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California Takes Aim at Productivity Quotas at Warehouse Distribution Centers

On September 22, 2021, Governor Gavin Newsom signed [Assembly Bill No. 701](#) ("AB 701"), which makes it unlawful for employers to require nonexempt employees at warehouse distribution centers ("Covered Employee" or "Covered Employees") to meet production quotas that prevent 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 ("Prohibitive Production Quota"). Employers are also prohibited from taking adverse action against Covered Employees for failing to meet a Prohibitive Production Quota. AB 701 will take effect January 1, 2022 (the "Effective Date"). **Which Employers Are Subject to AB 701?** AB 701 applies to employers with 100 or more employees at a single warehouse distribution center or 1,000 or more employees at one or more warehouse distribution centers in California ("Covered Employer" or "Covered Employers"). Covered Employers should note that the employee count includes individuals staffed through third-party employers, temporary services, staffing agencies, other similar entities, and all employees of the Covered Employer's commonly controlled group as defined by [Section 25105 of the Revenue and Taxation Code](#). **What Is Considered a Warehouse Distribution Center?** Warehouse distribution centers are establishments defined by the following North American Industry Classification System ("NAICS") Codes:

- [NAICS Code 493110 – General Warehousing and Storage](#);
- [NAICS Code 423 – Merchant Wholesalers, Durable Goods](#);
- [NAICS Code 424 – Merchant Wholesalers, Nondurable Goods](#); and
- [NAICS Code 454110 – Electronic Shopping and Mail-Order Houses](#).

Employers should note that [NAICS Code 493130 – Farm Product Warehousing and Storage](#) is not considered a warehouse distribution center under AB 701. **What Is a Quota?** A quota (commonly referred to as production quota) is 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. **What Must Covered Employers Do?** Within thirty (30) days of the Effective Date, Covered Employers must provide to Covered Employees a written description of each applicable production quota requirement, including the quantified number of tasks to be performed, or materials to be produced or handled, and any potential adverse employment action that could result from failure to meet the production quota (the "Production Requirement"). For Covered Employees hired after the Effective Date, Employers must provide the Production Requirement within thirty (30) days of the Covered Employee's date of hire. Employers must also provide the Production Requirement and work speed data reports for a Covered Employee's prior ninety (90) days within twenty-one (21) calendar days of the date of the request. Former Covered Employees may submit such a request but are limited to one request. **What Is Work Speed Data?** Work speed data is 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. Work speed data does not include qualitative performance assessments, personnel records, or itemized wage statements pursuant to [California Labor Code Section 226](#), except for any content of those records that includes employee work speed data (e.g., work done on a piece-rate basis). **What Counts Toward On-Task or Production Time for Production Quotas?** Any action taken by an employee to comply with occupational health and safety laws or division standards is considered time on task and productive time for the purposes of any quotas or monitoring system. Meal and rest periods are not considered productive time unless a Covered Employee is required to remain on call. **Can Covered Employers Still Discipline or Terminate Covered Employees for Failing to Meet Production Quotas?** Potentially, but a Covered Employer's production quota must have previously been disclosed to Covered Employees as a Production Requirement and cannot be a

Prohibitive Production Quota. Covered Employers should be mindful that AB 701 created a rebuttal presumption of unlawful retaliation if an employer takes any adverse action against a Covered Employee within ninety (90) days of either a Covered Employee's: (a) first request in a calendar year for information about work speed data or any production quota, or (b) making of a production quota-related complaint to the Covered Employer or to a government agency. **Other Implications** Employers should also note that current or former Covered Employees can bring an action for injunctive relief to suspend unsafe quotas in order to seek compliance with specified requirements of AB 701, and may, upon prevailing in the action, recover costs and reasonable attorneys' fees in that action. Plus, the California Labor Commissioner may investigate 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. Businesses and individuals with questions should contact experienced counsel for guidance on new policies and practices.

Authors

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