

AMENDED IN SENATE APRIL 14, 2016

SENATE BILL

No. 985

Introduced by ~~Senator~~ Senators Berryhill and Bates

February 10, 2016

~~An act to amend Section 511 of the Labor Code, relating to employment. An act to amend Section 510 of, and to add and repeal Section 511.5 of, the Labor Code, relating to employment, and declaring the urgency thereof, to take effect immediately.~~

LEGISLATIVE COUNSEL'S DIGEST

SB 985, as amended, Berryhill. ~~Alternative workweek schedule.~~
Employment: work hours.

Existing law, with certain exceptions, establishes 8 hours as a day's work and a 40-hour workweek and requires payment of prescribed overtime compensation for additional hours worked. Existing law authorizes the adoption by $\frac{2}{3}$ of employees in a work unit of alternative workweek schedules providing for workdays no longer than 10 hours within a 40-hour workweek.

This bill would enact the California Workplace Flexibility Act of 2016. The bill, until January 1, 2022, would establish an overtime exemption for an employee-selected flexible work schedule. The exemption would allow, at the written request of an individual nonexempt employee on a form provided by the Division of Labor Standards Enforcement, and upon employer approval, an employee-selected flexible work schedule providing for workdays up to 10 hours per day within a 40-hour workweek. The employer would be obligated to pay overtime based on the employee's regular rate of pay, as prescribed, for all hours worked over 40 hours in a workweek or over 10 hours in a workday, whichever is greater. The bill would

establish requirements for the termination of an agreed-upon schedule. The bill would require the employer to maintain in its files a signed statement of voluntary participation for all approved voluntary work schedules and to submit a copy of the signed request form to the division. The bill would except from its provisions employees covered by collective bargaining and specific public employees. The bill would require the division to enforce its provisions and adopt or revise regulations as necessary to implement its provisions. The bill would also require the division, by January 1, 2021, to prepare and submit a report to the Legislature evaluating the act.

This bill would declare that it is to take effect immediately as an urgency statute.

~~Existing law authorizes an employer to propose a regularly scheduled alternative workweek, as specified, that will be adopted if it receives approval in a secret ballot election by at least $\frac{2}{3}$ of affected employees in a work unit.~~

~~This bill would make nonsubstantive changes to those provisions.~~

Vote: ~~majority~~^{2/3}. Appropriation: no. Fiscal committee: ~~no~~^{yes}. State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. *This act shall be known and may be cited as the*
- 2 *California Workplace Flexibility Act of 2016.*
- 3 SEC. 2. *The Legislature finds and declares all of the following:*
- 4 (a) *California employees are increasingly requesting flexibility*
- 5 *in terms of their work schedules to help balance their work-life*
- 6 *commitments, and many prefer such increased flexibility over*
- 7 *additional compensation. As a result, many employers and human*
- 8 *resource professionals are attempting to enact flexible workplace*
- 9 *programs and policies to enhance employee engagement, recruit*
- 10 *and retain top talent, reduce turnover costs, and increase*
- 11 *productivity.*
- 12 (b) *While California is often a pioneer in enacting laws that*
- 13 *permit employees time away from the workplace, these laws*
- 14 *generally provide only unpaid leave. Therefore, many employees*
- 15 *are hesitant to take advantage of these laws because they want to*
- 16 *avoid reducing their overall work schedule. Accordingly, full-time*
- 17 *but hourly employees often request adjusting their schedules to*
- 18 *allow them to both take the time off in any given week but without*

1 *reducing their overall work schedule. While California does*
2 *authorize so-called “make up time” or “compensatory time off,”*
3 *these are often very limited in their application or stop-gap in*
4 *nature, and provide no meaningful assistance to most hourly*
5 *employees who have recurring nonwork obligations.*

6 *(c) Moreover, California overtime laws, which are unique in*
7 *the country, make it difficult for most employers to reach an*
8 *agreement with an individual worker that would allow a flexible*
9 *work schedule.*

10 *(d) Existing law does not permit a California employer to allow*
11 *an individual worker to choose a flexible work schedule of four*
12 *10-hour days per week without overtime being paid.*

13 *(e) As a consequence, large, small, and micro-employers do not*
14 *have the flexibility to offer their employees the opportunity to take*
15 *advantage of a flexible work schedule that would benefit the*
16 *workers and their families.*

17 *(f) Permitting employees to elect to work four 10-hour days per*
18 *week without the payment of overtime would allow those employees*
19 *to spend much-needed time with their families, lessen traffic*
20 *congestion on our crowded roads and highways, allow workers*
21 *to spend one day a week on personal matters, such as volunteering*
22 *at a child’s school, scheduling medical appointments, and attending*
23 *to other important family matters that often are difficult to schedule*
24 *with a five-days-per-week, eight-hours-per-day schedule.*

25 *(g) It is the intent of the Legislature in enacting the California*
26 *Workplace Flexibility Act of 2016 to protect workers as follows:*

27 *(1) An employee shall not be forced to work more than eight*
28 *hours in a day without receiving overtime, but, instead, he or she*
29 *may request a flexible work schedule of up to four 10-hour days*
30 *per week and the employer may agree to this schedule without*
31 *having to pay overtime for the 9th and 10th hours worked per day*
32 *in that schedule.*

33 *(2) The employer will be required to pay overtime rates after*
34 *10 work hours in a day for workers who have chosen a flexible*
35 *schedule pursuant to this act.*

36 *(3) The employer will be required to pay double normal pay*
37 *after 12 work hours in a day for a worker who has chosen a flexible*
38 *schedule under this act.*

1 (4) *The worker, including one who chooses a flexible schedule*
2 *under this act, will receive overtime for any hours worked over 40*
3 *hours in a single week.*

4 (h) *Workplaces that are unionized already allow workers to*
5 *choose to work four 10-hour days; however, it is virtually*
6 *impossible for workers of nonunionized workplaces to enjoy this*
7 *benefit.*

8 SEC. 3. *Section 510 of the Labor Code is amended to read:*

9 510. (a) Eight hours of labor constitutes a day's work. Any
10 work in excess of eight hours in one workday and any work in
11 excess of 40 hours in any one workweek and the first eight hours
12 worked on the seventh day of work in any one workweek shall be
13 compensated at the rate of no less than one and one-half times the
14 regular rate of pay for an employee. Any work in excess of 12
15 hours in one day shall be compensated at the rate of no less than
16 twice the regular rate of pay for an employee. In addition, any
17 work in excess of eight hours on any seventh day of a workweek
18 shall be compensated at the rate of no less than twice the regular
19 rate of pay of an employee. Nothing in this section requires an
20 employer to combine more than one rate of overtime compensation
21 in order to calculate the amount to be paid to an employee for any
22 hour of overtime work. The requirements of this section do not
23 apply to the payment of overtime compensation to an employee
24 working pursuant to any of the following:

25 (1) An alternative workweek schedule adopted pursuant to
26 Section 511.

27 (2) (A) *An employee-selected flexible work schedule adopted*
28 *pursuant to Section 511.5.*

29 (B) *This paragraph shall become inoperative on January 1,*
30 *2022.*

31 ~~(2)~~

32 (3) An alternative workweek schedule adopted pursuant to a
33 collective bargaining agreement pursuant to Section 514.

34 ~~(3)~~

35 (4) An alternative workweek schedule to which this chapter is
36 inapplicable pursuant to Section 554.

37 (b) Time spent commuting to and from the first place at which
38 an employee's presence is required by the employer shall not be
39 considered to be a part of a day's work, when the employee
40 commutes in a vehicle that is owned, leased, or subsidized by the

1 employer and is used for the purpose of ridesharing, as defined in
2 Section 522 of the Vehicle Code.

3 (c) This section does not affect, change, or limit an employer's
4 liability under the workers' compensation law.

5 *SEC. 4. Section 511.5 is added to the Labor Code, to read:*

6 *511.5. (a) Notwithstanding Section 511 or any other law or*
7 *order of the Industrial Welfare Commission, an individual*
8 *nonexempt employee may work up to 10 hours per workday without*
9 *any obligation on the part of the employer to pay an overtime rate*
10 *of compensation, except as provided in subdivision (b), if the*
11 *employee requests this schedule in writing and the employer*
12 *approves the request. The request by an employee shall be referred*
13 *to as an overtime exemption for an employee-selected flexible work*
14 *schedule. The request shall be in writing on a form provided by*
15 *the Division of Labor Standards Enforcement and shall include*
16 *all of the following:*

17 *(1) A statement that the employer and employee participating*
18 *in the flexible work schedule understand that work performed in*
19 *excess of 10 hours in a day or in excess of 40 hours in a week must*
20 *be compensated at one and one-half times the employee's regular*
21 *rate of pay.*

22 *(2) A description of the daily and weekly hours to be worked*
23 *under the flexible work schedule.*

24 *(3) A statement that the flexible work hour schedule has not*
25 *been made a condition of employment and that participation in*
26 *the plan is voluntary.*

27 *(4) The signature of the employer or authorized representative.*

28 *(b) If an employee-selected flexible work schedule is adopted*
29 *pursuant to subdivision (a), the employer shall pay overtime at*
30 *one and one-half times the employee's regular rate of pay for all*
31 *hours worked over 40 hours in a workweek or over 10 hours in a*
32 *workday, whichever is the greater number of hours. All work*
33 *performed in excess of 12 hours per workday and in excess of eight*
34 *hours on a fifth, sixth, or seventh day in the workweek shall be*
35 *paid at double the employee's regular rate of pay.*

36 *(c) The employer may inform its employees that it is willing to*
37 *consider an employee request to work an employee-selected flexible*
38 *work schedule, but shall not induce a request by promising an*
39 *employment benefit or threatening an employment detriment.*

1 (d) The employee or employer may discontinue the
2 employee-selected flexible work schedule at any time by giving
3 written notice to the other party. The request shall be effective the
4 first day of the next pay period or the fifth day after notice is given
5 if there are fewer than five days before the start of the next pay
6 period, unless otherwise agreed to by the employer and the
7 employee.

8 (e) For each employee participating in an approved voluntary
9 flexible work schedule, the employer shall maintain a signed
10 statement of voluntary participation in the employee's personnel
11 file or in a single file for all approved voluntary work schedules.

12 (f) The employer shall submit a copy of the signed
13 employee-selected flexible work schedule form to the Division of
14 Labor Standards Enforcement.

15 (g) This section does not apply to any employee covered by a
16 valid collective bargaining agreement or employed by the state,
17 a city, county, city and county, district, municipality, or other
18 public, quasi-public, or municipal corporation, or any political
19 subdivision of this state.

20 (h) This section shall be liberally construed to accomplish its
21 purposes.

22 (i) This section shall prevail over any inconsistent provisions
23 in any wage order of the Industrial Welfare Commission.

24 (j) (1) The Division of Labor Standards Enforcement shall
25 enforce this section and shall adopt or revise regulations as
26 necessary to conform and implement this section.

27 (2) Not later than January 1, 2021, the Division of Labor
28 Standards Enforcement shall prepare and submit to the Legislature
29 a report, in accordance with Section 9795 of the Government Code,
30 evaluating the California Workplace Flexibility Act of 2016,
31 including, but not limited to, all of the following:

32 (A) The number of employee complaints regarding employer
33 delay in approving a flexible work schedule.

34 (B) The number of employees who have complained of being
35 coerced to sign the employee-selected flexible work schedule form
36 referenced in this section.

37 (C) The total number of employer approved flexible work
38 schedules received by the Division of Labor Standards Enforcement
39 pursuant to subdivision (f).

1 (k) *This section shall remain in effect only until January 1, 2022,*
2 *and as of that date is repealed, unless a later enacted statute, that*
3 *is enacted before January 1, 2022, deletes or extends that date.*

4 SEC. 5. *This act is an urgency statute necessary for the*
5 *immediate preservation of the public peace, health, or safety within*
6 *the meaning of Article IV of the Constitution and shall go into*
7 *immediate effect. The facts constituting the necessity are:*

8 *In order to adjust to the changing demographics of California's*
9 *workforce, economic challenges, volatile fuel prices, and*
10 *transportation challenges for employees, and to timely provide*
11 *working Californians with a beneficial work schedule that*
12 *facilitates greater balance of work and life demands, it is necessary*
13 *that this act take effect immediately.*

14 ~~SECTION 1. Section 511 of the Labor Code is amended to~~
15 ~~read:~~

16 ~~511. (a) Upon the proposal of an employer, the employees of~~
17 ~~an employer may adopt a regularly scheduled alternative workweek~~
18 ~~that authorizes work by the affected employees for no longer than~~
19 ~~10 hours per day within a 40-hour workweek without the payment~~
20 ~~to the affected employees of an overtime rate of compensation~~
21 ~~pursuant to this section. A proposal to adopt an alternative~~
22 ~~workweek schedule shall be deemed adopted only if it receives~~
23 ~~approval in a secret ballot election by at least two-thirds of affected~~
24 ~~employees in a readily identifiable work unit. The regularly~~
25 ~~scheduled alternative workweek proposed by an employer for~~
26 ~~adoption by employees may be a single work schedule that would~~
27 ~~become the standard schedule for workers in the work unit, or a~~
28 ~~menu of work schedule options, from which each employee in the~~
29 ~~unit would be entitled to choose. Notwithstanding subdivision (c)~~
30 ~~of Section 500, the menu of work schedule options may include a~~
31 ~~regular schedule of eight-hour days that are compensated in~~
32 ~~accordance with subdivision (a) of Section 510. Employees who~~
33 ~~adopt a menu of work schedule options may, with employer~~
34 ~~consent, move from one schedule option to another on a weekly~~
35 ~~basis.~~

36 ~~(b) An affected employee working longer than eight hours, but~~
37 ~~not more than 12 hours in a day, pursuant to an alternative~~
38 ~~workweek schedule adopted pursuant to this section shall be paid~~
39 ~~an overtime rate of compensation of no less than one and one-half~~
40 ~~times the regular rate of pay of the employee for any work in excess~~

1 of the regularly scheduled hours established by the alternative
2 workweek agreement and for any work in excess of 40 hours per
3 week. An overtime rate of compensation of no less than double
4 the regular rate of pay of the employee shall be paid for any work
5 in excess of 12 hours per day and for any work in excess of eight
6 hours on those days worked beyond the regularly scheduled
7 workdays established by the alternative workweek agreement.
8 Nothing in this section requires an employer to combine more than
9 one rate of overtime compensation in order to calculate the amount
10 to be paid to an employee for any hour of overtime work.

11 (e) An employer shall not reduce an employee's regular rate of
12 hourly pay as a result of the adoption, repeal, or nullification of
13 an alternative workweek schedule.

14 (d) An employer shall make a reasonable effort to find a work
15 schedule not to exceed eight hours in a workday, in order to
16 accommodate any affected employee who was eligible to vote in
17 an election authorized by this section and is unable to work the
18 alternative schedule hours established as the result of that election.
19 An employer shall be permitted to provide a work schedule not to
20 exceed eight hours in a workday to accommodate any employee
21 who was hired after the date of the election and who is unable to
22 work the alternative schedule established as the result of that
23 election. An employer shall explore any available reasonable
24 alternative means of accommodating the religious belief or
25 observance of an affected employee that conflicts with an adopted
26 alternative workweek schedule, in the manner provided by
27 subdivision (j) of Section 12940 of the Government Code.

28 (e) The results of any election conducted pursuant to this section
29 shall be reported by an employer to the Division of Labor Standards
30 Enforcement within 30 days after the results are final.

31 (f) Any type of alternative workweek schedule that is authorized
32 by this code and that was in effect on January 1, 2000, may be
33 repealed by the affected employees pursuant to this section. Any
34 alternative workweek schedule that was adopted pursuant to Wage
35 Order Number 1, 4, 5, 7, or 9 of the Industrial Welfare Commission
36 is null and void, except for an alternative workweek providing for
37 a regular schedule of no more than 10 hours' work in a workday
38 that was adopted by a two-thirds vote of affected employees in a
39 secret ballot election pursuant to wage orders of the Industrial

1 Welfare Commission in effect prior to 1998. This subdivision does
2 not apply to exemptions authorized pursuant to Section 515:

3 (g) ~~Notwithstanding subdivision (f), an alternative workweek~~
4 ~~schedule in the health care industry adopted by a two-thirds vote~~
5 ~~of affected employees in a secret ballot election pursuant to Wage~~
6 ~~Order Numbers 4 and 5 in effect prior to 1998, that provided for~~
7 ~~workdays exceeding 10 hours but not exceeding 12 hours in a day~~
8 ~~without the payment of overtime compensation, shall be valid until~~
9 ~~July 1, 2000. An employer in the health care industry shall make~~
10 ~~a reasonable effort to accommodate any employee in the health~~
11 ~~care industry who is unable to work the alternative schedule~~
12 ~~established as the result of a valid election held in accordance with~~
13 ~~provisions of Wage Order Number 4 or 5 that were in effect prior~~
14 ~~to 1998.~~

15 (h) ~~Notwithstanding subdivision (f), if an employee is~~
16 ~~voluntarily working an alternative workweek schedule providing~~
17 ~~for a regular work schedule of not more than 10 hours' work in a~~
18 ~~workday as of July 1, 1999, an employee may continue to work~~
19 ~~that alternative workweek schedule without the entitlement of the~~
20 ~~payment of daily overtime compensation for the hours provided~~
21 ~~in that schedule if the employer approves a written request of the~~
22 ~~employee to work that schedule.~~

23 (i) ~~For purposes of this section, "work unit" includes a division,~~
24 ~~a department, a job classification, a shift, a separate physical~~
25 ~~location, or a recognized subdivision thereof. A work unit may~~
26 ~~consist of an individual employee as long as the criteria for an~~
27 ~~identifiable work unit in this section is met.~~