts from the provision of compensation for travel time, as specified above, H-2A employees who are covered by a collective bargaining agreement (CBA) if all of the following conditions are met:

   a) The employee and all other H-2A and/or farm labor contractor employees working for the same agricultural employer are covered by all the terms of a CBA covering directly hired employees, including pay for travel time.
   b) The CBA contains a grievance and arbitration procedure providing for resolution of disputes concerning transportation and payment of wages.
   c) The employer provides the federal Adverse Effect Wage Rate (AEWR) to all employees performing the same work regardless of whether they are directly hired or hired through a farm labor contractor or H-2A contractor.
   d) The CBA provides for compensation through fringe benefits that exceed the actual monetary value employees would have received as compensation for travel time.
   e) The CBA requires that the employer is obligated to maintain contemporaneous daily records of the time actually spent by the H-2A employee being transported by the employer or its agents to or from the housing provided to the worksite, and that the employer keep and maintain these records for three years after the termination of the H-2A employee.

9) 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.

10) Requires the LC to revise the template, as necessary, to:

   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.
   c) Add any other information that the LC deems material and necessary.
   d) Add or delete information because of the enactment or repealing of laws or regulations.

11) Makes several findings and declarations pertaining to H-2A workers and their potential limited knowledge of legal rights and remedies under California law and that neither federal nor state law requires employers to notify them of the existence of either federal or state emergency or disaster declarations.

COMMENTS

1. Background: H-2A Temporary Agricultural Workers

The federal H-2A program allows 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. H-2A employers must provide housing at no cost to H-2A workers and to workers in corresponding employment who are not reasonably able to return to their residence within the same day. Employer-provided or secured housing must meet all applicable safety standards. Regarding transportation, *employers are required to provide daily transportation between the workers' living quarters and the employer's worksite* at no cost to covered workers living in employer-provided housing. Employer-provided transportation must meet all applicable safety standards, be properly insured, and be operated by licensed drivers.

The U.S. Department of Labor certified 23,321 jobs in California to be filled by H-2A workers in 2019. (*Migration Dialogue*, UC Davis) According to the Assembly Labor Committee, "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."

Due to the continued disruptions and uncertainty to the U.S. food agriculture sector caused by COVID-19, on April 20, 2020, federal agencies eased some restrictions on foreign workers to ensure an adequate supply of labor to the agriculture industry. The USCIS also amended its regulations to allow H-2A workers to stay beyond the three-year maximum allowable period of stay in the United States. On August 20, 2020, USCIS temporarily extended these changes to continue to allow all H-2A petitioners with a valid temporary labor certification (TLC) to start employing certain foreign workers who are currently in the United States and in valid H-2A status. The temporary rule change was again extended on December 18, 2020 and is now set to expire on December 18, 2023.

2. Need for this bill?

According to the author, "These H-2A workers are recruited from Mexico and brought to California to work in the agricultural industry. Housing is provided by the employer but the workers have no vehicles or access to public transportation to help them get to the employer's worksites, so they generally must rely on transportation arranged by the employer. Many of these workers also are unaware of their basic state work place protections, such as overtime, meal and rest period breaks, and are some of the most

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[1] National Agricultural Worker Survey. Fiscal years 2015-2016. https://www.doleta.gov/naws/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.

historically exploited workers in the agricultural industry. According to EDD, in recent correspondence to CRLAF, there were approximately 107 California employers in 2019 that imported more than 23,000 H-2A farm workers.

In a review last year of more than 60 H-2A applications approved for circulation in California, the sponsors identified many which included terms and conditions inconsistent with California laws including the following:

--Meal deductions taken for all meals, and no rebate for meals not taken;
--No overtime rate stated (or incorrect overtime rate);
--Wage statements that do not meet CA standards;
--Restrictions on housing that include, no female visitors; visitors must check in with housing manager; worker's housing subject to search; employees only in housing (no guests) and that no tenancy is established; and
--Failure to reflect that transportation time is compensable.

Allowing these types of provisions in H-2A job orders in California directly leads to oppressive housing conditions, illegal deductions from wages, and outright wage theft. Workers deserve to know that these types of conditions are illegal in California, and that they have remedies to pursue under state law."

3. Compensation for Travel Time to and from Worksite:

As noted under the section above outlining what is included in the bill, for the most part, all of the rights and remedies outlined conform to existing provisions in both state and federal law, with the exception of the right to compensation for travel time and the night work safety standards. This bill would codify specific provisions for both of these rights. This comment focuses on the compensation for travel time provisions.

This bill would require H-2A employers to compensate employees 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 to the worksite when the employee 1) has no vehicle; 2) can't take public transportation; 3) has no other alternative but to take the employer transportation; and 4) is ***required*** by the employer to take the transportation. The bill specifies that this requirement to compensate for travel time is declaratory of existing law.

Travel Time Compensation: code and case law

The H-2A program guidelines require employers to provide daily transportation between the workers' living quarters and the employer's worksite at no cost to covered workers living in employer-provided housing. The issue of whether the time spent traveling to or from the worksite is compensable is not specifically addressed in code. Although this "right" is not in code, it has been addressed through the California Industrial Welfare Commission (IWC) wage orders and in court decisions.

Under IWC Wage Order 14, "hours worked" is defined as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (IWC Wage Order 14: Agricultural Occupations) State law does not distinguish between hours worked during the "normal" working hours or hours worked outside "normal" working hours. According to the

Division of Labor Standards Enforcement (DLSE, Labor Commissioner) "Travel time is considered compensable work hours where the employer requires its employees to meet at a designated place, use the employer's transportation to and from the work site and prohibits employees from using their own transportation. (Morillion v. Royal Packing Co. (2000) 22 Cal.4th 575)" According to DLSE, the rate at which the travel must be paid depends upon the nature of the compensation agreement. If the employee has agreed to pay a fixed hourly rate of pay for any work performed, then travel time must be paid at that regular hourly rate, or if applicable, the required overtime rate. An employer may establish a separate rate of pay for travel before the work is performed for hourly employees, provided the rate does not fall below the statutory minimum wage. (Labor Code Section 515)

As noted by the DLSE, this issue was further addressed in litigation under *Morillion v. Royal Packing Co. (2000)* The general question presented in the case was whether an employer that **requires** its employees to travel to a work site on its buses must compensate the employees for their time spent traveling on those buses. Specifically, the court had to decide whether the time agricultural employees spend traveling to and from the fields on employer-provided buses was compensable as "hours worked" under Industrial Welfare Commission wage order No. 14-80. According to the California Supreme Court, "we conclude the time agricultural employees are required to spend traveling on their employer's buses is compensable under Wage Order No. 14-80 because they are "subject to the control of an employer" and do not also have to be "suffered or permitted to work" during this travel period." (Morillion v. Royal Packing Co. (2000) 22 Cal. 4th 575)

Disagreement over "Mandatory" vs. "Voluntary"

There is disagreement from proponents and opponents of the measure on the legal standard for compensating H-2A workers for time spent on employer provided transportation to and from the worksite. Opponents of the measure argue that 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).* They believe that only mandated employer provided transportation is compensable, and argue that the transportation they provide is voluntary and that some workers choose alternate means of transport.

On the other hand, proponents argue that travel time - if the employee has no real choice but to take that transportation – is "mandated" and therefore compensable at their regular rate of pay. They argue that when 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.[3] They additionally point to the U.S. District Court case *Rodriguez v. SGLC, Inc.*,[4] where 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." The compensability question, proponents argue, rests on the extent of control exercised by the employer over the worker in their transportation options.

This bill attempts to provide clarity on the "mandated" vs. "voluntary" issue by specifying the circumstances under which pay would be required.

[3] *Alcantar v. Hobart Services* (9th Cir. 2015) 800 F.3d 1047, 1055, interpreting the *Morillion* decision.
[4] 2012 U.S. Dist. LEXIS 164383, *56.

4. Proponent Arguments:

According to the sponsors of the measure, the California Rural Legal Assistance Foundation, "This bill addresses a singular problem faced by tens of thousands of foreign contract farm workers entering California under federally-approved job offers that often include terms and conditions that are illegal under California law, with no state or federal agency charged with providing these vulnerable guest workers with an accurate summary of current state law rights that exceed federal law protections. The Governor's veto message recognizes the importance of getting this information into the hands of H-2A workers."

Regarding the provision on travel time compensation, the sponsors write:

> "As we have pointed out, courts have found that travel time by H-2A farm workers from the employer's housing to the employer's fields is time under the control of the employer—if the employee has no real choice but to take that transportation—and is therefore compensable at their regular rate of pay. AB 857 simply restates the most common transportation factual pattern where H-2A farm workers have no real choice: 1) they have no personal vehicle; 2) they can't take public transportation; and 3) they have no other real alternative than to get on the employer's bus. Putting this in the AB 857 notice ensures that these H-2A farm workers get appropriate information about when they must be paid for their travel time."
>
> They further state that, "Failure to pay travel time for transportation under these circumstances is, very simply, wage theft. Litigation by H-2A farm workers in the last several years has resulted in settlements exceeding several million dollars, with some H-2A employers changing their practices and counting this travel time going forward as time worked. As hours worked, travel time would be paid at the applicable regular or overtime rate depending on the total number of hours, including travel time, worked on that day."

Regarding the provision specifying that H-2A employees residing in employer-provided housing are considered tenants under California law, the sponsors state that,

> "The California Court of Appeals expressly recognized employer-housed farmworkers as "tenants" in *People v. Medrano,* (1978) 78 Cal. App. 3d 198, 213 when discussing whether workers have the right to have visitors. Since "[f]reedom of communication encompasses the right to receive as well as disseminate information," the worker tenants had not only a right to invite guests, but to be visited by uninvited guests. *Id*. at 210. The housing and provisions in the bill summarize the most basic privacy and property rights of workers, who do not leave those rights at the door simply because their landlord is their employer.
>
> In addition, a tenant residing in agricultural employee housing has all rights applicable to a person residing in employee housing, including … [a]ny protections for tenants or lessees under the Civil Code or the Labor Code, except as otherwise provided in Section 17031.6." Health & Safety Code § 17008.5. [Section 17031.6 includes some additional provisions applicable to forcible detainer and unlawful detainer actions, but does not otherwise limit tenant rights.]

> Reasonable restrictions may be imposed to protect the rights of other co-tenants and can be enforced. However, AB 857, like SB 1102, does make clear that California law does not allow for the equivalent of a company town, where an employer can control the free time of a worker in the same manner that work time is controlled."

The sponsors conclude by stating, "Finally, AB 857 states, as did SB 1102, that the notice is merely "a restatement of current law" and as does not create new rights. (See Pg 13, lines 25-26) That language was negotiated with lawyers for the Labor and Workforce Development Agency; LWDA would be obligated to change the notice if its travel time compensation or housing rights language is incorrect."

5. Opponent Arguments:

A coalition of organizations including the Western Growers Association write in opposition arguing that, "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."

Regarding travel time compensation, the opposition states:

> "AB 857 changes law and creates a right that is contrary to long established judicial precedence. AB 857 falsely states that it "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.
>
> AB 857 also potentially takes away existing compensation for travel time to employees who are under a collective bargaining agreement. This bill does so by specifically allowing travel time compensation to be negotiated away by the union."

Regarding the notice requirements, the opposition states:

> "This is simply unnecessary and burdensome because H-2A employees are *already* afforded the same rights and protections under state and federal law as domestic employees. Employers are *already* required to provide H-2A employees with a written copy of the H-2A contract, in their native language, by the first day of work." "Furthermore, the specified information that must be provided under the bill is *already* required to be provided to H-2A employees in the H-2A contract, or by law..."

Opponents conclude by stating that, "This bill significantly mirrors SB 1102 (Monning) which was *vetoed by Governor Newsom*. In his veto message, the Governor directed the California Labor and Workforce Development Agency to develop and maintain the employee notification template contemplated in SB 1102 since it is a process that can more readily take into consideration changes in H-2A governing law and any future court decisions. We strongly believe that the Governor's direction outlined in the veto message should proceed without the interference of AB 857."

6. Double referral:

This bill has been double referred and should it be passed out of the Senate Labor, Public Employment and Retirement Committee, it will be sent to the Senate Judiciary Committee.

7. Prior or Related Legislation:

AB 364 (Rodriguez, 2021) would extend licensing requirements to foreign labor contractors who recruit or solicit agricultural workers.

SB 1102 (Monning, 2020, Vetoed) was substantially similar to this bill. AB 857 includes sections specifically adding compensation for travel time in labor code, which SB 1102 did not include. In his veto message of SB 1102, Governor Newsom stated, "While I applaud the intent of this bill to create accessible and easy to understand notifications, this statutory construction departs from previous H2-A notice requirements like those found in Labor Code Section 2810.5 and prevents the agency from amending the template when new laws are passed or new court decisions affect the rights and obligations of H2-A employers and workers. Therefore, I am directing my Labor and Workforce Development Agency to develop and maintain a template contemplated in this bill to make available to H2-A employers, and I am returning SB 1102 without my signature."

SUPPORT

California Rural Legal Assistance Foundation (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 California
Equal Rights Advocates
Farmworker Justice
UFCW, Western States Council
United Farm Workers
Worksafe

OPPOSITION

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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