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SB-1402 Labor contracting: customer liability. (2017-2018)

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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.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: no

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.