City of Long Beach
Working Together to Serve

Memorandum

Date: November 9, 2018

To: Mayor and Members of the City Council

From: Patrick H. West, City Manager

Subject: **Report on SB 1402 (Lara) Labor contracting: customer liability**

On Tuesday, October 9, 2018, the Long Beach City Council requested the City Manager provide a report to the City Council on the impacts of new state legislation SB 1402.

SB 1402 was approved by the Governor and filed with the Secretary of State on September 22, 2018. It amends Section 2810.4 of the California Labor Code, and according to the State Senate Rules Committee, will require joint and several liability for customers who contract with port drayage services who have unpaid wage, tax and workers' compensation liability.

Attached are: (1) an analysis by the City Manager on the impacts of SB 1402; (2) the complete text of this legislation; and (3) an analysis of SB 1402 by the Senate Rules Committee.

If you have any questions, please contact Diana Tang, Manager of Government Affairs, at 562-570-6506.

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CITY OF LONG BEACH

SB 1402 (LARA) LABOR CONTRACTING: CUSTOMER LIABLITY

IMPACTS OF THE STATE LEGISLATION

November 5, 2018

Introduction

Senator Lara authored SB 1402 to address the issue of driver misclassification at ports throughout California. SB 1402 was approved by the Governor and filed with the Secretary of State on September 22, 2018. The bill amends Section 2810.4 of the California Labor Code, and according to the State Senate Rules Committee, will require joint and several liability for customers who contract with port drayage services who have unpaid wage, tax and workers' compensation liability.

Bill Summary

SB 1402 makes beneficial cargo owners (BCOs) jointly liable for violations of state labor and employment laws when they hire licensed motor carriers (LMCs) that have unpaid final judgments for failure to pay wages, imposing unlawful expenses on employees, failure to remit payroll taxes or provide worker's compensation insurance, misclassifying employees as independent contractors, and other labor law violations.

Under SB 1402, Port of Long Beach (Port) customers will have access to a list of trucking companies who have failed to pay final judgments, prepared by the Division of Labor Standards Enforcement. BCOs that continue to hire port trucking companies with unpaid final judgments will be liable for future state labor and employment law violations by these scofflaw trucking companies.

Background

The port drayage industry is a vital part of California's goods movement economy and employs an estimated 25,000 drivers who move freight between California's ports and distribution centers. An investigation by USA Today found "port trucking companies in Southern California have spent the past decade forcing drivers to finance their own trucks by taking on debt they could not afford." The investigation found instances where drivers "end up owing money to their employers – essentially working for free." This financing structure has lead to wage theft and other financial inequities in the drayage trucking industry. SB 1402 aims to correct the misclassification of truck drivers through data gathering and transparency.

Next Steps

Despite the challenges, there are opportunities to address the misclassification of truck drivers. The Port can:

- Request action from the Attorney General, actively monitoring judgments issued by the Labor Commissioner on misclassification, working with City staff to take action against business licenses when that option is available, engaging neighboring municipalities to take similar actions to revoke business licenses in their jurisdictions, engaging stakeholders and working with them to develop business solutions, and exploring potential state legislative solutions.
- Work diligently to improve efficiencies at the Port, including engaging industry stakeholders to reduce truck turn times and drive improvements to efficiencies in trucking operations, as this is also a critical component in the success of the drayage trucking industry and the goods movement industry as a whole.
- Obtain a current list of trucking companies with outstanding, unpaid judgments from the California Labor Commissioner following SB 1402 implementation on January 1, 2019.

Trucking operations is a critical link in the success of the supply chain, which moves imports and exports through the Port of Long Beach. Approximately 1,933 LMCs are registered with the Port of Long Beach. These LMCs should be held accountable for accurately classifying and compensating truck drivers for their work.

STATE OF CALIFORNIA
AUTHENTICATED
ELECTRONIC LEGAL MATERIAL

Senate Bill No. 1402

CHAPTER 702

An act to add Section 2810.4 to the Labor Code, relating to employment.

[Approved by Governor September 22, 2018. Filed with Secretary of State September 22, 2018.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1402, Lara. Labor contracting: customer liability.

Existing law requires a client employer to share with a labor contractor all civil legal responsibility and civil liability for all workers supplied by that labor contractor for the payment of wages and the failure to obtain valid workers' compensation coverage. Existing law also prohibits a client employer from shifting to the labor contractor legal duties or liabilities under workplace safety provisions with respect to workers provided by the labor contractor. Existing law defines terms for these purposes and authorizes the Labor Commissioner to adopt regulations and rules of practice and procedure necessary to administer and enforce these provisions. Existing law excludes certain types of employers from these provisions, including, but not limited to, a client employer that is not a motor carrier of property based solely on the employer's use of a third-party motor carrier of property with interstate or intrastate operating authority to ship or receive freight, and a client employer that is a motor carrier of property subcontracting with, or otherwise engaging, another motor carrier of property to provide transportation services using its own employees and commercial motor vehicles.

This bill would require a customer that, as part of its business, engages or uses to perform port drayage services a port drayage motor carrier, as defined, that is on a list established by the Division of Labor Standards Enforcement and posted on its Internet Web site pursuant to the bill to share with the motor carrier all civil legal responsibility and civil liability for port drayage services obtained after the date the motor carrier appeared on the list, as specified. The bill would require the division to notify a port drayage motor carrier at least 15 business days before adding the port drayage motor carrier to its Internet Web site and would require a port drayage motor carrier who provides port drayage services to a customer, prior to providing those services, and within 30 business days of entry of the judgment, to furnish prescribed notice to the customer concerning unsatisfied judgments against the motor carrier for unpaid wages, damages, unreimbursed expenses, and penalties. The bill would define terms for its purposes, including defining "customer," with certain exceptions, to mean a business entity, regardless of its form, that engages or uses a port drayage motor carrier to perform port drayage services on the customer's behalf, as described. The bill would prohibit a customer and a port drayage motor carrier from taking any adverse

action against a commercial driver for providing notification of violations or filing a claim or civil action. The bill would, with certain exceptions, not apply the joint and severable liability to customers who engage a drayage motor carrier whose employees are covered by a collective bargaining agreement or to a customer who wishes to terminate an existing contract until the termination date or until 90 business days following the listing of the drayage motor carrier on the division's Internet Web site, whichever is shorter. The bill would require a customer or port drayage motor carrier to provide to the Labor Commissioner, and make available for copying, information within its possession, custody, or control required to verify compliance with applicable state laws. The bill would authorize the Labor Commissioner and the Employment Development Department to adopt necessary regulations and rules to administer and enforce the bill's provisions. The bill would provide that waiver of its provisions is contrary to public policy, void, and unenforceable. The bill would provide that its provisions are severable.

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

SECTION 1. The Legislature finds and declares all of the following:

(a) The port drayage industry is a vital part of California's goods movement economy and employs an estimated 25,000 drivers who move freight between California's ports and distribution centers.

(b) California's port drayage drivers are the last American sharecroppers, held in debt servitude and working dangerously long hours for little pay.

(c) An investigation by USA Today found that "port trucking companies in Southern California have spent the past decade forcing drivers to finance their own trucks by taking on debt they could not afford." The investigation found instances where drivers "end up owing money to their employers – essentially working for free."

(d) A common practice is for a company that owns port drayage trucks to enter into a sublease agreement with drivers, with the promise that they will own the truck someday. Drivers can be terminated at any time and lose the money they thought they were paying toward the truck. Companies deduct money from driver paychecks for business expenses that lead to poverty wages or to the driver owing the company money.

(e) Port drayage drivers are a largely immigrant workforce and particularly vulnerable to labor exploitation.

(f) Drayage drivers at California ports are routinely misclassified as independent contractors when they in fact work as employees under California and federal labor laws. A recent report finds that two-thirds of California port drayage drivers fall under this category, and rampant misclassification of drivers contributes to wage theft and leaves drivers in a cycle of poverty.

(g) Companies can violate labor laws and misclassify employees when they control the manner and means of the work, set wages and hours, and in other ways act as an employer.

(h) The California Labor Commissioner's Office, Division of Labor Standards Enforcement, has awarded in excess of $45 million in unlawful deductions from wages and out-of-pocket expenses to more than 400 drivers. No court has overturned these awards on appeal.

(i) Drivers have seen little of those awards while misclassification remains endemic, as companies that commit violations go out of business and are replaced by others that repeat the pattern.

(j) The mistreatment of port drayage drivers has been known for more than a decade, and the Ports of Los Angeles and Long Beach attempted to address misclassification of drayage drivers in 2008 through their Clean Air Action Plan by requiring drivers to be classified as employees. The 9th Circuit Court of Appeals struck down that requirement.

(k) State and federal courts have consistently upheld the Labor Commissioner's authority to adjudicate port drayage driver claims and found that federal law does not preempt the state's interest in enforcing labor laws meant to protect drivers from wage theft.

(*l*) Independent studies have found that misclassifying employees undercuts fair competition by legitimate employers and creates an economic incentive for others to break the rules.

(m) Nationwide, according to the National Employment Law Project, in a paper titled, "The Big Rig Overhaul: Restoring Middle-Class Jobs at America's Ports Through Labor Law Enforcement" (2014), as much as $485 million in worker's compensation premiums and $60 million in federal taxes go unpaid in the drayage industry.

(n) More than 40 percent of United States shipping-container traffic flows through the Ports of Los Angeles and Long Beach. Port drivers are a critical link in the global supply chain and they need to share the benefits of this economic engine.

(o) Customers of port drayage are some of the world's largest retail and manufacturing companies. After more than a decade of rulings, media stories, and independent reports, they should be aware of the widespread labor violations in the drayage industry.

(p) The California Legislature established, with the enactment of Assembly Bill 1897 in 2014, that business entities that are provided workers from subcontractors can be jointly liable for the nonpayment of wages and failure to provide unemployment insurance by the subcontractor.

(q) Holding customers of trucking companies jointly liable for future labor law violations by port drayage motor carriers who they engage, where the customer has received advance notice of their record of unsatisfied judgments for labor law violations, will exert pressure across the supply chain to protect drayage drivers from further exploitation.

(r) Customers have the market power to exert meaningful change in the port drayage industry that has eluded California drivers for more than a decade.

(s) This is a remedial measure intended to better enable labor law enforcement of port drayage services.

SEC. 2. Section 2810.4 is added to the Labor Code, to read:

2810.4. (a) As used in this section:

(1) "Commercial driver" means a person who holds a valid commercial driver's license who is hired or contracted to provide port drayage services either as an independent contractor or an employee driver.

(2) (A) "Customer" means a business entity, regardless of its form, that engages or uses a port drayage motor carrier to perform port drayage services on the customer's behalf, whether the customer directly engages or uses a port drayage motor carrier or indirectly engages or uses a port drayage motor carrier through the use of an agent, including, but not limited to, a freight forwarder, motor transportation broker, ocean carrier, or other motor carrier.

(B) "Customer" does not include any of the following:

(i) A business entity with a workforce of fewer than 25 workers, including those hired directly by the customer or through a temporary employer or labor contractor.

(ii) The state or any political subdivision of the state, including any city, county, city and county, or special district.

(iii) A business entity, including, but not limited to, a marine terminal operator, who is not a customer, and who, incidental to the transportation of the freight for the customer, receives, makes available, or exchanges intermodal equipment, loaded or unloaded, or conducts any other transaction of equipment subject to an equipment interchange agreement with a motor carrier who is a signatory to an equipment interchange agreement.

(3) "Labor" has the same meaning provided by Section 200.

(4) (A) "Port drayage motor carrier" means an individual or entity that hires or engages commercial drivers in the port drayage industry.

(B) "Port drayage motor carrier" also means a registered owner, lessee, licensee, or bailee of a commercial motor vehicle, as defined in subdivision (b) of Section 15210 of the Vehicle Code, that operates or directs the operation of a commercial motor vehicle by a commercial driver on a for-hire or not-for-hire basis to perform port drayage services in the port drayage industry.

(C) "Port drayage motor carrier" also means an entity or individual who succeeds in the interest and operation of a predecessor port drayage motor carrier consistent with the provisions of Section 2684.

(5) "Port" means any sea or river port located in this state.

(6) "Port drayage services" means the movement within California of cargo or intermodal equipment by a commercial motor vehicle whose point-to-point movement has either its origin or destination at a port, including any interchange of power units, chassis, or intermodal containers, or the switching of port drayage drivers that occurs during the movement of that freight. It shall not include employees performing the intra-port or inter-port movement of cargo or cargo handling equipment under the control of their employers.

(7) "Wages" has the same meaning provided by Section 200 and all sums payable to an employee or the state based upon any failure to pay wages, as provided by law.

(b) (1) The Division of Labor Standards Enforcement shall post on its Internet Web site the names, addresses, and essential information for any port drayage motor carrier with any unsatisfied final court judgment, tax assessment, or tax lien that may be released to the public under federal and state disclosure laws, including any order, decision, or award obtained by a public or private person or entity pursuant to Section 98.1 finding that a port drayage motor carrier has engaged in illegal conduct including failure to pay wages, imposing unlawful expenses on employees, failure to remit payroll taxes, failure to provide workers' compensation insurance, or misclassification of employees as independent contractors with regard to a port drayage commercial driver. The Division of Labor Standards Enforcement shall update the Internet Web site monthly by the fifth day of each month. The Division of Labor Standards Enforcement shall not place the information on the Internet Web site until the period for all judicial appeals has expired. This posting shall be removed within 15 business days after the Division of Labor Standards Enforcement determines there has been full payment of the unsatisfied judgment or that the port drayage motor carrier has entered into an approved settlement dispensing of the judgment.

(2) No less than 15 business days prior to posting on its Internet Web site the names, addresses, and essential information for any port drayage motor carrier pursuant to paragraph (1), the Division of Labor Standards Enforcement shall provide notification by certified mail to the port drayage motor carrier which, at a minimum, shall include all of the following:

(A) The name, email address, and telephone number of a contact person at the division.

(B) The alleged conduct and a copy of the unsatisfied court judgment, assessment, order, decision, or award.

(C) A copy of the regulations or rules of practice or procedure adopted pursuant to subdivision (k) or (*l*) for removal of the posting.

(3) A customer that, as part of its business, engages or uses a port drayage motor carrier that is on the list established pursuant to paragraph (1) to perform port drayage services shall share with the motor carrier or the motor carrier's successor all civil legal responsibility and civil liability owed to a port drayage driver for port drayage services obtained after the date the motor carrier appeared on the list, meaning joint and several liability with the motor carrier for the full amount of unpaid wages, unreimbursed expenses, damages and penalties, including applicable interest, which are found due for all of the following:

(A) Minimum, regular, or premium wages that are unpaid by the motor carrier, including any wages that are found due under Section 226.7, 227.3, or 246.

(B) Unlawful deductions by the motor carrier from wages pursuant to Section 2802.

(C) Out-of-pocket business expenses incurred by the commercial driver that are not reimbursed by the motor carrier as required pursuant to Section 2802.

(D) Civil penalties for the failure to secure valid workers' compensation coverage as required by Section 3700.

(E) Damages or penalties as provided for by law that are due to the commercial driver or the state based upon the failure of the motor carrier to pay wages owed, including those set forth under Sections 203, 226, 226.8, 248.5, 558, 1194.2, and 1197.1.

(F) Applicable interest due for any sum described above.

(4) Pursuant to paragraph (3), each and every customer that engages or uses a port drayage motor carrier to provide port drayage services in a given workweek shall be jointly and severally liable with the motor carrier for the full amount of all unpaid wages, unreimbursed expenses, damages, and penalties, including applicable interest, which are found owed by the motor carrier for that workweek. The customer shall be jointly and severally liable from the time the driver is dispatched to begin work on behalf of the customer until all tasks are completed incidental to that work, including the return of an unladen chassis or intermodal container to its point of origin, and the driver is ready to be dispatched to haul freight on behalf of another customer.

(c) A customer's liability under this section shall be determined by either one of the following:

(1) The Labor Commissioner, in an administrative proceeding pursuant to Section 98, de novo appeal under Section 98.2, or pursuant to the Labor Commissioner's citation authority under this code.

(2) By a court in a civil action brought by the Labor Commissioner, or by a commercial driver or his or her representative, where at least 30 business days prior to filing the civil action, the Labor Commissioner, or commercial driver or representative, notifies the customer of its potential joint and several liability for any of the wages, expenses, damages, or penalties listed in paragraph (3) of subdivision (b). No civil action for a violation or enforcement of this section shall be brought pursuant to Part 13 (commencing with Section 2698) of Division 2.

(d) The joint and several liability provided by this section shall not apply as follows:

(1) To customers who engage or use a port drayage motor carrier whose employees are covered by a bona fide collective bargaining agreement, if the agreement expressly provides for wages, hours of work, working conditions, a process to resolve disputes concerning nonpayment of wages, expenses, damages, and penalties listed in paragraph (3) of subdivision (b), including applicable interest, and a waiver of the joint and several liability provided by this section.

(2) Where the customer and port drayage motor carrier had an existing contract for port drayage services at the time a port drayage motor carrier is listed on the Internet Web site maintained by the Division of Labor Standards Enforcement and the customer wishes to terminate the agreement,

joint and several liability shall not apply until the expiration of the existing contract or a period of 90 business days following the listing, whichever is shorter. This paragraph does not apply to contracts entered into, renegotiated, or extended after the date a port drayage motor carrier is listed on the Internet Web site.

(3) Where a port drayage motor carrier is not listed on the Division of Labor Standards Enforcement's Internet Web site pursuant to subdivision (b).

(4) Where a port drayage motor carrier satisfied the conditions for removal from the Internet Web site pursuant to paragraph (1) of subdivision (b) prior to the time period for which the joint and several liability is alleged.

(e) A port drayage motor carrier that provides port drayage services to a customer, prior to providing these services to the customer, shall furnish written notice to the customer of any unsatisfied final judgments against the motor carrier for unpaid wages, damages, unreimbursed expenses, and penalties, including applicable interest. The notice shall also provide the text of this section. The failure of the motor carrier to provide notice under this subdivision shall not be a defense to the joint and several liability provided by this section.

(f) A port drayage motor carrier that provides port drayage services to a customer shall provide, within 30 business days of entry of the judgment, written notice of any unsatisfied final judgments against the motor carrier for unpaid wages, damages, unreimbursed expenses, and penalties, including applicable interest, to any customer to which the motor carrier is presently providing port drayage services. The failure of the motor carrier to provide notice under this subdivision shall not be a defense to the joint and several liability provided by this section.

(g) A customer or port drayage motor carrier shall not take any adverse action against any commercial driver for providing notification of violations or filing a claim or civil action pertaining to unpaid wages, unreimbursed expenses, or the recovery of damages and penalties, including applicable interest.

(h) The remedies provided by this section are in addition to, and shall be supplemental of, any other theories of liability or requirement established by statute or common law.

(i) Two or more parties who are held jointly and severally liable under this section after a final judgment is rendered by the court shall not be prohibited from establishing, exercising, or enforcing by contract or otherwise, any lawful or equitable remedies, including, but not limited to, a right of contribution and indemnity against each other for liability created by acts of a port drayage motor carrier.

(j) Pursuant to the Labor Commissioner's citation authority, a customer or a port drayage motor carrier shall provide to the Labor Commissioner any information within its possession, custody, or control required to verify compliance with applicable state laws. Upon request, the records that contain this information shall be made available promptly for inspection, and the Labor Commissioner shall be permitted to copy them.

(k) The Labor Commissioner may adopt regulations and rules of practice and procedure necessary to administer and enforce the provisions of subdivisions (b) and (j) that are under his or her jurisdiction.

(*l*) The Employment Development Department may adopt regulations and rules of practice and procedure necessary to administer and enforce the provisions of subdivision (b) that are under its jurisdiction.

(m) A waiver of this section is contrary to public policy, and is void and unenforceable.

(n) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

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SENATE RULES COMMITTEE SB 1402
Office of Senate Floor Analyses
(916) 651-1520 Fax: (916) 327-4478

UNFINISHED BUSINESS

Bill No: SB 1402
Author: Lara (D), et al.
Amended: 8/20/18
Vote: 21

SENATE JUDICIARY COMMITTEE: 5-2, 4/24/18
AYES: Jackson, Hertzberg, Monning, Stern, Wieckowski
NOES: Moorlach, Anderson

SENATE LABOR & IND. REL. COMMITTEE: 4-1, 4/25/18
AYES: Pan, Jackson, Mitchell, Wieckowski
NOES: Stone

SENATE APPROPRIATIONS COMMITTEE: 5-2, 5/25/18
AYES: Lara, Beall, Bradford, Hill, Wiener
NOES: Bates, Nielsen

SENATE FLOOR: 24-12, 5/30/18
AYES: Allen, Atkins, Beall, Bradford, Dodd, Glazer, Hernandez, Hertzberg, Hill, Hueso, Jackson, Lara, Leyva, McGuire, Mitchell, Monning, Newman, Pan, Portantino, Roth, Skinner, Stern, Wieckowski, Wiener
NOES: Anderson, Bates, Berryhill, Fuller, Gaines, Moorlach, Morrell, Nguyen, Nielsen, Stone, Vidak, Wilk
NO VOTE RECORDED: Cannella, De León, Galgiani

ASSEMBLY FLOOR: 53-26, 8/30/18 - See last page for vote

SUBJECT: Labor contracting: customer liability

SOURCE: California Teamsters Public Affairs Council and California Labor Federation, AFL-CIO

DIGEST: This bill requires joint and several liability for customers who contract with port drayage services who have unpaid wage, tax and workers' compensation liability.

Assembly Amendments clarify the operation of the port drayage Web site list, provides that the timelines are business days (rather than calendar days), and provide a way for customers to not be held jointly and severally liable if the customers terminate their contracts, as specified.

ANALYSIS:

Existing law:

1) Extends liability to client employers who, in the usual course of business, utilize third-party labor contractors for unpaid wages and a lack of workers' compensation coverage if the following are true:

    a) The employer has 25 or more employees, including the contracted employees;
    b) The employer has 5 or more employees from a third-party labor contractor; and
    c) The third-party labor contractor isn't a non-profit or motion picture payroll company.

2) Defines "labor contractor" as means an individual or entity that supplies, either with or without a contract, a client employer with workers to perform labor within the client employer's usual course of business.

3) Defines "usual course of business" as the regular and customary work of a business, performed within or upon the premises or worksite of the client employer.

4) Prohibits a client employer from shifting to the labor contractor any legal duties or liabilities under Cal-OSHA with respect to workers supplied by the labor contractor.

5) Provides that a waiver of the above-provisions is contrary to public policy, and is void and unenforceable.

6) Exempts from the liability provisions discussed above motor carriers of property, household goods carriers, cable operators, and motor clubs. (Labor Code §2810.3)

This bill:

1) Makes findings and declarations on the importance of California's port drayage drivers, recent media coverage on the debt challenges port drayage workers face, and the history of illegal misclassification of port drayage drivers by some employers.

2) Defines a "customer" as an a business entity, regardless of its form, that has 25 or more employees, including temporary employees, and engages or uses a port drayage motor carrier to perform port drayage services on the customer's behalf. This definition includes port drayage services that are contracted directly by a customer or indirectly by the customer through an agent. This includes, but is not limited to, a freight forwarder, motor transportation broker, ocean carrier, or other motor carrier.

3) Excludes from the definition of "customer" the state, any subdivision of the state, any employer with less than 25 employees, and any business entity, including but not limited to a marine terminal operator, who makes available or exchanges intermodal equipment, as specified.

4) Defines "port drayage motor carrier" as an individual or entity that hires or engages commercial drivers in the port drayage industry or a registered owner, lessee, licensee, or bailee of a commercial motor vehicle that operates or directs the operation of a commercial motor vehicle by a commercial driver on a for-hire or not-for-hire basis to perform port drayage services in the port drayage industry.

5) Includes in the definition of "port drayage motor carrier" an entity or individual who succeeds in the interest or operation of a predecessor operator.

6) Defines the "Port drayage industry," "port trucking industry," or "port drayage services" as the movement within California of cargo or intermodal equipment by a commercial motor vehicle whose point-to-point movement either has its origin or destination at a port, as defined. This bill excludes employees performing the intra-port or inter-port movement of cargo or cargo handling equipment under the control of their employers from the above definition.

7) Requires that the Division of Labor Standards Enforcement (DLSE) post on its Internet Web site the names, addresses, and essential information for any port drayage motor carrier with any unsatisfied final court judgment, tax assessment, or tax lien that may be released to the public under federal and state disclosure laws, including any order, decision, or award obtained by a public or private person or entity, assessment of the Employment Development Department, or any order, decision, or award finding that a port drayage motor carrier has engaged in illegal conduct including failure to pay wages, imposing unlawful expenses on employees, failure to remit payroll taxes, failure to provide workers' compensation insurance, or misclassification of employees as independent contractors with regard to a port drayage commercial driver.

8) Requires that the DLSE shall not place the information on the Internet Web site until the period for all judicial court appeals has expired. This posting must be removed within 15 business days after the DLSE determines there has been full payment of the unsatisfied judgment or the port drayage motor carrier has entered into an approved settlement. The DLSE must also update the website monthly by the fifth day of each month.

9) Requires the DLSE to notify port drayage motor carriers of being listed on the Web site described above within 15 business days of being posted. The notice shall be delivered by certified mail and include, at a minimum, the contact information for a contact person as DLSE, the alleged conduct and a copy of the unsatisfied judgment, and a copy of the rules or regulations for removal of the posting.

10) Extends to a customer both shared civil legal and civil liability for all port drayage services obtained after the date the motor carrier appeared on the list, meaning joint and several liability for the full amount of unpaid wages, unreimbursed expenses, damages and penalties, including applicable interest, owed to a port drayage trucker for all of the following:

    a) Minimum, regular, or premium wages that are unpaid by the motor carrier, including rest and recovery periods.
    b) Unlawful deductions by the motor carrier from wages.
    c) Out-of-pocket business expenses incurred by the commercial driver that are not reimbursed by the motor carrier as required by law.
    d) Civil penalties for the failure to secure valid workers' compensation coverage.

e) Damages or penalties as provided for by law that are due to the commercial driver or the state based upon the failure of the motor carrier to pay wages owed, including failure to timely pay wages, provide an accurate pay stub, willfully misclassify an employee as an independent contractor, violate an Industrial Welfare Commission Wage Order, and liquidated damages and penalties due to paying less than the minimum wage.
f) Applicable interest due for any sum described above.

11) Requires that each and every customer that receives port drayage services from a motor carrier in a given workweek shall be jointly and severally liable with the motor carrier for the full amount of all wages, expenses, damages, and penalties which are found owed by the motor carrier for that workweek.

12) Requires that a port drayage motor carrier that provides port drayage services to a customer in the port drayage industry must, prior to providing these services to the customer, furnish written notice to the customer of any unsatisfied final judgments against the motor carrier for unpaid wages, damages, unreimbursed expenses and penalties, including applicable interest. The notice shall also provide the text of this section. The failure of the motor carrier to provide notice under this subdivision shall not be a defense to the joint and several liability provided by this section.

13) Requires that a port drayage motor carrier must provide, within 30 business days of entry of the judgment, written notice of any unsatisfied final judgments against the motor carrier for unpaid wages, damages, unreimbursed expenses and penalties, including applicable interest, to any customer to which the motor carrier is presently providing port drayage services in the port drayage industry. The failure of the motor carrier to provide notice under this subdivision shall not be a defense to the joint and several liability provided by this section.

14) Requires that a customer's liability must be determined by either by the Labor Commissioner or by a court in a civil action brought by the Labor Commissioner, or by a commercial driver or his or her representative, where at least 30 business days prior to filing the civil action, the Labor Commissioner, or commercial driver or representative, notifies the customer of its potential joint and several liability for any of the wages, expenses, damages, or penalties.

15) Provides that the joint and several liability described above shall not apply:

    a) To employees covered by a bona fide collective bargaining agreement, if the agreement expressly provides for wages, hours of work, working conditions, a process to resolve disputes concerning nonpayment of wages, expenses, damages, and penalties, including applicable interest, and a waiver of the joint and several liability;
    b) To customers who terminate a port drayage contract after the contracted port drayage motor carrier is added to the list, as specified;
    c) To port drayage motor carriers not posted on the DLSE's Web site; and
    d) To port drayage motor carriers who have satisfied the conditions for removal prior to the time period for which the joint and several liability is alleged.

16) Requires a customer or a port drayage motor carrier to provide to the Labor Commissioner any information within its possession, custody, or control required to verify compliance with applicable state laws. Upon request, the records that contain this information shall be made available promptly for inspection, and the Labor Commissioner must be permitted to copy them.

17) Prohibits a civil action for a violation or enforcement of this section shall be brought pursuant to the Private Attorneys General Act (PAGA).

18) Prohibits a customer or port drayage motor carrier from taking any adverse action against any commercial driver for providing notification of violations or filing a claim or civil action pertaining to unpaid wages, unreimbursed expenses, or the recovery of damages and penalties, including applicable interest.

19) Provides that the remedies provided by this section are in addition to, and shall be supplemental of, any other theories of liability or requirement established by statute or common law.

20) Provides that two or more parties who are held jointly and severally liable under this section after a final judgment is rendered by the court are not prohibited from establishing, exercising, or enforcing by contract a right of contribution and indemnity against each other for liability created by acts of a port drayage motor carrier.

21) Provides that the Labor Commissioner and Employment Development Department may adopt regulations and rules of practice and procedure necessary to administer and enforce the provisions of SB 1402.

22) Provides that a waiver of the above provisions is contrary to public policy, and is void and unenforceable.

23) Provides that the provisions of this bill are severable, and that if any of the provisions are found to be invalid, that invalidity shall not affect other provisions that can be given effect without the invalid provision or application.

Comments

*Background on Ports and Port Drayage: C*alifornia is home to the two busiest ports in the United States: the Port of Los Angeles and the Port of Long Beach. Combined, these ports would be the 10th busiest port in the world, making it the busiest port in the world outside of China, Singapore, South Korea and Dubai. Both ports serve as an important economic driver for all of California, but they also pose unique policy challenges: both ports combined are the largest source of air pollution in the Los Angeles metropolitan area.

To address this issue, the California Air Resources Board requires that port drayage trucks must have an engine from 2007 or later. Port drayage is the short-haul transportation of cargo (generally containers) within the same urban area. It came be from one port to another or from the port to a nearby warehouse or factory. The Port of Long Beach alone reports 17,000 active drayage trucks serving the Port.

These newer, cleaner burning engines have significantly reduced pollution at the Ports. Unfortunately, it also encourages misclassification of drivers as independent contractors, rather than employees, as this allowed port drayage companies to shift the costs of new engines and truck to the workers. According to USA Today, at least 1,150 labor complaints have been filed by port drayage workers with the DLSE since 2010. The DLSE's administrative law judges have sided with the complainants 97% of the time – and USA Today reports that these complaints involved 140 trucking companies. Complaints from workers focused on being misclassified as an independent contractor and not being paid at least the minimum wage, but also included workers being charged for using office materials, including toilet paper.

The same USA Today series also noted that large retailers which utilize port drayage companies continued to use the same port drayage contractors, despite the fact that the contractors were facing labor law charges. This stood in marked contrast with many of these same companies pledging to monitor their international supply chains for labor law violations from contractors and vendors. The USA Today articles did not discuss why these companies did not provide the same level of scrutiny to their port drayage contractors.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: No

According to the Assembly Appropriations Committee:

"One-time special fund costs of up to $2.1 million and annual costs of up to $1.8 million for DLSE to implement enforcing the provisions of this bill. Major cost drivers include the development of a web portal, the ongoing administration of the list of relevant port drayage carriers, and the additional review of wage claims as a result of the customer liability provisions. The ongoing costs associated with this bill are likely to decrease in future years."

SUPPORT: (Verified 8/30/18)

California Labor Federation (co-source)
California Teamsters Public Affairs Council (co-source)
CARECEN – Central American Resource Center
City of Long Beach
City of Los Angeles
Clergy and Laity for Economic Justice
East Area Progressive Democrats
EcoFlow Transportation
Historic Highland Park Neighborhood Council
Los Angeles Alliance for a New Economy
Mayor Eric Garcetti of Los Angeles
Mayor Robert Garcia of Long Beach
Mayor Libby Schaaf of Oakland
Natural Resources Defense Council
Our People Our Port Coalition
Shippers Transport Express
South Bay Los Angeles 350
Southern California Coalition for Occupational Safety and Health
Toll Global Forwarding
Warehouse Worker Resource Center

OPPOSITION: (Verified 8/30/18)

Agricultural Council of California
Almond Alliance of California
American Apparel and Footwear Association
Association of CA Egg Farmers
CA Association of Wheat Growers
CA Bean Shippers Association
CA Chamber of Commerce
CA Grain and Feed Association
CA Manufacturers & Technology Association
CA Pear Growers Association
CA Seed Association
CA State Floral Association
CA Warehouse Association
Family Business Association of California
Los Angeles Customs Brokers and Freight Forwarder's Association
National Federation of Independent Businesses
Pacific Egg & Poultry Association
Western States Trucking Association

ARGUMENTS IN SUPPORT: The California Teamsters Public Affairs Council, a sponsor of SB 1402, writes the following:

"SB 1402 will attempt to address the well documented swamp of illegality that exists in the port motor carrier industry, where drivers are regularly subjected to misclassification, fraud, and wage theft, and where large shippers who hire the trucking companies just look the other way. Currently, there is over $40 million in unsatisfied judgments against port trucking companies for illegal treatment of their drivers. There is perhaps no workforce in California where abuse of workers is more commonplace or more out of control....

SB 1402 will address the issue by having the State Labor Commissioner create a list of trucking companies that have unsatisfied judgments for labor law violations and employer tax fraud. If a shipper hires one of the trucking companies on the list and that trucking company subsequently commits violations with respect to drivers hauling freight for that shipper, then the shipper may be held jointly liable for the violation.

Under this bill, shippers can completely avoid joint liability by simply not hiring trucking companies with outstanding judgments and trucking companies can remove themselves from the list by satisfying judgments against them.... We

believe SB 1402 will help drain the labor law swamp in California's port drayage industry by creating a simple, inexpensive and easily followed system that encourages accountability by all market participants."

ARGUMENTS IN OPPOSITION: The California Chamber of Commerce and other business organizations oppose SB 1402, arguing:

"SB 1402 imposes liability upon a third-party customer for the wage and hour obligations of a motor carrier even though there is absolutely no evidence or proof that the customer exerted any control over the working conditions of the motor carrier's employees. There is simply no basis for a business that contracts for motor carrier services to be deemed statutorily liable for wages and other expenses when there is no way in which a customer can engage or force the motor carrier to comply with provisions of the Labor Code.

Further, SB 1402 does not require that the customer be in direct contract with the motor carrier or even have knowledge of who the motor carrier is that delivered its freight for liability to attach. Often times, a broker is used to manage a customer's shipments. The broker does not inform the customer of who the motor carrier is in order to prevent the carrier and the customer from contracting directly and cutting out the middle person (in this case, the broker)....

Current law already provides an adequate pathway for civil liability for a business that is actually controlling the employees of another.... SB 1402 completely ignores this long-standing common law analysis and imposes liability despite the lack of any control exerted by the third party. Even though the third party did not control the wages owed, did not control the hours the employee worked, and did not control the work environment of the employee, the third party will be held liable for all such obligations.

By imposing third-party liability, SB 1402 will create significant amounts of litigation... For the reasons stated, we respectfully OPPOSE SB 1402."

ASSEMBLY FLOOR: 53-26, 8/30/18
AYES: Aguiar-Curry, Arambula, Berman, Bloom, Bonta, Burke, Caballero, Calderon, Carrillo, Cervantes, Chau, Chiu, Chu, Cooper, Daly, Eggman, Friedman, Gabriel, Cristina Garcia, Eduardo Garcia, Gipson, Gloria, Gonzalez Fletcher, Gray, Grayson, Holden, Irwin, Jones-Sawyer, Kalra, Kamlager-Dove, Levine, Limón, Low, McCarty, Medina, Mullin, Muratsuchi, Nazarian, O'Donnell, Quirk, Quirk-Silva, Reyes, Rivas, Rodriguez, Rubio, Salas, Santiago, Mark Stone, Thurmond, Ting, Weber, Wood, Rendon

NOES: Acosta, Travis Allen, Baker, Bigelow, Brough, Chávez, Chen, Choi, Cunningham, Dahle, Flora, Fong, Frazier, Gallagher, Harper, Kiley, Lackey, Maienschein, Mathis, Mayes, Melendez, Obernolte, Patterson, Steinorth, Voepel, Waldron
NO VOTE RECORDED: Cooley

Prepared by: Gideon L. Baum / L. & I.R. / (916) 651-1556
8/30/18 20:05:34

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