STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
Division of Labor Standards Enforcement
Foreign Labor Contractor Registration

SUPPLEMENT TO INITIAL STATEMENT OF REASONS

The Labor Commissioner supplements the Initial Statement of Reasons with the following to address and demonstrate the specific purpose and reasonable necessity (Government Code 11346.2(b)(1)) for each of the proposed modifications to sections, as specified.

Article 1 – Scope, Coverage and Definitions

Section 13850 provides definitions that more specifically describe the types of activities and actors who are subject to regulated activities applicable to the foreign labor contractor registration program.

Subsection (a) defines "recruiting" and "recruits" in more specific terms. This definition is modified in two ways. First, the words "or directed" are added in the definition's opening phrase: "'Recruiting' or 'recruits' means any activity performed *or directed* by a person." (New language in italics.) This addition is necessary to encompass not only recruitment activity that the contractor himself or herself engages in, but also recruitment activities that are directed by the contractor, such as situations in which the contractor may hire a subcontractor to carry out recruitment activities. For example, the contractor may not wish to travel to towns throughout the workers' country of origin and may hire a representative in each town to recruit workers for a job opportunity in California. In such circumstances, the contractor is engaging in recruitment activity, even if it is by directing the work of others.

Second, the phrase "to perform labor which is related to a potential temporary or permanent employment opportunity" in California is replaced with the phrase "for labor, work, or services performed" in California. This language is provided for clarity, because the phrase "to perform labor which is related to a potential temporary or permanent employment opportunity" could be interpreted to mean labor *relating to* an employment opportunity, and not the actual labor or services that will be performed pursuant to the employment opportunity. This modification is also more consistent with the statutory definition of "foreign labor contracting activity" which does not reference the temporary or permanent nature of the employment opportunity, but includes recruiting or soliciting "in furtherance of that worker's employment in California." B&P Code §9998.1(b). Under California law, "labor" includes labor, work, or service, and this modification clarifies that work and services are contemplated as well. *See* Labor Code section 200(b) (defining "labor"). Where the term "labor" is used throughout these regulations, it should be understood to mean labor, work, or services.

Subsection (b) defines "solicits" in more specific terms. For the same reasons as stated above in Section 13850(a), the phrase "to perform labor which is related to a potential temporary or permanent employment opportunity" in California is amended. In this

subsection, the replacement phrase is "employment for labor, work, or services performed" in California, such that soliciting will include communicating regarding the terms of employment for labor, work, or services performed in California.

Subsection (c) includes minor technical, nonsubstantial edits.

Section 13851 pertains to coverage regarding regulated activities.

Subsection (a) contains minor technical, nonsubstantial edits.

Subsection (e)(2) is modified to include the phrase "and liabilities." This is necessary to reflect that employers who use foreign labor contractors not only have new obligations under the statute and regulations, but may be subject to liability for failure to comply as well. The liability provisions set forth in the statute, B&P Code §9998.8, include criminal and civil penalties, damages, costs, and attorney's fees.

Article 2 - Registration

Section 13853 provides written application content for someone seeking to register as a foreign labor contractor pursuant to B&P Code §9998.1.5. The Labor Commissioner plans to initiate this registration program using written, physical applications. However, with further developments in IT capacity, the Labor Commissioner may make an online application available, and would provide notice regarding such availability. Therefore, it is necessary to indicate that online applications may be available. In addition, the Labor Commissioner plans to accept completed and signed physical applications by email as well as by mail, so an email address has been added to the regulation. Corrections have been made to the Labor Commissioner's mailing address, which will be repeated everywhere the address is provided in these regulations. Following are additional changes to the application requirements that were initially proposed.

Subsection (a)(5) contains a new requirement that the applicant provide the domestic and international locations where the applicant is doing business (city, state, and country). In the event that the applicant's current business and mailing address are not in the same city, state, or country where the applicant actually conducts business, this information provides the Labor Commissioner with a fuller understanding of the applicant's foreign labor contracting operations and will allow the Labor Commissioner to better evaluate the manner and means by which the applicant proposes to conduct operations as a foreign labor contractor if registered. This information is consistent with other required registration application information that is necessary to confirm the applicant's competency and responsibility to perform regulated recruiting activities as specified under B&P Code §9998.1.5(b)(1)(A).

Subsection (a)(6), and subdivisions (A), (B), (C), and (D) are modified to require that applicants provide applicable foreign identification numbers. This is necessary in order for the Labor Commissioner to have the same type of information for foreign entities as is required for domestic entities, which are required to provide their Social Security Numbers or Tax Identification Numbers. This program contemplates registration of entities conducting foreign labor contracting activity wholly outside of the United States. Therefore, these foreign identification numbers are important for the Labor Commissioner to have in order to

verify basic information about the applicant and to evaluate the applicant's competency and responsibility to perform regulated recruiting activities as specified under B&P Code §9998.1.5(b)(1)(A). In addition, subdivision (a)(6)(B) includes a correction so that corporate officers must provide a home, not business address, consistent with the other persons who have financial interests in the applicant's business. This subdivision also updates the title of the Secretary of State form for Statement and Designation by Foreign Corporation.

Subsection (a)(10) contains a new requirement that the applicant list any license, registration, or permit issued pursuant to any state or federal law, or law of a foreign country, that any person or entity identified under subdivisions (a)(1), (a)(2), and (a)(6) of this section (the applicant and persons with financial interests in the applicant's business) has obtained within the last 5 years. This information is necessary because the applicant is required in renumbered subsection (a)(11) to list whether any of these persons or entities has had any license, registration, or permit issued pursuant to any state or federal law, or law of a foreign country that was suspended, revoked or denied, or has had any disciplinary action imposed upon him, her, or it in connection with the holding of a license or permit. In order to verify whether the applicant is accurately listing such actions with respect to a license or permit, particularly where this may involve the law of a foreign country, it is necessary to ask whether these persons or entities have had such licenses or permits.

Subdivision (a)(9)(A) is renumbered as subsection (a)(11)(A). This subsection is modified to require that the applicant indicate not just whether any person identified under subdivisions (a)(1), (a)(2), and (a)(6) has any of the enumerated issues, but whether any person *or entity* identified under subdivisions (a)(1), (a)(2), and (a)(6) has any of these issues. This modification is necessary to mirror the language in renumbered subdivision (a)(11)(B), which states that if any "person or entity identified in subdivision (A)" has any of the enumerated issues, the applicant must submit an explanation regarding the incident. Further, it is more accurate to include the word "entity" because subdivision (a)(1) includes all legal forms of business entities, whether individual/sole proprietor, partnership, corporation, limited liability company, or other business entity. A grammatically-consistent edit is also made in subdivision (a)(11)(A)(iii).

Subdivision (a)(9)(B) is renumbered as (a)(11)(B) corrects a typographical error; *(iii)* instead of *(vi)*.

Subdivision (a)(13)(E) is renumbered as (a)(15)(E), and subdivision (iii) is modified to substitute the phrase "which prohibits false imprisonment" with the phrase "relating to human trafficking." This modification is necessary to more accurately reflect all of the relevant provisions of Penal Code section 236.1 relating to human trafficking.

Subdivision (a)(13)(H) is renumbered as (a)(15)(H), and modified to add the words "or omission," such that the applicant must certify not only that the applicant is aware that any material misrepresentations made in connection with the application for registration constitute grounds for denial or revocation of registration, but that material omissions could constitute grounds for denial or revocation of registration as well. There are a number of items on the registration application that require the applicant to affirmatively provide information about the applicant and individuals who have financial interests in the

applicant's business, among other things. It is therefore necessary that the applicant acknowledge and memorialize an understanding of the potential adverse consequences of a material *omission*.

Subsection (b)(2) is revised to reflect that the Corporation Statement of Interest form SI-200 has been replaced by form SI-550.

Subsection (c) is added, which is necessary to allow the Labor Commissioner to request any additional documentation that may be needed to substantiate the veracity of statements made in response to the application questions. Particularly because this is a new registration program with unique characteristics relating to contractors operating abroad, the Labor Commissioner should be able to obtain information necessary to complete the statutorily-mandated investigation into the character, competency, and responsibility of the applicant.

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

Section 13865 implements the disclosure required under B&P Code §9998.2 for persons who know or should have known that they are using the services of a foreign labor contractor to procure foreign workers for employment in California.

Subsection (b)(1) deletes a reference to the statutory definition of foreign worker, as the regulatory definition of "foreign guest worker" in Section 13850(c) is intended to apply where "foreign worker" is used throughout these regulations. A typographical error is also corrected.

Subdivision (c)(1)(C) is modified to remove the requirement that the employing person provide, as part of the required disclosure to the Labor Commissioner, for each partner in a partnership, each member of an LLC, or each corporate officer of a corporation, the following: current physical business address, mailing address if different, preferred email address, and home physical address. The Labor Commissioner typically requires this type of information in registration programs where the Labor Commissioner is statutorily mandated to evaluate the character and fitness of a party seeking registration or licensing. Under this Foreign Labor Contractor registration program, the roles of the foreign labor contractor and the employer are distinct. The Labor Commissioner is required by the statute to assess the "character, competency, and responsibility" of the labor contractor prior to registration, including obtaining the names and addresses of all persons financially interested. *See* B&P Code §9998.1.5(b)(1)(A)-(B). By contrast, the statute only requires that the employer provide the Labor Commissioner with the name, address, and contact information of the person designated by the employer to work with a foreign labor contractor. *See* B&P Code §9998.2(b)(1). For this reason, it is not necessary for the Labor Commissioner to collect all of the information initially proposed in this provision.

Section 13868 is modified to correct a typographical error by inserting "not" before "registered" in the second sentence of the paragraph.

<u>Article 5</u> - Prohibited Fees & Costs; Post-Hire Costs and Expenses; Disclosures to Foreign Worker by Contractor

Section 13870 provides definitions which are necessary for contractors and employers to be more clearly informed of provisions pertaining to fees, costs, and expenses that are prohibited.

In order to streamline the regulations describing unlawful recruitment fees, and to reduce confusion reflected in public comments regarding the two separate lists of types of recruitment fees in proposed Sections 13870 (Unlawful Recruitment Fees) and 13872 (Other Fees, Costs, and Expenses Prohibited Post-Hire/Selection), it is proposed that these lists be consolidated in Section 13870. Many of the "other" fees listed in Section 13872(a) could also be charged to the worker prior to being hired or selected for a job opportunity. Consolidating the lists makes it clearer that these fees are all prohibited, regardless of when they are imposed. This consolidation is achieved as follows. Relevant language from Section 13872(a)(1)-(6) is added to Section 13870 subdivisions (a)(1)(A) (adding "placing" to reflect "worker placement" fees), (a)(1)(F) (adding the cost of a "visa" to "visa processing fees"), (a)(1)(P) (adding "third parties" and "labor brokers"). Section 13870 already includes recruiting and processing fees, because it incorporates the definition of "recruiting" activities in Section 13850, and it specifically addresses transportation, so these two items do not need to be added to Section 13870. The necessity of including these fees in the regulation was discussed in the Initial Statement of Reasons.

In addition, subsection (a)'s first sentence is modified as follows. The word "prospective" is deleted, which is necessary for clarity purposes, because the regulation provides that the fees described in this section could be charged to a worker subsequent to the worker's selection for employment, for example, as a deduction from wages – at that time, the worker is no longer a "prospective" worker. In addition, this change is consistent with the consolidation of fees prohibited both prior to and post-hire/selection, as explained above. The words "by a contractor" are deleted, both for clarity purposes, because the regulation provides that the fees may be collected by several other entities in addition to the foreign labor, and for consistency with the statute, which states that "a person using the services of a foreign labor contractor to obtain foreign workers or employees may not assess any fee . . . for foreign labor contracting activities." B&P Code section 9998.2.5(c).

In addition, the following are added to the list of unlawful recruitment fees:

> <u>Subdivision (a)(1)(T)</u>: Collateral requirements, such as land deeds. This addition is necessary because foreign labor recruiters may request or demand collateral for the payback of the recruitment fee or for their services, and workers or their family members may provide land deeds for this purpose. These types of fees that can trap workers in debt and in exploitative situations where they fear the economic consequences of leaving their employer are consistent with the recruitment fees prohibited under this statute.
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> <u>Subdivision (a)(1)(U)</u>: Fees to secure future employment opportunities. This addition is necessary because foreign labor contractors commonly charge internationally-recruited workers fees to "lock in" jobs in future seasons. Workers often feel obligated to pay these fees because they are so indebted by paying up-front costs that they need to stay longer to pay off their debts.

Section 13871 prohibits recruitment fees. The word "prospective" has been deleted for the same reason as explained above where this term was used in Section 13870.

Section 13872 is modified as discussed above, by consolidating the items in subsection (a) into the list of prohibited fees in Section 13870 and deleting them from this section. The title of this section is also modified by deleting "Post-Hire/Selection" because that part of the title is no longer applicable to the content of this section.

> Subsection (b) remains in substance because it implements the cost and expense prohibition prior to commencement of work by the worker, as stated in B&P Code §9998.2.5(d). This subsection further implements the prohibition for charging costs or expenses that are not customarily assessed against all workers similarly employed in the United States, as provided in B&P Code §9998.2.5(d). It is necessary to include this language in the regulation because it refers both to costs that are prohibited prior to the commencement of work in California, and also to the fact that costs that are not charged to similarly-employed U.S. workers cannot be charged to foreign workers. The Labor Commissioner interprets the statutory phrase "costs or expenses that are not customarily assessed against all workers similarly employed in the United States" to mean costs or expenses that cannot lawfully be charged or deducted from the wages of workers in the U.S. (even if U.S. workers are sometimes charged for these expenses in violation of the law), as well as costs or expenses that are not generally charged to similarly-employed U.S. workers.

Section 13873 as proposed required a contractor to identify and disclose allowable costs and expenses that would be charged to the foreign worker after she or he had been hired, including specific costs listed in B&P Code §9998.2.5 (housing, transportation to and from work, meals, medical examinations, health care, safety equipment, and education and training). The proposed modification to this section accounts for the fact that the statutory language appears to sanction certain costs, expenses, and deductions that are not, or in some cases, may not be, permissible under California and federal law.

The Labor Commissioner believes that the intent of this language was to provide notice to foreign workers regarding fees that may be assessed, in order to avoid situations in which foreign workers have been promised a certain level of wages, only to find upon beginning work in the state that deductions and other charges have depleted their pay – irrespective of whether those charges are lawful. However, reiterating this statutory language could create a misimpression among the regulated community that these fees are all lawful. It is necessary to harmonize this statutory language regarding fee transparency with the provision in B&P Code §9998.2.5(d) which states that a "foreign worker may not be required to pay any costs or expenses that are not customarily assessed against all workers similarly employed in the United States," as well as the statement in B&P Code §9998.8(e) that the liability and remedy section should not be construed to "preempt or alter any other rights or remedies . . . available under any other federal or state law." Thus, this section is revised to require a contractor to disclose costs, expenses, and deductions as long as they are "customarily assessed against similarly-employed workers in the United States and permitted under governing state and federal law."

A full explanation of why each of the items listed in B&P Code §9998.2.5(a)(2)-(6) may not be permissible under governing state and federal law is beyond the scope of this Supplement to the

Initial Statement of Reasons. This is a nuanced area of law where the legality of a charge or deduction can depend on whether it primarily benefits the employer or the employee, whether it is a business expense that must be borne by the employer, whether the proper procedure has been followed to take a lodging or meal credit against an employer's wage obligation, whether a deduction was voluntary and in writing, and whether there is a specific statutory prohibition, among other considerations. *See, e.g.,* Labor Commissioner's Office, Deductions, *available at* https://www.dir.ca.gov/dlse/faq_deductions.htm; 3 Ops.Atty.Gen. 178 (deductions are only permitted for items which are for the direct benefit of the employee – not deductions that benefit the employer). For example, proposed Section 13873(a)(1) referred to a disclosure for "[h]ousing or living accommodation that is limited to market rate for similar housing." This language was based on B&P Code §9998.2.5(d), which provides that the "amount charged for providing housing to the foreign workers shall be limited to the market rate for similar housing." However, as commenters noted, under California law, employers who wish to take a credit for lodging may only take credit in specified amounts that are below market rates, and there must be a specific voluntary written agreement that provides for a credit against the employer's minimum wage obligation. *See, e.g.,* California Minimum Wage Notice MW-2017, Section 3, *available at* https://www.dir.ca.gov/Iwc/MW-2017.pdf. In addition, under federal law, a housing credit cannot exceed the "reasonable cost" or "fair value" of the facilities furnished, meaning that where an employer's actual housing cost is less than the fair market value, a credit may not be taken up to the market rate. *See, e.g.,* U.S. Dep't of Labor, Wage & Hour Div., Field Assistance Bulletin No. 2015-1, *Credit toward Wages under Section 3(m) of the FLSA for Lodging Provided to Employees*, *available at https://www.dol.gov/whd/FieldBulletins/fab2015_1.htm*. Moreover, under the federal H-2B program, the U.S. Departments of Labor and Homeland Security have determined that, where housing is primarily for the benefit of the employer, such as where an employer has a need for a mobile workforce, workers cannot be charged for such lodging. *See* U.S. Dep't of Homeland Security & U.S. Dep't of Labor, *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, 80 Fed. Reg. 24042, 24063 (2015) (noting that deductions from wages for a cost that is primarily for the employer's benefit or convenience is not reasonable nor permissible, such as "housing that is provided by employers with a need for a mobile workforce, such as those in the carnival or forestry industries where workers are in an area for a short period of time, need to be available to work immediately, and may not be able to procure temporary housing easily").

The above example with respect to housing demonstrates the ways in which the costs listed in the statute may not lawfully be charged to foreign workers. Similar considerations would apply to the other items listed in the statute and the regulation that was initially proposed. Additionally, the Labor Commissioner interprets the statutory prohibition on requiring foreign workers to pay "any costs or expenses that are not customarily assessed against all workers similarly employed in the United States" to mean costs or expenses that cannot lawfully be charged or deducted from the wages of workers in the U.S., as well as costs or expenses that are generally not charged to similarly-employed U.S. workers. Therefore, the following changes are proposed:

> The title of this section is changed to "*Potentially* Allowable Post-Hire Costs and Expenses to be Itemized or Disclosed," to reflect that these costs may not be allowable.
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> Subsection (a) is revised to delete the list of costs or expenses that were proposed in subsection (a)(1)-(7), and to provide that a contractor shall identify and disclose to the

worker any and all costs or expenses that may be charged to the worker while working in the state, including for the items listed in B&P Code section 9998.2.5, as long as these costs, expenses, or deductions are customarily assessed against similarly-employed workers in the United States and permitted under governing state and federal law.

Subsection (b) is revised to state that if there is no amount *to be charged*, the disclosure should indicate "none."

Subsection (c) is deleted because it has been rendered superfluous.

Finally, B&P Code §9998.8(e) is added to the reference notes.

Section 13874 establishes the contents of a disclosure form that must be provided to a worker at the time of recruitment, with a copy also provided to the Labor Commissioner.

Subsection (a) is modified to remove the phrase "but in no event later than the time for applying for a work visa." This change is necessary because if the disclosure and the work contract are not provided to the worker until she or he applies for a work visa and has a consular interview, the worker may not have ample time to fully evaluate the terms and conditions of the job opportunity prior to accepting the position and making plans to travel to California for the job opportunity. This timing does not conflict with the federal H-2B regulations, which require disclosure of the job order *no later than* the time at which the worker applies for a visa. *See* 20 C.F.R. 655.20(l).

Subdivision (b)(2)(A) is modified to correct a typographical error by substituting the word "employer" for "contractor," as that provision pertains to the employer, not the contractor.

Subsection (b)(6), which lists the information that is required to be included in the work contract that is signed by the employer and contains the assurances and terms and conditions of employment, is modified as follows:

Subdivision (b)(6)(A) adds that any production standards be included when describing the salary or wage rate. This is necessary because some workers are paid a piece rate, and their wages will be based on certain production standards.

Subdivision (b)(6)(I) is deleted. The subsequent subdivision, (b)(6)(J) (which has been relettered as (b)(6)(I)), requires that the weekly schedule be provided. Therefore, it is unnecessary and duplicative of (J) to require that the work contract also state whether the position is full-time or part-time. Additionally, the H-2B program requires that all positions be full-time, which obviates the need for this provision. *See* 20 C.F.R. 655.18(b)(2) (employer must indicate that "the job opportunity is a temporary, full-time position").

Subdivision (b)(6)(K) is relettered as (b)(6)(J), and modified by adding the word "any" at the beginning of the sentence. Although the three-fourths guarantee is part of the federal H-2B regulations, *see* 20 C.F.R. 655.20(f), for several years now, the Appropriations Act that funds the U.S. Department of Labor has provided that the Department of Labor may not use any funds to enforce the three-fourths guarantee. However, the Appropriations Act did not vacate these regulatory provisions, and they remain in effect, thus imposing a legal duty on H-2B employers, even though the Department of Labor cannot use any funds to enforce them until such time as the appropriations rider may be lifted. *See, e.g.,*

Employee Rights Under the H-2B Program, *available at* https://www.dol.gov/whd/posters/pdf/H2B-eng.pdf. The Labor Commissioner does not intend to impose a requirement on H-2B employers to include the three-fourths guarantee in their work contracts that is not required at this time by the Department of Labor. The term "any" reflects that employers may nevertheless offer a three-fourths guarantee to their H-2B workers, and that should be included in the work contract. Additionally, the phrase "(or 6-week period for employment periods lasting less than 120 days)" is added to this provision to reflect the requirement in the federal H-2B regulations at 20 C.F.R. 655.20(f).

Subdivision (b)(6)(L) is relettered as (b)(6)(K), and modified for reasons similar to the reasons explained above with respect to Section 13873. Specifically, although the statute, B&P Code §9998.2.5(a)(2), requires the contractor to provide the foreign worker with a signed copy of the work contract that includes, among other things, "any penalties for terminating employment," this type of contractual clause may violate applicable law where an employer seeks to recover this amount from the worker's wages. For example, under California law, an employer may not use "self help" to recover amounts purportedly owed to the employer by the employee. Labor Code §221 prohibits an employer from receiving from an employee any wage paid by the employer to the employee either by deduction or recovery after payment of the wage. Therefore, it is necessary to edit this provision to indicate any penalties for terminating employment to the extent that such penalties do not violate governing state or federal law.

Subdivision (b)(8)(B) is modified to reflect that the description of prohibited fees are now only in Section 13870, and not also in 13872.

Subsection (b)(10) is modified as follows:

- "Division 3, Chapter 21.5" is substituted for section 9998 of the Business and Professions Code, as the whole chapter entitled "Foreign Labor Contractors" provides protections for foreign workers.
- A reference to the federal H-2B regulations that provide worker protections is added, as this is the federal law directly applicable to H-2B workers employed in California.
- The foreign labor contractor is required to include as an attachment the Department of Industrial Relations flyer, *All Workers in California Have Rights*, which is available at: https://www.dir.ca.gov/letf/english_worker_mobile.pdf in English and is available in other languages at: https://www.dir.ca.gov/letf/Information_for_workers_and_employers.html. The contractor may also use a subsequently-issued worker rights flyer with updated information. It is necessary to require that this information be provided because foreign workers are entitled the same rights that other workers in California have under California law. However, because they are traveling to the state for work, they are likely unfamiliar with these rights under California law. Informing the workers of their rights will better enable them to recognize workplace violations, and empower them to seek redress and avoid exploitation.
- Additional language regarding the anti-retaliation provisions is added, which is necessary to more closely track the language of the statute, B&P Code §9998.6, and inform workers that retaliation against their family members is also prohibited.

- A toll-free number is added for workers to contact the Labor Commissioner's Office. This is necessary so that workers can contact the Labor Commissioner's Office regarding any questions or regarding complaints of violations.