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

ADDING SUBCHAPTER 13.5: ENFORCEMENT OF CLIENT EMPLOYER LIABILITY UNDER LABOR CODE SECTION 2810.3

ADOPTING SECTIONS 13830 THROUGH 13832 INCLUSIVE, REGULATING CLIENT EMPLOYER LIABILITY

INITIAL STATEMENT OF REASONS

INTRODUCTION

In 2014, the Legislature passed AB 1897 (Statutes 2014, Chapter 728), adding Labor Code section 2810.3, establishing that a "client employer" (specifically defined with exemptions) shall share with its "labor contractor" (specifically defined with exemptions) "all civil legal responsibility and civil liability for all workers supplied by that labor contractor," for any failure on the part of the labor contractor to pay wages as provided by law or to secure workers' compensation insurance. The Labor Commissioner, Chief of the Division of Labor Standards Enforcement (DLSE or Division), Department of Industrial Relations, is authorized pursuant to Labor Code section 2810.3(j) to adopt regulations and rules of practice and procedure necessary to administer and enforce the provisions of subdivisions (b) and (i) of section 2810.3 of the Labor Code that are within her jurisdiction. These subdivisions pertain to the statutory shared liability and the requirement that client employers and labor contractors provide the Labor Commissioner, upon request, information required to verify compliance with applicable state laws.

Application of section 2810.3 is relatively straightforward when the labor contractor provides workers to perform labor, work, or services for only one client employer. However, enforcement questions arise when the labor contractor provides the same workers to perform labor, work, or services for more than one client employer in a given workweek or workday, and fails to pay those workers as provided by law. The Labor Commissioner therefore proposes to exercise her rulemaking authority under section 2810.3(j) to adopt new Subchapter 13.5, Chapter 6, Division 1, of Title 8 of the California Code of Regulations, which contains a discrete regulation addressing the issue of multiple client employer liability.

The Labor Commissioner has determined that the proposed regulatory action is necessary for the Labor Commissioner to efficiently and equitably administer and enforce multiple client employer wage liability under Labor Code section 2810.3. Workers, labor contractors, and client employers involved in subcontracted work arrangements will benefit from clear rules regarding allocation of liability, and courts and the Labor Commissioner's Office will be able to more efficiently render liability determinations following promulgation of this regulation, thereby facilitating payment of unpaid wages, damages, and penalties owed to workers and the state.

SPECIFIC PURPOSE OF EACH SECTION – GOVERNMENT CODE § 11346.2(b)(1)

The Labor Commissioner has determined that each proposed section is reasonably necessary to carry out the 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 Section 13830 (Definitions) provides a definition of "wages" for purposes of client employer liability under Labor Code section 2810.3(a)(4). This definition is necessary because section 2810.3(a)(4) simply states that "wages" has the same meaning provided in Labor Code section 200, and includes "all sums payable to an employee or the state based upon any failure to pay wages, as provided by law." "Wages" is defined under Labor Code section 200 as "all amounts for labor performed by employees of every description," and "labor" as defined under Labor Code section 200 includes "labor, work, or service." (*See also* Labor Code section 2810.3(a)(2), defining "labor" according to section 200.) The proposed definition provides more specificity regarding the types of wages, damages, and penalties that are "sums payable to an employee or the state" under the Labor Code for labor, work, or services performed, as follows:

Subdivision (a) is necessary because it describes types of wages, including minimum, regular (contract-based), overtime, and other premium wages required by law. It also references other sections of the Labor Code that are regarded as wages, including Labor Code sections 226.2 (compensation of piece rate employees for rest and recovery periods and other nonproductive time); 226.7 (premium pay for failure to provide meal, rest, or recovery period); 227.3 (payment for vested vacation time on termination of employment); 246 (paid sick days); and 2802 (unreimbursed business expenses).

Subdivision (b) is necessary because it describes types of damages and penalties provided for by law that are due to the worker or the state upon a failure to pay wages. These include Labor Code sections 203 (penalty for willful failure to pay wages to discharged or quitting employee); 203.1 (penalty for bounced paycheck or insufficient funds to cash paycheck); 210 (penalty for failure to pay wages when due); 225.5 (penalty for unlawfully withholding wages due); 226 and 226.3 (damages and penalties relating to wage statement requirement); 248.5 (damages and penalties for paid sick leave violations); 558 (penalties for underpayment of wages due pursuant to provisions regulating hours and days of work); 1194.2 (damages for failure to pay minimum wage); and 1197.1 (damages and penalties for failure to pay minimum wage).

Subdivision (c) is necessary because it incorporates any applicable right to recover interest that may be due for any sum described in this section. Wages are ordinarily determined from a specified date (when due) and subject to recovery of interest until the wages are paid (e.g., Labor Code section 98.1(c), Civil Code section 3289).

Proposed Section 13831 (Recordkeeping) provides a recordkeeping requirement for labor contractors under Labor Code section 2810.3. This recordkeeping provision is necessary for enforcement of client employer liability, particularly where labor contractors are using the same workers to perform labor, work, or services at the worksite or premises of multiple client employers throughout the workday or workweek, and it would otherwise be difficult to identify the hours worked for each client employer in order to allocate shared liability for unpaid wages, damages, and penalties.

Subsection (a) is necessary because it explains that the recordkeeping requirements in this section are in addition to the existing recordkeeping requirements pursuant to Labor Code sections 226, 1174, and section 6 or 7 of any applicable order of the Industrial Welfare Commission (IWC), under which employers must maintain records of daily hours worked (including compensable travel time), when the employee begins and ends each work period, and meal periods. Subsection (a) is also necessary because it provides the length of time for which records must be kept. Consistent with the existing recordkeeping requirements, subsection (a) would require labor contractors to maintain the additional records specified in this section for three years. Finally, subsection (a) contains a reference to Labor Code section 2810.3(i), which already requires labor contractors to provide the Labor Commissioner with any information within its possession required to verify compliance with the law; as such, it is a necessary link to the additional recordkeeping requirements under this section.

Subdivision (a)(1) requires that labor contractors maintain accurate daily time records showing when each employee begins and ends each work period at each worksite or premises of each client employer, as well as the travel time between client employers, meal periods, and total daily hours worked. This provision is necessary for two related reasons. First, the provision specifies how the existing employer obligation to keep time records indicating the beginning and end of each work period is satisfied when labor, work, or services are performed for multiple client employers. Second, this provision is necessary for purposes of allocating liability among client employers if the labor contractor fails to pay wages as provided by law, because it establishes a standard basis to ascertain and calculate the amount of time that the employee spent performing labor, work, or services at, and traveling to, each particular client employer's worksite as a percentage of the total number of hours worked by that worker during either the workday or the workweek, such that a proportionate share of liability among different client employers can be determined. The Labor Commissioner's Office has determined that the workday or workweek, as applicable, captures the regular time frames for work performed by employees and is a standard, recognized basis in both statute and regulation for purposes of determining wages payable to an employee by his or her employer (*see, e.g.,* Labor Code section 500, IWC Wage Order 5-2017, sec. 2(U)-(V)).

Subdivision (a)(2) requires that labor contractors maintain a list of each client employer for which workers performed labor, work, or services, including the business name, address of the worksite or premises where labor, work, or services were performed, and the corresponding time period (beginning and end calendar dates) of performance. This provision is necessary as a practical matter so that the Labor Commissioner's Office has basic information regarding the labor contractor's client businesses and can enforce the shared liability provision against the identified client employers in a manner that allows for determination of an accurate proportionate share based on the amount of time worked for each respective client employer (as specified in section 13832), as appropriate.

Subsection (b) requires labor contractors to maintain the records described in subsection (a) at the labor contractor's place of business or a central location in California and make them available to the Labor Commissioner or her agents upon request for inspection and/or copying. This provision is necessary because accessibility of the records to the enforcement agency provides the Labor Commissioner's Office the ability to promptly and efficiently determine how to allocate shared

liability among the client employers with the labor contractor. This proposed section is not duplicative of the information-provision requirement in the statute (section 2810.3(i)) because it specifies where the records must be kept and to whom they should be provided for inspection and/or copying. In specifying the location for keeping the records, this subsection is similar to existing requirements that records be kept at the place of employment or central location in California (*see e.g.*, Labor Code section 226(a), IWC Wage Order 5-2017, sec. 7(C)), with a modification that the alternative location refer to "the labor contractor's place of business" instead of the "place of employment." Absent this modification, this requirement could be misinterpreted to mean the location where labor, work, or services are performed (at a client's employer's business), which may vary; as a result, an employee's time and payroll records could be located at several different places instead of at a centralized location, and such piecemeal records would not be readily accessible for the Labor Commissioner.

Subsection (c) provides that a failure to produce records upon request by the Labor Commissioner will be subject to the provisions of Labor Code section 1174.1. This provision is necessary to incorporate the existing recordkeeping enforcement mechanism under section 1174.1 – which is applicable to other payroll, time and employment records employers are regularly required by law to maintain, and which includes evidentiary sanctions for failure to produce required records that may be imposed at any administrative hearing or writ proceeding contesting a citation. This type of recordkeeping enforcement mechanism is necessary to ensure that the Labor Commissioner can access required records, and to maintain the efficiency and fairness of administrative proceedings.

Proposed Section 13832 (Methods for Determining Liability Among Multiple Client Employers) provides several methods for allocating shared liability where a labor contractor has provided the same workers to perform labor, work, or services at the worksite or premises of more than one client employer in a workweek or workday and has failed to pay the workers' wages as provided by law. Application of shared liability under Labor Code section 2810.3 is relatively straightforward when either the labor contractor provides workers to perform labor, work, or services for only one client employer, or when the same labor, work, or services are provided by the workers at a single worksite simultaneously to more than one client employer. In such cases, the labor contractor and client employer(s) would be jointly and severally liable for the entire amount of wages, damages, and penalties owed to the workers and the state. However, enforcement questions arise when the labor contractor provides the same workers to perform labor, work, or services for more than one client employer, at each client employer's respective worksite or premises, in a given workweek or workday – and thus when the labor, work, or services performed are split among multiple client employers. This proposed section is necessary to enforce the statute in the foregoing situation when the labor contractor fails to pay the workers as provided by law, because it establishes a means of allocating shared liability among multiple client employers.

The Labor Commissioner's Office considered various ways to carry out the statutory mandate that client employers "shall share with a labor contractor *all* civil legal responsibility and civil liability *for all workers* supplied by that labor contractor" (Labor Code section 2810.3(b), emphasis added) – when the same workers perform labor, work, or services for multiple client employers in a given workday or workweek. Based on the broad statutory language requiring shared liability, one approach to ensure client employers share "all" legal and civil liability "for all workers" would be

to hold all defendants jointly and severally liable for the full amount of wages, damages, and penalties owed due to any failure to pay workers. Under this approach, because each client employer for whom labor, work, or services were performed could be viewed as having contributed to the total number of hours worked by a worker in a given day or week, each and every client employer would be held jointly and severally liable with all other client employers and the labor contractor for 100% of all wages, damages, and penalties owed for that day or week – including as to work that was not performed for the client employer but was performed for the other client employer(s). Any apportionment of liability among client employers under this approach would be left to the client employers and the labor contractor to resolve on their own. Indeed, section 2810.3(g) states that a client employer is not prohibited from "establishing, exercising, or enforcing by contract any otherwise lawful remedies against a labor contractor for liability created by acts of a labor contractor."

However, it may be difficult to reconcile the full sweep of this approach with the statutory definitions under section 2810.3 that tie client employer liability to labor, work, or services performed on the premises or worksite of the client employer. As explained more fully below, allocation of multiple client employer liability based on proportionate share, on the other hand, would be determined by the relative amount of time spent by the worker performing labor, work, or services at the worksite or premises of each client employer.

Alternatively, the Labor Commissioner's Office could have chosen not to engage in rulemaking, and could continue to determine shared liability under Labor Code section 2810.3 on a case-by-case basis, allocating liability among multiple client employers as appropriate under the circumstances of each case. However, this would leave both workers and potentially liable businesses uncertain about how shared liability would be imposed in any particular case. Therefore, the Labor Commissioner has determined that allowing for public input through notice and comment as the agency creates a uniform regulatory approach is preferable to case-by-case adjudication.

The approach that the Labor Commissioner's Office decided to propose in this regulation is aimed at providing clear rules for allocating shared liability among multiple client employers while taking into account that the workers only performed labor, work, or services at each of the multiple client employers' worksites or premises for a portion of the overall time period for which there is unpaid wage liability. The regulation focuses primarily on allocating liability of each respective client employer based on a determination of each client employer's proportionate share. The Labor Commissioner's Office believes that the methods provided in this section are necessary to establish the most reasonable and equitable means of allocating the shared statutory liability.

As the preamble to subsection (a) explains, the shared statutory liability for wages, damages, and penalties must be allocated in some fashion among multiple client employers. The proposed regulation allocating liability based on a proportionate share mirrors the decades-old regulations that the Labor Commissioner adopted to administer proportionate share liability of garment manufacturers under Labor Code section 2670, *et seq.* (*see* 8 CCR 13630, *et seq.*). For example, the regulations here would similarly state that records maintained by the labor contractor may be used to determine proportionate share but if any necessary records are not produced, incomplete, inaccurate, or insufficient, the Labor Commissioner may rely on any other available evidence; just

and reasonable inferences about proportionate share may be made based on worker testimony; and if records, any other available evidence, and worker testimony are deemed insufficient to determine proportionate share, then the full amount of liability for wages, damages and penalties will be apportioned equally among all client employers.

Subsection (a) provides that the allocation of shared liability may be based on any of the methods described in this section, at the discretion of the Labor Commissioner in an administrative proceeding or a court in a civil action, as appropriate according to the circumstances of the case. This level of discretion is necessary because in some situations it will be more appropriate to apportion liability based on the workday, whereas other situations will lend themselves to a workweek allocation, and thus, the applicable method can only be determined under the particular facts in a case. In addition, records may not be available that can be used to accurately apportion liability, in which case other methods may be used.

Subdivision (a)(1) provides a method of calculating each client employer's proportionate share of liability based on the hours worked by the worker per workweek at, and any travel time to, the worksite or premises of each client employer as a percentage of the total number of hours worked by the worker for the labor contractor during that workweek. This provision is necessary because in some multiple client employer situations, it will be most efficient or equitable to allocate liability based on the workweek, including where sufficient records can be used to calculate the proportionate liability based on work at locations/worksites of different client employers. As mentioned above, the workweek is an established timeframe for purposes of determining wages payable to an employee by his or her employer (*see, e.g.,* Labor Code section 500, IWC Wage Order 5-2017, sec. 2(U)-(V)). Where the labor contractor's records indicate, for example, that the same workers performed labor, work, or services at the worksite or premises of different client employers on different days of a workweek, the workweek method may be the most fair and direct way of apportioning liability.

Subdivision (a)(2) provides a method of calculating each client employer's proportionate share of liability based on the hours worked by the worker per workday at, and any travel time to, the worksite or premises of each client employer as a percentage of the total number of hours worked by the worker for the labor contractor during that workday. This provision is necessary because in some multiple client employer situations, it will be most efficient or equitable to allocate liability based on the workday. As mentioned above, the workday is also an established timeframe for purposes of determining wages payable to an employee by his or her employer (*see, e.g.,* Labor Code section 500, IWC Wage Order 5-2017, sec. 2(U)-(V)). Where the labor contractor's records indicate, for example, that the same workers performed labor, work, or services at the worksite or premises of multiple client employers throughout a given workday, in some cases the workday method may be the most fair and direct way of apportioning liability.

Subdivision (a)(3) provides a method for calculating proportionate share liability if records maintained by the labor contractor are insufficient to determine such allocations, whereby any other available evidence may be used, including reliable evidence provided by a client employer. In these circumstances, just and reasonable inferences may be made based on worker testimony, including any estimates, as to the amount of time spent traveling between

and performing labor, work, or services at the worksite or premises of each client employer. This provision is necessary because, in the Labor Commissioner's enforcement experience, time and payroll records are frequently non-existent, inaccurate, incomplete, or otherwise insufficient. Client employers may have records that can help to establish their proportionate share, but client employers are not required to maintain or produce such records. Judicial opinions and public policy direct against penalizing an employee for an inability to prove the precise extent of uncompensated work; denying the employee recovery on that ground functions to encourage an employer's failure to keep proper records as required by law and allows the employer to keep the benefits of an employee's labor without paying due compensation. (*See Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727.) The *Hernandez* court established that where an employer fails to maintain records as required by law, reasonable inferences as to hours worked can be drawn from employee testimony, even if it is imprecise and only allows for estimates. Applying this existing rule under Labor Code section 2810.3 ensures that client employers share liability to the same extent as the labor contractor employer who is required to maintain records of hours worked as well as information regarding work performed for multiple client businesses (see Section 13831).

Subdivision (a)(4) provides a method for allocating liability if records, worker testimony, and any other available evidence are insufficient to determine each client employer's proportionate share of liability, whereby the full amount of liability will be apportioned equally among all known client employers. This provision is necessary because, in the Labor Commissioner's enforcement experience, sufficient evidence to determine proportionate share may be lacking in any given case, even when multiple client employer worksites are known. This method ensures that the central objective under Labor Code section 2810.3 – to ensure shared liability of the labor contractor and its client businesses for wages, damages, and penalties due to workers – will be met and will not be undercut if information is insufficient to allocate proportionate liability among multiple client employers. Liability that is allocated under this subdivision would not preclude any one of the client employers from establishing, exercising, or enforcing by contract any otherwise lawful remedies (e.g., indemnity) against a labor contractor, pursuant to Labor Code section 2810.3(g).

Anticipated Benefits, Government Code § 11346.2(b)(1)

The proposed regulation facilitates payment of unpaid wages, damages, and penalties due to workers and the state under the statutory shared liability provision in Labor Code section 2810.3 by providing clarity regarding how this provision will be enforced when the same workers perform labor, work, or services at the worksite or premises of more than one client employer in a given workweek or workday. Workers, labor contractors, and client employers involved in subcontracted work arrangements will benefit from clear rules regarding allocation of liability, and courts and the Labor Commissioner's Office will be able to more efficiently render liability determinations following promulgation of this regulation.

Economic Impact Assessment, Government Code § 11346.2(b)(2)

Because this regulation is not a major regulation, the economic impact assessment required by subdivision (b) of Section 11346.3 is provided below.

Sources Relied Upon, Government Code § 11346.2(b)(3)

None.

Reasonable Alternatives Rejected, Government Code § 11346.2(b)(4)

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 and businesses that use labor contractors).

Evidence Regarding Economic Impact on Business, Government Code § 11346.2(b)(5)

The Labor Commissioner's Office has determined that the proposal will not have a significant adverse economic impact on business based on analysis of the costs of compliance.

An estimated 585 businesses will be impacted by the proposed recordkeeping provision. This figure is derived from Employment Development Department (EDD) data for the North American Industry Classification System code (NAICS) or industry code associated with the contract staffing services industry (NAICS 561320), and the assumption that 95% of such businesses have multiple client employers.[1]

California Government Code section 11346.3 defines small businesses as businesses that are independently owned and operated, not dominant in their field of operation, and have fewer than 100 employees. EDD reports that 95.8% of the businesses in California's Administrative and Support Services industry (NAICS 561) have fewer than 100 employees.[2] We assume that a similar percentage of small businesses in the contract staffing industry will be impacted, thus there are 560 (585 x 95.8%) small businesses impacted and 25 typical businesses.

Estimated costs

The proposed recordkeeping regulation will require that types of records already required to be kept or ordinarily kept by labor contractors to track work performed for clients (employee hours and client employer information) be maintained specifically. The costs associated with this recordkeeping requirement are first-year costs to create a system to maintain records. We assume that the recordkeeping requirements will require 3 hours of programming time for each

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[1] Accessed 6/29/18: http://www.labormarketinfo.edd.ca.gov/aspdotnet/databrowsing/empResults.aspx?menuChoice=emp&searchType=Industry&keyword=561320&naicscode4=5613&naicscode6=561320&geogArea=0601000000

[2] Available at: http://www.labormarketinfo.edd.ca.gov/LMID/Size_of_Business_Data.html

typical business. Based on an hourly rate of $46.28 for programmers in California, the total estimated initial cost per typical business is $138.84 ($46.28 x 3).[3]

The creation or elimination of jobs within the state, Government Code § 11346.3(b)(1)(A)

The Labor Commissioner's Office does not anticipate the creation or elimination of jobs within the state attributed to this proposal.

The creation of new businesses or the elimination of existing businesses within the state, Government Code § 11346.3(b)(1)(B)

The costs and benefits will be borne by existing businesses and will not create or eliminate businesses.

The expansion of businesses currently doing business within the state, Government Code § 11346.3(b)(1)(C)

There is no anticipated expansion of businesses currently doing business within the state attributed to this proposal.

The benefits of the regulation to the health and welfare of California residents, worker safety, and the state's environment, Government Code § 11346.3(b)(1)(D)

The proposed regulation facilitates payment of unpaid wages, damages and penalties due to workers and the state under the statutory shared liability provision in Labor Code section 2810.3 by providing clarity regarding how this provision will be enforced when the same workers perform labor, work, or services at the worksite or premises of more than one client employer in a given workweek or workday. Workers, labor contractors, and client employers involved in subcontracted work arrangements will benefit from clear rules regarding allocation of liability, and courts and the Labor Commissioner's Office will be able to more efficiently render liability determinations following promulgation of this regulation. Thus, the regulatory action furthers the mission of the Labor Commissioner' Office, which is to ensure a just day's pay to every worker and promote economic justice. In addition, the proposed regulation increases transparency in business and government by setting forth rules for allocating liability. Finally, the proposed action indirectly prevents discrimination, and promotes fairness and social equity.

[3] Bureau of Labor Statistics on programmer hourly rates in California based on May 2017 data. Accessed 6/29/18: https://www.bls.gov/oes/current/oes151131.htm