

**STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
Division of Labor Standards Enforcement**

NOTICE OF PROPOSED RULEMAKING

Subject Matter of Regulations: Foreign Labor Contractor Registrations

**TITLE 8, CALIFORNIA CODE OF REGULATIONS
Sections 13850 et seq.**

NOTICE IS HEREBY GIVEN that the Labor Commissioner, Chief of the Division of Labor Standards Enforcement, Department of Industrial Relations, pursuant to the authority vested in her by Labor Code sections 59, 95, and Business & Professions Code section 9998.11, proposes to adopt sections 13850 through 13874 in proposed Subchapter 13 of existing Chapter 6, of Division 1, of Title 8, California Code of Regulations, relating to Foreign Labor Contractor Registrations.

PROPOSED REGULATORY ACTION

The Labor Commissioner proposes to adopt Subchapter 13 of Chapter 6 of Division 1, regulations consisting of the following:

Article 1. Scope, Coverage and Definitions

Section 13850 Definitions

Section 13851 Coverage; Exemption for Business Directly Recruiting Workers;
Non-Employee Agents as Foreign Labor Contractors

Article 2. Registration

Section 13853 Application for Registration as a Foreign Labor Contractor

Section 13855 Character, Competency and Responsibility

Section 13856 Registration Certificate

Section 13857 Surety Bond; Establishing Gross Income Receipts

Article 3. Denial of Registration; Suspension and Revocation

Section 13858 Actions on Applications and Registrations

Section 13859 Notice of Denial, Suspension or Revocation; Notice of Defense

Section 13860 Failure to File Notice of Defense; Discovery; Notice of Hearing

Section 13861 Conduct of Hearing; Rules of Evidence; Role of Hearing Officer

Section 13862 Rights of Parties at Hearing; Taking of Evidence; Rules of Procedure

Section 13863 Proposed Decision; Decision of Labor Commissioner; Judicial Review

Section 13864 Periods of Suspension or Revocation

Article 4. Disclosure to Labor Commissioner of Use of Foreign Labor Contractor

Section 13865 Employer Disclosure to Labor Commissioner of Use of Foreign Labor
Contractor

Section 13866 Validity and Duration of Disclosure

Section 13867 Amended Disclosure

Section 13868 Contracting with an Unregistered Foreign Labor Contractor

Article 5. Prohibited Fees & Costs; Post-Hire Costs and Expenses; Disclosures to Worker

by Contractor
Section 13870 Unlawful Recruitment Fees
Section 13871 Recruitment Fees and Costs Prohibited
Section 13872 Other Fees, Costs, and Expenses Prohibited Post-Hire/Selection
Section 13873 Allowable Post-Hire Costs and Expenses to be Itemized and Disclosed
Section 13874 Disclosure by Contractor to Worker

TIME AND PLACE OF PUBLIC HEARING

A public hearing has been scheduled to permit all interested persons the opportunity to present statements or arguments, either orally or in writing, with respect to the subjects noted above. The hearing will be held at the following time and place:

Date: October 11, 2017
Time: 10:00a.m. to 5:00p.m., or conclusion of business
Place: Elihu Harris State Building
Room 2 Meeting Room, 2nd Floor
1515 Clay Street
Oakland, CA 94612

The State Office Building and designated room are accessible to persons with mobility impairments. Alternate formats, assistive listening systems, sign language interpreters, or other type of reasonable accommodation to facilitate effective communication for persons with disabilities, are available upon request. Please contact the Division of Labor Standards Enforcement at 510-285-2118 to request an accommodation, or through the California Relay Service by dialing 711 or 1-800-735-2929 (TTY/English) or 1-800-855-3000 (TTY/Spanish) as soon as possible to request assistance.

Please note that public comment will begin promptly at 10:00 a.m. and will conclude when the last speaker has finished his or her presentation or 5:00 p.m., whichever is earlier. If public comment concludes before the noon recess, no afternoon session will be held.

The DLSE requests, but does not require, that any persons who make oral comments at the hearing also provide a written copy of their comments. Equal weight will be accorded to oral comments and written materials.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Department of Industrial Relations, Division of Labor Standards Enforcement. **The written comment period closes at 5:00 p.m., on October 9, 2017.** The Labor Commissioner will consider only comments received at the Division by that time. Equal weight will be accorded to comments presented at the hearing and to other written comments received by 5:00 p.m. on that date by the Division.

Submit written comments concerning the proposed regulations prior to the close of the public comment period to:

Jennifer Stevens, Legislative Analyst and Regulations Coordinator
Department of Industrial Relations
Division of Labor Standards Enforcement, Legal Unit
2031 Howe Avenue, Suite 100
Sacramento, CA 95825

Written comments may be submitted by facsimile transmission (FAX), addressed to the above-named contact person at (916) 263-2920. Written comments may also be sent electronically (via e-mail) using the following e-mail address: DLSERegulations@dir.ca.gov.

Unless submitted prior to or at the public hearing, Ms. Stevens must receive all written comments no later than October 9, 2017.

AUTHORITY AND REFERENCE

The Labor Commissioner is undertaking this regulatory action pursuant to the authority pursuant to Labor Code sections 59 and 95(a), and Business & Professions Code section 9998.11.

Reference is to Business & Professions Code sections 9998, 9998.1, 9998.1.5, 9998.2, 9998.2.5, 9998.5, and 9998.11.

INFORMATIVE DIGEST AND POLICY STATEMENT OVERVIEW

Existing law establishes a registration program for any person who solicits or recruits a foreign guest worker, as specified, to perform labor related to employment in California. (SB 477 [Chapter 711, Statutes of 2014].) The legislation prohibits any person, as specified, from providing any recruiting or soliciting activities for compensation in furtherance of a foreign worker's employment unless the person is first registered with the Labor Commissioner.

Existing law provides that the registration program is to be administered by the Labor Commissioner, who is Chief of the Division of Labor Standards Enforcement (DLSE or Division) within the Department of Industrial Relations. Existing law provides an application requirement, information concerning the applicant's character, competency, responsibility, manner and means of conducting business, and surety bond requirement.

Existing law requires employers to notify the Labor Commissioner of their intended use of a foreign labor contractor who is registered with the Labor Commissioner. Existing law further requires that foreign labor contractors notify prospective workers of certain rights, including contractor prohibitions, when performing recruitment activities for employment in California.

The proposed regulation provides necessary standards for the registration program which the Labor Commissioner is required to administer. These standards include further specifying who is covered by the permit requirement, the setting of a fee for registration, application information

items, and standards for processing permit applications and permit renewals. The proposal also specifies the procedure for an applicant to contest a denial of an application and for suspension and revocation procedures which are necessary to fully administer the registration program where a subsequent action impacts the registrant's qualification for a registration certificate. The proposals are necessary for the Labor Commissioner to duly and efficiently administer the mandated registration program designed to regulate foreign labor contractors who perform specified recruiting and soliciting activities to foreign workers for employment in this state.

These proposed regulations implement, interpret, and make specific the statutory requirements of Chapter 21.5 (Foreign Labor Contractors) of Division 3 (Professions and Vocations Generally), commencing with Section 9998 of the Business and Professions Code, hereafter referred to as "the Act" as follows:

Proposed **Subchapter 13** (of Chapter 6, Division 1, Title 8 of the California Code of Regulations) contains five (5) articles which group sections by related subject matter and further implement, establish standards, and provide requirements for application and issuance of registration to any person who seeks to solicit or recruit specified foreign guest workers for employment in California. The sections implement requirements or make more specific administrative procedures specified in Sections 9998 through 9998.11, inclusive which relates to issuing and maintaining registrations of foreign labor contractors and provides standards for required disclosures (1) by employers to the Labor Commissioner of their use of foreign labor contractors, and (2) by labor contractors to workers and the Labor Commissioner of information regarding rights and prohibited costs and expenses sought by a contractor from a worker.

Article 1. Scope, Coverage and Definitions

Section 13850 provides definitions for key terms which relate to the Act's coverage and makes specific the activities and persons who are the subject to the registration requirement. The section more specifically defines "recruiting" and "soliciting" by using common activities associated with ordinary meanings of the terms in the context of future employment. The term "foreign guest worker" is more specifically defined to harmonize the statutory provisions which define "foreign worker" and limit the coverage of the Act as only applicable to the federal H2b non-agricultural worker visa program.

Section 13851 provides clarification of the scope of the statutory exemption which excludes from the Act an employer who directly, or through an employee who meets specified requirements, recruits a foreign worker. The section also distinguishes between those who perform pursuant to the exemption and those non-employee agents who are subject to the Act and specifies the consequences for both a non-employee agent and employer subject to the Act.

Article 2. Registration

Section 13853 provides a specific procedure for applying for registration with the Labor Commissioner, including submission of a written application containing specified items of information which relate to the identification of the applicant, entity information, contact

information, and other specified items, including a surety bond, fingerprinting, and other specified items, and a payment of a total fee of \$95 for registration.

Section 13855 provides criteria the Labor Commissioner will use when determining an applicant's character, competency, and responsibility when considering information submitted or received in connection with an application, including past conduct relating to crimes or violations of laws, and subsequent rehabilitation.

Section 13856 provides the administrative process for issuance of a registration certificate, two-year duration, information items included on the certificate, procedure for changes in information, and process for obtaining a duplicate in the case of loss. The section also provides the information contained on the online registry of registrants and employees of registrants accessible on the Department of Industrial Relations' website and maintained by the Labor Commissioner.

Section 13857 provides the requirements for a surety bond required in the Act which specifies an approved form in the amount which is based on gross income receipts during a specified period (12 months) prior to filing the application. The section more specifically defines "gross receipts" for purposes of establishing the bond amount and specifies a period of a reasonable time but no more than fifteen days for an applicant to respond to a specific request by the Labor Commissioner for submission of documents verifying gross receipts.

Article 3. Denial of Registration; Suspension and Revocation

Section 13858 provides for administrative actions which may be taken by the Labor Commissioner for addressing (1) a denial of an application for registration when the agency determines that the applicant fails to qualify for registration under the requirements in Article 2 of this subchapter, and (2) the suspension or revocation of a registration by a registrant who violates or fails to comply with the Act or this subchapter applicable to registrants. The section introduces the subsequent procedures for the respective actions taken by the Labor Commissioner.

Section 13859 provides for a notice for a denial of an application or for a suspension or revocation if sought by the Labor Commissioner against an applicant or registrant and provides the requirements for providing notice of the respective administrative action by the Labor Commissioner. The section also creates a right to a hearing if appealed by the filing of a notice of defense within the prescribed period by the applicant/registrator, provides the grounds for a notice of defense, and waiver of a right to hearing if there is a failure to file a timely notice of defense.

Section 13860 provides the procedures and rights of an applicant or registrant in the event of filing a timely notice of defense, establishes the right to a hearing, the exclusive right and method for discovery, notice of hearing to all parties at least 10 days prior to the hearing, and the right to request an interpreter.

Section 13861 provides procedures for conducting a hearing based on a denial of an application or for suspension or revocation of a registration, including the informal nature of the hearing and

conferring authority to the hearing officer to control the order of presentation of evidence and otherwise rule on the evidence.

Section 13862 provides rights of parties at the hearing, as specified, including the right to be represented by counsel, cross-examination of witnesses, to rebut evidence, providing oral testimony under oath, declarations, recording of the proceeding, and amendments to any charging documents.

Section 13863 provides the procedures for preparing and issuing a decision based on the record made at the hearing, the contents of a decision, and review by the Labor Commissioner who may adopt or modify the proposed decision, or remand to the hearing officer for further proceedings. The section also provides the procedure for seeking judicial review of a decision by filing a timely petition for writ of mandate to the superior court pursuant to Code of Civil Procedure section 1094.5.

Section 13864 provides general guidelines which the Labor Commissioner may impose when determining whether a registration will be suspended or revoked based on specified criteria regarding the nature of the violation by the registrant, unless there is a specific determination that circumstances justify a different period of suspension or revocation.

Article 4. Disclosure to Labor Commissioner of Use of Foreign Labor Contractor

Section 13865 provides the procedure and format, including specified items of information, for the Act's required disclosure to the Labor Commissioner by an employer who uses a foreign labor contractor. The section also provides a more specific meaning for the statutory language giving rise to the disclosure requirement when the employer "knows or should have known" of their use of a labor contractor to perform a regulated activity subject to the Act.

Section 13866 provides for the duration and validity of a disclosure for a one-year period unless there are any changes which shall be reported by an amended disclosure.

Section 13867 provides the standards and procedures for reporting any changes to a previously submitted disclosure by an employer and the contents, as specified, for inclusion in an amended disclosure submitted to the Labor Commissioner.

Section 13868 provides that it shall be unlawful for an employer to knowingly, directly or indirectly, enter into an agreement to recruit or solicit foreign guest workers with a foreign labor contractor who has not registered with the Labor Commissioner and provides a standard for determining an employer's "knowledge" of an agreement which would qualify as unlawful under the section.

Article 5. Prohibited Fees & Costs; PostHire Costs and Expenses; Disclosures to Workers by Contractor

Section 13870 provides describes unlawful recruitment fees which relates to the subsequent provisions in the article which apply to prohibited and permitted activities of foreign labor contractors who interact with potential foreign workers. The section is intended to include various forms of monetary amounts that have been reported to be sought by labor contractors in connection with recruitment activities which effectively subsidize the labor contractor’s services or otherwise financially exploit foreign workers who desire or seek employment in California.

Section 13871 provides that a foreign labor contractor’s direct or indirect receipt of recruitment fees, as defined in Section 13870, which relates to any “foreign labor contracting activity,” as defined in the Act, is prohibited.

Section 13872 identifies specified fees, costs, and expenses which relate to matters which may be charged workers after their hire or selection for employment but prior to commencement of work in California and which are prohibited under the Act or federal regulations. The fee, cost, or expense items in this section can be distinguished from prohibited recruitment fees which may be sought at an earlier time, and this section provides that the post-hire or selection of a worker does not permit charging a worker for any of the listed services.

Section 13873 identifies post-hire costs and expenses that are allowed under the Act or other federal regulation and must be identified and disclosed, as specified, to the foreign worker during recruitment.

Section 13874 provides the items of information which must be disclosed to the worker by the foreign labor contractor and the procedure and form of the disclosure which must also be provided to the Labor Commissioner, as specified. The section further provides for the form to be in both English and the primary language of the worker who is being recruited and that the employer or foreign labor contractor is responsible for translating the worker disclosure form.

OBJECTIVE AND ANTICIPATED BENEFITS OF THE PROPOSED REGULATIONS

The objective of the proposed regulations is to establish procedures, standards, and criteria necessary for the Labor Commissioner to administer the foreign labor contractor registration program and disclosure requirements in accordance with the statutory requirements provided in Chapter 21.5 (Foreign Labor Contractors) in Division 3 (Professions and Vocations Generally) of the Business and Professions Code. This chapter contains provisions requiring persons to apply for, and receive, a registration from the Labor Commissioner prior to engaging in activities related to recruiting and soliciting of foreign workers for employment in this state. Further, the chapter requires that employers who use labor contractors and the labor contractors themselves submit disclosures to a foreign worker and the Labor Commissioner, as specified. Establishing standardized information regarding the standards, criteria, and processes for registration and performing the required disclosures will inform the public of the agency’s standard procedures regarding the required registration program and provide for consistent administration of the program by the agency. Uniform procedures for submitting the required application and fingerprints under proposed time periods, as specified, will provide for efficient and effective issuance of permits to persons who seek to perform the regulated activities and will further

accomplish the objective of the legislation (SB 477) to enhance the protection of foreign workers under the federal H2b worker visa program.

DETERMINATION OF INCONSISTENCY AND/OR INCOMPATIBILITY WITH EXISTING STATE REGULATIONS

The Labor Commissioner has determined that these proposed regulations are not inconsistent or incompatible with existing state statutes or other regulations. After conducting a review for any regulations that would relate to or affect this area, the Labor Commissioner has concluded that these are the only regulations which regulate foreign labor contractors who are subject to regulation under Chapter 21.5 (Foreign Labor Contractors) of Division 3 (Professions and Vocations Generally of the Business and Professions Code.

DUPLICATION OF BUSINESS AND PROFESSIONS CODE PROVISIONS:

The proposed regulations repeat limited parts of various provisions of Business and Professions Code sections 9998, 9998.1, 9998.1.5, 9998.2, 9998.2.5, 9998.4, 9998.5, 9998.8, and 9998.10. Duplication is necessary for the purpose of clarity such that the regulations represent comprehensive and consistent description of procedural requirements, standards, and criteria for administering the permit program.

DISCLOSURES REGARDING THE PROPOSED REGULATORY ACTION

The Labor Commissioner has made the following initial determinations:

Mandate on local agencies and school districts: None.

Cost or savings to any state agency: None.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code sections 17500 through 17630: None.

Other nondiscretionary cost or savings imposed on local agencies: No fiscal impact exists because these proposed regulations create rules to conform or carry out provisions in statute.

Cost or savings in federal funding to the state: None.

Direct cost impacts on housing: None.

Cost impacts on a representative private person or business: The proposed regulations will impact (1) persons or businesses who perform the regulated activities (soliciting or recruiting workers under the 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. Estimated costs for submitting disclosures to the Labor Commissioner by registered labor contractors and for employers who use labor contractors are \$20, respectively.

The Labor Commissioner identifies a total fee of \$95 for registration which will be incurred by any person who seeks to perform recruiting or soliciting activities of specified foreign workers certified under the federal H2b worker visa program for employment in California. These persons or businesses that perform foreign labor contracting activities covered under the Act are required to register with the Labor Commissioner as set forth in Business and Professions Code section 9998 et. seq. Registration applicants will also be subject to paying vendors authorized by the Department of Justice to take or scan fingerprints for submission for checking criminal history for determining the applicant's character, competency and responsibility. The Labor Commissioner is informed that vendors who provide fingerprint scanning services charge various amounts that generally range between \$20 and \$40 for providing fingerprinting services. This cost is not required for renewal applicants who do not have to submit fingerprints.

Effect on Small Business: The proposed regulations will affect a small business which performs foreign labor contracting activities to recruit or solicit foreign workers under the federal H2b worker visa program for employment in California. The regulations will also affect a small business employer who must disclose to the Labor Commissioner their use of a foreign labor contractor to recruit workers under the federal H2b visa program.

Significant Statewide Adverse Economic Impact Directly Affecting Business, Including the Ability of California Businesses to Compete with Businesses in Other States: None.

Summary Results of the Economic Impact Analysis/Assessment

The Labor Commissioner concludes that it is (1) unlikely that the proposal will create any jobs with the State of California, except for a non-determinable number of employer businesses which may hire recruiters as employees to directly perform recruiting of foreign workers, (2) unlikely that the proposal will eliminate any jobs within the State of California, (3) unlikely that the proposal will create any new businesses within the State of California, (4) unlikely that the proposal will eliminate any existing businesses within the State of California, except for current labor contractors who recruit foreign workers who may cease operating rather than register with the Labor Commissioner, (5) unlikely that the proposal would cause the expansion of businesses currently doing business within the State of California, and (6) the proposal will enhance the safety and welfare of foreign workers temporarily employed in California under the federal H2b visas, including proper payment of wages. Accordingly, the Labor Commissioner has determined that the proposed regulatory action will not have a significant impact on business.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5(a)(13), the Labor Commissioner must determine that no reasonable alternative considered or that has otherwise been identified and

brought to the Labor Commissioner's attention would be more effective in carrying out the purpose for which the actions are proposed, or would be as effective and less burdensome to affected private persons than the proposed actions, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

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 (persons who seek to represent or perform specified services, as defined, and employers who use labor contractors, and that would ensure full compliance with the existing statutes regarding permits being implemented or made specific by the proposed regulations.

The Labor Commissioner invites interested persons to present reasonable alternatives to the proposed regulations at the scheduled hearing or during the written comment period.

PUBLIC DISCUSSIONS OF PROPOSED REGULATIONS

A text of draft proposed regulations will be made available for public comment from August 25, 2017 to October 9, 2017 on the Department of Industrial Relations' website (<https://www.dir.ca.gov/Rulemaking/DIRProposed.html>), and a public meeting for public comment will be held as noted.

AVAILABILITY OF INITIAL STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS, RULEMAKING FILE AND DOCUMENTS SUPPORTING THE RULEMAKING FILE / INTERNET ACCESS

An Initial Statement of Reasons and the text of the proposed regulations in plain English have been prepared and are available from the contact person named in this notice. The entire rulemaking file will be made available for inspection and copying at the address indicated below.

As of the date of this Notice, the rulemaking file consists of the Notice, the Initial Statement of Reasons, proposed text of the regulations, and the Economic and Fiscal Impact Statement (Form STD 399). Also included are documents relied upon in drafting the proposed regulations.

In addition, the Notice, Initial Statement of Reasons, and proposed text of regulations may be accessed and downloaded from the Department of Industrial Relations' website at www.dir.ca.gov. To access them, click on the "Laws & Regulations" button and follow the link for "Rulemaking - Proposed Regulations". There you will find all of the agencies current rulemaking proceedings. Scroll down the list to find the Foreign Labor Contractors rulemaking link.

Any interested person may inspect a copy or direct questions about the proposed regulations and any supplemental information contained in the rulemaking file. The rulemaking file will be available for inspection at the Division of Labor Standards Enforcement, 2031 Howe Avenue,

Suite 100, Sacramento, California, between 9:00 a.m. and 4:30 p.m., Monday through Friday, unless the state office is closed for a state holiday. Copies of the proposed regulations, initial statement of reasons and any information contained in the rulemaking file may be requested in writing to the contact person.

CONTACT PERSON

Nonsubstantive inquiries concerning this action, such as requests to be added to the mailing list for rulemaking notices, requests for copies of the text of the proposed regulations, the Initial Statement of Reasons, and any supplemental information contained in the rulemaking file may be requested in writing at the same address. The contact person is:

Jennifer Stevens, Legislative Analyst and Regulations Coordinator
Department of Industrial Relations
Division of Labor Standards Enforcement, Legal Unit
2031 Howe Avenue, Suite 100
Sacramento, CA 95825
E-mail: jstevens@dir.ca.gov

The telephone number of the contact person is (916) 263-1563.

CONTACT PERSON FOR SUBSTANTIVE QUESTIONS

In the event the contact person is unavailable, or to obtain responses to questions regarding the substance of the proposed regulations, inquiries should be directed to the following backup contact person:

Robert N. Villalovos, Senior Staff Attorney
Department of Industrial Relations
Division of Labor Standards Enforcement, Legal Unit
2031 Howe Avenue, Suite 100
Sacramento, CA 95825
E-mail: rvillalovos@dir.ca.gov

The telephone number of the backup contact persons is (916) 928-3117.

AVAILABILITY OF CHANGES FOLLOWING PUBLIC HEARING

If the Labor Commissioner makes changes to the proposed regulations as a result of the public hearing and public comment received, the modified text with changes clearly indicated will be made available for public comment for at least 15 days prior to the date on which the regulations are adopted.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, the Final Statement of Reasons will be available and copies may be requested from the contact person named in this notice or may be accessed on the Department of Industrial Relations' website at www.dir.ca.gov/Rulemaking/DIRProposed.html.

AUTOMATIC MAILING

A copy of this Notice, the Initial Statement of Reasons, and the text of the regulations, will automatically be sent to those interested persons on the DLSE's mailing list.

If adopted, the regulations as amended will appear in title 8, California Code of Regulations, commencing with section 11770. The text of the final regulations will also be available through the website of the Office of Administrative Law at www.oal.ca.gov.