
THIRD READING

Bill No: AB 857
Author: Kalra (D), et al.
Amended: 8/25/21 in Senate
Vote: 21

SENATE LABOR, PUB. EMP. & RET. COMMITTEE: 4-1, 6/7/21
AYES: Cortese, Durazo, Laird, Newman
NOES: Ochoa Bogh

SENATE JUDICIARY COMMITTEE: 8-2, 7/13/21
AYES: Umberg, Durazo, Gonzalez, Hertzberg, Laird, Skinner, Stern, Wieckowski
NOES: Borgeas, Jones
NO VOTE RECORDED: Caballero

SENATE APPROPRIATIONS COMMITTEE: Senate Rule 28.8

ASSEMBLY FLOOR: 43-21, 5/6/21 - See last page for vote

SUBJECT: Employers: Labor Commissioner: required disclosures

SOURCE: California Rural Legal Assistance Foundation

DIGEST: This bill (1) requires agricultural employers to provide farmworkers brought to California from abroad under the federal H-2A program with a notice summarizing their workplace rights under state law; (2) directs the Labor Commissioner to develop a template that agricultural employers can use to fulfill this requirement; and (3) codifies the circumstances when H-2A farm workers must be paid at their regular rate of pay for time spent traveling to work.

Senate Floor Amendments of 8/25/21 make changes to the travel time compensation provisions, which (1) clarify when travel time compensation begins; (2) define “regular rate of pay”; and (3) remove the statement that the travel time compensation provisions are “declaratory of existing law.”

ANALYSIS:

Existing law:

- 1) Empowers the Labor Commissioner's office, within the Department of Industrial Relations, with ensuring a just day's pay in every workplace in the State and promote economic justice through robust enforcement of labor laws. (Labor Code (LC) §79-107)
- 2) Establishes the federal H-2A Program for Temporary Agricultural Workers allowing U.S. employers or 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 to perform the labor or services involved in the petition, and
 - b) the employment of the foreign agricultural worker will not adversely affect the wages and working conditions of workers in the U.S. similarly employed. (Title 8 U.S. Code Section §1188)
- 3) 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 overtime rate.
 - b) Allowances, if any, including meal or lodging allowances.
 - c) The name and physical address of the employer's main office or principal place of business, mailing address, if different, and the telephone number.
 - d) The name, address, and telephone number of the employer's workers' compensation insurance carrier. (LC §2810.5)
- 4) 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, as specified, and requires the Labor Commissioner to prepare, and make available to employers, a template with the information specified above. (LC §2810.5)
- 5) 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, among others, 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 Fair Employment and Housing Act; and (b) any protections for tenants or lessees under the Civil Code or the Labor Code, except as otherwise provided in Section 17031.6. (Health and Safety Code §17008.5)

This bill:

- 1) Requires the workplace rights notice under LC 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(ies) where the employee is employed that may affect their health and safety.
- 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 (CFR), 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; Health 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 California Code of Regulations (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 Labor Commissioner 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) Specifies, as being declaratory of existing law, that 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 to or from the housing provided by the employer to or from the 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 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 Labor Commissioner, but shall be posted on the Labor Commissioner's Internet website commencing January 2, 2022.
- 10) Requires the Labor Commissioner 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 Labor Commissioner 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.

Background

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. (NOTE: *Please see policy committee analysis for more background information on compensation for travel time to and from work.*)

Comments

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 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.”

Related/Prior Legislation

AB 364 (Rodriguez, 2021) extends licensing requirements to foreign labor contractors who recruit or solicit foreign agricultural workers. (Pending in the Senate Appropriations Committee.)

SB 1102 (Monning, 2020), which was 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.”

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: No

SUPPORT: (Verified 8/25/21)

California Rural Legal Assistance Foundation (source)
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
United Farm Workers
United Food and Commercial Workers, Western States Council
Worksafe

OPPOSITION: (Verified 8/25/21)

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

ARGUMENTS IN SUPPORT: According to this bill’s sponsor, 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.”

On travel time compensation, the sponsor writes, “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.”

ARGUMENTS IN OPPOSITION: A coalition of agricultural employers write, “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.” About travel time compensation, they argue, “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.”

They conclude, “This bill significantly mirrors SB 1102 (Monning) which was *vetoed by Governor Newsom*. ... We strongly believe that the Governor’s direction outlined in the veto message should proceed without the interference of AB 857.”

ASSEMBLY FLOOR: 43-21, 5/6/21

AYES: Arambula, Bauer-Kahan, Bennett, Berman, Bloom, Boerner Horvath, Burke, Calderon, Carrillo, Cervantes, Chau, Chiu, Cooley, Friedman, Gabriel, Cristina Garcia, Eduardo Garcia, Gipson, Lorena Gonzalez, Holden, Jones-Sawyer, Kalra, Lee, Low, Maienschein, McCarty, Medina, Muratsuchi, Nazarian, Ramos, Reyes, Luz Rivas, Robert Rivas, Rodriguez, Salas, Santiago, Stone, Ting, Ward, Akilah Weber, Wicks, Wood, Rendon

NOES: Bigelow, Chen, Cunningham, Megan Dahle, Davies, Flora, Fong, Gallagher, Gray, Kiley, Lackey, Levine, Mathis, Nguyen, Patterson, Quirk, Seyarto, Smith, Valladares, Voepel, Waldron

NO VOTE RECORDED: Aguiar-Curry, Choi, Cooper, Daly, Frazier, Grayson, Irwin, Mayes, Mullin, O'Donnell, Petrie-Norris, Quirk-Silva, Blanca Rubio, Villapudua

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8/28/21 11:14:35

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