

TITLE 8 INDUSTRIAL RELATIONS
DIVISION 1. DEPARTMENT OF INDUSTRIAL RELATIONS
CHAPTER 6. DIVISION OF LABOR STANDARDS ENFORCEMENT

ADDING SUBCHAPTER 13. FOREIGN LABOR CONTRACTOR REGISTRATION

ADOPTING SECTIONS 13850 THROUGH 13874, INCLUSIVE,
REGULATING FOREIGN LABOR CONTRACTORS

INITIAL STATEMENT OF REASONS

INTRODUCTION

The Labor Commissioner, Chief of the Division of Labor Standards Enforcement (DLSE or Division), Department of Industrial Relations, is authorized pursuant to Business & Professions Code §9998.11 to adopt regulations or policies and procedures to implement Chapter 21.5 (Foreign Labor Contractors) of Division 3 (Professions and Vocations) of the Business & Professions Code (hereafter, “B&P Code”). The Labor Commissioner proposes the adoption of new Subchapter 13 of Chapter 6, of Division 1, of Title 8 of the California Code of Regulations pertaining to the implementation of requirements for registration of foreign labor contractors and disclosure procedures applicable to foreign labor contractors and employers who use them. The proposed regulatory action is necessary to effectively implement statutory requirements regarding registration by providing standards for applicants and types of information used by the Labor Commissioner regarding registration and regulation of foreign labor contractors, establishing other requirements for administering the foreign labor contractor laws under Chapter 21.5, of Division 3, of the Business and Professions Code (commencing with B&P Code §9998; hereafter, “the Act”), and to provide for consistent internal agency practices for processing registration applications.

In 2014, the Legislature passed SB 477 which amended existing laws pertaining to foreign labor contractors in B&P Code §9998 et seq. Findings made by the Legislature recognized that foreign labor contractors are increasingly relied upon to facilitate the movement of labor from one country to another, with California a leading destination state; that despite law-abiding labor contractors, some labor contractors are often complicit with, or directly involved in the illegal trafficking of foreign workers; and that unscrupulous foreign labor contractors often charge exorbitant fees for their services that force workers to go into debt bondage, falsify documents, and deceive workers about terms and conditions of work, which increases vulnerability to human trafficking. (Statutes 2014, Chapter 711, § 1.) In recognizing that there is existing regulation of farm labor contractors through a licensing system which provides some oversight of foreign labor contractors, the bill intended to expand regulation of specific activities of foreign labor contractors by requiring foreign labor contractors to register with the appropriate state agency, mandate disclosure of the use of foreign labor contractors and their agents by employers seeking to employ foreign workers, imposing penalties on a person using an unregistered contractor, and expanding the remedies available to foreign workers aggrieved by the actions of labor contractors and those acting in concert with them. (*Id.*)

The federal Immigration and Nationality Act of 1952 (INA) set up a federal program, administered in part by the U.S. Department of Labor in consultation with Department of Homeland Security, that certifies foreign workers as eligible to work in the United States under the federal H2b worker visa program, which is the program covered under the state Act. The federal government regulates immigration, including the H2b guest worker visa program, which permit foreign persons to work in the United States and saves from federal preemption “licensing and similar laws” which regulate those who “employ, recruit, or refer for a fee” for employment of foreign workers. (8 U.S.C. §1324a(h)(2).) Instead of regulating the employment of undocumented persons or admission of foreign workers in California, this bill and the implementing regulations fundamentally regulate employers who use labor contractors to perform “foreign labor contractor activity” (recruits or solicits) to employ a foreign worker who is authorized by the federal government to work in the U.S. The proposed regulations recognize that several prohibitions against charging workers for costs, expenses, or other fees and requiring disclosures to workers are also prohibited or required under federal law, and the Labor Commissioner has attempted to avoid conflict with federal regulations affecting labor certification of H2b workers (recently modified in 2015). Accordingly, the proposed regulations are designed to only implement or make more specific the state law regulating foreign labor contractors and employers who use such contractors to recruit foreign workers to work in California.

Recognizing that private enforcement by aggrieved persons or their representatives is available, the proposed regulations also provide a more specific regulatory framework of requirements and exemptions under the Act, including definitions of terms, for private enforcement of the foreign labor contractor requirements in the courts, which can rely on the regulations as standards which construe and implement the statutory requirements.

The Labor Commissioner has determined that the proposed regulations are reasonably necessary to effectively administer and enforce the foreign labor contractor registration program and disclosure requirements imposed upon employers and labor contractors. The fundamental intent of the foreign labor contractor law is to protect foreign workers who provide labor to employers in California which benefits both employers and the state. Establishing the proposed standards for registration applications, bond requirements, and duties of employers and contractors will benefit the workers subject to the protections of the foreign labor contractor law and provide a more level and fair playing field for contractors lawfully operating these businesses and for businesses who use labor contractors to obtain foreign workers to work in California.

SPECIFIC PURPOSE OF EACH SECTION – GOVERNMENT CODE §11346.2(b)(1) The Labor Commissioner has determined that each adoption is reasonably necessary to carry out the authority and purposes for which they are proposed and each proposed section relates to a public problem, administrative requirement, or other condition or circumstance that the section is intended to address.

Proposed Article 1 – Scope, Coverage and Definitions

Section 13850 provides definitions which provide meanings to terms used in Chapter 21.5, commencing with Business & Professions Code §9998, and in various sections of this subchapter. The definitions will more specifically describe and thus clarify the types of activities

and actors who are subject to regulated activities applicable to the contractor registration program. In broadly defining “foreign labor contracting activities” in B&P Code §9998.1, the statute extends its coverage to “recruiting or soliciting” a foreign worker which recognizes a difference in activities under either term. In order to implement both terms, which are important to determining coverage, setting forth definitions is necessary to ensure that the meaning of key terms used in the regulation is clear and the terms will be interpreted consistently by the public.

Subsection (a) defines “recruiting” and “recruits” in more specific terms in order to capture the general activities associated with obtaining foreign workers for employment in the United States, and more specifically, in California. The Labor Commissioner has determined that persons engaging in recruitment of foreign workers necessarily make representations to potential workers regarding employment opportunities which are at the core of recruitment and which present unaccountable risks of misrepresentation of employment opportunities in general and in actual terms of employment. Since a major objective of SB 477 is to establish standards for recruitment activities and prohibit practices of misrepresentation, it is necessary to state in more practical terms what is included in the defined words, based on the plain meaning of the terms phrased in the context of recruitment of foreign workers for employment in California. Related activities of persons engaging in recruiting for employers often include providing or coordinating transportation for the purpose of obtaining or securing employment, which is more specifically defined in the special definition of recruiting. Similarly, the Labor Commissioner has determined that recruiters also engage in related “process” activities such as interviewing, reviewing, evaluating, or screening applications for employment in California as well as setting up visa appointments and referring a foreign worker to a specific employer. Specific inclusion of activities related to “transportation” and “process” in foreign labor recruitment activities ensures that persons performing such associated activities fall within the regulated activity under the statute, and their inclusion in the regulatory definition will more effectively address and curb abuses, including human trafficking, by recruiters during the pre-employment period.

Subsection (b) provides a special definition of “solicits” which, in addition to “recruits,” is also used in the statutory definition for “foreign labor contracting activities” and has a more specific ordinary meaning which may be understood in practice as more specific than the general term of “recruits.” A more specific meaning for “solicits” is necessary to describe types of activities of solicitation which can be more limited activity used by recruiters to elicit interest of workers by distributing information or offers of employment or opportunities for employment in California. Its meaning is based on the ordinary meaning of the word phrased in the context of seeking to obtain employment using methods to disseminate information or obtain applicants which are used by recruiters. Providing a special definition of “solicits” will better inform the public of the types of activities which fall within the term expressed in the statute as falling within the regulated activity.

Subsection (c) provides a special definition for the term “foreign guest worker” which is used in the proposed regulations. Only foreign persons who are authorized by the federal government may work in the United States. SB 477 amended (added to) existing provisions regulating foreign labor contracting. The Act previously provided its scope and application to “non-agricultural workers as defined under” the federal statute which regulates the H2b visa program. (B&P §9998). Notably, Section 9998 was not amended by SB 477 and thus continues to confine the application of the chapter to nonagricultural workers as defined in the federal H2b visa program. The majority of employment of H2b workers in California includes: landscaping and

groundskeeping workers, amusement and recreation attendants, coaches and scouts, forest and conservation workers, and nonfarm animal caretakers.

(<https://www.foreignlaborcert.doleta.gov/map/2015/ca.pdf>) It is necessary to specifically define the term “foreign guest worker” in the regulations for purposes of implementing the registration requirement and related employer and contractor disclosure requirements, so that the scope of the regulations is consistent with the statutory coverage for the chapter established in §9998.

The Labor Commissioner recognizes the view that the specific provisions expanding the substantive provisions of the Act in SB 477 did not contain language limiting coverage of the chapter to only foreign workers under the H2b visa program and that statements by legislators and other groups during the legislative process spoke in more general terms that extended beyond the H-2B program and may have relied upon more broadly based information and/or statistics in defining or weighing the problem of abuses. However, the Labor Commissioner cannot disregard the coverage limitation in §9998 which, by its terms, extends to the whole chapter, including the provisions added by SB 477. Agency regulations cannot be inconsistent with applicable coverage limitations contained in the enabling statute. Disregarding the coverage limitation in §9998 would constitute an exercise by the Labor Commissioner of legislative authority to effect a repeal by implication an existing substantive coverage provision in Section 9998, despite the fact that SB 477 neither repealed or amended §9998. While the Labor Commissioner recognizes that these proposals will not carry out the desired effect of covering recruitment of all foreign workers under all federal visa or guest worker programs, as intended by SB 477’s proponents, any clarification must come from the legislature rather than the agency charged with implementing all of the applicable statutes, including those not amended under SB 477. In the absence of a more expressed legislative intent to modify the coverage language in §9998, the Labor Commissioner cannot, through interpretation, disregard a statutory provision addressing coverage of the chapter which was not modified in SB 477.

Section 13851 provides necessary clarifications to exemptions from coverage which are the result of exemptions based in statute that apply to coverage of foreign labor contractors who recruit foreign workers and employers who use such contractors to obtain those workers to work in this state.

Subsection (a) provides that the requirements set forth in the subchapter shall apply to foreign labor contractors who are not exempt under the Business and Professions Code and this subchapter of the regulations. To the extent that language in this section is redundant or duplicative of what the statute provides, it will more clearly associate non-coverage of the regulations in this subchapter as co-existent with the express statutory exemptions by placing all related considerations regarding coverage in a single regulatory section . This subsection also has the effect of informing the public and courts which may interpret these regulations that the exemptions contained in this subchapter are to be harmonized as consistent with applicable statutory language.

Subsection (b) provides a practical test for determining application of the registration requirement based on the exemption for employers who directly or through an employee of the employer solicits a foreign worker for the employer’s own use. The subsection identifies the elements which must be met to qualify for the exclusion. The formulation of the exemption is necessary to ensure that the exemption does not extend to allowing an employer or the employer’s employee to merely control recruiting activities which are actually performed by

non-employee agents subject to the registration requirement, as doing so would severely dilute the legislative objective to regulate persons other than the employer or their designated employee who in fact perform regulated activities. Also, the delegation of authority by an employer to another person (who is not an employee) to perform recruiting activities on its behalf could improperly insulate such other persons from the registration requirement and foster unregulated recruiting practices by persons who are not directly accountable to the employer. The language in this subsection thus discourages the use of layers of entities simply based on only limited participation of an employer or employee in performing recruitment activities and avoids impairment of the Act, which is intended to regulate recruiting activities performed by any persons other than the employer or a direct employee of the employer.

Subsection (c) provides further clarification regarding the use of a person who is not the employer or employee of the employer who is identified as a “non-employee agent” who must be registered as a foreign labor contractor. The absence of a narrow and specific formulation for the use of a non-employee agent as being subject to registration would potentially vitiate the registration requirement through business practices which are ostensibly performed by employers but ultimately rely on other persons to actually perform recruitment activities. A fundamental requirement in the Act requiring written disclosure of information to workers and the Labor Commissioner includes the requirement that the contractor, any subcontractor, or agent who performs recruiting for an employer must be identified (B&P Code §9998.2.5(a)). Since a major and fundamental purpose of the legislation is to regulate those persons who perform recruiting and soliciting activities, the exemption for employers who directly perform recruitment and do not use other persons to perform regulated activities must be narrowly drawn in order to effectively implement the registration requirement. Additionally, the Labor Commissioner is aware that businesses utilize staffing agencies to provide workers for the business and may also be a joint employer with the business. Since the primary role of a staffing agency is to provide workers who are recruited by the staffing agency that is a separate business, it is appropriate and necessary that a staffing agency who performs foreign labor contracting activities, as defined under the Act, be deemed a non-employee agent of the employer and subject to the registration and contractor disclosure requirements. The inclusion of staffing agencies as non-employee agents is justified due to their inherent and primary role in obtaining and securing workers for subsequent employment, whether independently or on behalf of an employer business. Their potential liability as a joint employer under Labor Code and Industrial Welfare Commission Wage Order provisions that regulate employers and provide worker protections does not control nor necessarily preclude their occupational regulation under the Business & Professions Code. The Labor Commissioner has determined that making staffing agencies subject to the Act is consistent with both the occupational regulatory authority under the B&P Code and more closely addresses the legislative objective to regulate recruitment of foreign workers by businesses and other persons acting for the benefit of employer businesses.

Subsection (d) provides further clarification to the employee exemption in B&P Code §9998.1(b) by more clearly expressing that a person acting as an agent of an employer and who is not an employee of the employer is a non-employee agent and is subject to the registration requirement. This provision is necessary to foreclose the ability of an employer business to use non-employee agents to directly solicit or recruit foreign workers and this provision is a necessary consequence in view of the statutory exemption language in §9998.1(b) and the practical test specified in subsection (b) of this regulation. The subsection more clearly implements the exemption by

formulating it in terms of the practical test specified in subsection (b) of this section and effectively avoids a result which allows an employer to use any agent under the limited exemption allowing for use of an employee by confusing the distinct of “agent” with “employee” in order to avoid the use of a registered labor contractor. An agent may include an employee but a “non-employee agent” more accurately identifies the type of agent who is subject to the registration requirement, i.e., any agent who is not an employee.

Subsection (e) provides the consequence for use of a non-employee agent, which relates to a recruiter’s compliance with the requirement to register as a foreign labor contractor as well as the employer’s obligation to use only registered contractors when using other persons to perform recruitment activities. The purpose is to tie coverage, including failure of an employer to satisfy the limited employee exemption, to the general obligations under the Act and its regulations by directly stating the consequences (obligations) when using persons who do not qualify under the employee exemption.

Proposed Article 2 - Registration

Section 13853 provides written application content for someone seeking to register as a foreign labor contractor pursuant to B&P Code §9998.1.5. Adopting these requirements by regulation standardizes the information the Labor Commissioner will review and implements specific statutory rules and duties applicable to qualifying for registration.

The preamble language in the section also establishes that the information provided in connection with an application must be certified and made under penalty of perjury, which is necessary to implement the requirement under B&P Code §9998.1.5(b)(1) that an application be subscribed and sworn to by the applicant for registration.

Subsection (a) specifies overall application alternatives for a “new” (initial) registration application or a “renewal” of registration, which will be designated by the applicant and is necessary to inform the public of the two categories of applications established by the Labor Commissioner to register as a foreign labor contractor. It is necessary for the Labor Commissioner to establish the specific information and documents that must be submitted by a person applying to register as a foreign labor contractor.

Subsection (a)(1) specifies information which identifies an applicant by their legal name and conventional identifying information for individuals and non-individuals (corporation, limited liability company, and partnerships), whichever applies to the applicant’s business. Requiring that the applicant furnish name, business form, and contact information is reasonably necessary for the Labor Commissioner to comply with the statutory mandate to publicly post a list of the names and contact information for any person (defined under B&P Code §9998.1(a) to include any natural person, company, firm, partnership or joint venture, association, corporation, limited liability company or sole proprietorship) who is registered to perform foreign labor contracting activities, as well as for any foreign labor contractors that are denied renewal or registration. *See* B&P Code §9998.1.5(a).

Subsection (a)(2) is necessary because both individuals and non-individual businesses often use fictitious names when conducting businesses, which are different from their actual legal

names. Obtaining all names an applicant intends to use in conducting business provides a means to associate fictitious names with actual names of those who will conduct business as a foreign labor contractor and is necessary for the agency's administration of the registration law. Also, as fictitious names change often and a business may use multiple fictitious names, the Labor Commissioner has determined that providing information for a three-year period previous to the application is necessary to associate with potential liabilities of the applicant that are relevant to determining competency, character and responsibility for registration under B&P Code §9998.1.5(b)(1)(A).

Subsection (a)(3) is necessary in order for the Labor Commissioner to obtain essential contact information regarding physical location of the business and other essential contact information required, including mailing address, if different from physical address, and a preferred email address. An applicant's designation of a fixed location and email address ensures the ability of the agency to communicate and provide any necessary notices or other communication to a registrant performing the regulated activity. Simply providing a Post Office box or private mail box address is inadequate to sufficiently be able to physically locate a registrant's business. Requiring business telephone numbers (main and mobile) is information similar to the business contact information and provides for a more immediate means of communicating with a foreign labor contractor when they are conducting their business. The ability to more immediately contact a contractor is especially important due to the transitory nature of foreign labor contracting.

Subsection (a)(4) provides that the Labor Commissioner must be notified promptly of any changes to the contact information which is necessary for the agency to maintain its ability to locate the contractor in the event of a relocation or other changes in contact information of the registered business. The Labor Commissioner has further determined notification must be made no later than 10 days after the change which is reasonable in view of the need for the agency to be informed of a change in proximity to any actual change in contact information. The time frame is reasonably consistent with other similar requirements to promptly notify the Labor Commissioner of changes in contact information, e.g., 5 days for farm labor contractor licenses (8 CCR 13660(a)(3), and 10 days for a party in a wage claim filed with the Labor Commissioner (Labor Code section 98(a). A 10-day time period promotes the ability of the agency to readily notify a foreign labor contractor of actions or issues related to their registration.

Subsection (a)(5) is necessary in order for the Labor Commissioner to ascertain the specific legal entity (individual/sole proprietor, partnership, limited liability company, or corporation) under which the applicant business will operate under the registration. A home address (if a sole proprietor) is necessary for the agency to have complete location information for an applicant seeking to register to conduct business as a foreign labor contractor and to provide an alternative source for contacting a contractor for notices or other communications. Similarly, specifying the inclusion of a foreign address outside the United States is necessary due to the fact that the contractor may be located or conducting its business outside the United States and such contact information is essential for the Labor Commissioner to provide notices and other communication to the contractor regarding the regulated activity. Additional contact information pertaining to financially interested persons for the respective

applicant entity, including name, business and home addresses (including foreign address, if applicable), and phone numbers of corporate officers, or members or managing agents and designation of foreign corporate status is required for the Labor Commissioner to evaluate the nature of the business, its status with required filings with the Secretary of State, as applicable, and persons responsible for operating the business for which a registration is sought. For individuals, it is reasonably necessary to obtain date of birth, driver's license and social security number (or taxpayer identification number) to more specifically identify among other individuals from the public at large as well as those applying, or who have previously applied, for registration. For non-individual businesses, the date of creation of the applicable business entity is required to ascertain its existence at the time of application for registration which ensures that a legally recognized business entity intends to engage in conduct regulated under the foreign labor contractor law. Requiring identification and contact information of persons financially interested in the applicant business together with an indication of the amount of their respective financial interest provides a basis for verifying information and directly implements the requirements of B&P Code §9998.1.5(b)(1)(B) in the application for registration.

Subsection (a)(6) is necessary for the Labor Commissioner to determine whether the applicant will use the services of any other individual or entity (who is not the registrant) to perform foreign labor contracting activity for the registrant (see B&P Code §9998.1(b)). Identification of other individuals (by name, address, phone number, Social Security number, and foreign labor contractor registration number), including agents, employees or other entities, which an applicant will use to perform the regulated activity is necessary because it indicates a fundamental operational component of the business by indicating how the applicant will be performing the regulated activities. Such information reveals whether the regulated activity of foreign labor contracting is in fact being performed by a person or entity other than the applicant. If so, the identifying information is necessary for the reasons set forth in subsections (a)(1) through (a)(5) above. If the applicant responds in the negative, then he or she shall state who specifically will perform the regulated activity for the applicant. In addition to ensuring that the agency is provided with accurate information identifying the persons that will be performing the regulated activities, this information is needed to confirm the applicant's competency and responsibility to perform regulated recruiting activities and the manner and means by which the applicant proposes to conduct operations as a foreign labor contractor if registered, as specified under B&P Code §9998.1.5(b)(1)(A).

Subsection (a)(7) is necessary for the Labor Commissioner to evaluate (and be able to verify information) to determine an applicant's character, competency and responsibility as specified under B&P Code §9998.1.5(b)(1)(A). Information identifying and listing known businesses (identified by name, address (physical and mailing, if different), email address, and phone numbers) the applicant plans or intends to contract within the next 12 months indicates the nature and extent of the business the applicant intends to operate. A list of businesses with whom the applicant has contracted within the last 2 years (if applying for a renewal) provides a history of the scope of regulated activity. Information about both anticipated and recent past business operations is needed to enable the agency to assess the manner and means by which the applicant proposes to conduct (and in the case of a renewal

application, a previous record for conducting) foreign labor contracting activities if registered, as specified under B&P Code §9998.1.5(b)(1)(A).

Subsection (a)(8) is necessary in order to determine the applicant's responsibilities when utilizing another business in connection with its regulated business operations. The information requested seeks basic information which identifies the business type, name, address(es), email address, and phone numbers of any other such business, in order to allow the agency to ascertain and review a foreign labor contractor applicant's responsibilities when the applicant operates its foreign labor contracting operations jointly in connection with another business. The ability of the agency to review this information is relevant to the determination of an applicant's "responsibility," which is a requirement for registration under B&P Code §9998.1.5(b)(1)(A) and (b)(2).

Subsection (a)(9)(A) provisions are necessary for the Labor Commissioner to review and evaluate an applicant's history regarding compliance with legal obligations which are related to wage and tax delinquencies, judgments, pleas in criminal cases, and previous compliance with any licensing or permits held by the applicant business under subsection (a)(1) and responsible persons of the business as well as those identified with a financial interest under subsections (a)(5). The requested information directly relates to and demonstrates character, competency and responsibility of the applicant and persons responsible for foreign labor contracting activities and/or operating or controlling such activities. The applicant's provision of all facts concerning the character, competency and responsibility of the applicant is a requirement of registration under B&P Code §9998.1.5(b)(1)(A). Furthermore, this information is necessary to enable the agency to effectuate B&P Code §9998.1.5(b)(3)(B), which requires an applicant who has been the subject of a final judgment in a specified amount to post a surety bond as a condition of registration. A five-year period for information regarding specified criminal matters and adverse actions regarding licenses or permits is deemed a reasonable time for history related to an applicant's prior criminal conduct and prior licensure when determining an applicant's current ability (character, competency, and responsibility) to lawfully operate as a foreign labor contracting business that recruits or solicits for compensation the labor of foreign workers for an employer.

Subsection (a)(9)(A)(i) requiring information regarding owed payroll taxes or personal, partnership, or corporate income taxes, social security taxes, or disability insurance taxes is necessary to determine an applicant's fitness to conduct a registered business. The information is necessary for the Labor Commissioner to effectively determine an applicant's history with meeting business and employer obligations in order to assess the applicant's character, competency and responsibility pursuant to B&P Code §9998.1.5(b)(1)(A).

Subsection (a)(9)(A)(ii) requiring information regarding history of criminal guilty pleas or conviction of a crime is necessary to determine an applicant's character, competency, and responsibility pursuant to B&P Code §9998.1.5(b)(1)(A), as a condition of registering as a business that recruits or solicits foreign workers for compensation. This proposed subsection requires the applicant to provide information about criminal history relating to fraud or misrepresentation which is directly related to the regulated activity of

foreign labor contracting. In passing SB 477, the Legislature declared, “Unscrupulous foreign labor contractors often charge exorbitant fees for their services, force foreign workers into debt bondage, falsify documents, and deceive foreign workers about the terms and conditions of work, thereby increasing their vulnerability to human trafficking.” (Statutes 2014, Chapter 711, sec. 1(c).)

Subsection (a)(10)(A)(iii) requiring indication of any suspension, revocation, denial or other disciplinary action for any license or permit issued pursuant to any state, federal law, or law of another country, demonstrates an applicant’s history of compliance with licensing laws relevant to conducting a business and is necessary to determine an applicant's character, competency, and responsibility to conduct business as a foreign labor contractor, pursuant to B&P Code §9998.1.5(b)(1)(A).

Subsection (a)(9)(B) is necessary to enable the agency to also consider any extenuating circumstances (e.g. nature of violation or charge, forum, length of time since disposition, etc.) through an applicant's explanation regarding incidences reported by the applicant under subsection (a)(9)(A). The information will allow the Labor Commissioner to more completely review the reported information when determining an applicant’s competency, character, and responsibility under B&P Code §9998.1.5(b)(1)(A).

Subsection (a)(10) seeks information regarding the number of employees the applicant will employ, if applicable, and the federal and state tax employer identification numbers which is necessary to ascertain the scope of personnel used in connection with, and which support the applicant in performing foreign labor contracting activities. Requiring tax identification numbers for federal and state tax purposes is necessary to verify that the applicant, if an employer, is properly identified with taxing authorities.

Subsection (a)(11) requiring total annual gross receipts for the applicant is necessary to effectuate B&P Code §9998.1.5(b)(3)(A), which requires the applicant to deposit a surety bond with the Labor Commissioner, in an amount based on the size of the person’s annual gross receipts as defined in Section 13857(b), as a condition of registration. This information is also necessary to evaluate the financial viability of the applicant, which will be used to determine the competency and responsibility of the applicant under B&P Code §9998.1.5(b)(1)(A).

Subsection (a)(12) requires the name and address of an agent or representative, if any, designated by the applicant to communicate with agency personnel in connection with the application. This is necessary to facilitate communication between the applicant and the agency in connection with the application process or following registration.

Subsection (a)(13) requires certified statements on the application to ensure that an applicant is aware of requirements for registration and continuing conditions for maintaining registration once granted. The attested statements on the application are necessary to reinforce an applicant’s awareness of its legal obligations when applying for registration and acting as a foreign labor contractor if registration is granted, and the need to implement any necessary measures to comply with those obligations.

Subsection (a)(13)(A) requires certification by the applicant that the applicant will comply with workers' compensation liability coverage, if applicable, as is required of all employers in the state pursuant to Labor Code §3700. To the extent that the applicant will act in the capacity as an employer of persons (other than foreign workers), current law requires any and all employers to obtain and maintain this coverage.

Subsection (a)(13)(B) requires certification by the applicant that the applicant is aware of and agrees to comply with the legal requirement to deposit a surety bond pursuant to B&P Code §9998.1.5(b)(3). On-going bond coverage by the foreign labor contractor for the statutorily-prescribed bond amounts under B&P Code Section 9998.1.5(b)(3) constitutes a condition for registration under the law.

Subsection (a)(15)(C) requires certification by the applicant that the applicant agrees, as a condition of being registered as a foreign labor contractor, to keep the Labor Commissioner informed of any change in the contractor's address and other contact information. This is necessary in order for the Labor Commissioner to have the most current contact information of the contractor in the event of any notice, service of papers, or other communication which must be made to the registered foreign labor contractor.

Subsection (a)(13)(D) requires certification by the applicant that the applicant consents to designation of the Labor Commissioner as the registrant's agent to accept service of summons in any action against the registrant, if the registrant has left the jurisdiction in which the action is commenced or otherwise has become unavailable to accept service. This proposed subsection directly effectuates B&P Code §9998.1.5(b)(1)(C), which requires such a declaration by the applicant as a condition of registration, and provides for the manner of submission of such declaration.

Subsections (a)(13)(E)(i) through (iv) require certification by the applicant that the applicant is aware of the responsibilities as a registered foreign labor contractor and agrees to operate its business in compliance with applicable provisions of law, and specifically enumerates provisions of federal and state law that the applicant certifies the applicant has not violated. In general, requiring the applicant to attest to awareness of and compliance with applicable provisions of the law is necessary both to make foreign labor contractors more conscious of their legal responsibilities in conducting their business operations, and to enable the agency to assess an applicant's competency and responsibility under B&P Code §9998.1.5(b)(1)(A) based on facts provided by the applicant. Moreover, the attestation that the applicant has not been found to have violated specific provisions of specified federal and state laws necessarily informs the agency's determination as to whether the applicant is or is not qualified to be registered as a foreign labor contractor pursuant to B&P Code §9998.1.5(c).

Subsection (a)(13)(F) requires certification by the applicant that the applicant has provided all facts required by the Labor Commissioner for the agency to determine the character, competency, and responsibility of the applicant and the manner and means by which the applicant proposes to conduct operations as a foreign labor contractor if registered. This certification is necessary to ensure the completeness and correctness of information provided by the applicant in order for the Labor Commissioner to make a determination under B&P Code §9998.1.5(b)(1)(A) and (b)(2).

Subsection (a)(13)(G) requires certification by the applicant that the applicant is aware of applicable laws and regulations regarding registration and continued registration as a foreign labor contractor, and that applicants are subject to the specified adverse actions for failure to comply with such provisions. This certification is necessary in order to make an applicant more aware of initial and continuing legal obligations as a foreign labor contractor, in order to promote and enhance compliance with the laws and regulations regarding foreign labor contracting.

Subsection (a)(13)(H) requires certification by the applicant that the applicant is aware that any material misrepresentations made in connection with the application for registration constitute grounds for denial or revocation of registration. This certification is necessary in order for the applicant to acknowledge and memorialize an understanding of the adverse consequences of a material misrepresentation in the application. The ordinary meaning of “material” is “important, essential, or pertinent to the matter under discussion; important enough to affect the outcome of a case, the validity of an instrument, etc.” (Webster’s New World College Dictionary, 4th Ed, p. 886). A misrepresentation is “[a] material fact stated as a fraudulent, negligent, or innocent misstatement, or an incomplete statement.”(<http://www.thelawdictionary.org/misrepresentation-2>) Inclusion of “material misrepresentation” of a fact presented in connection with an application for registration (as distinguishable from insignificant, trivial, or unimportant matters which do not have an effective influence on a decision) is necessary to clarify the nature of any misrepresentation made by an applicant that would be grounds for a denial or revocation of registration.

Subsection (b) requiring other items and documents which must be provided along with an application for registration is necessary for the agency to verify information provided pursuant to subsection (a) of proposed section 13853 and to have a record of the information provided by the applicant as required under statute, including information submitted by the applicant and reviewed by the agency to determine an applicant’s character, competency, and responsibility (pursuant to B&P Code §9998.1.5(b)(1)(A)).

Subsection (b)(1) requires the payment of a fee associated with an application for registration pursuant to B&P Code §9998.1.5(b)(4), and sets forth the manner for making payment, either online or by certified check, money order, or cashier’s check. B&P Code §9998.1.5(b)(4) requires a registration and filing fee but does not specify the amount of

such fees, nor the timing of payment of such fees. This provision more specifically requires payment of the specified fee at the time of filing of the registration application with the Labor Commissioner because the filing of an application initiates administrative processing by the agency. The provision also sets a total fee in the amount of \$95 which the Labor Commissioner has determined sufficient to support the ongoing costs of the foreign labor contractor registration program, as required under B&P Code §9998.1.5(b)(4).

Subsection (b)(2) requiring a copy of the creating documents and statements of information filed with the Secretary of State, as applicable, are necessary to verify the existence and applicant's use of a lawfully formed corporation, limited liability company, or partnership, including identification of principals who operate and/or control the contractor's business, and seek information necessary to determine an applicant's character, competency and responsibility under B&P Code §9998.1.5(b)(1)(A). For applicants who are organized entities located in a foreign country that are required to be registered or authorized with a foreign country, a similar registration or other certificate issued by an appropriate governmental authority is required in order for the Labor Commissioner to confirm or verify such entity's existence or authorization to act as a lawful business in the foreign country.

Subsection (b)(3) is necessary because each applicant, as a condition of registration, must deposit a surety bond with the Labor Commissioner pursuant to B&P Code §9998.1.5(b)(3). To satisfy this requirement, the Labor Commissioner has established a form Foreign Labor Contractor Surety Bond (DLSE 702) for deposit with the Labor Commissioner. An original bond is required when using the physical application process to register.

Subsection (b)(4) requiring live scan fingerprint images is necessary to determine criminal history of applicants and individuals within a partnership, corporation, or limited liability company who are responsible for operating a business applying to register as a foreign labor contractor. This information is necessary to implement a mechanism for obtaining criminal history information from the Department of Justice in order to determine the existence of a criminal history of individuals who will operate a registered foreign labor contracting business. As specified in subsection (a)(9)(A)(ii), such criminal history information is necessary for the agency to determine the applicant's character, competency, and responsibility (pursuant to B&P Code §9998.1.5(b)(1)(A)), as well as statutory grounds for denial of registration if there is a criminal history of human trafficking (see B&P Code §9998.1.5(c)(3)). The agency receives criminal history information from the Department of Justice for purposes of performing certification or licensing duties pursuant to Penal Code §11105.

Subsection (b)(5) requiring a copy of a driver's license (or other photo identification) of specified persons is necessary to verify the identity of persons indicated on the application as those who will operate and/or have control over the operations of the foreign labor contracting business. This information is necessary for the Labor Commissioner to determine the correct identity of the applicant for purposes of

determining the applicant's character, competency, and responsibility under B&P Code §9998.1.5(b)(1)(A), as a condition to registration of the business and persons who perform the regulated activity.

Section 13855 provides parameters for "character, competency, and responsibility" stated in B&P Code §9998.1.5(b)(1)(A), which the Labor Commissioner must determine prior to registering a person to act as foreign labor contractor based upon the information provided by the applicant in the registration application, and in view of an applicant's previous conduct or conviction of a crime substantially related to conduct relating to solicitation and recruiting. See B&P Code §9998.1.5(b)(1)(A) and (b)(2); §9998.1.5(c). This proposed section also specifies conditions for rehabilitation of an applicant following a period of time after completion of any ordered incarceration or penalty under a crime or act, as specified. Adopting these requirements by regulation standardizes the information the agency will consider and review, and implements specific statutory rules and duties applicable to qualifying for registration as foreign labor contractor.

Subsection (a) is necessary to establish that the Labor Commissioner's determination of an applicant's character, competency, and responsibility pursuant to B&P Code §9998.1.5(b)(1)(A) which will be based on evaluating the information provided by an applicant (under proposed §13853) or otherwise obtained by the Labor Commissioner during review of an application. It is necessary to further specify types of conduct and convictions which pertain to an applicant's past history where specific conduct, acts, or convictions of crimes are substantially related to one's qualifications to be registered to perform regulated activities as a foreign labor contractor. Language explaining what is considered to be substantially related to soliciting or recruiting activities provides a more specific scope for reviewing the information regarding past conduct.

This subsection identifies four categories of past history (subsection (a)(1) through (4)) which require examination in view of the role and duties of the applicant as a foreign labor contractor as well as an employer or business. Specifically, established violations of provisions of the B&P Code and related regulations reflect an inability to comply with laws applicable to businesses, including persons performing a regulated occupational activity. Criminal or civil violations of the federal trafficking laws, farm labor contractor laws, and Penal Code §236.1 relating to false imprisonment are grounds for disqualification for registration under §9998.1.5(c) and must be considered in connection with assessing whether a registration shall be granted. Crimes or acts involving dishonesty, fraud, deceit, or theft with the intent to substantially benefit oneself or harm another reflect an applicant's capacity to act, transact, or otherwise engage others to act in an honest and lawful manner. Crimes involving physical violence reflect an applicant's capacity to act, transact with others, or otherwise engage others in a peaceful and healthy manner. The Labor Commissioner has determined that these categories are necessary to provide the public with general guidelines used by the agency when reviewing past history rather than provide an exhaustive and specific list of past acts of an applicant which directly disqualify an applicant, because such a specific listing could not fully capture all acts or conduct necessary to make determinations for registration as a foreign labor contractor. The stated categories are primarily based on similar provisions adapted from the state contractor's license law (see B&P Code 480 and 8 CCR 868) and farm

labor contracting law (8 CCR §13660.1(a)) which are adapted here to foreign labor contractor registration.

Subsection (b) is necessary to establish criteria for considering rehabilitation and reflects the discretion to be exercised by the Labor Commissioner in evaluating an applicant for registration. The stated considerations are primarily based on similar factors adapted from the state contractor's license law (see B&P Code §482 and 16 CCR §869) and farm labor contractor law (8 CCR §13660.1(b)) and provide sufficient guidelines for evaluating rehabilitation for foreign labor contracting.

Section 13856 sets forth the procedures for issuance of a Registration Certificate to a person who has been determined by the Labor Commissioner to be qualified for registration, including the manner of issuing the Registration Certificate to the applicant.

Subsection (a) informs the applicant that a Registration Certificate will be issued once the applicant has complied with proposed sections 13853, 13855, and 13857, including providing information pursuant to those sections that is necessary for the agency to determine the character, competency and responsibility of the applicant under B&P Code §9998.1.5(b)(1)(A). Adopting this proposed section by regulation standardizes the information the agency will utilize to issue and the manner of issuing a Registration Certificate, which is a statutory prerequisite for a foreign labor contractor to lawfully conduct business operations. This proposed section effectuates specific statutory rules and duties regarding registration of a person to act as a foreign labor contractor if certain conditions are met. *See* B&P Code §9998.1.5(b) and (c). A Registration Certificate constitutes official documentation issued by Labor Commissioner signifying that the agency has determined the applicant has met conditions of registration. This subsection also provides for delivery of the certificate to the registrant by mail.

Subsection (b) is necessary because the Registration Certificate, like all licenses and permits which enable a person or business entity to conduct business under specified and regulated conditions, may not extend in effect indefinitely but must be subject to an expiration date, as business operations of a foreign labor contractor may change over time. In order to ensure that persons who have been granted a Registration Certificate continue to meet the ongoing registration requirements under the foreign labor contracting law, the Labor Commissioner must determine how long the Registration Certificate will remain valid (which in turn, triggers a registration renewal process for a subsequent period of time). Such a time limit on the duration of registration is implicitly incorporated under B&P Code §9998.1.5(a) and (b), which include references to renewal of registrations. The agency has determined that a period of two years is a reasonable duration for validity of the Registration Certificate which captures both a reasonable period for changes in a business' operations following registration as well as a reasonable allocation of agency staff resources to administer the registration program.

Subsection (c) is necessary to inform the applicant and the public about the contents of the Registration Certificate, which signifies that the applicant identified in the Registration Certificate has met the legal requirements to be registered as a foreign labor contractor. The contents include the registrant's name and contact information, which the registrant is otherwise required to provide under B&P Code §9998.1.5 (a) for posting on DLSE's website. The address

and telephone number (which are also to be provided by the applicant as part of the Labor Commissioner's evaluation of the application for registration), as well as the registration number, are necessary elements of the Registration Certificate, as they serve to uniquely identify the registrant for purposes of demonstrating proof of registration to an employer who is required to ascertain whether it will retain a registered contractor, and for the public on the online registry on DLSE's website. The dates that the Registration Certificate will remain valid are necessary in order to apprise the registrant of the duration of time that the registrant may lawfully act as a foreign labor contractor.

Subsection (d), regarding the non-transferability of the Registration Certificate, is necessary in order to ensure that the foreign labor contracting law is not circumvented. The Registration Certificate is issued to a specific applicant that has submitted and subscribed to information that the Labor Commissioner has investigated and reviewed to determine whether certain specified conditions for registration have been satisfied. *See* B&P Code §9998.1.5 (b) and (c). Allowing the Registration Certificate to be transferable would eviscerate the entire statutorily-mandated investigation prior to registration and make the registration process nugatory.

Subsection (e), requiring notification to the Labor Commissioner of any change in contact information of the registrant within 10 days of any change, is necessary to effectuate B&P Code §9998.1.5 (a) requiring the name and contact information of the registrant to be publicly posted on DLSE's website. The language is intended to be consistent with and for the same purposes as specified for Section 13853(a)(4) and incorporated herein. Additionally, contact information must remain current so that the Labor Commissioner can locate the contractor in the event of a relocation of the registered business and is able to send any required information and communication to the registered foreign labor contractor. Stale contact information could result in the inability to accurately identify or provide necessary information to the registrant, including information related to revocation or suspension of registration and other enforcement action.

Subsection (f) is necessary in order to establish a process for the registrant to obtain another copy of a Registration Certificate in case of loss. Since registration is a legal requirement in order to operate as a foreign labor contractor pursuant to B&P Code §9998.1.5, registrants must possess a valid Registration Certificate, which serves as official proof of registration. This subsection institutes a practical procedure to enable a registrant to obtain a duplicate certificate if the original was lost.

Subsection (g) which more specifically describes the information regarding registrants that will be posted on an internet-based online registry required under B&P Code §9998.1.5. Subsection (g)(1) provides that the same name and contact information on the Registration Certificate shall be listed on the registry, which allows employer and workers to sufficiently identify registered contractors with sufficient specificity to confirm a person's registration status). Subsection (g)(2) is necessary since the abuses in recruiting foreign workers described in the legislative reports for SB 477 are performed by individuals, making it critical that all those persons who perform the regulated activity for a registrant are disclosed in order for employers, employees, and enforcement agencies to identify authorized persons performing such activities. Subsection (g)(3) provides discretionary authority for the Labor Commissioner to indicate the information in a single list or separate lists for registrants and those who have been denied registration or whose

registration has been revoked. Identifying revoked registrations will assist the public (including employers and workers) and law enforcement agencies of registrations who have been affirmatively revoked and minimizes the ability of those to continue acting underground in the capacity of a foreign labor recruiter.

Section 13857 implements the bond requirement in B&P Code §9998.1.5(b)(3) which requires as a condition of registration that a bond be deposited with the Labor Commissioner in an amount based on “gross receipts” for the contractor.

Subsection (a) specifies the use of an approved bond form prescribed by DLSE (DLSE 702) which shall be issued by a surety company authorized to do business in California. This is necessary based on Government Code section 11110, which requires that a bond form used in connection with a license, registration or permit must be approved by the Attorney General’s Office.

Subsection (b) makes more specific the requirement in B&P Code §9998.1.5(b)(3) by specifying what constitutes gross receipts for purposes of determining the amount of the required bond based on 12-month period prior to application and specifying a procedure for responding to a specific request by the Labor Commissioner to provide supporting documents. Since the bonds provide a source for recovery by an aggrieved worker, it is necessary that the amount of the bond which is based on gross receipts which can be ascertained or verified by the Labor Commissioner when appropriate. Stating a consequence for failure to timely respond or providing false and misleading information regarding gross receipts by denial of an application or renewal is necessary to insure the appropriate monetary value secured under the bond requirement is an effective condition for registration.

Subsection (c) which provides for maintaining continuous bond obligations in the event the required principal sum of the bond is reduced by a payout during the course of a registration period is necessary to maintain the required coverage. Since bonds are a primary means of ensuring liabilities to aggrieved persons, maintaining the principal sum for the bond would thwart deficiencies created by payouts made to individuals submitting claims against the bond. Specifying a consequence for a failure to maintain continuous coverage (suspend, revoke, or denial of an application) is necessary to ensure and reinforce continuous protection of workers under a bond in the amount specified in B&P Code §9998.1.5(b)(3).

Subsection (d) is necessary to address the problem where an employer ceases its business by providing that DLSE will hold the bond for a period of no more than 6 months after the cessation of the business. This does not extend the terms of the bond to cover an additional 6 months but would allow a reasonable time for claims to be filed against the bond held by DLSE for any liabilities accruing prior to closure of the business. This time period avoids loss of valid claims by workers simply due to a licensee’s cessation of its business and provides protection for workers’ losses. This provision does not establish a statute of limitations for claims but provides that the Labor Commissioner will hold the bond on deposit for six months which is deemed a reasonable period for allowing claims for work performed prior to cessation of the business. The time period is consistent with the six-month period specified for commencing an action on bonds

securing payment of wages for laborers applicable to private and public works of improvement (Civil Code 8610 and 9558).

Proposed Article 3 - Denial of Registration; Suspension and Revocation

Section 13858 provides introductory language which classifies the types of actions which may be taken on a registration application where an applicant fails to qualify for registration (subsection (a)) and actions against registrants for violations of the laws applicable to registrants (subsection (b)). This section provides context for application of the subsequent sections describing procedures provided in new Article 3 - Denial of Registration; Suspension and Revocation.

Section 13859 provides a notice requirement for actions which deny a registration and suspend or revoke a registration and further require a hearing by a hearing officer if appealed by the applicant or registrant.

Subsection (a) establishes a means of informing and providing an opportunity for hearing regarding an adverse action by the Labor Commissioner on an application or registration which comports with due process protections. The Labor Commissioner has determined that notice and hearings requested by applicants or registrants shall be in accordance with rules established in new Article 3 which is intended to apply instead of rules of procedure contained in the administrative adjudicatory provisions in the Government Code contained in Chapter 5 of Part 1, Division 3 of Title 2, commencing with Government Code §11500. The referenced Government Code sections authorize an agency to adopt its own procedures for adjudicatory proceedings which are expressly adopted by an agency and the agency has determined that providing rules of procedure in these regulations will more effectively inform applicants and registrants of procedures to contest or object to adverse agency actions. The procedures specified in this section are largely based on similar provisions used by the Labor Commissioner in administering the garment manufacturing registration program (see Title 8. California Code of Regulations, § 13646) which has been effective, provide a method for efficient administration by the agency, and are compliant with procedural due process requirements for a registration program.

Subsection (a)(1) further establishes that the notice of adverse action relating to a suspension or revocation of a registration shall be made by the filing of an accusation, which is a common name designating an agency's action on an existing registration or license. The subsection further specifies that such notice contain sufficient and plainly stated information upon which the agency bases its proposed action. The notice does not require verification (made under penalty of perjury) if made by an authorized person, as specified which is consistent with the exception for verified pleadings applicable to court actions (Code of Civil Procedure section 446) These basic requirements are necessary to sufficiently inform the registrant in ordinary and concise language the acts or omissions upon which the proposed action is based to enable him or her to review and determine whether to contest the proposed action.

Subsection (a)(2) establishes that the notice of adverse action relating to a denial or renewal of a registration shall be made by the filing of a statement of issues which is a common name designating an agency's action which denies a person's qualification for a registration or license.

Similar to the text and purposes stated for subsection (a)(1), the subsection further specifies that such notice contain sufficient information regarding items of information that are lacking or deficient or which have come to the attention of the agency justifying a denial and is necessary to inform the applicant (initial or renewal) of the proposed action and enable him or her to determine whether to contest the proposed denial or otherwise defend against the proposed action.

Subsection (b) provides for service of the moving document (accusation or statement of issues) upon the person who is applying for or holds a registration upon which action is being taken by the Labor Commissioner which shall further inform the person of their right to file a notice of defense within a specified period (15 days after service), which is a common and reasonable period of time for a person to inform the Labor Commissioner of his or her objection to the proposed action and request for hearing. This requirement is necessary in order to provide a person with a sufficient opportunity to contest the proposed action. In order to afford broad application of a person's right to contest a proposed action, the Labor Commissioner determines that the filing of a notice of defense is sufficient to constitute a request for hearing and will be deemed a request for hearing for purposes of these regulations. Since the failure to timely file a notice of defense within the prescribed period forecloses any hearing on the administrative action, the provision includes a statement that such failure constitutes a waiver of a request for hearing.

Subsection (c) establishes actions which may be taken by a person who files a notice of defense and reasonably covers grounds for which the person can assert his or her position with respect to all or some of the matters which are stated in the agency's moving document (accusation or statement of issues). The specified grounds for contesting or admitting matters will assist a person contesting the proposed agency action in formulating defenses that address the item(s) stated in the moving document and will assist the Labor Commissioner in determining the scope and length of a hearing to determine the disputed matters for purposes of scheduling the hearing.

Subsection (d) provides authority for the Labor Commissioner to grant a hearing in his or her discretion even where the applicant or registrant fails to file a timely defense. Such authority is necessary to ensure a fair disposition of agency actions where circumstances justify the grant of a hearing in order to address any unusual circumstance or irregularity brought to the Labor Commissioner's attention subsequent to the notice of adverse action, to ensure a fair administration of the registration program.

Section 13860 establishes the applicable procedures when a person who is subject to adverse action regarding their application or registration files a timely notice of defense which provides standardized procedures that inform affected persons of due process rights related to the timely filing of a notice of defense. The section also provides the consequences when a person fails to file a timely notice of defense or who files a notice but fails to appear at a hearing to clearly state the effect of inaction by the affected person.

Subsection (a) provides the right to a hearing on the merits when a person files a timely notice of defense, creating a right to a hearing on the agency's action which is fundamental to procedural due process. By deeming a filed notice of defense a specific denial of all parts of the agency

action that are not expressly admitted, the notice of defense will not be subjected to technical rules requiring artful drafting of the person's objections or defenses to the proposed agency action. While formulating any objection or defense pursuant to §13859(e) encourages specification of the grounds, this rule prevents sole reliance upon an absence of specification in the notice of defense to foreclose a person from being heard on the proposed agency action.

Subsection (b) provides for actions the Labor Commissioner may take when there is a failure to timely file a notice of defense or where the person fails to appear at a subsequently scheduled hearing on the merits. This provision spells out the actions the agency may take, including admissions and other evidence or proceeding by default without scheduling a separate hearing. This procedure is necessary to allow for the Labor Commissioner to pursue determining the action without delays when the affected person does not file a notice of action, or files a notice of defense but fails to appear at a scheduled hearing in order to prolong a determination of the proposed agency action.

Subsection (c) provides an exclusive rule for prehearing discovery for agency action to deny an application or suspend/revoke a registration which adopts by reference the procedure specified in Government Code §11507.6. The adopted process is necessary to provide a uniform procedure for a party to an adverse action proceeding to obtain information from the other party in an orderly manner. This subsection further provides reasonable standards for replying to a discovery request and the procedure to compel compliance, including service and time periods, for seeking to compel discovery in the event of a failure to comply which shall be determined by a hearing officer in writing which is necessary to provide a standardized procedure relating to discovery requests.

Subsection (d) provides a minimum time period for service of a notice of hearing of at least 10 days prior to the hearing date. The 10 days is a minimum which affords a reasonable time where cases involve discrete acts or omissions which are the basis of the agency action, but does not foreclose longer periods where more issues are contested. This standard is similar to the minimum 10-day standard for notices of hearing applicable to formal administrative adjudications (Government Code section 11509) and for adverse actions in the garment registration program also administered by the Labor Commissioner. The contents of a notice must substantially comply with the form set forth in Government Code §11509, which is expressly referenced and is designed to provide necessary and standard information for hearing notices. Notices must also inform the person of the right to request an interpreter for the party or witness, which is necessary due to Labor Code §105 that requires the Labor Commissioner to provide an interpreter in a hearing conducted by the agency.

Section 13861 provides standards for conducting hearings, including rules of evidence and the role of the hearing officer for hearings held under this new article. The standards are primarily based on similar provisions in the garment manufacturing regulations which the Labor Commissioner also administers and has found to provide hearing procedures which are efficient to administer and meet due process requirements for providing a fair hearing.

Subsection (a) provides that a hearing shall be conducted by a hearing officer appointed by the Labor Commissioner and conducted in accordance with §§ 13860 through 13862, inclusive, and

is necessary to expressly state the governing rules for any hearing contesting an adverse action against an applicant (denial) or registrant (suspension/revocation) under the subchapter. Similar to other administrative hearings conducted by the Labor Commissioner under other statutes, legal due process requires that a party be provided a fair hearing (*Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731) requiring that the hearing officer who determines the matter is a designated person who is independent of the person who initiated or otherwise determined the proposed adverse action and must conduct a hearing in a fair and independent manner.

Subsection (b) establishes the application of the more relaxed rule in administrative hearings that does not require technical rules relating to evidence and witnesses which are ordinarily required in court proceedings. This establishes a more informal hearing proceeding which focuses on substance rather than procedure in the presentation of evidence to be considered by the hearing officer. Preserving the application of privileges to protect confidential communications and the general rule of admissibility based upon relevancy is necessary to establish reasonable parameters for inclusion which also protects confidential relationships associated with protected privileged communications.

Subsection (c) adopts the general rule for admissibility of hearsay evidence in administrative hearings and avoids application of technical rules ordinarily applicable to hearsay in court proceedings and is necessary to allow parties to more readily present relevant evidence.

Subsection (d) provides authority to the hearing officer to control the manner and order for presentation of evidence subject to the more specific standards specified in Section 13862 and to rule on excluding evidence in order to allow for an efficient proceeding, which is necessary to provide a basis for a reasoned decision by the hearing officer that also comports with due process.

Section 13862 provides for rights of a party appearing at a hearing and establishes housekeeping requirements for the parties and hearing officer who conducts a hearing under the article. The standards are primarily based on similar provisions in the garment manufacturing regulations which Labor Commissioner also administers and has found to provide hearing procedures which are efficient to administer and meet due process requirements for providing a fair hearing. Recognizing that the subchapter regulates in a new area and subjects persons who have not been subject to previous regulation, the Labor Commissioner determined that the rights and standards in this section warrant express provisions to more clearly inform affected persons of the standard hearing procedures within the subchapter.

Subsections (a) and (b) provide rules establishing rights which are commonly recognized to ensure fundamental fairness of a hearing, by allowing a party to appear in person and by counsel, to call witnesses and cross-examine opposing witnesses, to rebut evidence and present exhibits and other evidence, and requiring oral testimony under oath.

Subsection (c) provides for the admission of written declarations in hearings under the procedure set forth in Government Code §11514, which the Labor Commissioner adopts as an appropriate procedure that uses an existing standard for submission of declarations by a party at a hearing.

Subsection (d) provides for recording or transcribing of a hearing which is designed to constitute an administrative record of the hearing proceeding and is necessary in the case of judicial review of the agency's determination pursuant to §§ 13860 (requiring a hearing upon timely notice of defense) and 13863 (providing for judicial review of a decision after hearing), and to comply with Code of Civil Procedure §1094.5, which requires an administrative record for judicial review.

Subsection (e) provides a procedure for the Labor Commissioner to file an amended or supplemental notice of action (accusation or statement of issues) to account for subsequent information uncovered or obtained following the issuance of the notice of action which generates new charges, but only on condition that the affected person have a reasonable opportunity to prepare a defense to any new charges. The procedure is necessary to allow the Labor Commissioner to fully determine any contested proposed action based on the available evidence which speaks to the person's qualifications for registration.

Section 13863 provides a procedure for preparation of a written decision by the hearing officer following a hearing, time periods for issuance of a decision following review by the Labor Commissioner for final action among specified alternatives that constitute disposition of the agency's action, and a procedure for seeking subsequent judicial review. The provisions are necessary for timely disposition of a case and for the Labor Commissioner to review contested dispositions of matters heard, where authority over registration is ultimately vested with the Labor Commissioner.

Subsection (a) requires that the decision prepared by the hearing officer comply with the content requirements specified in Government Code §11425.50, which is adopted for decisions under this section and establishes a standard for decision content that sufficiently allows for review of the factual and legal basis for the Labor Commissioner's decision and judicial review if sought by the affected person. The timing for issuance of a decision (within 60 days of the hearing) is necessary to provide a reasonably prompt disposition, including review by the Labor Commissioner, or his or her designee. The section further provides a general effective date for a decision which is 30 days after it is delivered or mailed to the affected person unless the Labor Commissioner expresses a different date or grants a stay of execution. Providing authority for the Labor Commissioner to specify an effective date, issuance of a stay or other express conditions is necessary to allow for flexibility appropriate to particular cases.

Subsection (b) provides a procedure through which an aggrieved person may seek judicial review of the Labor Commissioner's decision and is necessary to comply with the constitutional guarantee that administrative decisions must be subject to judicial review since the courts have ultimate authority to determine rights under the law. The procedure to seek judicial review falls under Code of Civil Procedure §1094.5 (writ of mandate) and the section provides a filing in superior court within 45 days of service of the decision, which is reasonably sufficient to initiate judicial review of the administrative decision which vests jurisdiction of the matter with the appropriate superior court. The language which states the consequence for a failure to file a timely petition is that the administrative decision is final is necessary to inform the affected person of administrative finality of the decision to which an aggrieved person is required to comply without further administrative review or action.

Section 13864 provides standards for periods of suspension or revocation of registrations which may be made by the Labor Commissioner.

Subsection (a) establishes general standards specified in subsections (b) and (c) based on a specified type of violation or grounds for disqualification/discipline, where a decision does not otherwise specify a different time period for suspension or revocation.

Subsections (b) and (c) provide time periods for suspensions and revocations, respectively, which distinguish violations or grounds which pertain to a failure to make required disclosures to workers (specified in §13874) or when based on commission of fraud, unless there is a specified determination for a different period of time in the decision. Since disclosure of specified information to workers and fraud prevention are fundamental aims of SB 477, specification of time periods for suspensions or revocations based on these grounds is necessary to ensure minimum time periods will be effective as a consequence for a suspension or revocation. Specifying such time periods will more effectively achieve the intent for the registration and related obligations of the Act. The language expressly provides that a different period may be imposed in a decision based on a specific determination under the circumstances of a particular matter. The time periods reflect a progressively longer period of time based on the number of violations or grounds which are based in turn on the intent that that severity should be greater for more violations or more grounds for suspension or revocation, and provides registrants with express consequences for violations of two central aims of this subchapter.

Subsection (d) provides a special rule that addresses revocation of a registration that allows a contractor to apply for a new registration only after expiration of a revocation for a specified time period. This provision is necessary to preclude a person from seeking a subsequent registration prior to expiration of any specified period in a previous revocation and curbs attempts to shorten the full effective dates of a previous revocation. Requiring that an applicant whose previous registration was revoked to satisfy any previous judgments and settlement agreements related to a violation of laws applicable to foreign labor contractors is necessary to ensure that the person has addressed consequences for any previous violations of applicable laws by appropriate redress of amounts due to the State or an aggrieved person. This requirement will afford registration to persons who have demonstrated compliance with any outstanding obligations arising from a registration which was revoked.

Proposed Article 4 - Disclosure to Labor Commissioner of Use of Foreign Labor Contractor

Section 13865 implements the disclosure required under B&P Code §9998.2 for persons who know or should have known that they are using a foreign labor contractor subject to these regulatory requirements.

Subsection (a) restates the persons who are required to provide the disclosure pursuant to B&P Code §9998.1(b) and phrases the requirement stated in §9998.2(a) as applying to the use of a person who performs foreign labor contracting activities. While there is some duplication with language in B&P Code §9998.2(a), it is necessary to provide context for the subsequent subsections detailing disclosure content and procedures so the regulated public can clearly understand the required application of disclosure in view of the source of the disclosure requirement being implemented in the section. The subsection further provides that a foreign labor contractor's actual registration status is evidence of an employer's knowledge, which gives rise to the disclosure requirement and furthers the effect and use of the registry as a means for employers to determine whether a recruiter is registered with the Labor Commissioner.

Subsection (b) establishes special definitions for the operative terms “knows” and “should have known” that trigger the disclosure and is necessary to provide further meaning in more plain terms and is intended to state more specifically what these terms mean for purposes of a person’s (employer’s) obligation to disclose the use of a foreign labor contractor and allow such persons to more easily determine whether they fall under the employer disclosure obligation.

Subsection (b)(1) further defines the terms “knows of the use of services of a foreign labor contractor” as meaning when a person “willfully or intentionally” uses another to perform contracting services and further incorporates the exception (to application of the statutes) as not including instances where the worker is recruited directly by the employing person (employer) or an employee of the employing person. A standard based on variations of the term “knows” as well as ordinary meaning of the word is often associated with actions that are willful or intentional in the sense that one intends the acts he or she performs. Defining “knows” more specifically, using the terms willful or intentional, provides a more practical understanding of knowledge of the use of a foreign labor contractor that extends beyond a mental state but is reflected in action by a person.

Subsection (b)(2) more specifically provides what may constitute “should have known” for purposes of the disclosure requirement. The included subsections (A) and (B) provide alternatives that apply concepts of constructive knowledge and account for “foreign labor contracting activity” that excludes from coverage direct recruiting by person (employer) or authorized employee of the employer, and further, identifies circumstances from which knowledge can be reasonably imputed. Subsection (A) states a standard for failing to exercise reasonable diligence, and subsection (B) states a standard relating to applying a reasonable prudent person with regulatory duty acting under particular circumstances.

Subsection (b)(3) clarifies that the person who uses a contractor to recruit or solicit foreign workers is the employing person or employer of the worker who is subject to the disclosure requirement in the section. As there are several actors who are involved in foreign labor contracting activities—contractor, worker, and employer -- this section makes clear that it is the employing person or employer under B&P Code §9998.1(b) who must disclose pursuant to the section.

Subsection (c) sets forth the contents for a disclosure form to be used by an employer as required in B&P Code §9998.1(b)(1), and specifies the manner for submitting the required disclosure form to the Labor Commissioner through email or regular mail, as specified.

Subsection (c)(1) requires that the disclosure provide identifying information regarding the employer. Subsections (A) through (D) require specific information regarding legal name, other names doing business as, contact information for the employer and persons responsible for the employer’s operations, as specified. Obtaining information regarding persons responsible for operations of the employer’s business is necessary to ensure that the business employer who ultimately employs a foreign worker can be contacted in connection with its use of a registered or unregistered foreign labor contractor, or otherwise served with notice or legal process for its noncompliance with employer responsibilities under the Act.

Subsection (c)(2) requiring disclosure of information regarding the contractor who will recruit and the employer’s use of foreign workers is necessary for the Labor

Commissioner to sufficiently regulate the registration program and determine the nature and scope of contractor activities relating to planned recruitment of workers that will be conducted for the employer. Subsection (A) requires identification and contact information for the person designated by the employer and implements the requirement in B&P Code §9998.2(b)(1) as a required item on the disclosure. Subsection (B) requires that the disclosure describe the type of business of the employing person by specifying the industry and function and goods or services provided by the employer, and is required in order for the Labor Commissioner to monitor businesses that are using contractors for solicitation and hiring of foreign workers, both for administrative purposes relating to the program and for possible future development of the registration program. Subsection (C) requires items of information relating to the planned employment of foreign workers, including location of work, number of foreign workers, employment dates, visa classifications, brief description of positions to be filled, and the number of labor contractors the employer will use to solicit or recruit workers. The Labor Commissioner has determined that this is necessary to ensure that sufficient information is provided by employers who use foreign labor to allow for verification in order to address foreign worker exploitation. The Labor Commissioner must be able to more specifically track both employer identified labor needs and expectations with activities of contractors in filling such needs and expectations in order to ensure that both prongs of activities are identified and enforced. To do so, the items identified in subsection (c)(2)(C)(i) through (vi) require information about the contractor who will be used for recruitment of foreign workers to work for the employer. The items consist of information relating to the planned employment which includes: location of work, number of workers, visa program, and foreign worker positions that a contractor will recruit for the employer. Recognizing that employer needs can change, an employer will provide information ascertainable at the time of its disclosure which encourages reporting of estimated foreign worker positions that can be modified in a subsequent amendment to a disclosure under §13867 of this subchapter. Transparency regarding an employer's planned use of foreign workers will also promote the use of registered foreign labor contractors for a regulated activity related to the contractor registration program.

Subsection (c)(3) requires that the employer identify each foreign labor contractor and provide contact information for the contractor for each operation identified in (c)(2). In requiring the recruiter information based on identified operations, employers could provide a separate disclosure for each identified operation or a single disclosure for multiple identified operations so long as the required information meets the requirements of this section for any identified operation for which foreign workers will be recruited by a foreign labor contractor.

Subsection (c)(4) implements the requirement in B&P Code §9998.1.5(b)(2) that requires that a disclosure include a declaration consenting to the Labor Commissioner as an agent for service of process, as specified. Including the requirement of the statute in this regulation is duplicative but necessary in order for this regulatory section to provide all required disclosure content in the agency form developed by DLSE.

Section 13866 establishes a period of time that a disclosure is valid. The Labor Commissioner has determined that a one-year period is reasonable and sufficiently balances the need for a person (employer) who intends to use foreign workers in their operations as identified in a

disclosure and the need for current information which is more subject to changing business conditions (specific to the business and the larger economy) after a year. Instead of the time period based on a calendar or fiscal year, the one-year period is based on the initial disclosure by the employer and is thus more flexible to the time of year an employer decides that foreign labor will be used in their operations.

Section 13867 provides a procedure for submitting material amendment(s) to a previous disclosure, which is to be made within 15 days of any changes (subsection (a)) and for identifying changes to information (subsection (b)) on a form for reporting amendments. This provision is necessary to ensure that current information, as specified in §13865(c), is provided for persons (employers) who are required by the Act to disclose their use of foreign labor contractors to the Labor Commissioner. Requiring an amended disclosure within 15 days promotes prompt disclosure of changes reasonably close in time to the change and enhances accuracy in the information required under the disclosure. Requiring that information items which have changed since a previous disclosure be identified and updated by employers will enable the Labor Commissioner to verify such information with the worker disclosures required by contractors and vice versa, which in turn will enhance the ability for enforcement of both disclosure requirements under the Act and provide more transparency for the recruitment of foreign workers employed in California.

Section 13868 further implements the prohibition of “knowingly” entering into an agreement for the services of a foreign labor contractor that is not registered under the Act (B&P Code §9998.2(c)) and this subchapter. This section further describes the knowledge standard based on concepts of both direct knowledge and indirect knowledge that is further described in terms of indirect or constructive knowledge. This minimizes non-compliance by the employing person under a simple defense that there was no direct or actual knowledge. This language is necessary as a means to recognize that knowledge is often difficult to prove and is often reflected in actions which reveal a failure to make reasonable inquiry or a conscious disregard of a duty to ascertain contractor status based on the circumstances at the time of entering into an agreement. Also, the language which considers constructive knowledge prevents dilution of the prohibition where an employer avoids or disregards the registration requirement based on lack of actual knowledge of contractor status (e.g., not checking the registry of foreign labor contractors maintained by the agency on its website or failing to otherwise perform a reasonable inquiry). A clear standard for the prohibition of entering into an agreement with an unregistered foreign labor contractor will enhance the ability of employers to comply and minimize their risk of liability for performing a prohibited act.

Proposed Article 5 - Prohibited Fees & Costs; Post-Hire Costs and Expenses; Disclosures to Foreign Worker by Contractor

Section 13870 provides definitions which shall apply for purposes of further implementing Act and are necessary for contractors and employers to be more clearly informed of provisions pertaining to fees, fees, costs, and expenses, which are prohibited and/or those which must be disclosed to foreign workers under the Act.

Subsection (a) provides a specific definition for “recruitment fees” that are related to amounts of money or property which may be charged or collected from a worker and associated with

soliciting and recruiting foreign workers. Federal laws prohibit the collection of monetary amounts by employers or their agents who perform recruitment of foreign workers, as does the Act, and the purpose of this provision is to more clearly define what types of fees, costs, or expenses are included in fees that are charged or assessed directly or indirectly from prospective workers under representations of employment opportunities in California. Persons who perform recruiting activities use various means and descriptions for charging or collecting amounts that are collected up front or taken subsequently in the form of wage concessions or deductions, kickbacks, bribes, tributes, and other methods that effectively require workers to reimburse or subsidize recruitment activities for a labor contractor or employer. The Act's prohibition against employees paying fees for any activity related to obtaining employment is consistent with federal regulations pertaining to the H-2B temporary non-agricultural worker visa program (see, 20 CFR §655.20(o)).

Subsection (a)(1) provides a list of the types of fees, in (a)(1)(A) through (a)(1)(S), which constitute recruitment fees that may be charged in the form payment of money or indebtedness against a foreign worker prior to, contemporaneous with, or subsequent to recruiting activities. Language in this subsection makes clear that the listed items are not exhaustive. The Act requires that a contractor disclose to workers a prohibition against assessment of "any fee, . . . , or other costs to a foreign worker for foreign labor contracting activities" (see, B&P Code §9998.2.5(a)(5) and (c)). The items listed are contained in the statute and restated in this section for clarity along with other more specifically described types of fees charged to workers that are related to contracting activities. The list also includes types of fees which are contemplated under federal regulations (20 CFR §655.20(o)-(p)) that also generally describe the types of prohibited fees other than reimbursement of costs that are legally the responsibility of the worker and primarily for the worker's benefit, such as government required passport fees (also not included in this proposed subsection). More specific examples of fees which have been known to be related to fees charged for recruitment activities, as specified in this section, will more clearly inform contractors and employers that where such fees are related to soliciting and recruiting activities, they are prohibited recruitment fees, as defined in this section.

Subsection (a)(2) provides that amounts which are added to expenses authorized for collection from workers provided under federal visa program requirements and that are beyond actual amounts for expenses, may constitute recruitment fees if charged or collected for an item that falls within subsection (a)(1). This provision is necessary to prevent contractors (or employers) from padding authorized expenses to indirectly recover amounts which constitute a prohibited "recruitment fee" and thus avoid a fraudulent scheme to indirectly charge a recruitment fee to a worker under the guise of an authorized expense reimbursement.

Section 13871 establishes as unlawful and prohibited the fees and costs charged by a foreign labor contractor to directly or indirectly recover any amount constitutes a prohibited recruitment fee pursuant to statute and §13870. The primary purpose of this section is to capture the more specific types of fees and costs contemplated under B&P Code §9998.2.5(a)(5) and (c) and specified in Section 13870, by establishing the legal effect (prohibition) for collecting any fees and costs from a worker for foreign labor contracting activities under the Act.

Section 13872 classifies prohibited fees, costs, and expenses which a contractor or agent or employee of a contractor may not charge to a worker in relation to foreign labor contracting which may be sought following selection or hire of the worker for employment in California which are also specified for purposes of inclusion in the contractor's disclosure to the worker pursuant to Section 13874(b)(8)(B).

Subsection (a) provides items of fees and costs which relate to foreign labor contracting activities that can occur following the selection or hire of the worker. This subsection is necessary to more clearly identify those prohibited post-hire or selection fees and costs associated with securing and the actual placement of a worker for employment, including any legal expenses for securing employment by the foreign labor contractor. The items specified in subsections (a)(1) through (a)(6) are consistent with federal regulations that also preclude charging transportation and visa-related charges to a worker. (See, 20 CFR §655.20(j) and justification for regulation stated in the Federal Register (Fed.Reg. Vol 80, No. 82, 4/29/15, pp. 24067-24069; and 20 CFR §655.18(b)(12)-(15).) While the federal regulation precludes payment of fees and costs as an assurance and obligation of an employer, the federal regulation also requires that an employer contractually prohibit any agent or recruiter from directly or indirectly receiving prohibited payments or other compensation from workers before or after the worker obtains employment. (20 CFR §655.20(p)). Classifying the types of fees and costs that can be charged after selection of the worker further promotes the overall prohibition of such charges to a worker when used as a means for an employer or labor contractor to recoup from a worker costs for foreign labor contracting activities.

Subsection (b) further implements the cost and expense prohibition prior to commencement of work by the worker and is necessary to preclude the creation of other costs or expenses not specifically described in subsection (a) that could be charged to a hired or selected worker, as contemplated in B&P Code §9998.2.5(a)(5)(A) and (c), provisions which attribute responsibility for these costs to the contractor or the employer but not to a worker. This subsection further implements the prohibition for charging costs or expenses that are not customarily assessed against all workers similarly employed in the United States, as provided in B&P Code §9998.2.5(d) and is consistent with federal regulation (see 20 CFR §§ 655.18(a)(1) and 655.20(q)).

Section 13873 clarifies that the required itemization of allowable costs and expenses specified in B&P Code §9998.2.5(a)(4) that must be disclosed to a worker and refers to those costs and expenses which are charged to workers after hire or selection to work. This provision is necessary to place all related allowable items relating to post-hire costs and expenses in a single section for easier classification as well as inclusion in the disclosure form pursuant to §13874(a)(9). This provision clarifies the distinction between costs or expenses which relate to pre-hire recruiting activities (prohibited in other provisions of the Act and this subchapter) and those which hired workers may be charged by an employer upon hire or selection of the worker.

Subsections (a)(1) through (a)(7) specifying allowable costs and expenses in more descriptive terms and incorporate the limits for housing expenses (market rate for similar housing per B&P Code §9998.2.5(d)) and transportation (to and from the worksite, meals medical examinations, health care, safety equipment (B&B Code §9998.2.5(2)-(6)), and education or training (B&P Code §9998.2.5(a)(6)). The duplication of items in (a)(1)

through (7) which are also listed in various statutory sections allows a better understanding of allowable costs and expenses that are required to be disclosed as a category on the disclosure form as specified in §13874(b)(9). By separately identifying these allowable but disclosable cost and expense items, this subsection informs the public as to how these allowable items which can be charged a worker are categorically distinguished from prohibited costs and expenses also categorically specified in this article.

Subsection (b) creates a requirement that the disclosure of any of the items in subsection (a) shall affirmatively indicate “none” if there are no such expenses related to the worker’s employment. This more effectively makes the requirement a more complete and effective disclosure to the worker, since all anticipated costs and expenses must be addressed by indicating an amount or that there is “none” for each cost and expense item.

Subsection (c) incorporates into post-hire category of cost and expenses, “any other” cost or expense item that is not a prohibited fee or cost but is an item charged to a worker must still be identified and disclosed to the worker as required in B&P Code §9998.2.5(a)(4). Due to the problem of fraud in the area of recruitment of foreign workers, which the Act seeks to address, this subsection is necessary to ensure that all non-prohibited cost or expense items sought to be charged or otherwise expected to be a responsibility of a worker are identified and disclosed by description and amount to inform a worker.

Section 13874 establishes the contents of a disclosure form, established by the Labor Commissioner, that must be provided to a worker at the time of recruitment, with a copy also provided to the Labor Commissioner. Items in the required disclosure shall contain the employment-specific information and other required disclosures and fee prohibitions specified in B&P Code §9998.2.5 which are made more specific in prior sections of the article (Sections 13870 through 13873). Providing the information at such time benefits the workers against mistreatment and fosters use of standard practices by employers who are subject to the Act and contractors who solicit and recruit foreign workers for such employers in California.

Subsection (a) establishes the required use of a specific written disclosure form prepared by the Labor Commissioner and the timing for providing a completed form to the worker and to the Labor Commissioner, within 7 business days, as required under B&P Code §9998.2.5(a) and (b). Providing all required content in a single disclosure to the worker will more effectively inform workers, at the earliest practicable time during recruitment but no later than the time a worker commits (applying for a visa) to come to the United States, of the protections and requirements under the Act and the registration program regulations in this subchapter. The latest time for providing the disclosure (no later than time for applying for visa) is based on the time a worker is required to be given a copy of a job order under federal requirements applicable to the H2b visa program (see 20 CFR §§ 655.18(a) and 655.20(l)) which the Labor Commissioner seeks to be consistent with in order to avoid different disclosure requirements. The foreign labor contractor has the option of filing with the Labor Commissioner via mail or email, as specified, which will provide flexibility for contractors in sending the form within the prescribed time.

Subsection (b) specifies the content for the required disclosure form. Subsections (b)(1) through (3) require identifying information regarding the worker given the form, the

employer providing the employment opportunity, including legal and “doing business as” names, and contact information, and the name and contact information for the person contractor and subcontractor or agent who is recruiting for the employer which items are required under B&P Code §9998.2.5(a)(1). Identification of the worker is necessary as the disclosure is required for each worker pursuant to B&P Code §9998.2.5(a) and identifying the worker provides a mechanism for verification of an actual disclosure made by the contractor. Identification and contact information regarding the employer and each person performing recruiting activities (contractor, subcontractor, or agent) are critical to both achieving effective disclosure to the prospective worker and for determining compliance with the registration and disclosure requirements under the Act. Recognizing that foreign labor contractors may use subcontractors or agents, it is important that the contractor disclose each layer of subcontractor or agent used for foreign labor contracting activities. Requiring the registration number and related admonition re-enforces the obligation that only persons registered with the Labor Commissioner may recruit foreign workers for employment in California.

Subsection (b)(4) incorporates into the required disclosure form required visa information specified in B&P Code §9998.2.5(a)(3). The requirement is duplicative of the statutory language but is included here to provide clarity by providing in a single place all required items to be included in the disclosure form established by DLSE and avoid confusion by requiring the public to ascertain disclosure content requirements from both the statute and the regulations.

Subsection (b)(5) incorporates the disclosure regarding provided or required training that is required in B&P Code §9998.2.5(a)(6). This subsection requiring that the disclosure include this statement regarding training more specifically identifies the nature, timing and cost for any required training that is a condition of employment, and further clarifies that the cost of training relating to the prospective employment shall not be charged to the worker when specific training is an employer requirement for employment. This is consistent with both federal (see 20 CFR §655.18(b)(7)) and state law (see Labor Code §2802; DLSE Opinion Letter 1994.11.17).

Subsection (b)(6) incorporates into the required disclosure the requirement to provide as an attachment to the disclosure form a signed copy of the “work contract” that includes all assurances and terms and conditions of employment, as specified in B&P Code §9998.2.5(a)(2). The Labor Commissioner has included items referenced in the statute and additional items that more specifically provide basic terms and conditions which enable a worker to make an informed decision regarding the proposed employment opportunity. The Labor Commissioner determined that requirements for work contracts required under the federal H2b visa program are substantially similar to those listed in subsection (b)(6)(A) through (M). (See 20 CFR 655.18) In practice, under federal regulations, a work contract is based upon a federally-required “job order” which is used by employers when applying for foreign worker labor certification to employ foreign workers in the United States. The terms of the job order become the work contract upon certification by the U.S. Department of Labor’s Office of Labor Certifications. The Labor Commissioner has determined that, for purposes of providing a work contract required under the state statute, it would be more efficient and convenient for foreign labor contractors (and employers utilizing foreign labor contractors) to utilize job orders and work contracts required under the federal H2b visa

program which contain essential terms and conditions of employment. This will avoid confusion between federal and state requirements under this Act, make it less burdensome, and foster compliance by providing that a contract with terms which comply with federal labor certification requirements will also constitute compliance with the disclosure of the “work contract” required under state law. Since “job order” requirements that employers submit for federal foreign labor certification control the content for work contracts under which workers are employed, this subsection allows an employer to attach to the required disclosure form a copy of a signed job order submitted to the U.S. Department of Labor when applying for federal certification. This option allows for early disclosure to the worker of essential assurances and terms and conditions of employment.

Subsection (b)(7) incorporates into the required disclosure form an item that informs the worker of the conditions for making any new requirements or other changes to the work contract initially provided, as required under B&P Code §9998.2.5(a)(5)(B). This requirement is duplicative of the statutory language but is included here to provide clarity by providing in a single place all required items to be included in the disclosure form established by the Labor Commissioner and to avoid confusion caused by requiring the public to ascertain disclosure content requirements from both the statute and the regulation.

Subsection (b)(8) incorporates into the required disclosure form a statement that no costs, expenses or fees may be charged to a worker prior to commencing work as required in B&P Code §9998.2.5(d) and a list of prohibited fees stated in §13870(a).

Subsection (b)(8)(A) consists of a prohibition which duplicates the statutory language which must be included in the disclosure but is included here to provide clarity by providing in a single place all required items in the disclosure form established by the Labor Commissioner and to avoid confusion caused by requiring the public to ascertain disclosure content requirements from both the statute and the regulation. This subsection also makes clear that costs specifically for tools, supplies, or equipment necessary to perform the job shall be provided by the employer because such specified category of costs represent a common category for which an employer could attempt to shift costs to foreign workers in violation of B&P Code §9998.2.5(d). Including on the disclosure form the specified category of costs that shall not be imposed on a worker provides awareness for the worker as well as the foreign labor contractor, at the recruitment stage, of the prohibition and unlawfulness of imposing pre-work costs on the foreign worker.

Subsection (b)(8)(B) incorporates the list of prohibited “recruitment fees” in §13870(a) into the required disclosure form for the purpose of more clearly informing the worker of the specific types of fees that are prohibited under the Act. Indicating specific fees will both preclude a contractor from lawfully requesting such fees and inform a worker of the prohibition to charging such fees, and thus will address the unlawful practice of workers paying such fees. In requiring the disclosure of prohibited fees, workers will receive, at the time of recruitment, necessary information that informs them of the economic impact for pursuing employment in California.

Subsection (b)(9) incorporates into the required disclosure form the required listing of allowable post-hire costs which must be itemized and disclosed pursuant to B&P Code §9998.2.5(a)(4) as more specifically implemented in §13873 of this subchapter. The requirement is duplicative of the statutory language but is included here to promote clarity by

providing in a single place all required items to be included in the disclosure form established by the agency and avoids confusion caused by requiring the public to ascertain disclosure content requirements from both the statute and the regulation.

Section (b)(10) incorporates into the required disclosure form several disclosure requirements stated in various provisions of the Act. The requirements are duplicative of the statutory language but are included here to promote clarity by providing in a single place and in a more organized and simple format all required items to be included in the disclosure form established by the agency based on rights conferred under the Act and to avoid confusion in trying to ascertain disclosure content requirements from several provisions in the statute and these regulations. The specified items of information incorporate into the disclosure form general liability provisions in B&P Code §9998.8, and provide contact information for the Labor Commissioner's Office and national human trafficking resource center hotline pursuant to the directive in B&P Code §9998.2.5(a)(5)(C).

Subsection (b)(11) includes in the disclosure form an attestation by the contractor that the information was disclosed to the worker and is true and complete, and further provides that a material misrepresentation on the disclosure is a grounds for adverse action against the contractor's registration (denial, suspension, or revocation). This provision establishes a standard for accountability in the accuracy and completeness of information provided to the worker and a consequence for material representations by the contractor against their registration. Action against the contractor's registration is not intended to apply to technical or clerical errors or mistakes but would address matters which would have made a material impact on the worker's ability to make a fully informed and voluntary decision to work for an employer in California.

Subsection (c) incorporates the requirement that the disclosure to a worker be in English and in the primary language of the worker as specified in B&P Code §9998.2.5(a), and further provides that the employer or contractor is responsible for providing a translation of the disclosure, which is to be provided to the worker and Labor Commissioner. This is necessary to establish responsibility for providing the translation, which shall not be directly or indirectly charged to the worker. The Labor Commissioner reserves the right, in his or her discretion, to request a certification of a translated disclosure, which a contractor must provide within 10 days of a request. This standard lessens the burden of providing separate certified translations for each and every disclosure, but allows the Labor Commissioner to monitor and ascertain accuracy regarding items of information in the disclosure for any specific disclosure or group of disclosures. It is not administratively feasible for Labor Commissioner to provide a translation of the form or the work contract in the various languages of foreign workers who may be covered by this requirement. The work contract (or compliant job order submitted for federal foreign labor certification) will necessarily contain terms specific to a worker's employment and would not be amenable to the Labor Commissioner providing translation for such specific terms in the many languages or distinct regional dialects. For more common languages, the Labor Commissioner intends to translate common provisions of the disclosure form itself (without work contract) and make such disclosure forms available on its website, as resources permit.

OTHER REQUIRED SHOWINGS – GOVERNMENT CODE 11346.2(b)

Results of the Economic Impact Analysis/Assessment– Government Code 11346.2(b)(2)(A)

The proposed regulation provides necessary standards for the registration program which the Labor Commissioner is required to administer along with implementation of disclosures by an employer who will use a foreign labor contractor and by a foreign labor contractor required under SB 477 (Chapter 711, Statutes of 2014). The proposed regulations will impact (1) persons or businesses who perform foreign labor contracting activities (soliciting or recruiting workers under the federal H2b visa program for employment in California) who must first register with the Labor Commissioner under the mandated registration program, and make specified disclosures on an agency-created form to workers and the Labor Commissioner, and (2) employer businesses who must disclose to the Labor Commissioner on an agency-created form their use of registered foreign labor contractors. The required disclosures may be delivered to the Labor Commissioner by electronic mail or regular mail.

Significant statewide adverse economic impact directly affecting businesses and including the ability of California businesses to compete with businesses in other states: The proposed action will directly affect businesses and persons statewide who perform specified soliciting or recruiting activities to obtain foreign workers for employment in California under the federal H2b visa program. The Labor Commissioner concludes that the regulations will not adversely affect the ability of California businesses to compete with business in the other states. Based on latest yearly data from the U.S. Department of Labor’s Office of Foreign Labor Certifications, a total of 191 labor certification applications under H2b were processed in Fiscal Year 2015 which sought a total of 3,255 worker positions for employment in California. (<https://www.foreignlaborcert.doleta.gov/map/2015/ca.pdf>). Utilizing a 135 to 1 ratio of contractors to workers, which the Labor Commissioner applies in connection with farm labor contractors, the Labor Commissioner estimates 20-25 registrations of foreign labor contractors. DLSE is informed that vendors who provide fingerprint scanning services charge various amounts which generally range between \$20 and \$40 (\$30 average) for providing fingerprinting services (this cost is not required for renewal applicants who do not have to submit fingerprints). Accordingly, a foreign labor contractor will incur a total cost of \$125 for initial registration (\$95 + 30) under the program. The total statewide annual impact for registrations is in the range of \$1,900 to \$2,375 for 20-25 estimated registrations. Under the Act and these implementing regulations, employers must disclose to the Labor Commissioner their use of foreign labor contractors and registered labor contractor must disclose recruitments to the Labor Commissioner. There is no fee for an employer to submit the disclosure to the Labor Commissioner, which can be provided electronically on an agency-created form. However, the Labor Commissioner estimates a \$20 cost for preparing and submitting these respective disclosures to the Labor Commissioner’s Office.

Creation or Elimination of Jobs within the State of California: Unregistered foreign labor contractors are statutorily precluded from engaging in the regulated activity. Any unregistered foreign labor contractor who performs regulated activities would violate the statutory prohibition. Since only persons who are registered would be permitted to perform the regulated activities as a direct result of the legislation (SB 477) being implemented by these regulations, any elimination of jobs previously held by recruiters are the result of the legislation and not of the regulations. To the extent that any job was previously held by recruiter working in a business

which performs a regulated activity, the job is not necessarily eliminated and may be performed by another individual who qualifies for and obtains a registration. Therefore, the regulations do not create or eliminate jobs in in California.

Creation of New or Elimination of Existing Businesses within the State of California: The proposed regulations are designed to standardize criteria for administering statutory registration requirements. The regulations will establish uniform standards for coverage of the registration requirement, registration applications with identifying and contact information, fees, requirements for renewal, denial, and administrative procedures for suspension and revocation of permits. While the proposed regulations will impact businesses that fall under the registration requirement, the regulatory action primarily implements, clarifies and standardizes requirements set by statute or that are necessary to implement statutory prohibitions and requirements, and will not significantly increase statutory obligations. Therefore, no new businesses in California will be created or existing businesses eliminated by these regulations.

Studies, Reports, or Documents Relied Upon – Government Code 11346.2(b)(3)
Cost Sheet for FnLC Registration

Reasonable Alternatives – Government Code 11346.2(b)(4)(A)

The Labor Commissioner has initially determined that no alternatives would be more effective in carrying out the purpose that underlies the proposed regulatory action, or would be at least as effective or less burdensome on the regulated public (labor contractors that recruit foreign workers for employment in California and employers who use foreign labor contractors) and that would ensure full compliance with the existing licensing statutes being implemented or made specific by the proposed regulations.

Facts and Evidence to Support Determination that Action Will Not Have A Significant Impact On Business – Government Code 11346.2(b)(5)(A)

The Labor Commissioner has determined that the proposed regulatory action implementing the statutorily required registration program will have an impact on individuals and businesses who operate as foreign labor contractors who seek to perform the regulated activity with respect to recruiting foreign workers for employment in California who are not otherwise excluded from the registration requirements. Foreign labor contractors and will be required to apply for a registration, pay a fee, and provide fingerprints to the Department of Justice. The scope of the legislation (SB 477) is limited to the federal H2b worker visas through which 3,255 worker positions were sought for employment in California in fiscal year 2015. The Labor Commissioner estimates that a small number (20-25) foreign labor contractors will likely register. Since SB 477 only regulates recruiters who are foreign labor contractors performing a federal foreign labor contracting activity, as defined, and employers who use such foreign labor contractors, but does not regulate recruiting activities directly performed by an employer (or employee of the employer) and thus not every recruitment or subsequent employment of H2b workers are subject to the Act and these proposed regulations. Accordingly, these regulations will not have a significant impact on business based on the Act's limited scope to workers recruited under the H2B visa program and the alternative for employers to directly recruit (not use a foreign labor contractor) to employ foreign workers under the federal H2b visa program.