

New Washington Law Regulates Warehouse Distribution Center Worker Quotas

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A new Washington law regulating employers' use of production quotas or production standards for employees working at warehouse distribution centers (House Bill 1762) will go into effect on July 1, 2024.

The Washington law is similar to a statute passed in California in 2021 pertaining to large warehouses. Further, New York's Warehouse Worker Protection Act, which is like the laws of California and Washington, goes into effect June 19, 2023.

Coverage

The Washington law covers all employers with at least 100 nonexempt employees at a single warehouse distribution center in Washington or at least 1,000 nonexempt employees at one or more warehouse distribution centers in Washington.

To determine the employee threshold for coverage, those employed directly or indirectly, those employed through an agency, and all those employed by an employer's affiliates are counted.

"Warehouse distribution center" is defined to include establishments engaging in activities falling under NAICS codes:

- 493 for warehousing and storage, but not including 493130 for farm product warehousing and storage;
- 423 for merchant wholesalers, durable goods;
- 424 for merchant wholesalers, nondurable goods; or
- 454110 for electronic shopping and mail-order houses.

Quota

The new law defines "quota" broadly:

a work performance standard, whether required or recommended, where: (a) 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; or (b) an employee's actions are categorized between time performing tasks and not performing tasks, if the employee may suffer an adverse employment action if they fail to meet the performance standard.

This definition could include standardized "items per hour" quotas and more sophisticated algorithms or engineered labor standards to establish workplace productivity requirements.

Requirements

Covered employers must provide new employees a written description, in the employee's preferred language, of all applicable quotas (along with the potential adverse employment actions if the quotas or production standards are not met) and any associated incentives or bonus programs.

Employers must also provide notice of changes to quotas. These notices must be provided upon hire or within 30 days of the law's effective date, or by July 31, 2024. An employee must be notified (verbally or in writing) of subsequent changes to quotas as soon as possible before being subject to the new quota, and the employee must be provided an updated written description of each quota to which the employee is subject within two business days of the change.

When establishing quotas or production standards, employers must include time for rest breaks, reasonable travel time to rest and meal break locations, time to do work subject to the quota, and time to use the bathroom (including reasonable travel). The "reasonable travel time" must take into account the architecture and geography of the facility, as well as the employee's location. Quotas must also allow time for employees to take "any actions necessary for the employee to exercise the employee's right to a safe and healthful workplace" pursuant to the Washington Industrial Safety and Health Act (WISHA).

Quotas that do not provide employees with sufficient time to do any of the above, prevent activities related to employees' occupational safety and health, or expose employees to safety and health hazards in violation of WISHA are prohibited. Employees need not meet prohibited quotas, and employers cannot take adverse action against an employee for failing to meet a prohibited quota.

Covered employers that use quotas or monitor employee "work speed data" (information on an employee's performance of a quota) must keep records of each employee's work speed data and the aggregated work speed data for similar employees at the same warehouse distribution center for the duration of an employee's employment. They also must maintain the final six months of each employee's work speed data (and the aggregate work speed data) for up to six months after employment separation. If an employer takes adverse action against an employee for failure to meet a quota, it must preserve records related to the basis for the adverse action for at least three years after the adverse action. In theory, this could create a nearly permanent retention requirement for quota-related data.

The law gives employees the right to request and receive, within strict deadlines and at no cost, quota-related information (*i.e.*, written description of each relevant quota, past six months of personal work speed data, and past six months of aggregated work speed data for similar employees at the same warehouse distribution center). Former employees also may request and receive this information within three years of separation from employment.

Prohibitions Against Retaliation, Discrimination; Enforcement

The law's antiretaliation or antidiscrimination provisions protect current or former employees for exercising any right under the law, including requesting quota information or making a good faith complaint about a quota. There is a *rebuttable presumption* of retaliation if an employer takes any adverse action within 90 days of a protected activity. (Claims of discrimination or retaliation will follow the same procedures as for the Washington Minimum Wage Act, and claims related to unsafe quotas will follow that for

WISHA.)

The Washington Department of Labor & Industries (L&I) will enforce all other claims as detailed in the new law. L&I will investigate employees' complaints and can initiate its own investigations. It can request that an employer conduct a self-audit and make records available. L&I can also order an employer to correct a prohibited quota within 15 calendar days.

A first-time violation of the new law or any related rules can result in a civil penalty of \$1,000. L&I will create a schedule of enhanced penalties for repeat violations, up to \$10,000 per violation. Additionally, employers found to have violated the law will be required to pay the employee one hour of pay for each day that had a rest or meal period violation. Further, the L&I can file a court action against an employer. If L&I prevails, it is entitled to attorney's fees and costs. The new law does not provide for a private right of action.

Covered Washington employers should start planning now and ensure their productivity standards comply with the new law, including with its documentation requirements. Please contact a Jackson Lewis attorney with any questions.

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