

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

NOTICE OF PROPOSED RULEMAKING

**Subject Matter of Regulations:
Public List of Certain Port Drayage Motor Carriers and Customer Sharing of Liability
Under Labor Code Section 2810.4**

**TITLE 8, CALIFORNIA CODE OF REGULATIONS
New Sections 13875 – 13888**

NOTICE IS HEREBY GIVEN that the Labor Commissioner, Chief of the Division of Labor Standards Enforcement, Department of Industrial Relations, pursuant to the authority vested in the her by Labor Code section 2810.4(k), proposes to adopt sections 13875 through 13888 in proposed Subchapter 15 of existing Chapter 6, of Division 1, of Title 8, California Code of Regulations, relating to the Public List of Certain Port Drayage Motor Carriers and Customer Sharing of Liability Under Labor Code Section 2810.4.

PROPOSED REGULATORY ACTION

The Labor Commissioner proposes to adopt regulations under new Subchapter 15 of Chapter 6 of Division 1 consisting of the following:

- Article 1 Definitions Used in Subchapter
 - Section 13875 Definitions
- Article 2 Compilation and Maintenance of Public List of Port Drayage Motor Carriers
 - Section 13876 Sources of Information for Internet Website Posting
 - Section 13877 Notice to Port Drayage Motor Carriers
 - Section 13878 Response to Notice
 - Section 13879 Labor Commissioner Disposition of Responses Timely Received
 - Section 13880 Labor Commissioner Disposition Where No Timely Response or No Response Received
 - Section 13881 Removal from Public List
 - Section 13822 Notice to Port Drayage Motor Carrier Successors
- Article 3 Hearing Procedures, Judicial Review
 - Section 13883 Hearing Regarding Determination of Port Drayage Motor Carrier Successor
 - Section 13884 Rights of Parties at Hearing; Taking of Evidence; Rules of Procedure
 - Section 13885 Conduct of Hearing; Rules of Evidence; Role of Hearing Officer
 - Section 13886 Hearing Officer Decision
 - Section 13887 Judicial Review
- Article 4 Enforcement
 - Section 13888 Determining Customer Liability

TIME AND PLACE OF PUBLIC HEARING

The Labor Commissioner's Office has not scheduled a public hearing on this proposed action. However, the Labor Commissioner's Office will hold a hearing if it receives a written request for a public hearing from any interested person, or their authorized representative, no later than 15 days before the close of the written comment period. A written request for a hearing must be sent to the same email address or mailing address listed below for the Contact Person for nonsubstantive inquiries.

WRITTEN COMMENT PERIOD

Any interested person, or their authorized representative, may submit written comments relevant to the proposed regulatory action to the Department of Industrial Relations, Division of Labor Standards Enforcement. **The written comment period closes at midnight on October 20, 2020.** The Labor Commissioner will consider only comments received at the Division by that time. Equal weight will be accorded to comments presented at the hearing and to other written comments received by midnight on that date by the Division.

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

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

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

AUTHORITY AND REFERENCE

Labor Code section 2810.4(k) authorizes the Labor Commissioner, Chief of the Division of Labor Standards Enforcement (also known as the Labor Commissioner's Office) to adopt regulations as necessary to administer and enforce the provisions of Labor Code section 2810.4 that are within the Labor Commissioner's jurisdiction. The proposed regulations implement, interpret, and make specific provisions of Labor Code section 2810.4 that pertain to the Internet website posting and shared customer liability requirements of the law.

INFORMATIVE DIGEST AND POLICY STATEMENT OVERVIEW

In 2017, USA Today published an investigative series "Rigged," which documented labor violations experienced by drivers in the port trucking industry and the fact that more than \$40 million in unpaid wage judgments remained outstanding while customers continued to hire such companies or their successors to haul goods.¹ In September 2018, Senate Bill ("SB") 1402,

¹ Brett Murphy, *Rigged* (USA Today June 16, 2017; June 29, 2017; Oct. 26, 2017; and Dec. 28, 2017).

introduced by Senator Lara, was enacted to bring about greater accountability in the port trucking industry by requiring the Labor Commissioner to create a public list of trucking companies with outstanding judgments and imposing shared liability on customers that continue to use these companies if there are future labor violations.² This law, codified at Labor Code section 2810.4, went into effect on January 1, 2019. (SB 1402, Chapter 702, Statutes of 2018.)

The Labor Commissioner has maintained a public list of port trucking companies with outstanding judgments on its website since the law went into effect.³ This rulemaking action further implements and clarifies the procedures used to compile the public list and to be removed from the public list, the procedures for contesting the Labor Commissioner's determinations, and the manner in which customer liability will be enforced. The relevant provisions of the existing law are described below.

Existing law defines a "port drayage motor carrier" in part as an individual or entity that hires or engages commercial drivers in the port drayage industry, and it includes entities or individuals who succeed in the interest and operation of a port drayage motor carrier consistent with the successorship provisions of Labor Code section 2684.

Existing law defines a "commercial driver" as a person who "holds a valid commercial driver's license who is hired or contracted to provide port drayage services either as an independent contractor or an employee driver."

Existing law defines "port drayage services" as "the movement within California of cargo or intermodal equipment by a commercial motor vehicle whose point-to-point movement has either its origin or destination at a port, including any interchange of power units, chassis, or intermodal containers, or the switching of port drayage drivers that occurs during the movement of that freight."

Existing law requires the Labor Commissioner to post on its website the names, addresses, and essential information for any port drayage motor carrier with any unsatisfied final court judgment, tax assessment, or tax lien that may be released to the public under federal and state disclosure laws. This includes any order, decision, or award obtained by a public or private person or entity pursuant to Labor Code section 98.1 finding that a port drayage motor carrier engaged in illegal conduct including failure to pay wages, imposing unlawful expenses on employees, failure to remit payroll taxes, failure to provide workers' compensation insurance, or misclassification of employees as independent contractors with regard to a port drayage commercial driver.

Existing law requires that at least 15 business days prior to posting on its website the names, addresses, and essential information for any port drayage motor carrier, the Labor Commissioner's Office must notify the port drayage motor carrier by certified mail regarding the alleged conduct and must provide the name, email address, and telephone number of a contact person at the Labor Commissioner's Office, a copy of the unsatisfied court judgment, assessment, order, decision or award, and a copy of the regulations or rules of practice or procedure for removal of the posting.

² Brett Murphy, *California lawmakers pass bill to try to end trucker labor abuse by putting onus on stores* (USA Today Sept. 5, 2018).

³ See https://www.dir.ca.gov/DLSE/List_Port_Trucking_Companies_Outstanding_Judgments.html.

Existing law requires that a website posting must be removed within 15 business days after the Labor Commissioner determines there has been full payment of the unsatisfied judgment or that the port drayage motor carrier has entered into an approved settlement dispensing of the judgment.

Existing law requires the Labor Commissioner's Office to update the Internet website monthly by the fifth day of each month.

Existing law establishes that a "customer" (specifically defined with exemptions) that engages or uses a port drayage motor carrier that is on the list will be jointly and severally liable with the motor carrier, or the motor carrier's successor, for all civil legal responsibility and civil liability owed to a port truck driver. A customer's shared liability will be for services a customer obtained after the date the motor carrier appeared on the list, and includes liability with the motor carrier for the full amount of unpaid wages, unreimbursed expenses, damages and penalties, including applicable interest.

Existing law provides that a customer shall be jointly and severally liable from the time the driver is dispatched to begin work on behalf of the customer until all tasks are completed incidental to that work.

Existing law authorizes the Labor Commissioner to adopt regulations and rules of practice and procedure necessary to administer and enforce the Internet website posting and shared customer liability requirements of the law. These proposed regulations implement, interpret, and make specific these statutory provisions that are within the Labor Commissioner's jurisdiction under Labor Code section 2810.4. First, the regulations provide definitions that further interpret the law. Additionally, the proposed regulations set forth standards for compiling the public list, notifying motor carriers that they have been identified for inclusion on the list, providing a means for motor carriers to respond to the notice and contest their inclusion on the list should they wish to do so (using incorporated form WCA 128 PORT Proof of Payment or Settlement 12/2019), and providing information about how to be removed from the list. The proposed regulations also provide standards for determining whether a motor carrier's successor should be included on the public list, for notifying such a successor, and for allowing the purported successor to request a hearing should they wish to contest the Labor Commissioner's determination. Finally, the regulations standardize how customer liability will be determined by further clarifying the statutory terms regarding such liability.

OBJECTIVE AND ANTICIPATED BENEFITS OF THE PROPOSED REGULATIONS

The proposed regulations are intended to establish standards for creating and maintaining the public list mandated by SB 1402, including formal implementation of notice procedures the Labor Commissioner is required to carry out. Further, the proposed regulations are intended to provide clarity regarding enforcement of customers' joint and several liability under the law.

The primary benefit of the regulatory proposal is that it will incentivize and facilitate payment of unpaid wages, damages, and penalties due to workers and the state. In order to avoid losing business with customers who are concerned about having joint and several liability for future violations, motor carriers with outstanding judgments will pay off these outstanding debts. As a result, port truck drivers who have obtained judgments for unpaid wages and unreimbursed expenses but never actually received their back wages will finally receive what is owed to them,

allowing them to support their families and their communities. The Labor Commissioner's Office had awarded in excess of \$45 million in unlawful deductions from wages and out-of-pocket expenses to more than 400 drivers at the time this law went into effect, but drivers had actually received little of those awards due to nonpayment by the motor carriers. The potential benefit to workers is therefore millions of dollars in wages owed. Since the law went into effect on January 1, 2019, approximately \$1.2 million has been paid, and adoption of the regulatory proposal will further encourage payment of unpaid wages to drivers.

In addition to the enormous benefits to the welfare of workers, the state (and all taxpayers) will benefit by receiving overdue tax payments from port trucking companies that have outstanding tax assessments and tax liens. Further, port trucking companies will be aided by clear rules regarding how motor carriers are placed on the list and how they can be removed from the list. Finally, customers who do business with port trucking companies will benefit from the transparency of the list on the Labor Commissioner's website, so that they can avoid potentially being held jointly and severally liable for future wage violations incurred by a port trucking company that appears on the list. Thus, the regulatory action furthers the mission of the Labor Commissioner's 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 compiling and maintaining the list and for customers to avoid liability. Finally, the proposed action indirectly prevents discrimination, and promotes fairness and social equity.

DETERMINATION OF INCONSISTENCY AND/OR INCOMPATIBILITY WITH EXISTING STATE REGULATIONS

The Labor Commissioner has determined that these proposed regulations are not inconsistent or incompatible with existing state statutes or other regulations. After conducting a review for any regulations that would relate to or affect this area, the Labor Commissioner has concluded that these regulations are not inconsistent with proposed regulations that pertain to enforcement of shared liability between labor contractors and client employers under Labor Code section 2810.3.

DISCLOSURES REGARDING THE PROPOSED REGULATORY ACTION

The Labor Commissioner has made the following initial determinations:

Mandate on local agencies and school districts: None.

Cost or savings to any state agency: None.

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

Other nondiscretionary cost or savings imposed on local agencies: None.

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

Direct cost impacts on housing: None.

Cost impacts on a representative private person or business: The Labor Commissioner's Office estimates a cost of \$206.20 for a representative business affected by this proposal.

Effect on small business: The Labor Commissioner's Office estimates a cost of \$206.20 for a small business affected by this proposal.

Significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states: None.

Summary Results of the Economic Impact Analysis/Assessment

The Labor Commissioner's Office concludes that it is (1) unlikely that the proposal will create any jobs within the State of California; (2) unlikely that the proposal will eliminate any jobs within the State of California; (3) unlikely that the proposal will create any new businesses within the State of California; (4) unlikely that the proposal will eliminate any existing businesses within the State of California; (5) unlikely that the proposal would cause the expansion of businesses currently doing business within the State of California; and (6) likely that the proposal will provide clarity to businesses that face statutory shared liability under Labor Code section 2810.4. Accordingly, the Labor Commissioner has determined that the proposed regulatory action will not have a significant impact on business.

Benefits of the Proposed Action: By incentivizing payment of unpaid wages to port truck drivers and settlement of tax debts owed to the state, the proposed regulation will benefit California residents. The regulatory action furthers the mission of the Labor Commissioner's 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 clear procedures for the public listing and removal from the list, and for avoiding customer liability. Finally, the proposed action indirectly prevents discrimination, and promotes fairness and social equity.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5(a)(13), the Labor Commissioner must determine that no reasonable alternative considered or that has otherwise been identified and brought to the Labor Commissioner's attention would be more effective in carrying out the purpose for which the actions are proposed, or would be as effective and less burdensome to affected private persons than the proposed actions, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The Labor Commissioner has initially determined that no alternatives would be more effective in carrying out the purpose that underlies the proposed regulatory action, or would be at least as effective or less burdensome on the regulated public (port trucking companies and the customers who use them to haul freight).

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

PUBLIC DISCUSSIONS OF PROPOSED REGULATIONS

Prior to proposing to adopt these regulations, as part of the legislative process, the regulated community expressed a need for the Labor Commissioner to issue regulations establishing standards for inclusion on and removal from the public website list.

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

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

As of the date of this Notice, the rulemaking file consists of the Notice, the Initial Statement of Reasons, proposed text of the regulations, an incorporated form (WCA 128 PORT Proof of Payment or Settlement), and the Economic and Fiscal Impact Statement (Form STD 399).

In addition, the Notice, Initial Statement of Reasons, proposed text of regulations, and form may be accessed and downloaded from the Department of Industrial Relations' website at <https://www.dir.ca.gov/Rulemaking/DIRProposed.html>. To access them, please scroll to Division of Labor Standards Enforcement (DLSE), and click on the link for Public List of Certain Port Drayage Motor Carriers and Customer Sharing of Liability Under Labor Code Section 2810.4.

Any interested person may inspect a copy or direct questions about the proposed regulations and any supplemental information contained in the rulemaking file. The rulemaking file will be available for inspection at the Division of Labor Standards Enforcement, 2031 Howe Avenue, Suite 100, Sacramento, California, between 9:00 a.m. and 4:30 p.m., Monday through Friday, unless the state office is closed for a state holiday. Copies of the proposed regulations, initial statement of reasons and any information contained in the rulemaking file may be requested in writing to the contact person.

CONTACT PERSON

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

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

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

CONTACT PERSON FOR SUBSTANTIVE QUESTIONS

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

Patricia Salazar, Staff Attorney
Department of Industrial Relations
Division of Labor Standards Enforcement, Legal Unit
320 W. 4th Street, Suite 600, Los Angeles, CA 90013-2350
E-mail: psalazar@dir.ca.gov

The telephone number of the backup contact person is (213) 897-1511.

AVAILABILITY OF CHANGES FOLLOWING PUBLIC HEARING

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

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

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

AUTOMATIC MAILING

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

If adopted, the regulations as amended will appear in Title 8, California Code of Regulations, commencing with section 13875. The text of the final regulations will also be available through the website of the Office of Administrative Law at www.oal.ca.gov.