SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 857 (Kalra)
Version: February 17, 2021
Hearing Date: July 13, 2021
Fiscal: Yes
Urgency: No
TSG

SUBJECT

Employers: Labor Commissioner: required disclosures

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 could use to fulfill this requirement; (3) codifies the circumstances when H-2A farm workers must be paid for time spent traveling to work.

EXECUTIVE SUMMARY

Farmworkers, whose labor is essential to the production of food for California and the nation, perform some of the most physically demanding work in the state under difficult conditions. Each year, thousands of foreign workers are brought to California under the federal "H-2A" guestworker program to undertake this labor. All California employees are entitled to receive some information about their legal rights. None of the existing notices comprehensively informs H2-A guestworkers about key workplace protections afforded to them, however. As a result, H2-A workers may not know the full extent of their rights and can be more easily exploited by unscrupulous employers. In response, this bill would require California employers with H2-A workers to provide those workers with a summary of their specific workplace rights under state law. To make the requirement easy for employers to fulfill, the bill directs the Labor Commissioner to develop a standard template for the notice. The bill also sets forth the circumstances under which H-2A farmworkers must be compensated for the time they expend traveling between their housing and the worksite.

The bill is sponsored by California Rural Legal Assistance Foundation. Support is from organized labor generally, and farmworker advocates specifically. Opposition is from large agricultural employers who assert that the disclosure requirement represents a duplicative and unnecessary burden and that the travel-time compensation provisions misstate the existing law. The bill passed out of the Senate Labor, Public Employment, and Retirement Committee by a vote of 4-1.

PROPOSED CHANGES TO THE LAW

Existing federal law:

1) Provides, under the H-2A program, for the admission to the United States of non-immigrant workers to perform agricultural services of a temporary or seasonal nature, subject to specified requirements. (8 U.S.C. § 1188.)

2) Requires H-2A employers to comply with all applicable federal, state, and local laws. (20 C.F.R. § 655.135(e).)

Existing state law:

1) Requires employers to provide most employees, at the time of hire and in the language that the employer normally uses to communicate employment-related information to the employee, with written notice of specified workplace legal rights, including:
   a) rates of pay and basis thereof, including any rates for overtime;
   b) allowances claimed as part of the minimum wage, 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 by the employer;
   e) the physical address of the employer's main office or principal place of business, and a mailing address;
   f) the telephone number of the employer;
   g) the name, address, and telephone number of the employer's workers' compensation insurance carrier;
   h) that an employee: may accrue and use sick leave; has a right to request and use accrued paid sick leave; may not be terminated or retaliated against for using or requesting the use of accrued paid sick leave; and has the right to file a complaint against an employer who retaliates; and
   i) any other information the Labor Commissioner deems material and necessary. (Lab. Code § 2810.5(a)(1).)

2) Obligates employers to notify their employees in writing of any changes to the information set forth in (1), above, within seven calendar days after the time of the changes, unless the information is communicated in other, specified ways. (Lab. Code § 2810.5(b).)

3) Excludes the following employees from the required notice in (1), above:
   a) an employee directly employed by the state or any political subdivision thereof, including any city, county, city and county, or special district;
   b) an employee who is exempt from the payment of overtime wages by statute or the wage orders of the Industrial Welfare Commission; or

   c) an employee who is covered by a valid collective bargaining agreement if the agreement expressly provides for the wages, hours of work, and working conditions of the employee, and if the agreement provides premium wage rates for all overtime hours worked and a regular hourly rate of pay for those employees of not less than 30 percent more than the state minimum wage. (Lab. Code § 2810.5(c).)

3) Directs the Labor Commissioner to create and make available to employers a notice template that complies with the requirements in (1), above. (Lab. Code § 2810.5(a)(2).)

4) Provides, pursuant to the Private Attorney Generals Act (PAGA), that aggrieved employees may, through specified procedures, seek civil penalties against an employer for failing to provide the notice as required in (1), above. (Lab. Code §§ 2698 – 2699.5.)

This bill:

1) Makes a series of findings and declarations regarding the number of H-2A workers laboring in California, their lack of awareness about their legal rights in the workplace, and the inadequacy of existing notice requirements to communicate this information to H-2A workers.

2) Requires employers, upon hiring an employee, to disclose if a federal or state emergency or disaster declaration that may affect employees' health and safety has been declared within the previous 30 days for the county or counties in which the worker will be employed.

3) Requires employers, within seven days, to notify every H-2A employee of any federal or state emergency or disaster declaration that may affect the employees' health and safety and that is issued after the date of hire for the county or counties in which the H-2A employees will be employed.

4) Requires every employer of California employees admitted under the federal H-2A program to provide each H-2A employee, on the first day the employee begins work for that employer in California, with a written notice in Spanish and, if requested by the employee, also in English, that discloses the wage rate required by the United States Department of Labor to be paid to the H-2A employee and summary information regarding all of the following:
   a) the right to notice of federal or state emergency or disaster declarations that may affect the employees;
   b) mandatory wage rates;
   c) overtime wage rates;
   d) required pay periods;

e) the requirement that employers pay for all hours worked;
f) required meal and rest periods;
g) the prohibition on charging H-2A workers for meals;
h) that H-2A workers must be paid for time spent traveling between housing provided by the employer and the worksite when the employee must take the transportation provided by the employer;
i) that H-2A workers have rights as tenants in employee housing, including the right to receive guests, the right to minimum standards of habitability, and the right not to be subjected to searches of their housing;
j) the right to exercise workplace legal rights without retaliation;
k) the right to itemized wage statements and their required content;
l) required training on sexual harassment prevention;
m) requirements relating to the availability of toilets, facilities for washing hands, and access to drinking water;
m) legal protections against heat, pesticide exposure, and nighttime work;
n) required workplace safety trainings;
o) safety requirements associated with transport in specified employer vehicles;
p) that H-2A workers cannot be charged for the tools or equipment they are required to use;
q) eligibility for health insurance through Covered California;
r) Workers' Compensation coverage and procedures; and
s) the right to report complaints to government agencies, legal aid practitioners, and worker advocates.

5) Directs the Labor Commissioner to:
   a) create a template notification with which employers can comply with the requirements of (3), above;
   b) make it available on the Labor Commissioner's website commencing January 2, 2022; and
   c) revise the template as necessary to keep the information current and reflect any changes in the relevant law.

6) Provides, as declaratory of existing law, that H-2A employers must compensate H-2A workers 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 is required by the employer or agent to take transportation provided or paid for by the employer or agent or 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.

7) Exempts an employer of H-2A workers from (6), above, if all of the H-2A and/or farm labor contractor employees working for the same agricultural employer are covered by all the terms of a collective bargaining agreement covering directly hired employees, including coverage under a provision for compensation for transportation time, among other specified terms.

COMMENTS

1. Background on the federal H2-A "Guest Worker" program

The federal government established the H-2A guest worker program in 1986 as part of the Immigration Reform and Control Act. (Pub. L. No. 99-603, 100 Stat. 3359.) Under the H-2A program, agricultural employers can bring foreign workers into the United States temporarily to perform work if the U.S. Department of Labor first certifies that (1) there are insufficient domestic workers who are willing, able, and qualified to perform the work at the time and place needed; and (2) the employment of foreign workers will not adversely affect the wages and working conditions of domestic workers. (8 U.S.C. § 1188.)

In recent years, California's agricultural sector has come to rely more and more on H-2A guest worker labor. Farmworker Justice, one of the supporters of the bill, asserts that "[t]he H-2A program, which was relatively small and localized for many years, has grown rapidly in the last few years across the country, particularly in California and that growth is expected to continue. In FY2016, the U.S. Department of Labor (DOL) approved 11,106 H-2A jobs in California, a 29% increase from FY2015. In 2019, DOL certified 23,321 H-2A jobs in California."

Employers of H-2A workers have to abide by program regulations. Among other things, employers must pay H-2A workers the federal minimum wage, the prevailing wage rate in the area, or the "adverse effect wage rate," whichever is highest. (20 C.F.R. § 655.102(b)(9).) The "adverse effect wage rate" is whatever rate of pay the U.S. Department of Labor determines will not adversely affect the wages of domestic farmworkers. (20 C.F.R. §§ 655.100(b), 655.107.) H-2A employers also have to reimburse H-2A workers for the cost of their travel from their homes abroad to the worksite in the United States, but only if the worker completes fifty percent of the contract work period. (20 C.F.R. § 655.102(b)(5)(i).) Similarly, if the worker completes the contract work period, the employer is supposed to pay for the worker's travel expenses for the trip back home. (20 C.F.R. § 655.102(b)(5)(ii).)

Of particular relevance to this bill, employers who hire H-2A workers agree not only to comply with federal law, but also to abide by all applicable state and local laws. (20 C.F.R. Section 655.135.) As a practical matter, however, the applicability of state and local laws to H-2A workers is of limited relevance if the H-2A workers are unaware of their rights. The notification required by this bill is intended to address that reality.

2. Vulnerability of H2-A workers to workplace exploitation and abuse

H-2A workers are especially vulnerable to workplace exploitation and abuse because their ability to work in the United States is directly tied to the employer that brought them here. Faced with unfair, unsafe, or illegal working conditions, H-2A workers cannot simply quit and look for a different job. Moreover, whether an H-2A worker gets reimbursed for the costs associated with their trip to the United States depends on how much of their contract they complete. If the worker quits or is fired before the contract is halfway done, the worker may never recover those travel costs. (20 C.F.R. § 655.102(b)(5)(i).) If the worker quits or gets fired before they finish the contract, they may have to pay their own way home. (20 C.F.R. § 655.102(b)(5)(ii).) Thus, there are strong practical considerations that deter H-2A workers from reporting and seeking redress for workplace exploitation and abuse.

To make matters worse, it appears that the government agencies charged with approving employer's applications to participate in the H-2A program may be consistently overlooking unlawful employment practices even where H-2A employers are quite open about them. The sponsors of this bill report that they reviewed more than 60 H-2A applications "approved for circulation" in California last year and found multiple examples of terms of and conditions that are inconsistent with California law. These included applications on which the H-2A employer:

- Took wage deductions for all meals taken and gave no rebate for meals not taken.
- Did not provide an overtime rate or calculated the overtime rate incorrectly.
- Offered wage statements that do not meet California standards.
- Placed restrictions on H-2A workers' housing, including prohibiting female visitors; requiring visitors to check in with the housing manager; subjecting the worker's housing to searches; prohibiting guests; and claiming that no tenancy is established through the provision of housing to H-2A workers.
- Failed to reflect that transportation time is compensable.

The sponsor concludes that: "[a]llowing 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. Dispute regarding compensation for travel time to and from the worksite

Although the opposition asserts that providing it would be burdensome, the content of the summary of California workplace rights that this bill requires employers to provide to H-2A workers is largely uncontroversial. There is one major point of contention, however. The proponents and opponents of the bill disagree about when employers must compensate H-2A workers for time spent traveling to and from the worksite.

Under California employment law, the general rule is that employers need not compensate their workers for the time that they spend commuting to and from the worksite, even if the employee travels in a vehicle provided by the employer for that purpose. (Lab. Code § 510(b).) However, over two decades ago now, the California Supreme Court ruled that, when an employer *requires* its workers to utilize employer-provided transportation to get to the worksite, then the employer must pay the workers for their time spent traveling, including any time that the workers must wait to be picked-up. (*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575.)

Based on the *Morillion* decisions and subsequent case law, this bill proposes to add a new section to the Labor Code specifying when H-2A workers must be paid for the time they spend getting to and from work. Specifically, the new section would state that employers must compensate H-2A workers 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: (1) has no personal vehicle; (2) cannot take public transportation to or from the worksite(s); and (3) has no other real alternative than to take the transportation provided by the employer or agent; or (4) when the H-2A employee is required by the employer or agent to take transportation provided or paid for by the employer or agent.

The bill itself asserts that this formulation is declaratory of existing law and a summary of this law would appear in the notice that H-2A workers would receive upon hire. However, employers would not have to comply with this formulation if their H-2A workers are covered under a collective bargaining agreement that addresses travel-time compensation.

The opponents of the bill question whether the proposed new section is indeed declaratory of existing law. While they generally accept that the *Morillion* line of cases establish that travel time to and from work is compensable when the employer affirmatively obligates the workers to use the employer's mode of transportation to reach the worksite, the opponents of the bill contend that at least three nuances of the proposed new section go beyond the precise holding in *Morillion*.

First, while the *Morillion* court did rule that agricultural workers must be compensated for travel time whenever the employer obligates them to use employer-provided transportation, the *Morillion* court did not necessarily say how much that compensation needs to be. In contrast, the bill says that the workers must receive their "regular rate of pay." The opposition contends that this phrase could be read to mean that they have to pay their H2-A workers for travel time at whatever rate they "regularly" pay to their H2-A workers, even if that is higher than the required minimum rate that H2-A workers must be paid generally. The proponents respond that "regular rate of pay" is

unambiguous language that ensures that travel time is paid at a rate equal to "at least the AEWR (Adverse Effect Wage Rate), the prevailing hourly wage rate, the prevailing piece rate, the agreed-upon collective bargaining rate, or the Federal or State minimum wage rate, in effect at the time work is performed, whichever is highest, for every hour or portion thereof worked during a pay period" as required by 20 C.F.R. 655.122(l). The proponents also report that they have vetted the language in the bill with the office of the Labor Commissioner.

Second, the opposition notes the *Morillion* decision only required compensation to be paid to workers from the mandatory pick-up point for the employer's transportation. (*Morillion,* 22 Cal.4th 575, 587-588 ("[W]hile the time plaintiffs spent traveling on Royal's buses to and from the fields is compensable as "hours worked" […]the time plaintiffs spent commuting from home to the departure points and back again is not."). Under the new section that the bill proposes to add to the Labor code, however, employers would have to pay H-2A workers for the time spent going "to or from the *housing* provided by the employer." While the opponents correctly point out the discrepancy between the use of departure point in the *Morillion* ruling and housing in the bill, the proponents note, with equal accuracy, that in the H-2A context, this discrepancy is essentially a distinction without a difference. H-2A employers must provide their H2-A workers with housing as part of the employment contract and must provide transportation, at no charge to the worker, from that housing to the worksite. (20 CFR 655.122(h)(3).) As a result, it is difficult to conceive of a lawful scenario in which an H2-A employer would be providing transportation to the worksite, but from a departure point that is not one and the same location as the provided housing.

Finally, the opposition disputes the way in which the bill interprets the *Morillion* decision. The *Morillion* decision states that workers must be compensated for travel time when they are required to utilize employer-provided transportation. There has been some legal debate ever since about what exactly that means. The bill takes the rule to mean that workers must be compensated for travel time to the workplace whenever, *as a practical matter*, the workers have no other real option. Such an interpretation derives strong support from the *Morillion* decision itself, which emphasized the role of control and agency. (*Morillion*, 22 Cal.4th 575, 587. ("The level of the employer's control over its employees, rather than the mere fact that the employer requires the employees' activity, is determinative.) The author and sponsor's interpretation is further buttressed by subsequent case law. In both *Alcantar v. Hobart Services* (9th Cir. 2015) 800 F.3d 1047) and *Rodriguez v. SGLC, Inc.* (E.D.Cal. Nov. 15, 2012, No. 2:08-cv-01971-MCE-KJN), the Ninth Circuit Court of Appeal and an Eastern District of California judge, respectively, refused to dismiss farmworker claims for travel-time wages even though the employers in question did not expressly require their workers to use the employer-provided transport. Instead, both courts ruled that the cases should proceed so that the trier of fact could determine whether or not, as a practical matter, the workers had any choice but to use the employer-provided transportation.

In spite of this jurisprudence, the opposition argues for a narrow reading of the *Morillion* case. They highlight the specific facts in the *Morillion* case: that riding the company bus was absolutely mandatory. The employer expressly forbid workers to get to the worksite in any other way and threatened workers with disciplinary action if they tried. The opponents therefore contend that the *Morillion* holding does not necessarily apply to situations in which the workers are technically free to use other means to get to the worksite. It may be worth inquiring just how far the opponents intend this proposition to stretch, however. Technically, an employee always has the "option" to walk or hail a cab to get to the worksite even if it is 80 miles away. Could an employer get out of having to compensate travel time under *Morillion* simply by handing workers the address of the worksite the night before and offering them the choice to ride the company bus or to walk?

4. Governor's veto of similar bill last year

This bill is quite similar to SB 1102 (Monning, 2020), which Governor Newsom vetoed last year. In his veto message, the Governor applauded the concept of increasing awareness about California labor law among H-2A workers through provision of a comprehensive notification. He found fault, however, in SB 1102's proposal for going about it. SB 1102 mandated specific content in the notices provided to each H-2A worker, with no obvious mechanism for updating the language over time to reflect changes in the law. The Governor therefore vetoed the bill, but directed the Labor and Workforce Development Agency (LWDA) to independently develop a summary of California workplace law. Presumably, the hope was that employers might elect to give out this notice to their H-2A employees voluntarily, though it is difficult to imagine why they would do so. In any event, as of the publication of this analysis LWDA has not published a summary of California workplace law relating to H2-A workers along the lines called for in the Governor's veto.

To respond to the concerns expressed in the Governor's veto message of SB 1102, the author and sponsor of this bill have given the Labor Commissioner discretion to revise the content of the notification in order to correct inconsistencies with current laws, jurisprudence, or regulations, among other things.

5. Arguments in support of the bill

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 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.

As sponsor of the bill, California Rural Legal Assistance Foundation, writes:

> AB 857 is an H-2A farm worker 'right to know' statute that pulls together into a single written notice critical state law information required to be given to each farm worker in Spanish on their first day of work here. 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.

In support, Farmworker Justice writes:

> H-2A workers are dependent on a series of recruiters and labor contractors to be recruited, granted a visa if selected by the employer, transported into the United States and then placed at an employer that obtained H-2A certification. These workers know that if their job ends at that one employer they must return home, so if they wish to continue in the job or be called back in a following season, they usually do not take any risks that could lead to be fired or rejected the following season. […]
>
> These and other pressures limit H-2A guestworkers' ability to obtain information about their labor rights and discourage H-2A guestworkers from asking questions about their rights. U.S. farmworkers then feel the same pressure to keep quiet because they are faced with competition from an endless supply of H-2A workers […].

6. Arguments in opposition to the bill

In opposition to the bill, a coalition of 11 agricultural trade associations and employer advocates writes:

> At a time when the industry is struggling most, AB 857 proposes unnecessary and costly changes in law. […] 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. […]
>
> More broadly, AB 857 would also require California employers to furnish yet another disclosure to their H-2A employees regarding their employment rights under California law. 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.

SUPPORT

California Rural Legal Assistance Foundation (sponsor)
California Alliance for Retired Americans
California Immigrant Policy Center
California Employment Lawyers Association
California Labor Federation
California Teamsters Public Affairs Council
Central Coast Alliance United for Sustainable Economy
Centro de los Derechos del Migrante
Coalition to Abolish Slavery & Trafficking
Consumer Attorneys of California
Equal Rights Advocates
Farmworker Justice
United Food and Commercial Workers, Western States Council
Worksafe
United Farmworkers

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 Agriculture Association
Western Growers Association

RELATED LEGISLATION

Pending Legislation: AB 364 (Rodriguez, 2021) would extend licensing requirements to foreign labor contractors who recruit or solicit agricultural workers. AB 364 is currently pending consideration before the Senate Labor, Public Employment, and Retirement Committee.

Prior Legislation:

SB 1102 (Monning, 2020) was substantially similar to this bill. In his message vetoing SB 1102, Governor Newsom wrote: "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."

AB 1783 (R. Rivas, Ch. 866, Stats. 2019), among other things, prohibited the provision of state funding, as defined, for the purposes of funding predevelopment of, developing, or operating any housing used to comply with the federal law requirement to furnish housing to H-2A workers.

AB 1522 (Gonzalez, Ch. 217, Stats. 2014) added information about sick leave laws to the notice that employers must provide to employees upon hire.

AB 469 (Swanson, Ch. 655, Stats. 2011) established, as part of the Wage Theft Prevention Act of 2011, the requirement that employers notify their employees, upon hire and in writing, about specified key workplace rights.

PRIOR VOTES:

Senate Labor, Public Employment and Retirement Committee (Ayes 4, Noes 1)
Assembly Floor (Ayes 43, Noes 21)
Assembly Appropriations Committee (Ayes 9, Noes 5)
Assembly Labor and Employment Committee (Ayes 5, Noes 2)

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