
SENATE COMMITTEE ON LABOR, PUBLIC EMPLOYMENT AND RETIREMENT

Senator Dave Cortese, Chair

2021 - 2022 Regular

Bill No:	SB 657	Hearing Date:	April 5, 2021
Author:	Ochoa Bogh		
Version:	February 19, 2021		
Urgency:	No	Fiscal:	Yes
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SUBJECT: Employment: electronic documents

KEY ISSUES

Shall the Legislature allow employers to substitute electronic notices and postings for actual workplace notices and postings when an employee works from home and is not at the physical location of the employer? Shall the Legislature—for any employment related document—allow employers to substitute electronic signatures and electronic acknowledgements of receipt for actual signatures and acknowledgements of receipt or attestation when an employee works from home and is not at the physical location of the employer?

ANALYSIS

Existing law:

- 1) Requires an employer to provide a notice to each current employee, by posting in the language the employer normally uses to communicate employment-related information to the employee, of any inspections of I-9 Employment Eligibility Verification forms or other employment records conducted by an immigration agency within 72 hours of receiving notice of the inspection. Requires that written notice shall also be given within 72 hours to the employee's authorized representative, if any. (Labor Code §90.2).
- 2) Requires and employer to post a notice specifying the regular pay days and the time and place of payment. (Labor Code §207).
- 3) Requires an employer to post a notice containing pertinent information regarding safety rules and regulations. Requires that the notice contain the address and telephone number of the nearest Cal-OSHA office; a clear explanation of an employee's right to report any unsafe working conditions; the right to request a safety inspection by the division for unsafe conditions; the right to refuse to work under conditions which endanger life or health; the right to receive information under the Hazardous Substances Information and Training Act; further requires that employers post the posting and notice requirements of employers and Cal-OSHA; establishes that Cal-OSHA may require the posting of any other information Cal-OSHA deems necessary. Establishes that Cal-OSHA may further promulgate regulations on the content and the required location and number of notices which must be posted by employers. (Labor Code §6328).
- 4) Requires an employer to post and keep posted in a conspicuous location frequented by employees, and where the notice may be easily read by employees during the hours of the workday, a notice that states the name of the current compensation insurance carrier of the employer, or when such is the fact, that the employer is self-insured, and who is

responsible for claims adjustment. Further establishes that the form and content of the required notice shall be prescribed by the administrative director of the Division of Worker's Compensation, after consultation with the Commission on Health and Safety and Workers' Compensation, and shall advise employees that all injuries should be reported to their employer. Further requires that the notice shall be easily understandable and shall include the following information:

- a. How to get emergency medical treatment, if needed.
 - b. The kinds of events, injuries, and illnesses covered by workers' compensation.
 - c. The injured employee's right to receive medical care.
 - d. The rights of the employee to select and change the treating physician under specified conditions.
 - e. The rights of the employee to receive temporary disability indemnity, permanent disability indemnity, supplemental job displacement, and death benefits, as appropriate.
 - f. To whom injuries should be reported.
 - g. The existence of time limits for the employer to be notified of an occupational injury.
 - h. The protections against retaliation for filing a claim.
 - i. The Internet Web site address and contact information that employees may use to obtain further information about the workers' compensation claims process and an injured employee's rights and obligations, including the location and telephone number of the nearest information and assistance officer.
 - j. That failure of an employer to provide the notice required by this section shall automatically permit the employee to be treated by his or her personal physician with respect to an injury occurring during that failure. (Labor Code §3550).
- 5) Requires an employer to prominently display a list of employees' rights and responsibilities under the whistleblower laws, including the telephone number of the whistleblower hotline. (Labor Code §1102.8).
- 6) Requires farm labor contractors to prominently display at the site where the work is to be performed and on all vehicles used by the farm labor contractor or his or her employees or agents for the transportation of employees the rate of compensation the licensee is paying to his or her employees for their services, printed in both English and Spanish (Labor Code §1695).
- 7) Requires the awarding body of contract for public works to make available through various means of access and notification, the prevailing wage rates for relevant job classifications. (Labor Code §1773).

This bill:

- 1) Provides that an employee who works from home and is not at the physical location of the employer may receive all notices and postings required under the Labor Code electronically.

- 2) Provides that an employee who works from home and is not at the physical location of the employer may utilize an electronic signature or electronic acknowledgment for any employment-related documents that require acknowledgment of receipt or attestation.

COMMENTS

1. Context and Considerations

Context

In California, employers are required, under various statutes and regulations, to notify workers of information relevant to employee rights and employer duties, as well as information pertaining to protections against discrimination and retaliation. Employers are also required to notify workers of workplace hazards and certain workplace injuries as well as incidents of employer misconduct pertaining to collective bargaining and unfair labor practices. While some of these posting requirements find their source in the California Labor Code, others are spelled out in the California Code of Regulations, other California Codes, and relevant federal laws and regulations. A somewhat comprehensive overview of employer required postings and notices can be examined at the following DIR link: <https://www.dir.ca.gov/wpnodb.html>.

Millions of Californians have been telecommuting over the last year as a consequence of the pandemic. Employers may be uncertain about how to meet their responsibilities pertaining to job postings and notifications required under the state's labor laws when their workforce is not working at the physical location of the employer. Employers may find that the situation also affects their ability to obtain signatures on employment-related documents or obtain acknowledgement of receipt of pertinent documents when the employer's workforce is working from home. Should the legal status quo with respect to both types of matters continue or are there different means of securing compliance that will facilitate the practice of telecommuting? This bill seeks to address these issues by allowing alternative means to provide relevant information to employees while also providing alternative means to secure signatures or acknowledge receipt of employment-related documents.

Considerations

- In general it is not clear what the reach and scope of the proposed legislation is or what the consequences of enacting such policy changes could be. Who is and isn't covered and for how long? Moreover, support letters imply that a return to work results in a return to the status quo but this isn't clear from the proposed language of the bill.
- The definitional parameters of "works from home", "not at the physical location of the employer", what constitutes "electronic notification", and what qualifies as an electronic signature and/or acknowledgement of receipt are not well specified.
- Are postings and notices specified under the California Code of Regulations but arising as a consequence of duties sourced in the Labor Code covered by the legislation, or only notifications specifically required by the letter of the law? For example, the requirements for some Cal-OSHA postings are spelled out in the regulations and not the Labor Code itself. How would these be treated?

- The definitional parameters of “any employment-related documents” is broad and may facilitate unforeseen conduct by bad actors seeking to benefit at the expense of both workers and employers. How will documents pertaining to employer investigations of alleged employee misconduct be affected by the legislation? Could alleged misconduct be acknowledged electronically (and possibly forged electronically) and then later be used as evidence in administrative or legal proceedings?

Some Additional Questions Pertaining to Compliance, Enforcement, and Identity Verification

- How does the employer ensure that relevant notification materials were received by covered employees?
- In the case of electronic signature and/or acknowledgement, how does the employer ensure that the signatures and/or acknowledgement was actually provided by the individual employees in question? How does the employer verify identity?
- How do enforcement agencies determine whether an employer is in compliance with notice and posting requirements? What constitutes evidence of compliance? What constitutes evidence of non-compliance?

2. Author’s Statement

According to the Author, “SB 657 authorizes businesses who have employees that are working from home or telecommuting to receive specific employment-related documents electronically, rather than simply having those notices posted at the place of business. In this new business climate that has forced businesses to adjust to the stay-at-home order, many businesses are trying to find new and innovative ways to provide the same services and share the same information with their employees as they did before the pandemic. It is important that all employees continue to receive the same information that they would have in the workplace. SB 657 would cover that gap and ensures that employees can be sent information electronically. Additionally, SB 657 would authorize employees to use an electronic signature rather than a wet signature on employment-related documents. This will allow for quicker and more efficient responses from employees.”

3. Proponent Arguments:

According to the California Chamber of Commerce, “During the current COVID-19 crisis, many employers have considered offering employees the opportunity to work from home in the midst of shelter-in-place and stay-at-home orders. Where such telecommuting is possible, it allows employees to remain working and earning income, even during a pandemic or other disruption. With near-record unemployment, we should be doing everything possible to maximize opportunities for employers to allow telecommuting so that workers can continue to be employed and support themselves and their families. These changes will be necessary even beyond the current pandemic. A recent survey of employers indicated that 52% will be offering telecommuting until the pandemic subsides, and 30% plan to allow employees to work remotely on an ongoing basis. Unfortunately, current law has not kept pace with the flexibility and technology that allows remote work, and fails to distinguish an employee working remotely from an employee working at the employer’s place of business. As a result, employers presently must meet certain requirements that were imposed without consideration of a remote workforce and cause legal uncertainties. Those uncertainties discourage

employers from allowing employees to work from home because employers cannot properly assess the risks and potential liabilities associated with allowing employees to work from home. If an employer is unwilling to offer remote work (where appropriate) due to these legal uncertainties, employers are faced with the choice of either (1) instructing the employee to report to the worksite (which may raise concerns about increased exposure), or (2) lay-off the employee, neither of which are good outcomes. Therefore, SB 657 seeks to clarify certain issues and remove barriers from employers agreeing to allow telecommuting. It clarifies that workplace notices and posters can be provided electronically, and electronic signatures will be accepted, for employees working from home.

According to the Society for Human Resource Management, “Unfortunately, while California is often at the forefront of many legal issues, it has enacted very few laws related to telecommuting, and it appears the law has not kept pace with technological advances. More specifically, the Labor Code presently fails to distinguish between work performed at the physical workplace, and work performed miles (or perhaps even counties) away and perhaps from an employee’s residence or other location. This means employers are often trying to put the proverbial square peg into the round hole as they attempt to apply rules written for a twentieth century workforce involving a physical common workplace to a twenty-first century workforce seeking increased flexibility as to when, where and how work is performed. Against this backdrop of no specific rules related to telecommuting, employers (and human resource professionals) must respond to telecommuting requests during a pandemic by either: (1) allowing the telecommuting but guessing as the applicable rules; (2) denying the telecommuting request and essentially forcing employees to commute to a physical workplace; or (3) denying the telecommuting request and not allowing the employee to work. None of these reflect good public policy results. SB 657 is a very positive first step that should help address several recurring legal situations in a manner that balances the needs of the telecommuting employee and their employers. For instance, a recurring issue in the telecommuting context is how to comply with the myriad number of laws that require notices and posters be posted in a conspicuous place in the workplace. While these laws are understandable in the traditional “physical” and communal workplace involving a human resources office or a common meeting room, their application is decidedly less clear in the telecommuting context with employees simply working from their home. A related issue is how to obtain any requisite acknowledgments from employees who may not be able to physically sign such documents in the human resource professional’s office. SB 657 would clarify that such workplace notices and posters can be provided to telecommuting employees electronically, with electronic signatures also being acceptable for telecommuting employees. These clarifications would ensure employees still receive notices and/or acknowledge receiving certain documents, but in a manner that can be done remotely. These changes are also limited to the telecommuting employee context and, thus, do not obviate the employer’s duty to post these notices at the physical worksite where applicable and/or obtain in-person acknowledgments from employees at the physical worksite. These clarifications will not prejudice any employees and will make it easier for employers to allow telecommuting, which employees increasingly want.

4. Opponent Arguments:

According to the California Labor Federation, “SB 657 (Ochoa Bogh) would jeopardize workers’ rights to critically important workplace information while creating greater opportunities for wage theft. SB 657 would allow any employee who “...works from home and is not at the physical location of the employer...to receive all required notices and

postings under this code electronically.” This section is problematic for a number of reasons. First, many questions remain regarding which employees would be covered. It is unclear, for example, whether telecommuters who have visited their office once or twice during the pandemic would be covered. An employee who has worked at an office throughout the pandemic but worked from home one day, on the other hand, could also be covered Second, electronically is not defined, meaning that postings could be delivered via email as a pdf, maintained on an employer-controlled website, or only available via an employer-monitored and tracked app. If one of the latter two options, the employer could not only easily manipulate the postings in violation of the law, but they could also track which employees were accessing the information, knowledge that could be used for retaliation if a posting violation claim is filed. Further, not all workers enjoy reliable access to the Internet. Thus, emailed disclosures would leave many workers unable to receive necessary information regarding their rights The second section allows employers to “...utilize an electronic signature or electronic acknowledgment for any employment-related documents that require acknowledgment of receipt or attestation.” Many concerns and risks exist with this language as well, the most pressing of which being issues related to privacy and compliance with labor laws. Email communication is not only notoriously easy for hackers to intercept, it can also be monitored by any number of third parties or private companies with little if any responsibility to report this activity. This leaves workers’ personally identifiable data at clear risk of misuse from improper sale and distribution, as well as data breaches that could compromise a worker’s finances, legal history, future employment, or other concerns. And this could all be as a condition of employment—nothing in the bill prohibits employers from firing workers unwilling to accept this risk. However, this also raises many issues around accessibility, and how these changes will affect workers without reliable access to email or the Internet Finally, such unfettered access to electronic signature or acknowledgment would create untold new opportunities for wage theft. For example, an employer could require wage stubs to be accessed via an electronic portal. Were a worker to suffer wage theft and then point this out to the employer, the employer could change the pay stub and hide the crime

5. Double Referral

Should SB 657 be passed out of the Senate Labor, Public Employment and Retirement Committee, the bill will be sent to the Senate Judiciary Committee for hearing.

6. Recent Legislation

AB 513 (Bigelow, 2021): this bill is nearly identical to SB 657, though it provides for mail notification in lieu of electronic notification where an employee does not have the capacity to receive such information electronically.

AB 1492 (Boerner Horvath, 2020): This bill would have clarified the manner in which meal and rest periods and employee reimbursements are handled for telecommuting employees, and would also have allowed for electronic notification and the use of electronic signatures and acknowledgements in the same manner contained in SB 657. The policy committee hearing for AB 1492 was cancelled at the request of the author.

SUPPORT

Acclamation Insurance Management Services
Allied Managed Care
California Association for Health Services At Home
California Chamber of Commerce
California Food Producers
California Hotel & Lodging Association
California State Council of Shrm (CALSHRM)
Carlsbad Chamber of Commerce
Chino Valley Chamber of Commerce
Coalition of Small and Disabled Veteran Businesses
Family Business Association of California
Flasher Barricade Association
Fremont Chamber of Commerce
Greater Coachella Valley Chamber of Commerce
Greater High Desert Chamber of Commerce
Housing Contractors of California
Lodi Chamber of Commerce
Long Beach Area Chamber of Commerce
Murrieta Wildomar Chamber of Commerce
National Federation of Independent Business (NFIB)
New Livable California DbA Livable California
North Orange County Chamber of Commerce
Oceanside Chamber of Commerce
Pleasanton Chamber of Commerce
Rancho Cordova Chamber of Commerce
Roseville Area Chamber of Commerce
San Gabriel Valley Economic Partnership
Santa Maria Valley Chamber of Commerce
Simi Valley Chamber of Commerce
Southwest California Legislative Council
Torrance Area Chamber of Commerce
Western Electrical Contractors Association

OPPOSITION

California Labor Federation, AFL-CIO

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