

MEMORANDUM

FROM: Kahn, Soares and Conway, LLP

DATE: September 14, 2016

RE: Analysis of AB 1066 (Gonzalez)

I. INTRODUCTION

Governor Jerry Brown signed AB 1066 (Gonzalez) into law on September 12, 2016. AB 1066, known as the Phase-In Overtime for Agricultural Workers Act of 2016 (**Act**), will make several dramatic changes to Wage Order No. 14-2001 of the Industrial Welfare Commission (revised 07-2014) (**Wage Order 14**), including Wage Order 14's overtime provisions.

The Act will go into effect January 1, 2017 with a schedule that will phase-in new overtime requirements for agricultural workers in two (2) different periods determined by the number of employees employed.

II. AFFECTED EMPLOYEES

A. *The Act will impact all employees covered by Wage Order 14.*

The Act will impact all employees covered by Wage Order 14, including all persons employed in an agricultural occupation whether paid on a time, piece rate, commission, or other basis. An "employee" is defined as "any person employed by an employer." While this is not particularly helpful, Wage Order 14 defines "employed in an agricultural occupation" as a person whose occupation includes:

- (1) The preparation, care, and treatment of farm land, pipeline, or ditches, including leveling for agricultural purposes, plowing, discing, and fertilizing the soil;
- (2) The sowing and planting of any agricultural or horticultural commodity;
- (3) The care of any agricultural or horticultural commodity, including but is not limited to, cultivation, irrigation, weed control, thinning, heating, pruning, or tying, fumigating, spraying, and dusting;
- (4) The harvesting of any agricultural or horticultural commodity, including but not limited to, picking, cutting, threshing, mowing, knocking off, field chopping, bunching, baling, balling, field packing, and placing in field containers or in the vehicle in which the commodity will be hauled, and transportation on the farm or to a place of first processing or distribution;
- (5) The assembly and storage of any agricultural or horticultural commodity, including but not limited to, loading, road siding, banking, stacking, binding, and piling;
- (6) The raising, feeding and management of livestock, fur bearing animals, poultry, fish, mollusks, and insects, including but not limited to, herding, housing, hatching, milking, shearing, handling eggs, and extracting honey;
- (7) The harvesting of fish, as defined by Section 45 of the Fish and Game Code, for commercial sale; and
- (8) The conservation, improvement or maintenance of such farm and its tools and equipment.

B. *Specific Impacts.*

1. *Employee in a managerial position.*

Wage Order 14 exempts an employee from overtime if the employee is engaged in work which is primarily intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment, and for which the remuneration is not less than two (2) times the monthly state minimum wage for full-time employment. The Act removes this exemption so an otherwise exempt farm manager will be entitled to overtime pay as specified in the Act.

2. *Family member.*

Wage Order 14 exempts a parent, spouse, child, or legally adopted child of the employer from overtime pay. The Act removes this exemption so family members of the employer are entitled to overtime pay as specified in the Act.

3. *Shepherd.*

Wage Order 14 exempts an employee engaged to work as a shepherd from overtime pay. The Act removes this exemption, so shepherds will be entitled to overtime pay as specified in the Act.

4. *Irrigator.*

Wage Order 14 exempts an employee covered by the Order during any week in which more than half of the employee's working time is devoted to performing the duties of an irrigator. The Act removes this exemption, so irrigators will be entitled to overtime pay as specified in the Act.

5. *Drivers regulated by the Department of Transportation and California Highway Patrol.*

Wage Order 14 exempts employees whose hours of service are regulated by the U.S. Department of Transportation or California Highway Patrol. The Act removes this exemption so affected truck drivers will be entitled to overtime pay as specified in the Act.

C. *Collective Bargaining Agreements.*

Under Wage Order 14, an employee may be exempted from Wage Order 14's overtime provisions if the employee is covered by a collective bargaining agreement that provides premium wage rates for overtime work and a cash wage rate for the employee of at least \$1 per hour more than minimum wage. The Act removes this exemption, effectively replacing it with the provision in Labor Code section 514, which exempts an employee from statutory overtime requirements if the employee is covered by a collective bargaining agreement that expressly provides for the wages, hours of work, and working conditions for the employees plus premium wage rates for all overtime worked and a regular hourly rate of pay of at least 30% more than the state minimum wage.

This means a union can still enter into a collective bargaining agreement with overtime provisions different than those of the Act, but the requirements to do so would be higher. It is unclear from the Act if existing collective bargaining agreements are grandfathered into the Act or if they must be revised to comply with the Act.

III. TIMELINE OF IMPLEMENTATION.

A. *Day's Rest Provision.*

Under Labor Code section 554, Wage Order 14 was exempt from the requirement that agricultural workers be provided with a day of rest every seven (7) days. The Act removes this exemption making agricultural employees subject to Labor Code section 551 and 552.

Labor Code section 551 provides that every employee is entitled to one day's rest every seven (7) days. Labor Code section 552 prohibits any employer from requiring his or her employees to work more than six (6) days in seven (7). However, Labor Code section 554 provides that the one-day-of-rest requirement may be met by accumulating days of rest when the nature of the employment reasonably requires that the employee work seven or more consecutive days, provided that in each calendar month the employee receives days of rest equivalent to one day's rest in seven.

As an enforcement policy, the Division of Labor Standards Enforcement (**DLSE**) interprets Labor Code sections 551 and 554 as permitting employees to work more than six (6) consecutive days when it is reasonably required by the nature of the work, provided that employees: (i) receive an average of one (1) day off in seven (7) during the calendar month; and (ii) are properly compensated for overtime hours worked.

The day of rest requirements do not apply to (i) cases of emergency; (ii) work performed in the protection of life or property from loss or destruction; or (iii) if the Chief of the DLSE exempts an employer or employees from the day-of-rest requirements when, in his or her judgment, hardship will otherwise result. The statutory day-of-rest requirements also will not apply when the hours of employment do not exceed 30 hours in any week or six (6) hours in any one day of the week. (*Labor Code § 556.*)

If a valid collective bargaining agreement pursuant to Labor Code section 514 exists regarding hours of work, the day-of-rest requirement does not apply. (*Labor Code § 554.*) However, employees subject to such an agreement still must receive an average of one (1) day off in seven (7) during each calendar month, unless the agreement expressly provides otherwise. (*Ibid.*)

Accordingly, under the Act, beginning January 1, 2017, every agricultural employee must be afforded one (1) day's rest every seven (7) days unless one of the above exemptions applies or the employee is subject to a valid collective bargaining agreement that provides the one (1) day's rest every seven (7) days does not apply.

B. Phase-In of Overtime Pay.

The Act incrementally reduces the amount of hours an agricultural employee may work per day and per week before receiving overtime pay depending on if the employer employs more than 25 employees.

The Act is unclear how “25 employees” is calculated. For example, if an employer employs six (6) employees year-round, and hires 20 employees for two (2) months during harvest, it is unclear if this employer falls under the phase-in period for an employer with 25 or more employees; the phase-in period for an employer with 25 employees or less; or the phase-in period for an employer with 25 employees or less for most of the year and the phase-in period for an employer with more than 25 employees for the two (2) months of harvest. This is an issue that likely will need to be determined in DSLE’s updated Wage Order 14 or the courts.

Below are phase-in periods for employers with more than 25 employees and employers with 25 employees or less:

Employers with more than 25 employees:

- January 1, 2019: Overtime must be paid for work in excess of **9 ½ hours per workday** or in excess of **55 hours per week**.
- January 1, 2020: Overtime must be paid for work in excess of **9 hours per workday** or in excess of **50 hours per week**.
- January 1, 2021: Overtime must be paid for work in excess of **8 ½ hours per workday** or in excess of **45 hours per week**.
- January 1, 2022: Overtime must be paid for work in excess of **8 hours per workday** or in excess of **40 hours per week**. Any work in excess of **12 hours in one day** must be compensated at the rate of no less than **twice** the employee’s regular rate of pay.

Employers with 25 or fewer employees:

- January 1, 2022: Overtime must be paid for work in excess of **9 ½ hours per workday** or in excess of **55 hours per week**.
- January 1, 2023: Overtime must be paid for work done over **9 hours per workday** or in excess of **50 hours per week**.
- January 1, 2024: Overtime must be paid for work in excess of **8 ½ hours per workday** or in excess of **45 hours per week**.
- January 1, 2025: Overtime must be paid for work in excess of **8 hours per workday** or in excess of **40 hours per week**. Any work in excess of 12 hours in one day must be compensated at the rate of no less than **twice** the employee’s regular rate of pay.

The requirement that an agricultural employee is to be paid one and one-half times the regular rate of pay for any work in excess of the hourly requirements remains unchanged by the Act. The Act specifies, however, that beginning January 1, 2022, employers with more than 25 employees must pay employees double time for any work in excess of 12 hours in a day and beginning January 1, 2025, employers with 25 or less employees must pay employees double time for any work in excess of 12 hours in a day.

C. *Suspension of Phase-In.*

The Act gives the Governor of California the authority to temporarily suspend the phase-in requirements of the Act if the Governor suspends a scheduled minimum wage increase pursuant to Labor Code section 1182.12(d)(3). However, the full implementation of the phase-in period for employers with more than 25 employees must be complete by January 1, 2022 and the phase-in period for employers with 25 or less employees must begin no later than January 1, 2022.

IV. CONCLUSION.

In conclusion, the Act will have a dramatic impact on the agricultural community in California. Moving forward, employers should err on the side of caution when determining the applicability of the Act and current and future collective bargaining agreements. Several provisions of the Act will need to be interpreted by DLSE or the courts, so employers should continue to monitor the activities of DLSE and carefully review Wage Order 14 once updated to comply with the Act.