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California Adopts New Protections for Warehouse Distribution Center Employees

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On September 22, 2021, Governor Gavin Newsom signed into law Assembly Bill 701 (“AB 701” or the “Act”), which regulates the use of quotas and sets forth notice requirements at warehouse distribution centers in California. The legislation goes into effect on January 1, 2022. AB 701 is codified in California Labor Code sections 2100, *et seq.*

Who Is a Covered Employer?

Employers that employ—either directly, indirectly, jointly, and/or through the services of a third-party employer, temporary service, or staffing agency—100 or more non-exempt employees at a single “warehouse distribution center” or 1,000 or more non-exempt employees at multiple “warehouse distribution centers,” within California must comply with the legislation within 30 days of the law going into effect (i.e., by January 31, 2022). Cal. Lab. Code § 2100(f). For the purposes of determining whether an employer meets the 100 or 1,000 non-exempt employee threshold, AB 701 does not distinguish between non-exempt employees subject to a quota and those who are not (i.e., non-exempt employees performing other tasks, such as janitorial or administrative staff).

AB 701 does not set forth timing or frequency requirements for tabulating non-exempt employees with respect to determining if the employer meets or surpasses the 100 or 1,000 employee thresholds. The State has not announced any forthcoming Frequently Asked Questions or other guidance that would provide employers with any additional information

“Warehouse distribution centers” means any establishment as defined by the North American Industry Classification System as 1) General Warehousing and Storage, 2) Merchant Wholesaler, Durable Goods, 3) Merchant Wholesaler, Nondurable Goods, or 4) Electronic Shopping and Mail-Order House. Cal. Lab. Code § 2101(i).

How Does AB 701 Define a Quota?

AB 701 defines a quota as “[A] work standard under which a [non-exempt] employee is assigned or required to perform at a specified productivity speed, or perform a quantified number of tasks, or to handle or produce a quantified amount of material, within a defined time period and under which the [non-exempt] employee may suffer an adverse employment action if they fail to complete the performance standard.” Cal. Lab. Code § 2100(h). “Defined time period” means any unit of time measurement equal to or less than the duration of an employee’s shift, and includes hours, minutes, and seconds and any fraction thereof. Cal. Lab. Code § 2100(b).

AB 701 defines employee work speed data to mean “information an employer collects, stores, analyzes, or interprets relating to an individual employee’s performance of a quota, including, but not limited to, quantities of tasks performed, quantities of items or materials handled or produced, rates or speeds of tasks performed, measurements or metrics of employee performance in relation to a quota, and time categorized as performing tasks or not performing tasks.” Cal. Lab. Code § 2100(e)(1). However, nothing in AB 701 requires an employer to monitor work speed data, and any employer that does not monitor such data has no obligation to provide it. Cal. Lab. Code § 2104(c).

How Do Covered Employers Comply?

Provide advance notice to employees of applicable quotas and their consequences: Covered employers are required to provide all non-exempt employees, upon hire or within 30 days of the law going into effect, with “a written description of each quota to which the employee is subject, including the quantified number of tasks to be performed or materials to be produced or handled, within the defined time period, and any potential adverse employment action that could result from failure to meet the quota.” Cal. Lab. Code § 2101.

Under AB 701, non-exempt employees are not required to “meet a quota that prevents compliance with meal or rest periods, use of bathroom facilities, including reasonable travel time to and from bathroom facilities, or occupational health and safety laws in the Labor Code or division standards.” Cal. Lab. Code § 2101.

Pursuant to AB 701, any actions taken by a non-exempt employee to comply with occupational health and safety laws—for example, driving forklifts and other industrial trucks properly (as opposed to recklessly or at inappropriate speeds), properly securing loads prior to transportation to prevent them from falling, taking the time to obtain an appropriate ladder or other device to reach high objects, as opposed to using one that is inadequate (i.e., unsafe) for the situation, etc.—shall be considered time on task and productive time for the purposes of any quota or monitoring system. Cal. Lab. Code § 2103. Meal and rest periods, however, are not considered productive time unless the employee remains on call. *Id.*

Implement a procedure for responding to employee inquiries about applicable quotas: Current or former non-exempt employees who believe that meeting a quota resulted in a violation of their right to a meal or rest period, or required them to violate any occupational health and safety laws, may make a written or oral request for a written description of each quota to which the employee is or was subject, and a copy of the most recent 90 days of the employee’s own personal work speed data. Cal. Lab. Code § 2104(a)(1). Employers are required to comply with such requests no later than 21 calendar days from the date of the request. Cal. Lab. Code § 2104(b). Former employees are limited to one request under this law, and the employer need only provide data from the 90 days prior to the date of the employee’s termination. Cal. Lab. Code §§ 2104(a)(2)-(3).

AB 701 prohibits an employer from taking an “adverse employment action against an employee for failure to meet a quota that does not allow a worker to comply with meal and rest periods, or occupational health and safety laws” or that was not disclosed to the employee. Cal. Lab. Code § 2102. Further, the legislation creates a rebuttable presumption of unlawful retaliation if the employer takes *any* adverse action against *any* non-exempt employee within 90 days of the employee either (1) initiating a first request in a calendar year for information about a quota or personal work speed data or (2) making a complaint that a quota violates AB 701 to the Labor Commissioner, Division of

Occupational Safety and Health, local or state governmental agency, or the employer. Cal. Lab. Code § 2105.

What Are the Potential Consequences if a Covered Employer Does Not Comply?

Private Right of Action: AB 701 provides that a current or former non-exempt employee may bring an action for injunctive relief to require the employer to comply with the Act. If successful, the employee may recover costs and reasonable attorneys' fees. Cal. Lab. Code § 2108.

Private Attorneys General Act: In addition to injunctive relief, AB 701 provides that a current or former non-exempt employee may bring an action against the employer pursuant to the Private Attorneys General Act ("PAGA") for civil penalties for a violation of the Act. Cal. Lab. Code § 2109. However, AB 701 provides employers the right to cure any alleged violations of the Act within 33 days of the postmark date of the PAGA notice sent by the purported aggrieved employee or representative to the employer and Labor Workforce Development Agency. Cal. Lab. Code § 2109; Cal. Lab. Code § 2699.3(c)(2)(A).

Agency Enforcement: AB 701 charges the Division of Labor Standards Enforcement's Labor Commissioner to enforce the legislation (using the procedures set forth in Labor Code sections 98, 98.3, 98.7, 98.74 and 1197.1) in conjunction with the Division of Occupational Safety and Health and the Division of Workers' Compensation. Cal. Lab. Code § 2107. To that end, AB 701 requires the Division of Occupational Safety and Health or the Division of Workers' Compensation to notify the Labor Commissioner "[i]f a particular worksite or employer is found to have an annual employee injury rate of at least 1.5 times higher than the warehousing industry's average annual injury rate." Cal. Lab. Code § 2107(b). The Labor Commissioner will then determine if an investigation is appropriate. Further, these agencies may request or subpoena an employer's records of warehouse distribution center quotas and employee work speed data upon receipt of a complaint regarding a violation. Cal. Lab. Code § 2106.

Next Steps

Employers should review their quota requirements and, if monitored, their non-exempt employees' work speed data, in light of the Act's requirements and prohibitions. Further, covered employers should prepare written descriptions of each quota to which each non-exempt employee is subject in anticipation of disseminating this information to their workforce as required by the Act.

Covered employers also should continue to monitor local laws for any ordinances that mandate greater protections for employees, as AB 701 also includes language that permits local governments to adopt ordinances that provide "equal or greater protection to employees." Cal. Lab. Code § 2111.

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