SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

SB 41 (Cortese)
Version: February 8, 2023
Hearing Date: February 14, 2023
Fiscal: Yes
Urgency: Yes
TSG

SUBJECT

Meal and rest breaks: cabin crew employees

DIGEST

This bill prospectively exempts flight attendants from California meal and rest break law, provided the flight attendants are covered by a collective bargaining agreement that sets forth alternative rules for handling meal and rest breaks. The bill also prevents such flight attendants from filing new lawsuits for meal and rest break violations starting the day the bill was introduced while allowing all litigation already pending at that time to run its natural course.

EXECUTIVE SUMMARY

California labor law entitles most employees to meal and rest breaks after they have put in a specified number of hours of work each day. A recent federal appellate court ruling found that these laws apply to California-based flight attendants, but the airlines contend that it is effectively impossible for them to comply. This bill – the result of negotiations between airlines and the flight attendants' unions – allows union airlines and their flight attendants to establish alternative meal and rest break rules through the collective bargaining process. Upon the Governor's signature and where such a collective bargaining agreement is in place, airlines will no longer have to comply with state meal and rest break laws with respect to their flight attendants. The bill has no impact on litigation alleging meal and rest break violations that was filed prior to the introduction of the bill on December 5, 2022.

The bill is sponsored by Alaska Airlines; American Airlines; the Association of Flight Attendants; the Association of Professional Flight Attendants; Southwest Airlines; the Transport Workers Union of America, AFL-CIO; and United Airlines. Support comes from organizations promoting regional travel and commerce. There is no opposition on file. The bill contains an urgency clause and would go into effect upon receiving the Governor's signature. The bill passed out of the Senate Labor, Public Employment and Retirement Committee by a vote of 5-0. If the bill passes out of this Committee, it will next be heard in the Senate Appropriations Committee.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Requires most California employers to authorize and permit employees to take ten minute paid rest breaks for every four hours, or major fraction thereof, worked. (Industrial Wage Orders 1-16.)

2) Requires, with specified exemptions, that California employers enable their employees to take unpaid meal breaks as follows:
   a) 30 minutes for every five hours worked, except that if the total work period is no more than 6 hours, the meal period may be waived by mutual consent; and
   b) a second 30 minute meal break if working more than 10 hours a day, except that if the work period is no more than 12 hours, the second meal period may be waived by mutual consent provided that the first meal break was not waived. (Lab. Code § 512.)

3) Prohibits an employer from requiring an employee to work during a meal or rest break mandated pursuant to statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Board, or the Division of Occupational Safety and Health. (Lab. Code § 226.7(b).)

4) Provides that an employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that a required meal or rest break is not provided. (Lab. Code 226.7(c).)

5) Holds that airlines are obligated to follow California meal and rest break laws in relation to California-based flight attendants. (*Bernstein v. Virgin Am., Inc.* (9th Cir. 2021) 3 F.4th 1127; cert denied (2022) ___U.S.___ (142 S.Ct. 2903).)

This bill:

1) Provides that, for purposes of this bill, a collective bargaining agreement "addresses" meal and rest breaks if it contains any provision providing for meal and rest breaks; providing compensation in lieu of meals, or per diem, which may be in lieu of meals; or providing a recognition of a right to eat on board an aircraft during the course of a duty day.

2) Provides that California meal and rest break laws do not apply to flight attendants as long as the flight attendants are covered by a collective bargaining agreement that addresses meal and rest breaks.

3) Provides that California meal and rest break laws do not apply to flight attendants who are organized pursuant to specified law but who are not yet covered by a collective bargaining agreement that addresses meal and rest breaks for at least 12

months from the time of organization, or longer if agreed upon in writing by the airline in question and the labor organization representing the flight attendants.

4) Prohibits a person, commencing December 5, 2022, from filing a new legal action by or on behalf of a person covered by a collective bargaining agreement that addresses meal and rest breaks if that new legal action asserts claims for meal and rest break violations.

5) Clarifies that the bill does not disturb a settlement agreement or final judgment of any civil action brought by a flight attendant, or a class of flight attendants, against an airline for alleged meal and rest break violations.

6) Contains an urgency clause and will take effect immediately upon the Governor's signature as a result.

COMMENTS

1. Meal and rest break law in California

California's meal and rest break laws are intended to help protect the health and safety of workers and the public alike by ensuring that workers do not go for lengthy periods without rest or sustenance on the job, thus helping to avoid unhealthy or dangerous fatigue while on the job. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1113.)

The law providing for rest breaks emanates from the various Industrial Wage Orders that govern employment in different sectors of the state economy. In most instances, employers are required to give their workers ten minutes of paid rest based after four hours of work or major fraction thereof. (*See* Industrial Wage Orders 1-16.) During these rest breaks, workers are supposed to be fully off duty. (*Ibid*.)

California law regarding meal breaks is set forth in Labor Code Section 512. Pursuant to that statute, in most instances California employers must enable their employees to take a 30-minute, unpaid meal break for every five hours the employee works except that, if the total work period is no more than 6 hours, the meal period may be waived by mutual consent. Employers have to give their employees a second 30-minute meal break if they work more than 10 hours a day. Here, too, the meal break may be waived by mutual consent if the work period goes no longer than 12 hours and the first meal break was not waived. (Lab. Code § 512.)

Both the meal and rest break requirements are backed by a simple remedy: for each day that an employer fails to provide a required break, the employer owes the worker one hour's worth of additional pay at the worker's regular hourly rate. (Lab. Code § 226.7(c). Though this additional hour of pay is sometimes referred to as a meal or rest

break "penalty," the courts have ruled that this additional pay is, in fact, a form of wages owed to the worker. (*Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 117). Accordingly, the employer's failure to pay this wage premium for missed meal and rest breaks means the employer has not paid the worker their complete wages, which can lead to further liability. (*See*, *e.g.*, Lab. Code § 203, which provides compensatory statutory penalties for each day, up to 30 days, that a worker must wait to receive their full and final wages.)

2. Application to flight attendants – *Bernstein v. Virgin America*

California's meal and rest break laws apply to the overwhelming majority of California employers. Until recently, however, there was considerable dispute as to whether California meal and rest break laws covered flight attendants based in California.

Some California-based flight attendants asserted that California meal and rest break law applied to them. The airlines by and large disagreed. The airlines asserted a number of arguments for their view: that application of state meal and rest break laws to interstate flights violated the dormant Commerce Clause; that the work performed had only a limited actual connection to the State of California such that California state law did not apply to that work; and that state law was preempted by federal law in this area. As to this last point, the airlines claimed that California's meal and rest break laws were preempted because, among other things, many of their operations are regulated by federal law and they claimed it was impossible to comply with Federal Aviation Administration regulations and California meal and rest break laws at the same time. Echoes of these arguments can still be found in the letters submitted to the Committee in support of this bill.

As a practical and legal matter, however, the dispute was largely laid to rest last year when the United States Supreme Court declined to review a Ninth Circuit Court of Appeals ruling that held, in essence, that California-based flight attendants are indeed entitled to the full benefit of California meal and rest break law. (*Bernstein v. Virgin Am., Inc.* (9th Cir. 2021) 3 F.4th 1127; *cert denied* (2022) ___U.S.___ (142 S.Ct. 2903).)

3. Related litigation

While the *Bernstein* lawsuit was pending and in the time since that case reached its final judgment, a number of similar lawsuits have been filed. In each case, one or more California-based flight attendants have come forward to allege that the airline for which they worked did not comply with California meal and rest break laws. Accordingly, these flight attendants have asked the courts to award them compensatory premium wages, among other damages.

All of these cases are – or the plaintiffs hope they will become – class actions. In other words, the individual flight attendants who have filed the lawsuits and are specifically

named as plaintiffs are not just seeking relief for themselves. They also hope to force the airlines they have sued to pay the premium wages for missed meal and rest breaks to all of the other California-based flight attendants who worked for the same airline during the relevant period of time.

These flight attendant meal and rest break violation cases are all in various stages of the legal process. In some instances, the courts have yet to determine whether to allow the matter to proceed as a class action. In other cases, class certification has already taken place. Some of the cases are apparently close to settling; still others have settled already. As mentioned, *Bernstein* case has already reached final judgment.

4. Resolution of the underlying issues through collective bargaining going forward

While all of this litigation has been unfolding, the labor unions representing flight attendants have been holding conversations off and on with their members' employers. The goal of these talks was, among other things, to reach a mutually agreeable resolution to the challenge of ensuring adequate meal and rest breaks in the context of air travel through collective bargaining.

Evidently, these discussions have at last born fruit. This bill is sponsored jointly by the flight attendants' union and several of the most prominent airlines for whom their members work. These sponsors report that SB 41 "reflects months of negotiations between commercial airlines and labor organizations representing cabin crew employees […]. The bill provides commercial airlines with a clear and implementable compliance standard, while also ensuring that their cabin crew employees receive the critical protections they so deserve."

Specifically, under SB 41, airlines whose flight attendants are covered by a collective bargaining agreement that provides alternative rules for handling meal and rest breaks will no longer be bound by California meal and rest break laws in relation to those flight attendants from the date of enactment of the bill. Similarly, SB 41 grants a minimum 12 month prospective exemption from state meal and rest break laws to airlines whose flight attendants have organized, even if they do not yet have a collective bargaining agreement addressing meal and rest breaks. This 12 month exemption can be extended, even in the ongoing absence of a collective bargaining agreement that addresses meal and rest breaks, but only if the airline and the relevant flight attendants' union agree to that extension. The idea, presumably, is to give airlines and newly organized flight attendants a deadline to reach agreement on these issues, but also a way to extend that deadline if both sides agree it would be helpful.

The bill does not impact airlines' legal duty to provide meal and rest breaks in accordance with California law if their flight attendants are not organized. Thus, so long as the *Bernstein* case is not overruled in some fashion, non-union airlines will still be liable to California-based flight attendants if those airlines do not provide meal and rest

breaks as state law requires. The difference implicitly reflects the view that flight attendants represented collectively are in a stronger bargaining position in relation to their employer and, accordingly, can negotiate appropriately protective meal and rest break rules without the need for government intervention.

5. Impact of the bill on litigation

As described in Comment 4, above, the main thrust of the bill is prospective. Amendments recently taken in the Senate Labor, Public Employment and Retirement Committee removed a provision that would otherwise have given some retroactive application to the bill. The Senate Labor, Public Employment and Retirement Committee amendments replaced that provision with a different one intended to specify how litigation over California-based flight attendants' meal and rest breaks is to be handled once the bill is enacted. The new provision states:

> (c) Notwithstanding any other law, commencing December 5, 2022, a person shall not file a new legal action by or on behalf of a person covered by a collective bargaining agreement meeting the requirements of paragraph (1) of subdivision (a) asserting a claim for alleged meal or rest break violations.

This new provision does not impact non-union flight attendants at all. They remain completely at liberty to file new lawsuits alleging meal and rest break violations or to pursue lawsuits they have already filed.

As to flight attendants covered by a collective bargaining agreement with provisions addressing meal and rest breaks, the intended application of this provision to litigation is summarized as follows, below:

a. *Prevents the filing of any new lawsuits for meal and rest break violations on and after the date the bill was introduced*

This provision means that if flight attendants covered by a qualifying collective bargaining agreement tried to file an entirely new lawsuit alleging meal and rest break violations going forward, they would be unable to do so. It also means that any case filed by flight attendants after December 5, 2022, would be effectively null and void if those flight attendants were covered by a qualifying collective bargaining agreement. As a practical matter, however, no such case has been brought to the Committee's attention.

b. Does not impact cases pending as of the bill introduction date

As the bill's only prohibition is on the filing of new lawsuits on or after the bill introduction date, the bill does *not* have any impact on cases that had already been filed

as of December 5, 2022. Those cases are free to run their natural course. For example, if the case has already been certified as a class action, it may continue as a class action. If the case has not yet been certified as a class action, the named plaintiffs may continue to seek certification of the class.

Leaving pending cases to go forward in all of the ways that they might have in the absence of this legislation is consistent with the Committee's historical aversion to interfering with the outcome of pending litigation. There are at least two major considerations behind this general policy. First, disruption of pending litigation can sometimes raise thorny constitutional due process issues. (*See, e.g., In re Marriage of Buol* (1985) 39 Cal.3d 751.) Second, there is the problem of the precedent that legislation interfering with pending litigation could set. Lawsuits are filed all the time. New defendants constantly find themselves facing liability as a result. If these defendants know they might be able to sidestep that liability through legislation, no doubt many will try. In addition to inundating the Legislature with bill proposals intended to eviscerate pending litigation, such a dynamic would probably be unhealthy for the public's confidence in the consistency and fairness of the legal and legislative systems.

6. Arguments in support of the bill

According to the author:

> Compliance with the California Meal and Rest break statute for inflight cabin crews is impossible for commercial airline flights longer than 2 ½ to 3 hours, because the FAA requires these employees to remain "on duty" at all times during a flight, including during meal and rest periods. Under California's meal and rest break law employees must be "off duty" during meal and rest breaks. Further, the statute requires an employee must be able to leave the premises, which is not possible for employees who are inflight. SB 41 provides a course correction for incompatible state law and federal regulations.
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> The bill reflects months of negotiations resulting in an agreement between commercial airlines and cabin crew labor representatives. The bill allows flight attendants to negotiate meal and rest break benefits while providing their respective employers the ability to comply with California law.

As sponsors of the bill, Alaska Airlines, American Airlines, the Association of Flight Attendants, the Association of Professional Flight Attendants, Southwest Airlines, the Transport Workers Union of America, AFL-CIO, and United Airlines jointly write:

SB 41, which reflects months of negotiations between commercial airlines and labor organizations representing cabin crew employees, seeks to address this legal conflict between California law and FAA regulations. The bill provides commercial airlines with a clear and implementable compliance standard, while also ensuring that their cabin crew employees receive the critical protections they so deserve.

SUPPORT

Alaska Airlines (sponsor)
American Airlines (sponsor)
Association of Flight Attendants (sponsor)
Association of Professional Flight Attendants (sponsor)
Southwest Airlines (sponsor)
Transport Workers Union of America, AFL-CIO (sponsor)
United Airlines (sponsor)
Bay Area Council
California Chamber of Commerce
San Francisco Travel Association
Silicon Valley Leadership Group

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

SB 646 (Hertzberg, Ch. 337, Stats. 2021) exempted janitorial employers from the Labor Code's Private Attorney General Act (PAGA) provided that their employees are covered by a collective bargaining agreement with specified content. The bill explicitly clarified that it did not apply to cases filed before the bill's effective date.

AB 2605 (Gipson, Ch. 584, Stats. 2018) exempted employees in specified, safety-related positions at petroleum processing facilities from aspects of state rest break laws provided that those employees are covered by a collective bargaining agreement with specified content. The bill explicitly clarified that it did not apply to cases filed before the bill's effective date.

PRIOR VOTES:

Senate Labor, Public Employment and Retirement Committee (Ayes 5, Noes 0)
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