California Employers with Warehouse Distribution Centers Face First-in-Nation Law Regulating Production Quotas

Insights
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California Governor Gavin Newsom just signed into effect a first-in-the-nation law that specifically targets warehouse distribution centers with complicated restrictions that regulate the use of production quotas. While much of the media attention surrounding AB 701 has focused on high-profile online retailers, the broad scope of the bill signed yesterday means it will potentially apply to many employers across a wide range of industries that utilize warehousing operations and distribution centers. This new law contains a multitude of legal risks and goes into effect on January 1, 2022. If AB 701 applies to your operations, you will need to start preparing now. What do employers need to know about this significant new law?

Which Employers Does AB 701 Target?

The first step to examine is which businesses will be impacted by the new law. AB 701 targets employers that utilize "warehouse distribution centers" and that meet certain employee population thresholds.

What Is a Warehouse Distribution Center?

In summary, AB 701 broadly applies to establishments that are primarily engaged in operating merchandise warehousing and storage facilities, that sell durable and/or nondurable goods to other businesses, or that are primarily engaged in selling merchandise using non-store means, such as through the Internet or catalogs.

Rather than provide a clear definition, AB 701 cites four NAICS Codes to define a "warehouse distribution center":

- 493110 – General Warehousing and Storage;
- 423 – Merchant Wholesalers, Durable Goods;
- 424 – Merchant Wholesalers, Nondurable Goods; and
- 454110 – Electronic Shopping and Mail-Order Houses.

It then requires employers to determine if their warehouse and/or distribution centers fit into those NAICS Codes. You should carefully review each applicable NAICS Code definition to determine if AB

NAICS Codes. You should carefully review each applicable NAICS Code definition to determine if AB 701 applies to your business. The law specifically exempts establishments that qualify as Farm Product Warehousing and Storage under NAICS Code 493130.

Note that under AB 701 it is irrelevant which NAICS Code you or another entity has assigned to your establishment. If any of these definitions could apply to your establishment, your warehouse and/or distribution center qualifies.

Do You Meet the Employee Population Threshold?

If your establishment qualifies as a warehouse distribution center, you then need to determine if you meet the employee population threshold.

AB 701 applies to employers that employ or exercise 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 distribution warehouse centers in California.

Employers must include in the population count workers who are provided through third parties, such as staffing agencies, if the employers exercise control over those workers' wages, hours, or working conditions. They must also include in the count *all employees* of the "commonly controlled group" who work at distribution warehouse centers in California.

AB 701's New Requirements

Qualified employers who use quotas must carefully follow—and quickly implement—AB 701's new requirements.

Regulating Quotas

Employers may implement quotas for their nonexempt warehouse employees, but those quotas now have specific restrictions. Under AB 701, a "quota" is a work standard assigned to an employee that the employee must complete within a defined time period or face an adverse employment action. A work standard is a requirement that the employee perform a specified productivity speed, perform a quantified number of tasks, or handle or produce a quantified amount of material.

Employers cannot require quotas that prevent compliance with meal or rest periods, use of bathroom facilities (including the time to travel to and from such facilities), or occupational health and safety laws. Additionally, the time employees spend complying with occupational health and safety laws must be considered as on task and productive for purposes of any quota — although meal and rest breaks are not considered productive time unless employees remain on call.

Written Descriptions of Quotas

Starting January 1, 2022, AB 701 requires employers to provide to each new hire a written description of applicable quotas. A compliant written description must include each work standard, the defined time period the work standard must be completed in, and any potential adverse employment actions if the quota is not met.

AB 701 also requires employers to give written descriptions of quotas to all current employees by January 31, 2022. Employers who do not already provide compliant written descriptions of quotas must act quickly to meet this deadline.

Taking Adverse Actions Against Employees Who Do Not Meet Quotas

AB 701 allows employers to take adverse actions against employees who do not meet their quotas. Still, you cannot do so if the quotas prevent compliance with meal or rest periods or occupational health and safety laws. Additionally, you cannot take adverse actions against an employee for failing to meet a quota unless the employee received the quota in writing as required by the law and discussed above.

Request for Records

Current or former employees who believe that a quota violated their right to meal or rest periods or any occupational health and safety laws can request a written description of each quota that applies to them and their work speed data over the previous 90 days. Employers must provide this information no later than 21 calendar days from the date of the request. Former employees may only make one such request. The law does not limit the number of requests current employees can make.

Notably, the law allows current or former employees to make written **or** oral requests. Additionally, a request for records under AB 701 does not include qualitative performance assessments, personnel records, or itemized wage statements. Employees who want that information must use procedures already in place through other Labor Code sections.

Enforcing AB 701

AB 701 also introduces many enforcement mechanisms.

Retaliation Claims, Injunctions, and PAGA Claims Are Available to Employees

The law creates new opportunities for employees to enforce the law. Of course, in doing so, the law creates new avenues for plaintiffs' attorneys to line their pockets. First, the law presumes retaliation if employers take adverse action against employees who, in the previous 90 days, have 1) requested for the first time in the calendar year their quota and/or work speed data or 2) complained to their employers or government agencies about an alleged violation of AB 701.

Second, the law allows current *and* former employees to bring an action for injunctive relief for any alleged violations of AB 701. It also allows those employees to recover costs and attorneys' fees if they prevail.

Third, the law allows plaintiffs to include AB 701 violations in PAGA actions. With that said, the law also allows employers to cure any alleged violations before plaintiffs file a lawsuit. But that may be cold comfort for employers already facing frequent PAGA shakedowns.

New State Actions

The law also creates new requirements for government agencies. The Labor Commissioner must coordinate with other government agencies to educate employees, track injury data, and enforce AB 701. The Labor Commissioner can also use already available enforcement mechanisms to enforce AB 701.

Additionally, the law requires Cal/OSHA and the Division of Workers' Compensation to notify the Labor Commissioner if a worksite or employer has an annual employee injury rate of at least 1.5 times higher than the industry average.

What Employers Should Do Now

If AB 701 applies to you, act now to ensure compliance before the law goes into effect on January 1, 2022.

1. Evaluate your current quotas. Although you likely already do this, ensure any quotas do not prevent employees from taking compliant meal and rest periods, using the bathroom, or complying with health and safety laws.
2. If you utilize quotas, make sure that you create and produce written quotas for each employee. Current employees must receive compliant written descriptions of quotas by January 31, 2022. Additionally, new employees must receive compliant written descriptions of quotas at the time of hire.
3. Create a process for data requests. Ensure that you have processes in place — and that you communicate those processes — for employees to request their data in writing or orally. Also ensure that you have processes in place to provide that data within 21 days of the request.
4. Pause before taking adverse actions. The unlawful retaliation presumption creates significant risks for employers who want to discipline, terminate, or take any other adverse action against their nonexempt warehouse employees. Of course, employers should always ensure that their reasons for taking an adverse action are proper and well-documented. But, with this new presumption, employers should be even more careful.

We will monitor developments related to this new law and provide updates as warranted, so make sure that you are subscribed to Fisher Phillips' Insights to get the most up-to-date information

sure that you are subscribed to Fisher Phillips Insights to get the most up-to-date information direct to your inbox. If you have further questions on how to comply with AB 701, contact your Fisher Phillips attorney, the author of this Insight, or any attorney in any one of our six California offices.

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