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AB-701 Warehouse distribution centers. (2021-2022)

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CALIFORNIA LEGISLATURE— 2021–2022 REGULAR SESSION

ASSEMBLY BILL

NO. 701

Introduced by Assembly Member Lorena Gonzalez

~~(Coauthor: Assembly Member~~ (Coauthors: Assembly Members Carrillo, Kalra, and Santiago)

~~(Coauthor: Senator~~ (Coauthors: Senators Durazo and Stern)

February 16, 2021

An act to amend Section 138.7 of, and to add Part 8.6 (commencing with Section 2100) to Division 2 of, the Labor Code, relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

AB 701, as amended, Lorena Gonzalez. Warehouse distribution centers.

(1) Existing law relating to employment regulation and supervision imposes special provisions on certain occupations and industries. Existing law charges the Labor Commissioner and the Division of Labor Standards Enforcement with the enforcement of labor laws.

This bill, among other things, would require specified employers to provide to each employee, defined as a nonexempt employee who works at a warehouse distribution center, upon hire, or within 30 days of the effective date of these provisions, 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. The bill would provide that an employee shall not be required to meet a quota that prevents compliance with meal or rest periods, use of bathroom facilities, or occupational health and safety laws, as specified. The bill would prohibit an employer from taking adverse action against an employee for failure to meet a quota that has not been disclosed or for failure to meet a quota that does not allow a worker to comply with meal or rest periods or occupational health and safety laws. The bill would require that any action taken by an employee to comply with

occupational health and safety laws or division standards be considered time on task and productive time for the purposes of any quotas or monitoring system.

This bill would provide that if a current or former employee believes that meeting a quota caused a violation of their right to a meal or rest period or required them to violate any occupational health and safety law or standard, they have the right to request, and the employer is required to provide, a written description of each quota to which the employee is subject and a copy of the most recent 90 days of the employee's own personal work speed data. The bill would limit a former employee to one of these requests. The bill would also authorize a current or former employee to bring an action for injunctive relief to obtain compliance with specified requirements, and may, upon prevailing in the action, recover costs and reasonable attorney's fees in that action.

This bill would require the Labor Commissioner to enforce these provisions by engaging in coordinated and strategic enforcement efforts with the Department of Industrial Relations, including the Division of Occupational Safety and Health and the Division of Workers' Compensation. The bill would authorize the commissioner to have access to data from the department including employer-reported injury data and enforcement actions in warehouses, the identity of uninsured employers, and employers who are committing workers' compensation fraud, wage theft, or other information relevant to the commissioner's authority, and would make other conforming changes. The bill would require the commissioner to report to the Legislature by January 1, 2023, the number of claims filed with the commissioner, data on warehouse production quotas in warehouses ~~with~~ *in which* annual employee injury rates *are* above the industry average, and the number of investigations undertaken and enforcement actions initiated, per ~~employer.~~ *employer, as specified.*

This bill would require ~~to commissioner, if a pattern or practice of injuries or health and safety violations is found at a particular worksite or with an employer, to initiate an investigation of violations in coordination with other divisions within the Department of Industrial Relations, as needed.~~ *the Division of Occupational Safety and Health or the Division of Workers' Compensation to notify the commissioner, who is required to determine whether an investigation of violations pursuant to these provisions is appropriate, if 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.* The bill would authorize the commissioner to adopt regulations relating to the procedures for an employee to make a complaint alleging a violation of this part.

(2) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: yes

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The Legislature finds and declares the following:

(a) The rapid growth of just-in-time logistics and same- and next-day consumer package delivery, and advances in technology used for tracking employee productivity, have led to a rise in the number of warehouse and distribution center workers who are subject to quantified work quotas.

(b) Warehouse and distribution center employees who work under those quotas are expected to complete a quantified number of tasks within specific time periods, often measured down to the minute or second, and face adverse employment action, including suspension or termination, if they fail to do so.

(c) Those quotas generally do not allow for workers to comply with safety guidelines or to recover from strenuous activity during productive work time, leaving warehouse and distribution center employees who work under them at high risk of injury and illness.

(d) The quotas under which warehouse and distribution center employees regularly work also affect their compensation. California and many cities require employers to pay their employees a minimum-wage rate. Warehouse and distribution center employees who work under a quota, however, do not receive the full benefit of minimum wages if their quota is increased to make up for the direct or indirect effect of a minimum-wage increase.

(e) Quotas in occupations that are already physically demanding not only increase accidents, but they also incentivize unsafe work. The workforce in warehouse and logistics is largely comprised of people of color who

depend upon these jobs to provide for their families and often see no alternative but to prioritize quota compliance over their own safety.

SEC. 2. Section 138.7 of the Labor Code is amended to read:

138.7. (a) Except as expressly permitted in subdivision (b), a person or public or private entity not a party to a claim for workers' compensation benefits shall not obtain individually identifiable information obtained or maintained by the division regarding that claim. For purposes of this section, "individually identifiable information" means any data concerning an injury or claim that is linked to a uniquely identifiable employee, employer, claims administrator, or any other person or entity.

(b) (1) (A) The administrative director, or a statistical agent designated by the administrative director, may use individually identifiable information for purposes of creating and maintaining the workers' compensation information system as specified in Section 138.6.

(B) The administrative director may publish the identity of claims administrators in the annual report disclosing the compliance rates of claims administrators pursuant to subdivision (d) of Section 138.6.

(C) The administrative director shall use individually identifiable information for purposes of creating provider medical utilization data as specified in Section 138.8.

(2) (A) The State Department of Public Health may use individually identifiable information for purposes of establishing and maintaining a program on occupational health and occupational disease prevention as specified in Section 105175 of the Health and Safety Code.

(B) (i) The State Department of Health Care Services may use individually identifiable information for purposes of seeking recovery of Medi-Cal costs incurred by the state for treatment provided to injured workers that should have been incurred by employers and insurance carriers pursuant to Article 3.5 (commencing with Section 14124.70) of Chapter 7 of Part 3 of Division 9 of the Welfare and Institutions Code.

(ii) The Department of Industrial Relations shall furnish individually identifiable information to the State Department of Health Care Services, and the State Department of Health Care Services may furnish the information to its designated agent, provided that the individually identifiable information shall not be disclosed for use other than the purposes described in clause (i). The administrative director may adopt regulations solely for the purpose of governing access by the State Department of Health Care Services or its designated agents to the individually identifiable information as defined in subdivision (a).

(3) (A) Individually identifiable information may be used by the Division of Workers' Compensation, the Division of Labor Standards and Enforcement, and the Division of Occupational Safety and Health as necessary to carry out their duties. The administrative director shall adopt regulations governing the access to the information described in this subdivision by these divisions. Any regulations adopted pursuant to this subdivision shall set forth the specific uses for which this information may be obtained.

(B) Individually identifiable information maintained in the workers' compensation information system and the Division of Workers' Compensation may be used by researchers employed by or under contract to the Commission on Health and Safety and Workers' Compensation as necessary to carry out the commission's research. The administrative director shall adopt regulations governing the access to the information described in this subdivision by commission researchers. These regulations shall set forth the specific uses for which this information may be obtained and include provisions guaranteeing the confidentiality of individually identifiable information. Individually identifiable information obtained under this subdivision shall not be disclosed to commission members. Individually identifiable information obtained by researchers under contract to the commission pursuant to this subparagraph may not be disclosed to any other person or entity, public or private, for a use other than that research project for which the information was obtained. Within a reasonable period of time after the research for which the information was obtained has been completed, the data collected shall be modified in a manner so that the subjects cannot be identified, directly or through identifiers linked to the subjects.

(C) Individually identifiable information may be used by the Office of Self-Insurance Plans of the Department of Industrial Relations as necessary to carry out its duties, including evaluating the costs of administration, workers' compensation benefit expenditures, and solvency and performance of the public self-insured employers' workers' compensation programs.

(4) The administrative director shall adopt regulations allowing reasonable access to individually identifiable information by other persons or public or private entities for the purpose of bona fide statistical research. This research shall not divulge individually identifiable information concerning a particular employee, employer, claims administrator, or any other person or entity. The regulations adopted pursuant to this paragraph shall include provisions guaranteeing the confidentiality of individually identifiable information. Within a reasonable period of time after the research for which the information was obtained has been completed, the data collected shall be modified in a manner so that the subjects cannot be identified, directly or through identifiers linked to the subjects.

(5) (A) This section shall not operate to exempt from disclosure any information that is considered to be a public record pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code) contained in an individual's file once an application for adjudication has been filed pursuant to Section 5501.5.

(B) Individually identifiable information shall not be provided to any person or public or private entity who is not a party to the claim unless that person self-identifies or that public or private entity identifies itself and states the reason for making the request. The administrative director may require the person or public or private entity making the request to produce information to verify that the name and address of the requester is valid and correct. If the purpose of the request is related to preemployment screening, the administrative director shall notify the person about whom the information is requested that the information was provided and shall include the following in 12-point type:

"IT MAY BE A VIOLATION OF FEDERAL AND STATE LAW TO DISCRIMINATE AGAINST A JOB APPLICANT BECAUSE THE APPLICANT HAS FILED A CLAIM FOR WORKERS' COMPENSATION BENEFITS."

(C) Any residence address is confidential and shall not be disclosed to any person or public or private entity except to a party to the claim, a law enforcement agency, an office of a district attorney, any person for a journalistic purpose, or other governmental agency.

(D) This paragraph does not prohibit the use of individually identifiable information for purposes of identifying bona fide lien claimants.

(c) Except as provided in subdivision (b), individually identifiable information obtained by the division is privileged and is not subject to subpoena in a civil proceeding unless, after reasonable notice to the division and a hearing, a court determines that the public interest and the intent of this section will not be jeopardized by disclosure of the information. This section shall not operate to restrict access to information by any law enforcement agency or district attorney's office or to limit admissibility of that information in a criminal proceeding.

(d) It is unlawful for any person who has received individually identifiable information from the division pursuant to this section to provide that information to any person who is not entitled to it under this section.

SEC. 3. Part 8.6 (commencing with Section 2100) is added to Division 2 of the Labor Code, to read:

PART 8.6. Warehouse Distribution Centers

2100. As used in this part:

(a) "Commissioner" means the Labor Commissioner.

(b) "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.

(c) "Division" means the Division of Occupational Safety and Health.

(d) "Employee" means a nonexempt employee who works at a warehouse distribution center.

(e) (1) "Employee work speed data" means 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.

(2) "Employee work speed data" does not include qualitative performance assessments, personnel records, or itemized wage statements pursuant to Section 226, except for any content of those records that includes employee work speed data as defined in this part.

(f) "Employer" means a person who directly or indirectly, or through an agent or any other person, including through the services of a third-party employer, temporary service, or staffing agency or similar entity, employs or exercises control over the wages, hours, or working conditions of 100 or more employees at a single warehouse distribution center or 1,000 or more employees at one or more warehouse distribution centers in the state. For purposes of this definition, all employees of an employer's commonly controlled group, as that term is defined in Section 25105 of the Revenue and Taxation Code, shall be counted in determining the number of employees employed at a single warehouse distribution center or at one or more warehouse distribution centers in the state.

(g) "Person" means an individual, corporation, partnership, limited partnership, limited liability partnership, limited liability company, business trust, estate, trust, association, joint venture, agency, instrumentality, or any other legal or commercial entity, whether domestic or foreign.

(h) "Quota" means a work standard under which an 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 employee may suffer an adverse employment action if they fail to complete the performance standard.

(i) (1) "Warehouse distribution center" means an establishment as defined by any of the following North American Industry Classification System (NAICS) Codes, however that establishment is denominated:

(A) 493110 for General Warehousing and Storage.

(B) 423 for Merchant Wholesalers, Durable Goods.

(C) 424 for Merchant Wholesalers, Nondurable Goods.

(D) 454110 for Electronic Shopping and Mail-Order Houses.

(2) The term "warehouse distribution center" does not include NAICS Code 493130, Farm Product Warehousing and Storage.

2101. Each employer shall provide to each employee, upon hire, or within 30 days of the effective date of this part, 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.

2102. An employee shall not be 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. An employer shall not take 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 in the Labor Code or division standards, or for failure to meet a quota that has not been disclosed to the employee pursuant to Section 2101.

2103. (a) Any actions taken by an employee to comply with occupational health and safety laws in the Labor Code or division standards shall be considered time on task and productive time for purposes of any quota or monitoring system.

(b) Notwithstanding subdivision (a), consistent with existing law, meal and rest breaks are not considered productive time unless the employee is required to remain on call.

2104. (a) (1) If a current or former employee believes that meeting a quota caused a violation of their right to a meal or rest period or required them to violate any occupational health and safety laws in the Labor Code or division standards, they have the right to request, and the employer shall provide, a written description of each quota to which the employee is subject and a copy of the most recent 90 days of the employee's own personal work speed data.

(2) If a former employee requests a written description of the quotas to which they were subject and a copy of their own personal work speed data pursuant to paragraph (1), the employer shall provide 90 days of the former

employee's quotas and personal work speed data for the 90 days prior to the date of the employee's separation from the employer.

(3) A former employee is limited to one request pursuant to this subdivision.

(b) An employer that receives a written or oral request for information pursuant to subdivision (a) shall comply with the request as soon as practicable, but no later than 21 calendar days from the date of the request.

(c) Nothing in this section requires an employer to use quotas or monitor work speed data. An employer that does not monitor this data has no obligation to provide it.

2105. For purposes of this part, there shall be a rebuttable presumption of unlawful retaliation if an employer in any manner discriminates, retaliates, or takes any adverse action against any employee within 90 days of the employee doing either of the following:

(a) Initiating the employee's first request in a calendar year for information about a quota or personal work speed data pursuant to subdivision (a) of Section 2104.

(b) Making a complaint related to a quota alleging any violation of Sections 2101 to 2104, inclusive, to the commissioner, the division, other local or state governmental agency, or the employer.

2106. Upon receiving a complaint regarding a violation of this part, a state or local enforcement entity may request or subpoena the records of warehouse distribution center quotas and employee work speed data.

2107. (a) The commissioner shall do all of the following:

(1) The commissioner shall enforce this part by engaging in coordinated and strategic enforcement efforts with the divisions within the Department of Industrial Relations, including the Division of Occupational Safety and Health and the Division of Workers' Compensation. The commissioner shall have access to data from the department including employer-reported injury data and enforcement actions in warehouses, and the identity of uninsured employers, and employers who are committing workers' compensation fraud, wage theft, or other information relevant to the commissioner's authority.

(2) The commissioner shall strategically collaborate with stakeholders to educate workers and employers about their rights and obligations under this part, respectively, in order to increase compliance.

(3) (A) The commissioner shall report to the Legislature by January 1, 2023, the number of claims filed with the commissioner under this part, data on warehouse production quotas in warehouses ~~with~~ *in which the Division of Workers' Compensation has indicated that* annual employee injury rates *are* above the industry average, and the number of investigations undertaken and enforcement actions initiated, per employer.

(B) The requirement for submitting a report imposed under subparagraph (A) is inoperative on January 1, 2027, pursuant to Section 10231.5 of the Government Code.

(C) A report to be submitted pursuant to subparagraph (A) shall be submitted in compliance with Section 9795 of the Government Code.

~~(b) If the commissioner finds a pattern or practice of injuries, or of health and safety violations, at a particular worksite or with an employer, the commissioner shall initiate an investigation of violations under this part and coordinate with other divisions within the Department of Industrial Relations, as needed.~~

(b) If 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, the Division of Occupational Safety and Health or the Division of Workers' Compensation shall notify the commissioner, and the commissioner shall determine whether an investigation of violations pursuant to this part, if relevant to the commissioner's authority, is appropriate. The commissioner may coordinate enforcement with other divisions within the Department of Industrial Relations, as needed.

(c) The commissioner shall have the authority to adopt regulations relating to the procedures for an employee to make a complaint alleging a violation of this part.

(d) The commissioner shall enforce this part using the procedures set forth in Sections 98, 98.3, 98.7, 98.74, and 1197.1.

(e) In any successful action brought by the commissioner to enforce this part, the court may grant injunctive relief in order to obtain compliance with the part, and shall award costs and reasonable attorney's fee.

2108. A current or former employee may bring an action for injunctive relief to obtain compliance with Sections 2101 to 2104, inclusive, and may, upon prevailing in the action, recover costs and reasonable attorney's fees in that action. In any action involving a quota that prevented the compliance with regulations promulgated by the Occupational Safety and Health Standards Board, the injunctive relief shall be limited to suspension of the quota and any adverse action that resulted from its enforcement.

2109. In any action by a current or former employee that could be brought pursuant to the Labor Code Private Attorneys General Act of 2004 (Part 13 (commencing with Section 2698)) for violations of this part, the employer shall have the right to cure alleged violations as set forth in Section 2699.3. If, in that action, a violation of any occupational health and safety laws in the Labor Code or division standards contained in or interpreting Division 5 (commencing with Section 6300) is alleged, the current or former employee shall comply with the applicable procedural requirements of subdivision (b) of Section 2699.3.

2110. This part does not limit the authority of the Attorney General, a district attorney, or a city attorney, either upon their own complaint or the complaint of any person acting for themselves or the general public, to prosecute actions, either civil or criminal, for violations of this part, or to enforce the provisions thereof independently and without specific direction of the commissioner or the division.

2111. This part does not preempt any city, county, or city and county ordinance that provides equal or greater protection to employees who are covered by this part.

2112. The provisions of this part are severable. If any provision of this part or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

SEC. 4. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.