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Senator Thomas Umberg, Chair
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SB 338 (Gonzalez)
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SUBJECT

Joint and several liability of port drayage motor carrier customers: health and safety violations: prior offenders: liability owed to the state

DIGEST

This bill expands the bases for a port drayage motor carrier to be placed on the Division of Labor Standards Enforcement's list, pursuant to Section 2810.4 of the Labor Code, and thus expands the bases of joint and several liability for customers of such carriers. The bill requires an audit to be conducted before a carrier can be removed from the list.

EXECUTIVE SUMMARY

In response to well-documented labor abuses in the port drayage services industry, SB 1402 (Lara, Ch. 702, Stats. 2018) established a new enforcement mechanism. It required the Division of Labor Standards Enforcement (DLSE) to list the names and other information of port drayage motor carriers with unsatisfied judgments, assessments, or other awards against it based on illegal conduct, including failure to pay wages and misclassification of employees, as specified. Customers working with such carriers that are placed on the list are subject to joint and several liability with the carrier for the relevant liabilities, including unpaid wages and assessed penalties.

The author asserts that while SB 1402 has encouraged trucking companies to pay final judgments, "the law does not currently extend to protecting workers against violations other than unpaid wage claims, and does not prevent companies with systemically bad practices from choosing to settle unpaid wage claims rather than get put on the joint liability 'bad actor' list."

This bill creates additional bases for inclusion on the DLSE list and creates a new category of "prior offender" with stricter standards. It also includes a requirement that DLSE conduct a compliance audit before a carrier can be removed from the list.

The bill is sponsored by the California Teamsters Public Affairs Council, the International Brotherhood of Teamsters, Port Division, and the Los Angeles Alliance for a New Economy. It is supported by various labor groups. It is opposed by the California Trucking Association, the California Chamber of Commerce, and other industry associations. The bill passed the Senate Labor, Public Employment, and Retirement Committee on a 4 to 1 vote.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Requires DLSE to post on its website the names, addresses, and essential information for any port drayage motor carrier with an unsatisfied final court judgment, tax assessment, or tax lien, including any order, decision, or award obtained by a public or private person or entity pursuant to Section 98.1 of the Labor Code, 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. (Lab. Code § 2810.4(b).)

2) Provides that DLSE shall not post the information on its website until the period for all appeals has expired and only after providing at least 15 days advance notice, as specified. The posting must be removed within 15 business days after the DLSE 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. DLSE is required to update the list of employers monthly. (Lab. Code § 2810.4(b).)

3) Subjects a customer that engages or uses a port drayage motor carrier that is on the list to joint and several liability with the motor carrier or the motor carrier's successor for all civil legal responsibility and civil liability owed to a port drayage driver for services obtained after the date the motor carrier appeared on the list, as specified. This includes sharing with the motor carrier 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;
    b) unlawful deductions from wages;
    c) out-of-pocket expenses incurred by the commercial driver;
    d) civil penalties for failure to secure workers' compensation coverage; and
    e) damages or penalties as provided for by law that are due based upon the failure to pay wages owed. (Lab. Code § 2810.4(b)(3).)

4) Provides that a customer's joint and several liability is to be determined by either of the following:
    a) by the Labor Commissioner in an administrative proceeding or pursuant to their citation authority; or
    b) by a court in a civil action brought by the Labor Commissioner or a commercial driver or their representative after providing the customer with at least 30 business days notice prior to filing the action, as provided. (Lab. Code § 2810.4(c).)

5) Provides a series of exemptions for customers from the joint and several liability, including where the carrier's employees are covered by a collective bargaining agreement, as specified. (Lab. Code § 2810.4(d).)

6) Requires a port drayage motor carrier that provides port drayage services to a customer to furnish written notice to the customer of any unsatisfied final judgments against the motor carrier, as specified, and the text of this section. (Lab. Code § 2810.4(e), (f).)

7) Prohibits adverse action against a 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. (Lab. Code § 2810.4(g).)

8) Defines "port drayage motor carrier" to mean an individual or entity that hires or engages commercial drivers in the port drayage industry. "Port drayage motor carrier" also means 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. It also includes an entity or individual who succeeds in the interest and operation of a predecessor port drayage motor carrier. (Lab. Code § 2810.4(a)(4).)

9) Defines "port drayage services" to mean 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. It does not include employees performing the intra-port or inter-port movement of cargo or cargo handling equipment under the control of their employers. (Lab. Code § 2810.4(a)(6).)

10) Defines a "customer" as a business entity that engages or uses a port drayage motor carrier to perform port drayage services on the customer's behalf, as provided. However, it excludes the following:
    a) a business entity with a workforce of fewer than 25 workers;
    b) a public entity, as provided; and

c) a business entity, including, but not limited to, a marine terminal operator, who is not a customer, and who conducts transactions of equipment as specified. (Lab. Code § 2810.4(a)(2).)

This bill:

1) Adds additional bases for a carrier to be placed on the DLSE list, including:
   a) a final order from the Occupational Safety and Health Appeals Board regarding a citation, notice, order, or special order from the Division of Occupational Safety and Health finding that the employer has committed a violation; and
   b) a final order or judgment from any other state or local entity finding that the port drayage motor carrier has violated a law, ordinance, rule, regulation, or guidance intended to protect employee health and safety, including, but not limited to, a measure designed to prevent the spread of COVID-19.

2) Provides that a carrier shall be taken off the list within 15 days of DLSE determining both of the following:
   a) there has been full payment of the unsatisfied judgment or any other financial liabilities or that the port drayage motor carrier has entered into an approved settlement dispensing of the judgment or liabilities; and
   b) an audit conducted by DLSE demonstrates that all violations have been remedied or sufficiently abated, as determined by DLSE.

3) Requires the port drayage motor carrier to reimburse DLSE for the reasonable cost of the audit.

4) Requires DLSE to additionally post on its website the names, addresses, and essential information for a prior offender with a subsequent judgment, ruling, citation, decision, order, or award finding that the port drayage motor carrier has violated a labor, employment, or health and safety law, regulation, or enforced guidance even if all periods for appeals have not expired.

5) Defines "prior offender" to mean a carrier that has had a final determination, assessment, finding, order, judgment, or award issued against it or against its predecessor for violating an applicable labor, employment, or health and safety law, regulation, or guidance.

6) Extends the joint and several liability of customers to include tax assessments owed to the state and civil liability stemming from the motor carrier's failure to comply with applicable health and safety laws, rules, or regulations.

7) Establishes additional notice requirements regarding the added bases for liability.

COMMENTS

1. Workers' rights in the drayage industry

a. Classification of workers: employee versus independent contractor

The line between who is an independent contractor and who is an employee is not always crystal clear. Frequently, jobs have some characteristics of independent contractor status and some characteristics of employee status. For example, controversy arose over how to categorize taxi drivers who leased their cabs, set their own hours, and paid for their own gas, but had to follow company rules regarding dress, annual classroom education, forms of payment, and advertising.[1]

There is a lot at stake in these gray areas. Employees have long been entitled to certain workplace protections under California and federal law. For example, employees must be paid at least the minimum wage, they are due overtime wages for working long hours, they generally cannot be forced to pay for the equipment they need to do the job, they must be covered by workers' compensation in the case they suffer injury in the workplace, and they are entitled to state unemployment and disability insurance coverage, for which employers must pay their share. It is also more difficult for independent contractors to organize for better terms and conditions. Independent contractors are not covered by the National Labor Relations Act (*see* 20 U.S.C. 152(3)) and, since they are what amount to individual small businesses, they could be seen as colluding in violation of anti-trust laws if they do try to organize.

Given what is at stake and the fact that the line between independent contractor and employee can be hazy, it is perhaps not surprising that employees frequently get misclassified as independent contractors. While California law presumes that workers are employees and places the burden on the hiring entity to show that they are not (Lab. Code § 3357), the financial benefits to a company of a labor force consisting of independent contractors creates a strong incentive for companies to push the envelope and, in the case of bad actors, simply to cheat.

b. Misclassification in the drayage industry

Drayage services involve transporting goods a short distance via ground freight or the charge for such a transport. In freight forwarding, drayage is typically used to describe the trucking service from an ocean port to a rail ramp, warehouse, or other destination. A study performed by the National Employment Law Project (NELP) noted that the Los

[1] *NLRB v. Friendly Cab Co.* (9th Cir. 2008) 512 F.3d 1090.

Angeles port is the largest container port in the United States, Long Beach the second largest, and Oakland the fifth largest container port.[2] The port-trucking industry is a $12-billion-per-year business.[3] There are an estimated 25,000 port truck drivers in California, accounting for about one third of the nation's drayage-industry drivers. California's port truck drivers provide critical drayage services, which enables stores to stock their shelves with consumer goods all over California, with additional freight moving across the United States. They are an integral part of the supply chain for many of the big-box stores that are found in nearly every community. However, over the last several decades, these drivers have been subjected to an industry-wide campaign to undercut their wages, their rights, and their livelihoods.

It is well-documented that these drivers have been systematically misclassified as independent contractors rather than employees.[4] Since the 1970s, labor practices in the port truck industry have changed dramatically, leading to the development of an industry characterized by "fierce competition, ever-increasing service requirements, a contingent workforce, poverty level wages, no health care coverage, rampant safety violations, and ineffective or illusory enforcement."[5] Drayage carriers committing these violations are therefore not the exception, and many well-known companies have utilized the services of port drayage carriers that have mistreated their employees. An NELP study estimated that 49,000 of the nation's 75,000 port truck drivers are misclassified as independent contractors, and the total quantifiable costs of misclassification nationally runs $1.4 billion annually. In California, there are 25,000 port drivers, and 16,400 of them are estimated to be misclassified as independent contractors. This has resulted in drivers being denied fair wages and forced to work unsustainable hours in order to make a living.

Over the last decade, there have been hundreds of wage-theft complaints brought before the California Department of Labor and prosecuted by California's public

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[2] R. Smith, P. A. Marvy, J. Zerolnick, *The Big Rig Overhaul – Restoring Middle-Class Jobs at America's Ports Through Labor Law Enforcement* (Feb. 2014) NELP, https://www.nelp.org/wp-content/uploads/2015/03/Big-Rig-Overhaul-Misclassification-Port-Truck-Drivers-Labor-Law-Enforcement.pdf [as of Apr. 5, 2021]. All further internet citations are current as of April 5, 2021.
[3] Erica Phillips, *Port-Trucking Firms Run Into Labor Dispute* (May 11, 2016) Wall Street Journal, https://www.wsj.com/articles/port-trucking-firms-run-into-labor-dispute-1462959003.
[4] *See* Karen Meeks, *Most U.S. port truck drivers are misclassified as independent contractors, according to new report* (Sept. 1, 2017) Press-Telegram, https://www.presstelegram.com/2014/02/19/most-us-port-truck-drivers-are-misclassified-as-independent-contractors-according-to-new-report; Michael Hiltzik, *Port truckers who carry your favorite goods to market are being cheated to save you money* (Jun. 29, 2017) Los Angeles Times, http://www.latimes.com/business/hiltzik/la-fi-hiltzik-port-truckers-20170702-story.html; Brett Murphy, *Rigged: Forced into debt. Worked past exhaustion. Left with nothing.* (Jun. 16, 2017) USA Today, https:// www.usatoday.com/pages/interactives/news/rigged-forced-into-debt-worked-past-exhaustion-left-with-nothing.
[5] R. Smith, P. A. Marvy, J. Zerolnick, *The Big Rig Overhaul – Restoring Middle-Class Jobs at America's Ports Through Labor Law Enforcement* (Feb. 2014) NELP, https://www.nelp.org/wp-content/uploads/2015/03/Big-Rig-Overhaul-Misclassification-Port-Truck-Drivers-Labor-Law-Enforcement.pdf.

entities. In 2014, California Labor Commissioner Julie A. Su won an action involving Port of Long Beach truck drivers working for Seacon Logix, Inc. who were ruled employees and not independent contractors and were entitled to all basic labor law protections.[6]

In 2015, "[s]even Los Angeles-area truckers [] won a $2 million claim against an international shipping company accused of stealing their wages by improperly classifying them as independent contractors and charging them to lease its trucks to drive. In a decision with implications for hundreds of companies and thousands of truckers in Southern California alone, a San Diego County Superior Court judge held that the seven plaintiffs should have been defined as employees of Pacer Cartage under California's labor law, not as independent owner-operators."[7] In 2010, then-California Attorney General Jerry Brown prosecuted and prevailed in multiple employee misclassification cases.[8]

Investigations of the industry have revealed that companies threaten drivers with discipline or termination if they do not agree to work nearly around the clock.[9] Drivers have reported that they have been ordered to doctor their driving logs to hide overtime from regulators. In one proceeding before the Labor Commission, drivers testified that they had to work up to 19 hours a day, violating federal fatigue laws for truckers. In that case, the Commission ruled that 40 drivers were inaccurately classified as independent contractors and awarded a combined $6.8 million for lost wages.

Despite these large awards and settlements against the offending port drayage carriers, drivers are often still never paid. Investigations and media coverage indicate that these carriers use "legal loopholes, shell companies, and bankruptcy protection to dodge the punishment labor court judges have handed down."[10]

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[6] Cal. Dept. of Industrial Relations, News Release #2017-39, *U.S. District Court Upholds Labor Commissioner Awards of Almost $1 Million for Misclassification of Port and Rail Truck Driver* (May 23, 2017) https://www.dir.ca.gov/DIRNews/2017/2017-39.pdf.
[7] S. Gorman, *California Truckers Win $2 Million in Wage Theft Suit* (Jan. 30, 2015) Reuters, https://www.reuters.com/article/idUSKBN0L404020150131.
[8] *See* Office of the Attorney General, *Brown Wins Fifth Suit Against Port Trucking Companies that Violated Workers' Rights* (Feb. 4, 2010) http://oag.ca.gov/news/press-releases/brown-wins-fifth-suit-against-port-trucking-companies-violated-workers-rights.
[9] Brett Murphy, *Rigged: Forced into debt. Worked past exhaustion. Left with nothing.* (Jun. 16, 2017) USA Today, https:// www.usatoday.com/pages/interactives/news/rigged-forced-into-debt-worked-past-exhaustion-left-with-nothing.
[10] Brett Murphy, *Shell games: How trucking companies that cheat drivers dodge penalties* (Oct. 26, 2017) USA Today, https://www.usatoday.com/pages/interactives/news/rigged-shell-games-how-trucking-companies-that-cheat-drivers-dodge-penalties.

c. Wage claim collections issues

When workers have been misclassified by their employers as independent contractors instead of employees, one of their potential remedies is to seek payment of all of the additional wages (regular, overtime, and double-time) to which they would have been entitled if properly classified. Misclassified workers can also seek penalties for the meal periods and rest breaks to which they were entitled as employees. (Lab. Code §§ 226.7, 512.) It is these types of claims that have led to the victories listed in the previous section.

However, even if workers can successfully prove to the California Labor Commissioner or the courts that they have been misclassified, judgments for unpaid wages are notoriously difficult to collect. According to a 2013 study by NELP based on data from the California Labor Commission:

> Although the [California Labor Commissioner] issued awards for unpaid wages of more than $282 million between 2008 and 2011, workers were able to collect a mere $42 million—roughly 15 percent—of those awards from their employers. Our research also finds that workers who try to enforce [California Labor Commission] judgments for unpaid wages often find that their employers have disappeared, hidden assets, or shut down operations and reorganized as a new entity.
>
> Employers who did not pay their workers, refused to settle, were found by [the California Labor Commissioner] to owe wages, and then became subject to a court judgment were more likely than not to have suspended, forfeited, cancelled, or dissolved business status within a year of the wage claim.[11]

A more recent investigation by USA Today Network found these issues continue:

> The Network examined California labor commissioner and court cases filed by more than 1,100 port truck drivers and traced the outcomes for almost 60 companies found by the courts to have violated the law.
>
> At least a dozen have so far avoided all or most of their labor judgments after shifting assets into new business names. Many delayed paying for two years or more, then filed for bankruptcy protection or pressured drivers to accept settlements that gave them a fraction of what the labor commissioner said they were owed.
>
> The vast majority of the owners still operate today, moving goods out of California ports and on their way to major national retailers.

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[11] NELP, *Hollow Victories: The Crisis in Collecting Unpaid Wages for California's Workers* (June 27, 2013) http://www.nelp.org/publication/hollow-victories-the-crisis-in-collecting-unpaid-wages-for-californias-workers/.

> "The idea that companies are still around without paying the full boat is a point of outrage in and of itself," said Jay Shin, directing attorney at the Wage Justice Center, a nonprofit that has provided legal help for drivers and contracted with the labor commissioner to collect judgments.
>
> From 2012 to 2016, port truck drivers were awarded $37 million in back pay and penalties. It's not clear how much has been paid out because state records don't show most private settlements or pending negotiations. But the labor commissioner has been able to track only $3 million that has gone to drivers.[12]

As a practical matter, therefore, though the law prohibits misclassification of workers, many companies have simply been getting away with it.

d. Protecting drivers through their customers

SB 1402 was the response to these industry-wide abuses. It created Section 2810.4 in order to put financial pressure on trucking companies to quickly pay outstanding wage claims, and other awards, to their workers or government entities.

Section 2810.4 requires DLSE to post the names and other information of port drayage motor carriers that have an unsatisfied final court judgment, tax assessment, or tax lien, including any order, decision, or award obtained that found 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. However, a judgment or other award cannot trigger placement on the DLSE list until the time for all judicial appeals has expired and DLSE has provided advance notice.

The import of the list is that any customer that engages or uses a carrier on the list is jointly and severally liable with the carrier for the full amount of unpaid wages, unreimbursed expenses, damages and penalties, including applicable interest, which are found due for various Labor Code violations. The liability is determined by the Labor Commissioner in an administrative hearing or pursuant to its citation authority. It can also be determined by a court in an action field by the Labor Commissioner or a commercial driver, again with advance notice. The Labor Commissioner and the Employment Development Department are authorized to promulgate regulations to carry out the law.

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[12] Brett Murphy, *Shell games: How trucking companies that cheat drivers dodge penalties* (Oct. 26, 2017) USA Today, https://www.usatoday.com/pages/interactives/news/rigged-shell-games-how-trucking-companies-that-cheat-drivers-dodge-penalties.

Essentially, Section 2810.4 creates liability for businesses that make the decision to contract with port drayage carriers that have violated their own workers' rights. This increases the risk of contracting with problematic carriers, such as the ones referenced above. For those offending port drayage carriers that have thus far avoided their obligations to workers, the statute serves to impede their ability to do business until they make good on their debts to their drivers. Section 2810.4 went into effect January 1, 2019. Although a unique approach to carrying it out, there is certainly precedent for holding companies liable for the labor law violations of others with whom they contract. (*See e.g.,* Lab. Code §§ 218.7, 2810, 2810.3.)

2. Expanding Section 2810.4

This bill builds on Section 2810.4 to address some concerns highlighted by the author and sponsors.

According to the author:

> Port truck drivers have been notoriously exploited by bad actors in the trucking industry. These bad actors routinely misclassify workers to cut costs, wrongfully excluding workers from minimum wage, workers compensation, and the right to join a union. During the COVID-19 pandemic, misclassified workers have also been excluded from unemployment insurance, sick days, and basic health and safety protections like PPE. Even though misclassification is illegal, it is often cheaper for trucking companies to settle wage claims for pennies on the dollar rather than to provide their workers with the protections and pay they deserve. SB 338 addresses this ongoing problem by building off of existing law, wherein trucking companies that walk away from unpaid wage claims get added to a joint liability "bad actor" list. This existing law has been important in stopping bad actors from walking away from unpaid wage claims, but it does not protect worker's health and safety, or address more systemic misclassification problems. SB 338 address[es] these failings and protects workers health and safety by adding trucking companies to the "bad actor" list if they get a final health and safety violation from Cal/OSHA or other state or local entity. This bill will also roots out systemic bad practices by adding prior offender trucking companies to the "bad actor" list more readily, and by requiring companies to conduct an audit to show that they have fixed the underlying problem in order to get off the "bad actor" list. Truck Drivers are essential workers who are critical to maintaining the supply chain. The trucking industry cannot continue to exploit these workers: that is why I am introducing SB 338, to protect the health, safety, and worker rights of Port Truck Drivers across California.

This bill makes three main changes to the law: (1) expands the bases for placement on the list to include health and safety violations; (2) establishes a new category of "prior offender" with stricter standards under the law; and (3) heightens the bar for carriers to get off of the list.

Under this bill, a port drayage motor carrier will be put on the DLSE list for two new sets of violations:

- a final order from the Occupational Safety and Health Appeals Board regarding a citation, notice, order, or special order from the Division of Occupational Safety and Health finding that the employer has committed a violation; and
- a final order or judgment from any other state or local entity finding that the port drayage motor carrier has violated a law, ordinance, rule, regulation, or guidance intended to protect employee health and safety, including, but not limited to, a measure designed to prevent the spread of COVID-19.

The sponsors of the bill make the case for including such triggers: "This pandemic has underscored how important basic worker protections are for all workers. Misclassified drivers at the ports were denied Personal Protective Equipment, had no access to sick leave, [and] could not get workers compensation benefits when they got sick on the job." These bases are significantly lower than those that currently exist in the law, and it is unclear exactly what the universe of local entity orders and judgements is that meet this criteria. In response, the author has agreed to several amendments. The provision dealing with a final order from the Occupational Safety and Health Appeals Board will only apply to a "serious violation" and only one "which remains unabated, unremedied, or unsatisfied following the period for which any appeal may be made." In order to ensure complete clarity, the author has agreed to completely remove the second provision referencing a "final order or judgment from any other state or local entity."

The bill also requires DLSE to add to its list a "prior offender" with a "subsequent judgment, ruling, citation, decision, order, or award finding that the port drayage motor carrier has violated a labor, employment, or health and safety law, regulation, or enforced guidance even if all periods for appeals have not expired." This means that once a carrier is deemed a prior offender they are placed on the list, and their customers are potentially subject to joint and several liability, as soon as 15 days after a judgment, is issued.

"Prior offender" means "a port drayage motor carrier that has had a final determination, assessment, finding, order, judgment, or award issued against it or against its predecessor for violating an applicable labor, employment, or health and safety law, regulation, or guidance." As soon as a carrier violates any relevant law or even guidance, it is deemed a prior offender and will be placed on the list immediately upon a subsequent finding against it, regardless of the time for appeals.

The author justifies such a robust change to the law:

> SB 338 is intended to catch the worst of the worst bad actors that systemically misclassify workers because it is cheaper to pay out settlements than to provide basic worker protections to their workers. As long as these bad actors can reach settlements when they violate labor laws, they will continue to get contracts with retailers that reward these abusive practices. SB 338 closes this existing loophole by adding repeat offenders to the list before they can make a settlement and avoid being put on the "bad actor" list.

In response to concerns that the "prior offender" definition sweeps up a wide swath of carriers with the breadth of violations that can trigger such a label, the author has agreed to narrow the definition to only include port drayage motor carriers that have engaged in unlawful conduct relating to the misclassification of employees as independent contractors, including failure to pay wages, imposing unlawful expenses on employees, failure to remit payroll taxes, failure to provide workers' compensation insurance, and unfair competition. In conjunction with the amendment above, this significantly heightens the standard from the bill in print, working to ensure only the worst actors are subject to these provisions.

Finally, the bill provides that in order for a carrier to get taken off the list, DLSE must determine both of the following:

- there has been full payment of an unsatisfied judgment or any other financial liabilities for a violation or that the port drayage motor carrier has entered into an approved settlement dispensing of the judgment or liabilities; and
- an audit conducted by DLSE demonstrates that all violations have been remedied or sufficiently abated, as determined by DLSE. The port drayage motor carrier is required to reimburse DLSE for the audit.

The audit is intended to ensure that carriers do not simply do the bare minimum to get off the list, and that the underlying issues are legitimately addressed. Concerns have been raised about what happens when DLSE is backlogged or is otherwise unable to conduct an audit in a timely manner. The author continues to engage with stakeholders to ensure the process is clear and practicable.

A coalition in opposition to the bill, including the California Trucking Association and the California Chamber of Commerce, argue that the new bases for placement on the DLSE list "will catch both good and bad faith actors." They argue:

> This language does not allow for an employer to be cited, appeal, lose, and then immediately remedy the violation without being listed. In other words – any Cal/OSHA citation, regardless of its weight, will cause an

> employer to qualify as a "prior offender," and therefore be treated akin to a bad faith actor. This improperly lumps together proverbial "good actors" – who promptly resolve their mistakes – and "bad actors" who refuse to remedy a violation after the legal issues are settled.

Opponents urge amendments making these sections apply "to only violations which remain unsatisfied following the period for which any appeal or reconsideration may be made and a reasonable period to remedy the violation has passed." They also argue for amendments to the provision involving "other state or local entity" findings "to clarify the scope of the provision is limited to issues related to the Health and Safety Code and to only violations which remain unsatisfied following the period for which any appeal or reconsideration may be made." As discussed above, several amendments have been agreed to that significantly mitigate, and in some cases eliminate, these concerns.

The groups in opposition also argue:

> Just three years ago, the Governor signed SB 1402 (2018 - Lara), which SB 338 seeks to amend. Because imposition of customer joint liability would, in effect, put targeted companies out of business it was agreed upon in SB 1402 that such a severe penalty should be imposed only where the company has failed to satisfy an unpaid final judgement after the expiration of appeals periods provided under the law. SB 338's present text ignores this part of SB 1402's framework, and instead establishes liability before the judicial process is complete.

The sponsors of the bill make the case for why Section 2810.4 is not strong enough and should be built upon now:

> While this was a good start, it provides far less protection for workers than exists in other industries. This is because, in order to avoid getting on the list, trucking companies have factored in wage theft as a cost of doing business, wagering that they won't get caught, and paying individual judgments or preemptively settling cases when they occasionally do get caught to avoid getting on the list. Meanwhile, the underlying violations remain unremedied.
>
> Indeed, few trucking companies ever meet the narrow criteria to get on the list and those that do are soon removed even if they continue to misclassify as long as they pay off all outstanding judgments. Drivers then must start the lengthy process of filing claims anew, allowing companies to profit for years before they finally are forced to pay out any new claims against them based on the same underlying violations of the law. As a result, the powerful players who rely on companies that misclassify to

> move goods as cheaply as possible have little incentive to demand that the trucking companies they use comply with the law.

Writing in support, the California Professional Firefighters argue:

> SB 338 would strengthen existing law in several important ways: (1) it would include health and safety violations as triggers to get trucking companies on the list of those companies with unsatisfied court judgments, tax assessments, tax liens, or any order, decision, or award finding that the port drayage motor carrier has engaged in illegal conduct; (2) it would include a provision for "repeat offenders" —who already have had final judgments in the past and obtain a subsequent judgment, ruling, decision, or citation for violating a labor, employment or health and safety law—to get on the list; and (3) it would require companies to show the Labor Agency that they have fully remedied the underlying violations in order to get removed from the list.

SUPPORT

California Teamsters Public Affairs Council (co-sponsor)
International Brotherhood of Teamsters, Port Division (co-sponsor)
Los Angeles Alliance for a New Economy (co-sponsor)
AFSCME, AFL-CIO
Bet Tzedek
California Applicants' Attorneys Association
California Conference Board of the Amalgamated Transit Union
California Conference of Machinists
California Employment Lawyers Association
California Faculty Association
California IATSE Council
California Labor Federation
California Professional Firefighters
California Rural Legal Assistance Foundation
California-Nevada Conference of Operating Engineers, International Union of Operating Engineers
Clergy and Laity United for Economic Justice
Coalition for Clean Air
Communications Workers of America, District 9
Consumer Attorneys of California
Earth Justice
East Area Progressive Democrats
Engineers and Scientists of California Local 20, IFPTE AFL-CIO & CLC
Garment Worker Center
Instituto de Educacion Popular del Sur de California

Jobs to Move America
Latinos in Action
LAX Area Democratic Club
Long Beach Young Democrats
Los Angeles County Federation of Labor
National Employment Law Project
Northeast Democratic Club
NRDC
Partnerships for Working Families
Progressive Democratic Club
San Diego County Building & Construction Trades Council
Southern California Cosh
Stonewall Democratic Club
Strategic Action for a Just Economy
Teamsters Port Division
Unite Here International Union, AFL-CIO
United Food and Commercial Workers, Western States Council
Utility Workers Union of America, Local 132
Utility Workers Union of America, Local 483
Utility Workers Union of America, Local 522
Warehouse Worker Resource Center
Worksafe

OPPOSITION

Agricultural Council of California
California Chamber of Commerce
California Citrus Mutual
California Farm Bureau Federation
California Fresh Fruit Association
California Grocers Association
California Manufacturers and Technologies Association
California Trucking Association
California Walnut Commission
Far West Equipment Dealers Association
Harbor Trucking Association
Pacific Merchant Shipping Association
Western Growers
Western Plant Health Association
Western States Trucking Association

RELATED LEGISLATION

Pending Legislation: SB 62 (Durazo, 2021) reinforces existing law in order to increase the legal responsibility of fashion brands and garment manufacturers for employment violations taking place in their supply chains. The bill also prohibits the payments of wages on a per piece basis in the garment industry, unless authorized by a collective bargaining agreement, and makes it easier for garment workers to obtain compensation for unpaid wages from the Garment Manufacturers Special Account (GMSA). This bill is currently in the Senate Appropriations Committee.

Prior Legislation:

SB 1402 (Lara, Ch. 702, Stats. 2018) *See* Executive Summary and Comments.

AB 621 (Roger Hernández, Ch. 741, Stats. 2015) relieves a motor carrier performing drayage services at one or more ports in California from liability for statutory or civil penalties associated with misclassification of commercial drivers as independent contractors if the motor carrier enters into a settlement agreement before January 1, 2017, with the Labor Commissioner whereby the motor carrier agrees to convert all of its commercial drivers to employees.

AB 1897 (Roger Hernández, Ch. 728, Stats. 2014) requires a client employer, as defined, to share with a labor contractor, as defined, all civil legal responsibility and civil liability for: (1) payment of wages to workers provided by a labor contractor; (2) failure to report and pay all required employer contributions, worker contributions, and personal income tax withholdings as required by the Unemployment Insurance Code; and (3) failure to secure valid workers' compensation coverage.

SB 459 (Corbett, Ch. 706, Stats. 2011) prohibits willful misclassification of individuals as independent contractors, prohibits charging individuals who have been mischaracterized as independent contractors a fee or making deductions from compensation, where those acts would have violated the law if the individuals had not been mischaracterized; authorizes the Labor and Workforce Development Agency to assess specified civil damages against, and requires the Agency to take other specified disciplinary actions against, persons or employers violating these prohibitions; provides that a person who, for money or other valuable consideration, knowingly advises an employer to treat an individual as an independent contractor to avoid employee status for the individual shall be jointly and severally liable with the employer if the individual is not found to be an independent contractor; and other provisions.

SB 459 (Corbett, Ch. 706, Stats. 2011) prohibited any person or employer from engaging in willful misclassification of an employee as an independent contractor and provided for civil penalties.

AB 950 (Pérez, Swanson, 2011) would have deemed a drayage truck operator an employee of the entity or person who arranges for or engages the services of the operator for purposes of all of the provisions of state law that govern employment, as specified. AB 950 died on the Assembly Inactive File.

SB 1583 (Corbett, 2008) would have provided employment consultant liability for advising unlawful conduct through employee misclassification but was vetoed by Governor Schwarzenegger who argued that the liability created under the bill would discourage consultants from giving employment advice.

SB 1490 (Padilla, 2008) would have required the Employment Development Department (EDD) to create a form, including factors used by EDD in determining independent contractor status, to be distributed by employers to workers. SB 1490 was held in the Senate Committee on Appropriations.

SB 622 (Padilla, 2007) would have made it unlawful for employers to willfully misclassify an employee as an independent contractor. The bill was vetoed by Governor Schwarzenegger because he believed sufficient remedies for employer misconduct already existed and the bill could cause businesses to avoid using independent contractors even where appropriately utilized.

SB 1213 (Dunn, 2006) would have provided port owner-operator drivers the right to organize collectively to better their economic conditions through joint negotiations with port motor carriers concerning their compensation, benefits, and terms and conditions of engagement. SB 1213 was vetoed by Governor Schwarzenegger, who believed the provisions of the bill offered a legally doubtful attempt at an antitrust exemption, expanding state regulation in a manner never tried before that would undoubtedly set off legal battles that will take years to resolve. Governor Schwarzenegger further stated the litigation that would result from this bill is counter-productive to the cooperative work necessary to capture the economic potential afforded by the growth of California's ports.

SB 848 (Dunn, 2005) was similar to SB 1213 and was vetoed by Governor Schwarzenegger who believed the bill would create a litigious firestorm that would be counterproductive to the cooperative work that must be accomplished to capture the economic potential afforded by the growth in international trade.

PRIOR VOTES:

Senate Labor, Public Employment, and Retirement Committee (Ayes 4, Noes 1)

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