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**SB-338 Joint and several liability of port drayage motor carrier customers: health and safety violations: prior offenders: liability owed to the state. (2021-2022)**

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**Senate Bill No. 338**

**CHAPTER 333**

An act to amend Section 2810.4 of the Labor Code, relating to private employment.

[ Approved by Governor September 27, 2021. Filed with Secretary of State September 27, 2021. ]

**LEGISLATIVE COUNSEL'S DIGEST**

SB 338, Gonzalez. Joint and several liability of port drayage motor carrier customers: health and safety violations: prior offenders: liability owed to the state.

Existing law requires the Division of Labor Standards Enforcement to post on its internet website a list of port drayage motor carriers 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 including failure to pay wages, imposing unlawful expenses on employees, and other labor violations. Existing law prohibits the division from placing the information on the internet website until the period for all judicial appeals has expired. Existing law requires the division to remove a posting within 15 business days after the division determines there has been payment or settlement of the unsatisfied judgment, as specified. Existing law, except as specified, imposes joint and several liability on the port drayage motor carrier and any customer that obtained port drayage services after the date the port drayage motor carrier appeared on the division's list for all civil legal responsibility and liability owed to a port drayage driver, including unpaid wages, unreimbursed expenses, and damages and penalties that are due, as specified.

This bill would require the Division of Labor Standards Enforcement to post the information for a port drayage motor carrier that is a prior offender, as defined, with a subsequent judgment, ruling, citation, order, decision, or award finding a violation of a labor or employment law or regulation, even if all periods for appeals have not expired. The bill would require the division to post the information only if it is provided to the division in a format acceptable to the division.

This bill would require the Division of Labor Standards Enforcement, if it receives notice that a prior offender that is listed on the division's internet webpage has subsequently prevailed on appeal, to remove the posting for the prior offender within 15 business days after determining that there remains no other basis upon which to retain the prior offender's information on the internet webpage. The bill would also require the division to remove a posting within 15 business days after the division determines, first, that there has been payment or settlement of the unsatisfied judgment or any other financial liabilities and, second, that the port drayage motor carrier has submitted certification, under penalty of perjury, that all identified violations have been remedied or abated and, after the division issues certain regulations, sufficient documentation that all violations have been remedied or sufficiently abated, as specified. By expanding the crime of perjury, this bill would impose a state-mandated local program.

This bill would expand the liability of a customer of a listed port drayage motor carrier to also include the civil legal responsibility and civil liability owed to the state for port drayage services obtained after the date the motor carrier appeared on the prior offender list. The bill would add, in this regard, potential responsibility and liability for employment tax assessments issued by the

state and civil liability stemming from the motor carrier's failure to comply with applicable health and safety laws, rules, or regulations.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

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

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## 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) 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 are misclassified as independent contractors, and rampant misclassification of drivers contributes to wage theft and leaves drivers in a cycle of poverty.

(f) 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.

(g) Port drayage drivers are a largely immigrant workforce and particularly vulnerable to labor exploitation. As immigrant workers, many of these workers are often fearful to report violations to state agencies or are unaware of their rights, depriving them of access to critical safety net benefits by virtue of their misclassification.

(h) The COVID-19 pandemic has highlighted the impact of misclassification on worker health and safety and on public health. Drayage drivers, a largely low-wage immigrant workforce concentrated in southern California, are among the groups that have been hardest hit by the COVID-19 pandemic. During the COVID-19 pandemic, drivers who are misclassified have been illegally denied paid sick leave, have not been provided with mandated personal protective equipment, and have not had access to workers' compensation benefits if they contract the virus on the job. This puts the drivers, their families, and other workers in the supply chain at risk and significantly undermines the ability of the state and public health officials to get the spread of the virus under control.

(i) The COVID-19 pandemic has also highlighted the incredible strain that misclassification puts on the state and state agencies tasked with administering safety net benefits such as unemployment insurance and disability benefits. These state agencies have spent an inordinate amount of time processing and investigating cases where port truck drivers have claimed benefits but have been misclassified, sometimes taking months to make a determination that the employee is misclassified and is entitled to benefits and sometimes wrongly denying these port truck drivers benefits. Port truck drivers have thus been forced both to wait months for benefits and to expend their own and agency resources fighting these incorrect determinations.

(j) The Division of Labor Standards Enforcement in the office of the Labor Commissioner, has awarded in excess of \$50,000,000 in unlawful deductions from wages and out-of-pocket expenses to more than 500 drivers. No court has overturned these awards on appeal.

(k) Misclassification remains endemic in the industry. Many companies that commit violations go out of business and are replaced by others, or even the same entity under a different name, that repeat the pattern. Both workers and the state are often unable to act quickly enough or expend the necessary resources to collect from these defunct or fraudulently reorganized companies. Even when companies do not shut down after having been found to have violated the law, those companies will settle out the monetary

aspects of the case but will continue misclassifying their drivers as independent contractors, thereby perpetuating the systemic and nefarious business practices that they, and their customers, benefit from at the expense of drivers.

(l) 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 Ninth Circuit Court of Appeals struck down that requirement.

(m) 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 and to provide other basic protections to employees.

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

(o) 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 \$485,000,000 in workers' compensation premiums and \$60,000,000 in federal taxes go unpaid in the drayage industry.

(p) 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.

(q) 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.

(r) Customers of port drayage represent some of the wealthiest companies in the world. Many of these companies have reported record profits even in the midst of a pandemic that has devastated businesses in other sectors and has resulted in employees across the country—including port truck drivers—losing work and having to rely on the social safety nets that motor carriers do not contribute to when they misclassify their drivers.

(s) The 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.

(t) Holding customers of trucking companies jointly liable for future labor, employment, and health and safety law violations by port drayage motor carriers whom they engage and of whose prior violations of labor, employment, or health and safety laws the customers received advance notice will exert pressure across the supply chain to protect drayage drivers from further exploitation.

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

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

**SEC. 2.** Section 2810.4 of the Labor Code is amended 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) "Internet webpage" refers only to the port drayage motor carrier list that the Division of Labor Standards Enforcement is required to update and maintain pursuant to subdivision (b) and shall not be construed to apply to any other information about wage claims, investigations, citations, judgments, or other activities that the Division of Labor Standards Enforcement may provide to the public through its internet website.
- (4) "Labor" has the same meaning provided by Section 200.
- (5) (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.
- (6) "Port" means any sea or river port located in this state.
- (7) "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.
- (8) "Prior offender" means a port drayage motor carrier that has had at least one of the following:
- (A) A final court judgment, tax assessment, or tax lien that may be released to the public under federal and state disclosure laws and which arose from unlawful conduct relating to the misclassification of employees as independent contractors.
- (B) A final Labor Commissioner citation or a Labor Commissioner order, decision, or award that arose from unlawful conduct relating to the misclassification of employees as independent contractors.
- (9) "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) (A) The Division of Labor Standards Enforcement shall post on its internet webpage the names, addresses, and essential information for a port drayage motor carrier with an 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.
- (B) The Division of Labor Standards Enforcement shall post on its internet webpage, to the extent permitted by federal and state disclosure laws, a list consisting of the names, addresses, and essential information for a prior offender with a subsequent judgment, ruling, citation, order, decision, or award finding that the port drayage motor carrier has violated a labor or employment law or regulation, even if all periods for appeals have not expired. If the Division of Labor Standards Enforcement receives notice that a prior offender that is listed on the division's internet webpage pursuant to this subparagraph has subsequently prevailed on appeal, the division shall remove the posting for the prior offender within 15 days after the division has determined that there remains no other basis under this section upon which to retain the prior offender's information on the internet webpage. The Division of Labor Standards Enforcement shall be required to post the prior offender to this list on the internet webpage only if notice of the subsequent and prior judgment, ruling, citation, order, decision, or award is provided in a manner and format that is acceptable to the Division of Labor Standards Enforcement.
- (C) Except as provided in subparagraph (B), the Division of Labor Standards Enforcement shall not place the information required to be posted by this paragraph on the internet webpage until the period for all judicial appeals has expired.
- (D) A posting required by this paragraph shall be removed within 15 business days after the Division of Labor Standards Enforcement determines, first, that there has been full payment of an unsatisfied judgment or any other financial liabilities for all violations identified pursuant to subparagraphs (A) and (B) or that the port drayage motor carrier has entered into an approved settlement dispensing of the judgment or liabilities and, second, that both of the following conditions have been satisfied:

(i) The port drayage motor carrier has submitted certification, under penalty of perjury, that all violations identified pursuant to subparagraphs (A) and (B) have been remedied or abated.

(ii) On and after the date that the Division of Labor Standards Enforcement adopts regulations describing what constitutes "sufficient documentation" for purposes of this clause, the port drayage motor carrier has submitted sufficient documentation that all violations identified pursuant to subparagraphs (A) and (B) have been remedied or sufficiently abated.

(2) No less than 15 business days before posting on its internet webpage 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 citation, unsatisfied court judgment, assessment, order, decision, or award.

(C) A copy of the regulations or rules of practice or procedure adopted pursuant to subdivision (l) or (m) 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 or to the state 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 and all other amounts that 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) Employment tax assessments issued by the state.

(F) Civil liability stemming from the motor carrier's failure to comply with applicable health and safety laws, rules, or regulations.

(G) 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.

(H) 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.

(5) Except as provided in subparagraphs (B), (C), and (D) of paragraph (1) of this subdivision, the Division of Labor Standards Enforcement shall update its internet webpage monthly by the fifth day of each month.

(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 their 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 webpage 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 webpage.

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

(4) Where a port drayage motor carrier satisfied the conditions for removal from the internet webpage 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 the text of this section and written notice to the customer of any of the following:

(1) Any unsatisfied final judgments against the motor carrier for unpaid wages, damages, unreimbursed expenses, and penalties, including applicable interest.

(2) 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 serious violation that remains unabated, unremedied, or unsatisfied following the period for which any appeal may be made.

(3) If the motor carrier is a prior offender, a subsequent judgment, ruling, citation, order, decision, or award that the Division of Labor Standards Enforcement is required to post on its internet webpage pursuant to subdivision (b).

(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.

(g) The failure of the motor carrier to provide notice under subdivision (e) or (f) shall not be a defense to the joint and several liability provided by this section.

(h) 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.

(i) 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.

(j) 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.

(k) 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.

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

(m) 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.

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

(o) 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.

**SEC. 3.** No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.