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

FINAL STATEMENT OF REASONS

UPDATE OF INITIAL STATEMENT OF REASONS

Pursuant to Government Code Section 11346.9(d), the Labor Commissioner incorporates the Initial Statement of Reasons prepared in this rulemaking.

MODIFICATIONS RESULTING FROM THE 45-DAY PUBLIC COMMENT PERIOD (March 8, 2019 – April 22, 2019)

On April 26, 2019, the Labor Commissioner held a public hearing to consider revisions to Title 8 of the California Code of Regulations, by adding new subchapter 13.5, Section 13830 through 13832 regulating client employer liability. In addition to this hearing, the Labor Commissioner received written comments on the initial proposed text. The following sections were modified following the initial public comment period and circulated for additional comment: 13830(a), (b); 13831(a), (a)(1); and 13832(a)(1), (a)(2), and (a)(3). The Labor Commissioner developed the following modifications.

Section	Initial Proposed Text	Modifications	Justification
13830(a)	Any minimum, regular, overtime or other premium wages that are due to the worker, including any wages due under Labor Code sections 226.2, 226.7, 227.3, 246, and 2802;	Any minimum, regular, overtime or other premium wages that are due to the worker, including **but not limited to** any wages due under Labor Code sections 226.2, 226.7, 227.3, 246, and 2802;	The modification is necessary to clarify that examples listed of wages that could be encompassed within a claim under Labor Code Section 2810.3 are not exhaustive.
13830(b)	Any damages or penalties that are due to the worker or the state based upon any failure to pay wages, as provided by law, including those set forth under Labor Code sections 203, 203.1, 210, 225.5, 226, 226.3, 248.5, 558, 1194.2, and 1197.1;	Any damages or penalties that are due to the worker or the state based upon any failure to pay wages, as provided by law, including **but not limited to** those set forth under Labor Code sections 203, 203.1, 210, 225.5, 226, 226.3, 248.5, 558, 1194.2, and 1197.1;	The modification is necessary to clarify that examples listed of damages and penalties that could be encompassed within a claim under Labor Code Section 2810.3 are not exhaustive.

Section	Initial Proposed Text	Modifications	Justification
13831(a)	In addition to the recordkeeping obligations of an employer under Labor Code sections 226 and 1174, and Section 6 or 7 ("Records") of any applicable order of the Industrial Welfare Commission, as well as Labor Code section 2810.3(i), a labor contractor shall keep the following records for a period of no less than three years:	In addition to the recordkeeping obligations of an employer**, including but not limited to those** under Labor Code sections 226 and 1174, and Section 6 or 7 ("Records") of any applicable order of the Industrial Welfare Commission, as well as Labor Code section 2810.3(i), a labor contractor shall keep the following records for a period of no less than three years:	The modification is necessary to clarify that examples listed of other recordkeeping requirements required by law are not exhaustive and that this regulation does not override or replace any other recordkeeping requirements.
13831(a)(1)	Accurate daily time records showing when each employee begins and ends each work period at each and every worksite or premises of the client employer where labor, work, or services are performed by the employee. Travel time between client employer worksites or premises, meal periods and total daily hours worked shall also be recorded.	Accurate daily time records showing when each employee begins and ends each work period at each and every worksite or premises of the client employer where labor, work, or services are performed by the employee. **Compensable travel time to and from the first and last worksite, T**~~t~~travel time between client employer worksites or premises, meal periods and total daily hours worked shall also be recorded.	The proposed regulation could have been read to limit liability and record keeping requirements for a labor contractor or client employer for compensable travel time to and from the first and last work location. Accordingly, the Labor Commissioner determined that it is necessary to clarify that a labor contractor must keep accurate daily time records of compensable travel time, including but not limited to compensable travel time to and from the first and last worksite and travel time between client employers,

Section	Initial Proposed Text	Modifications	Justification
13832(a)(1)	Hours Worked Per Workweek by the Worker for Each Client Employer. The amount of time that the worker spent performing labor, work, or services at the worksite or premises of each client employer, and travel time between client employer worksites (if any), during the workweek, shall be calculated as a percentage of the total number of hours worked by the worker for the labor contractor during that workweek. The resulting percentage for each client employer shall be its share of liability as applied to the full amount of all wages, damages, and penalties owed by the labor contractor for that workweek.	Hours Worked Per Workweek by the Worker for Each Client Employer. The amount of time that the worker spent performing labor, work, or services at the worksite or premises of each client employer, ~~**and**~~ **including compensable** travel time **to and from the first and last worksite, and** between client employer worksites (if any), during the workweek, shall be calculated as a percentage of the total number of hours worked by the worker for the labor contractor during that workweek. The resulting percentage for each client employer shall be its share of liability as applied to the full amount of all wages, damages, and penalties owed by the labor contractor for that workweek.	The proposed regulation could have been read to limit liability for a labor contractor or client employer for compensable travel time to and from the first and last work location. Accordingly, the Labor Commissioner determined that it is necessary to clarify that compensable travel time, including but not limited to an apportionment for compensable travel time to and from the first and last worksite and travel time between client employers, shall be included when determining the percentage of time a worker spent performing labor, work, or services for a client employer.

Section	Initial Proposed Text	Modifications	Justification
13832(a)(2)	Hours Worked Per Workday by the Worker for Each Client Employer. The amount of time that the worker spent performing labor, work, or services at the worksite or premises of each client employer and travel time between client employer worksites (if any), during the workday, shall be calculated as a percentage of the total number of hours worked by the worker for the labor contractor during that workday. The resulting percentage for each client employer shall be its share of liability as applied to the full amount of all wages, damages, and penalties owed by the labor contractor for that workday.	Hours Worked Per Workday by the Worker for Each Client Employer. The amount of time that the worker spent performing labor, work, or services at the worksite or premises of each client employer, ~~**and**~~ **including compensable** travel time **to and from the first and last worksite, and** between client employer worksites (if any), during the workday, shall be calculated as a percentage of the total number of hours worked by the worker for the labor contractor during that workday. The resulting percentage for each client employer shall be its share of liability as applied to the full amount of all wages, damages, and penalties owed by the labor contractor for that workday.	The proposed regulation could have been read to limit liability for a labor contractor or client employer for compensable travel time to and from the first and last work location. Accordingly, the Labor Commissioner determined that it is necessary to clarify that compensable travel time, including but not limited to an apportionment for compensable travel time to and from the first and last worksite and travel time between client employers, shall be included when determining the percentage of time a worker spent performing labor, work, or services for a client employer.
13832(a)(3)	Worker Testimony in the Absence of Accurate Records.	Worker Testimony **to Determine Allocation** in the Absence of Accurate Records.	This modification is necessary to clarify that, absent accurate records, just and reasonable inferences from worker testimony may be used to determine allocation among client employers by workweek or workday. It also underscores the requirement that equal apportionment may only be made if there are no accurate records and if other evidence, including worker testimony, is deemed insufficient.

Section	Initial Proposed Text	Modifications	Justification
13832(a)(3)	If any necessary records required in section 13831 are not produced, incomplete, inaccurate, or insufficient, the Labor Commissioner or a court may rely on any other available evidence, including reliable evidence from client employers. Just and reasonable inferences about the allocation may be made based on worker testimony, including any estimates, as to time spent traveling between and performing labor, work, or services at the worksite or premises of each client employer.	If any necessary records required in section 13831 are not produced, incomplete, inaccurate, or insufficient, the Labor Commissioner or a court may rely on any other available evidence, including reliable evidence from client employers. Just and reasonable inferences about the allocation may be made based on worker testimony, including any estimates, as to **travel time and** time spent ~~**traveling between and**~~ performing labor, work, or services at the worksite or premises of each client employer.	The proposed regulation could have been read to exclude the use of worker testimony to determine compensable travel time to and from the first and last work location. This modification is necessary to clarify that just and reasonable inferences about the allocation of all travel time between client employers may be made based on worker testimony.

LOCAL MANDATE DETERMINATION

The proposed regulations do not impose any mandate on local agencies or school districts.

ADDITIONAL DOCUMENTS RELIED UPON

None.

ADDITIONAL DOCUMENTS INCORPORATED BY REFERENCE

None.

ALTERNATIVES THAT WOULD LESS ADVERSE ECONOMIC IMPACT ON SMALL BUSINESS

No alternatives were proposed to the Labor Commissioner that would lessen any adverse economic impact on small businesses.

ALTERNATIVES DETERMINATION

The Labor Commissioner has determined that no alternative considered by the Labor Commissioner would be (1) more effective in carrying out the purpose for which the action is proposed, (2) as effective as and less burdensome to affected private persons than the adopted action, or (3) would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. The new sections adopted by the

Labor Commissioner are the only regulatory provisions identified by the agency that accomplish the goal of setting forth clear rules for enforcement of multiple client employer liability, and no alternatives were proposed by the public that would have the same desired regulatory effect.

NECESSITY DETERMINATION, GOVERNMENT CODE § 11346.3(d)

The Division finds that it is necessary for the health, safety, and welfare of the people of the state that the record-keeping requirements of section 13831 apply to business.

ADDITIONAL ANTICIPATED BENEFITS, GOVERNMENT CODE § 11346.2(b)(1)

The proposed regulation facilitates the payment of unpaid wages, damages, and penalties due to workers who have been deprived of their lawful wages for work performed. As a result, it promotes the safety and economic security and health of workers and their families, as it enables them to afford the basic necessities of daily living including food, rent, utilities, and medical care. Providing lawful wages to workers also ensures fairness and equity, as it corrects unlawful acts that benefit non-compliant hiring entities, cause financial deprivation and hardship for workers, and create unfair competition for law-abiding businesses.

More specifically, within the proposed regulation the provisions regarding record-keeping requirements will promote fairness and social equity for workers and law-abiding employers. Clarifying the record-keeping requirement for labor contractors will ensure the transparency necessary so that workers can verify the hours they have worked, their pay, and to which client employers those hours should be allocated. For law-abiding employers, the regulation will promote fairness by clarifying which records they are required to maintain.

Additionally, the proposed regulations defining wages and how liability will be divided among multiple client employers involved in subcontracted work arrangements will promote fairness and transparency by creating clear rules for courts and the Labor Commissioner to follow. The set methodology for allocating this liability will also ensure fairness and efficiency through consistent application of the law for workers, labor contractors, and client employers.

ADDITIONAL 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 the payment of unpaid wages, damages, and penalties due to workers who have been deprived of their lawful wages for work performed. As a result, it promotes the safety, economic security, health and welfare of California workers and their families, as it enables them to afford the basic necessities of daily living including food, rent, utilities, and medical care. Ensuring that lawful wages due are paid to workers also promotes the health of the state's economy as it corrects unlawful acts that benefit non-compliant hiring entities and create unfair competition for law-abiding businesses.

The additional clarity provided in this regulation regarding which wages are owed, how records must be kept to ensure proper payment under the shared liability provisions under Labor Code

section 2810.3, and how liability will be allocated among multiple client employers also will protect the welfare of California residents by providing transparency to workers and businesses about the requirements of the law and allowing courts and the Labor Commissioner to decide these claims fairly and efficiently.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE INITIAL NOTICE PERIOD OF MARCH 8, 2019 THROUGH APRIL 22, 2019

Comments are organized by regulation section. Written 45-day comments are identified by assigned number of commenter and assigned number within the comment letter (e.g., 3.1, 3.2). Public hearing comments are identified as "PH" and are listed as "45" to indicate the 45-day comment period, followed by the assigned number within the public hearing transcript (e.g., PH 45.1, PH 45.2).

Section 13830- Definition of "Wages"

Section 13830 defines wages as pertains to liability under Labor Code section 2810.3 and includes damages or penalties that are due to the worker or the state based upon any failure to pay and applicable interest due. Labor Code section 2810.3 defines wages to have the same meaning provided by Labor Code section 200 and all sums payable to an employee or the state based upon any failure to pay wages, as provided by law. Labor Code section 200 defines wages to include all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation.

Comment 2.1

Commenter states that the definition expands and deviates from the definition of wages provided under Labor Code section 2810.3 by greatly expanding the definition of wages. Commenter suggests removing subsection (b) and subsection (c) from the definition of wages.

Response to Comment 2.1

The Labor Commissioner declines to adopt the proposed modification because subsections (b) and (c) are components of the definition of "wages" under section 2810.3 and these aspects of the definition cannot be read out of the statute, as the commenter suggests. Specifically, unlike the definition of "wages" under Labor Code section 200, which pertains solely to "all amounts for labor performed," the plain language of the definition of wages under Labor Code section 2810.3 includes the wages encompassed under section 200 *and also* "all sums payable to an employee or the state based upon any failure to pay wages, as provided by law." Subsection (a) describes the types of wages that would fall under the statute and subsections (b) and (c) describe the types of damages, penalties, and interest that are "payable to an employee or the state based upon the failure to pay wages." The proposed modification would fail to provide appropriate clarity to employees, labor contractors, or client employers regarding the scope of potential liability under the statute.

Comment 3.1, 3.2, PH 45.1, PH 45.2

Commenters are concerned that use of the word "including" without the phrase "but not limited to" in subsections (a) and (b) suggests this is an exhaustive list of the types of wages, damages, and penalties that would be encompassed within a claim under Labor Code section 2810.3. Commenter suggests adding the phrase "but not limited to" to both subsections (a) and (b) in order

to capture all types of wages due including any that might apply if the legislature enacted additional categories of wages due.

Response to comments 3.1, 3.2, PH 45.1, PH 45.2

The Labor Commissioner accepted this comment and modified the text in subsections (a) and (b) to clarify that examples listed of wages, damages, and penalties that could be encompassed within a claim under Labor Code 2810.3 are not exhaustive. The regulations include the most common examples to provide additional specificity for employees, labor contractors, and client employers, but the examples provided do not exclude any claim for wages, damages, or penalties pursuant to current or future law.

Section 13831- Recordkeeping

Section 13831 sets forth recordkeeping requirements for labor contractors for purposes of enforcement of liability under Labor Code section 2810.3.

Comments 3.3, 4.1, 5.1, PH 45.3

Commenters request that client employers also be subject to the recordkeeping requirements in proposed section 13831(a).

Response to comments 3.3, 4.1, 5.1, PH 45.3

The Labor Commissioner has considered the comment and suggestion, but declines to adopt this modification. Employers have an existing obligation to keep accurate records of employee hours, and, under these regulations, a labor contractor also must keep additional records of the work periods at each worksite, among other things. The Labor Commissioner understands commenters' concern that placing the burden solely on the labor contractor to keep records that pertain to work performed for multiple client employers may not always result in the availability of all such necessary records. As explained in the Initial Statement of Reasons, in the Labor Commissioner's enforcement experience, time and payroll records are frequently non-existent, inaccurate, incomplete, or otherwise insufficient. However, the default rules set by existing law and these regulations account for this situation. Specifically, where an employer fails to maintain records 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. (*See Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727.) When assessing client employer liability, the *Hernandez* rule will also apply to employee testimony regarding where, when, and for which client employer an employee worked if a labor contractor fails to keep the records required under this section. In such circumstances, client employers can also submit evidence regarding the time periods when a labor contractors' workers performed work at the worksite or premises of the client employer.

Comment 3.4, PH 45.4

Commenter suggests that Labor Code section 1695.55 regarding recordkeeping requirements for farm labor contractors be added to subsection (a) in order to clarify that this adds to and preserves the record keeping requirements for farm labor contractors under that section.

Response to comments 3.4, PH 45.4
The Labor Commissioner considered this comment and modified subsection (a) to clarify that the recordkeeping requirements listed are not exhaustive. The recordkeeping requirement in Section 13831 is intended to be in addition to any other recordkeeping required by law, which includes, for farm labor contractors, the recordkeeping requirements in Labor Code section 1695.55.

Comment 3.5, PH 45.5
Commenter suggests the recordkeeping requirements in subsection (a)(1) pertaining to travel time be expanded to include not only travel between client employer worksites to also include all compensable travel time and provides suggested language as follows:

> "All travel time including compensable travel time to and from the first and last work location and travel time between client employers worksites or premises, meal periods and total daily hours shall also be recorded."

Response to comments 3.4, PH 45.4
The Labor Commissioner accepted this comment and modified subsection (a)(1) to clarify that a labor contractor must record all compensable travel time to and from the first and last worksite in addition to travel time between the client employer worksites and premises. This addition to the recordkeeping provision will facilitate enforcement of shared liability for unpaid wages under Labor Code section 2810.3.

Comment 5.1
In addition to suggesting that client employers be required to maintain the records specified in subsection (a)(1) commenter suggests requiring the client employer to "submit to the contractor the information specified in subsection (a)(1)."

Response to comment 5.1
The Labor Commissioner declines to adopt this recommendation, as per the response to comments 3.3, 4.1, and PH 45.3.

Section 13832- Determination of Liability Among Multiple Client Employers
Section 13832 establishes methods for determining allocation of liability among multiple client employers where a labor contractor provides the same worker(s) to perform labor, work, or services at the premises or worksite of more than one client employer in a workweek or workday.

Comment 2.2
Commenter contends that the definitions for workday and workweek in subsections (a)(1) and (a)(2) lack clarity questioning whether the workday or workweek would be defined according to the labor contractor, client employer, or worker. Commenter suggests amending this section to clarify that workday and workweek is defined by the labor contractor.

Response to comment 2.2
The Labor Commissioner considered the comment and suggestion, but declines to incorporate it. These terms are not a source of confusion, as the Industrial Welfare Commission wage orders as well as Labor Code section 500 define them clearly. Moreover, the Labor Commissioner has long-

standing guidance on how these terms are interpreted. *See, e.g.,* Opinion Letter 1993.12.09, 1986.12.01.

Comment 2.3
Subdivision (a)(3) establishes worker testimony as one of the methods for determining allocation of liability among multiple client employers where a labor contractor provides the same worker(s) to perform labor, work, or services at the premises or worksite of more than one client employer and states that "If any necessary records required in section 13831 are not produced, incomplete, inaccurate, or insufficient, the Labor Commissioner or a court may rely on any other available evidence, including reliable evidence from client employers." Commenter is concerned that there is no explanation or definition for what is considered "reliable evidence," questions whether this means evidence provided by the client employer, and requests that the proposed regulations provide guidance regarding the standards to determine if evidence is "reliable evidence."

Response to comment 2.3
The Labor Commissioner has considered the comment and suggestion, but declines to incorporate it. Judicial officers and hearing officers routinely consider the credibility of witnesses and reliability of evidence. The Labor Commissioner declines to introduce a separate standard of "reliability" that applies in only this context. Additionally, despite the commenter's confusion on this matter, the regulatory text already states explicitly that "reliable evidence" may be provided by client employers.

Comment 3.6, PH 45.6
Commenter is concerned that the language in subsection (a)(1) limits liability for a labor contractor or client employer regarding travel time between client employer worksites and suggests adding "all compensable travel time to and from the first and last work location" to the types of amounts due that would be apportioned between multiple client employers and provides the following suggested language:

> "The amount of time that the worker spent performing labor, work, or services at the worksite or premises of each client employer, compensable travel time to and from the first and last work location and travel time between client employer worksites (if any), during the…"

Response to comment 3.6, PH 45.6
The Labor Commissioner has considered the comment and suggestion, and agrees that the proposed regulation could have been read to limit liability for a labor contractor or client employer for compensable travel time to and from the first and last work location. (*See, e.g., Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575.) Accordingly, the Labor Commissioner determined that it is necessary to clarify that, under subsections (a)(1) and (a)(2), compensable travel time, including but not limited to an apportionment for compensable travel time to and from the first and last worksite and travel time between client employers, shall be included when determining the percentage of time a worker spent performing labor, work, or services for a client employer.

Comment 3.7, PH 45.7

Commenter is concerned that the language in subsection (a)(4) limits liability for a labor contractor or client employer regarding travel time between client employer worksites where worker testimony is used to determine allocation of liability and suggests adding worker testimony about compensable travel time to subsection (a)(4) and provides the following suggested language:

> "Just and reasonable inferences about the allocation may be made based on worker testimony, including any estimates, as to compensable travel time to and from the first and last work location and time spent traveling between and performing labor, work, or services at the worksite or premises of each client employer."

Response to comment 3.7, PH 45.7
The requested language change within this comment pertains to subsection (a)(3). Consistent with the reasons stated above, and in response to the comment, the Labor Commissioner has modified subsection (a)(3) to state that, in the absence of records, just and reasonable inferences can be made based on a worker's estimates as to any travel time as well as time spent performing labor, work, or services at the worksite or premises of the client employer.

Comment 5.2
Commenter objects to adopting any rule that apportions liability among client employers because client employers are in a better position that workers to recover from all responsible actors and can address indemnification against one another in contract language with the contractor.

Response to comment 5.2
The Labor Commissioner carefully considered the approach suggested by the commentator. For the reasons described in detail in the Initial Statement of Reasons, the Labor Commissioner declines to adopt this approach. (*See* Initial Statement of Reasons, pp. 5-6.) Briefly, the Labor Commissioner determined that 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.

Comment 5.3
Commenter is concerned that this section provides no opportunity to vet client employers for legitimate separation and independence pointing out that unscrupulous employers may create shell corporations in order to limit liability and recommends that this section require client employers to show separation of owners, directors, officers, and managing agents. The commenter suggests the regulations draw from successor liability in Labor Code section 238(e) for making determinations of legitimate separation and independence.

Response to Comment 5.3
The Labor Commissioner has considered the comment and suggestion, but declines to incorporate it. The purpose of this discrete set of regulations is to provide a set of clear rules to workers, labor contractors, and client employers regarding potential liability under Labor Code section 2810.3, particularly in cases with multiple client employers. The concern regarding shell corporations is beyond the scope of this regulatory proposal.

Comment 5.4

Commenter observes that the language of subsection (a)(4) is ambiguous and may be interpreted to mean that if insufficient evidence exists under subsections (a)(1) or (a)(2) then the Department should split liability evenly among client employers even if an even split contradicts worker testimony under subsection (3). Commenter recommends that the language clarify that insufficient evidence of all three methods of determining hours worked across client employers triggers equal apportionment under subsection (a)(4).

Response to comment 5.4

The Labor Commissioner has considered the recommendation but declines to adopt it. Subsection (a)(4) allows for equal apportionment only "[i]f records described in section 13821, any other available evidence, *and worker testimony* are deemed insufficient to determine allocation of liability based on subdivision (1) or (2) . . . ." (emphasis added). The plain language of the regulation therefore does require consideration of worker testimony under subsection (a)(3) to try and apportion liability by the methods in subsection (a)(1) or (a)(2) before resorting to equal apportionment of wages, damages, and penalties amongst known client employers. In order to highlight this aspect of subsection (a)(3) and to provide additional clarity, the Labor Commissioner added "to Determine Allocation" in the heading of subsection (a)(3), "Worker Testimony to Determine Allocation in the Absence of Accurate Records."

COMMENTS RECEIVED DURING THE PERIOD THE MODIFIED TEXT WAS AVAILABLE TO THE PUBLIC

The modified text was made available to the public for comment from June 10, 2019 through June 25, 2019. The Labor Commissioner did not receive any comments on the modified text.