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CALIFORNIA LEGISLATURE—2015–16 REGULAR SESSION

ASSEMBLY BILL

No. 621

Introduced by Assembly Member Roger Hernández

February 24, 2015

An act to add Section 2750.8 to the Labor Code, and to add Article 8.6 (commencing with Section 1160) to Chapter 4 of Part 1 of Division 1 of the Unemployment Insurance Code, relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

AB 621, as amended, Roger Hernández. Drayage truck operators: Motor Carrier Employer Amnesty Program.

Existing law governs the relationship between an employer and an employee with regard to hiring, promotion, discipline, wages and hours, working conditions, and administrative and judicial remedies. Existing law sets forth guidelines for determining whether a person who performs work for another pursuant to a contract is an employee or an independent contractor. Existing law authorizes the Labor Commissioner to investigate employee complaints and to conduct a hearing in any action to recover wages, penalties, and other demands for compensation.

This bill would establish the Motor Carrier Employer Amnesty Program pursuant to which, notwithstanding any law, a motor carrier performing drayage services may be relieved of liability for statutory or civil penalties associated with misclassification of commercial drivers

as independent contractors if the motor carrier enters into a settlement agreement with the Labor Commissioner, with the *cooperation and* consent of the Employment Development Department, prior to January 1, 2017, whereby the motor carrier agrees to convert all of its commercial drivers to employees, and the settlement agreement contains prescribed components, including, but not limited to, an agreement by the motor carrier to pay all wages, benefits, and taxes owed, if any. The bill would permit a settlement agreement to contain a provision authorizing the Labor Commissioner and the Employment Development Department to recover from the motor carrier the reasonable, actual costs of the Labor Commissioner and the Employment Development Department for their respective review, approval, and compliance monitoring of that settlement agreement.

Vote: majority. Appropriation: no. Fiscal committee: yes.
 State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 2750.8 is added to the Labor Code, to
- 2 read:
- 3 2750.8. (a) The Labor Commissioner and the Department of
- 4 Employment Development shall administer the Motor Carrier
- 5 Employer Amnesty Program pursuant to which, notwithstanding
- 6 any law, an eligible motor carrier performing drayage services at
- 7 any port shall be relieved of liability for statutory or civil penalties
- 8 associated with the misclassification of commercial drivers as
- 9 independent contractors, as provided by this program, if the eligible
- 10 motor carrier executes a settlement agreement with the Labor
- 11 Commissioner whereby the eligible motor carrier agrees to, among
- 12 other things, properly classify all of its commercial drivers as
- 13 employees.
- 14 (b) As used in this section, the following terms shall have the
- 15 following meanings:
- 16 (1) “Commercial driver” means a person who holds a valid
- 17 commercial driver’s license who is hired or contracted to provide
- 18 port drayage services.
- 19 (2) “Department” means the Employment Development
- 20 Department.

1 (3) “Eligible motor carrier” means a motor carrier that shall not
2 have any of the following on the date it applies to participate in
3 the program:

4 (A) A civil lawsuit that was filed on or before ~~January 1,~~
5 *December 31, 2015*, pending against it in a state or federal court
6 that alleges *or involves* a misclassification of a commercial driver.

7 (B) A penalty assessed by the department pursuant to Section
8 1128 that is final imposition of that penalty.

9 (4) “Motor carrier” means a registered owner, lessee, licensee,
10 or bailee of a commercial motor vehicle, as set forth in subdivision
11 (b) of Section 15210 of the Vehicle Code, that operates or directs
12 the operation of a commercial motor vehicle on a for-hire or
13 not-for-hire basis to perform port drayage services.

14 (5) “Port” means any sea or river port located in this state.

15 (6) “Program” means the Motor Carrier Employer Amnesty
16 Program established by this section and as provided by Article 8.6
17 (commencing with Section 1160) of Chapter 4 of Part 1 of Division
18 1 of the Unemployment Insurance Code.

19 (c) (1) A motor carrier shall only apply to participate in the
20 program by doing all of the following:

21 (A) Submit an application to the Labor Commissioner, on a
22 form provided by the Labor Commissioner. The application shall,
23 at a minimum, require the motor carrier to establish it qualifies as
24 an eligible motor carrier.

25 (B) Report on the results of a self-audit in accordance with the
26 guidelines provided by the Labor Commissioner.

27 (2) *A motor carrier that voluntarily or as a result of a final*
28 *disposition in a civil proceeding reclassified its commercial drivers*
29 *as employees on or before January 1, 2016, shall, in addition to*
30 *other information requested by the Labor Commissioner, also*
31 *submit with its application all of the following:*

32 (A) *Documentation demonstrating that the motor carrier*
33 *reclassified its commercial drivers as employees, including the*
34 *commencement period applicable to the reclassification.*

35 (B) *The identification of each commercial driver reclassified*
36 *in the documents provided in subparagraph (A), the amounts paid*
37 *to each commercial driver to compensate for the previous*
38 *misclassification, and the time period applicable to the amount*
39 *paid to each commercial driver prior to reclassification.*

1 (C) A report of a self-audit for all commercial drivers
2 reclassified by the motor carrier identified in subparagraphs (A)
3 and (B), and also include a separate self-audit report for any
4 commercial driver who is subject to reclassification, but is not
5 identified in subparagraph (B).

6 ~~(2)~~

7 (3) A proceeding or action against a motor carrier pursuant to
8 Sections 2698 to 2699.5, inclusive, shall not be initiated after the
9 motor carrier has submitted an application for participation in the
10 program, but may be initiated if the motor carrier’s application is
11 denied.

12 ~~(3)~~

13 (4) If a motor carrier’s application to participate the program is
14 denied by the Labor Commissioner, the application or its
15 submission shall not be considered an acknowledgment or
16 admission by the motor carrier that it misclassified its commercial
17 drivers as independent contractors, and the application or its
18 submission shall not be construed in any way to support an
19 evidentiary inference that the motor carrier failed to properly
20 classify its commercial drivers as employees.

21 (d) The Labor Commissioner shall analyze the information
22 provided pursuant to paragraph (2) of subdivision (c) for the
23 purpose of evaluating the scope of a prior reclassification of an
24 eligible motor carrier’s commercial drivers to employees and has
25 discretionary authority to determine whether the scope was
26 sufficient to afford relief to the misclassified commercial drivers.

27 ~~(d)~~

28 (e) Before January 1, 2017, the Labor Commissioner, ~~in~~
29 ~~cooperation~~ ~~and~~ with the *cooperation and* consent of the
30 department, may negotiate and execute a settlement agreement
31 with an eligible motor carrier pursuant to the program that applied
32 to participate in the program. The Labor Commissioner shall not
33 execute a settlement agreement on or after January 1, 2017.

34 ~~(e)~~

35 (f) Prior to the Labor Commissioner executing a settlement
36 agreement, an eligible motor carrier shall file its contribution
37 returns and report unreported wages and taxes for the time period
38 it seeks relief under the settlement agreement.

39 ~~(f)~~

1 (g) A settlement agreement executed by the Labor Commissioner
2 and an eligible motor carrier pursuant to the program shall require
3 an eligible motor carrier to do all of the following:

4 (1) Pay all wages, benefits, and taxes owed, if any, to or in
5 relation to all of its commercial drivers reclassified from
6 independent contractors to employees for the period of time from
7 the first date of misclassification to the date the settlement
8 agreement is executed, but not exceeding the applicable statute of
9 limitations.

10 (2) Maintain any converted commercial driver positions as
11 employee positions.

12 (3) Consent that any future commercial drivers hired to perform
13 the same or similar duties as those employees converted pursuant
14 to the settlement agreement shall be presumed to have employee
15 status and that the eligible motor carrier shall have the burden to
16 prove by clear and convincing evidence that they are not employees
17 in any administrative or judicial proceeding in which their
18 employment status is an issue.

19 (4) Immediately after the execution of the settlement agreement,
20 secure the workers' compensation coverage that is legally required
21 for the commercial drivers who were reclassified as employees,
22 effective on or before the date the settlement agreement is executed.

23 (5) Provide the Labor Commissioner and the department with
24 proof of workers' compensation insurance coverage in compliance
25 with paragraph (4) within five days of securing the coverage.

26 (6) Pay the costs authorized by subdivision ~~(g)~~, (h), if required.

27 (7) Perform any other requirements or provisions the Labor
28 Commissioner and the department deem necessary to carry out
29 the intent of this section, the program, or to enforce the settlement
30 agreement.

31 ~~(g)~~

32 (h) A settlement agreement may require an eligible motor carrier
33 to pay the reasonable, actual costs of the Labor Commissioner and
34 the department for their respective review, approval, and
35 compliance monitoring of the settlement agreement. The costs
36 shall be deposited into the Labor Enforcement and Compliance
37 Fund. The portion of the costs attributable to the department shall
38 be transferred to the department upon appropriation by the
39 Legislature.

40 ~~(h)~~

1 (i) The settlement agreement may include provisions for an
2 eligible motor carrier to make installment payments of amounts
3 due pursuant to paragraphs (1) and (6) of subdivision ~~(f)~~(g) in lieu
4 of a full payment. An installment payment agreement shall be
5 included within the settlement agreement and charge interest on
6 the outstanding amounts due at the rate prescribed in Sections 1113
7 and 1129 of the Unemployment Insurance Code. Interest on
8 amounts due shall be charged from the day after the date the
9 settlement agreement is executed. The settlement agreement shall
10 contain a provision that if a motor carrier fails, without good cause,
11 to fully comply with terms of the settlement agreement authorizing
12 installment payments, the settlement agreement shall be null and
13 void and the total amount of tax, interest, and penalties for the time
14 period covered by the settlement agreement shall be immediately
15 due and payable.

16 ~~(i)~~

17 (j) The Labor Commissioner and the department may share any
18 information necessary to carry out the program. Sharing
19 information pursuant to this subdivision shall not constitute a
20 waiver of any applicable confidentiality requirements and the party
21 receiving the information shall be subject to any existing
22 confidentiality requirements for that information.

23 ~~(j)~~

24 (k) (1) Notwithstanding any other law and pursuant to the
25 program, an eligible motor carrier that executed and performed its
26 obligations pursuant to a settlement agreement shall not be liable,
27 and the Labor Commissioner or the department shall not enforce,
28 any civil or statutory penalties, including, but not limited to,
29 remedies available under subdivision (e) of Section 226, that might
30 have become due and payable for the time period covered by the
31 settlement agreement, except for the following penalties:

32 (A) A penalty charged under Section 1128 of the Unemployment
33 Insurance Code that is final on the date of the settlement agreement
34 is executed, unless the penalty is reversed by the California
35 Unemployment Insurance Appeals Board.

36 (B) A penalty for an amount an eligible motor carrier admitted
37 was based on fraud or made with the intent to evade the reporting
38 requirements set forth in this division or authorized regulations.

39 (C) A penalty based on a violation of this division or Division
40 6 (commencing with Section 13000) and either of the following:

1 (i) The eligible motor carrier was on notice of a criminal
2 investigation due to a complaint having been filed or by written
3 notice having been mailed to the eligible motor carrier informing
4 the motor carrier that it is under criminal investigation.

5 (ii) A criminal court proceeding has already been initiated
6 against the eligible motor carrier.

7 (2) (A) Notwithstanding any other law and pursuant to the
8 program, an eligible motor carrier that executed and performed its
9 obligations pursuant to a settlement agreement shall not be liable,
10 and the Labor Commissioner or the department shall not enforce,
11 any unpaid penalties, and interest owed on unpaid penalties, on or
12 before the date the settlement agreement was executed, pursuant
13 to Sections 1112.5, 1126, and 1127 of the Unemployment Insurance
14 Code for the tax reporting periods for which the settlement
15 agreement is applicable, that are owed as a result of the
16 nonpayment of tax liabilities due to the misclassification of one
17 or more commercial drivers as independent contractors and the
18 reclassification of these commercial drivers as employees, except
19 that penalties, and interest owed on penalties, established as a result
20 of an assessment issued by the department before the date the
21 settlement agreement was executed shall not be waived pursuant
22 to the program.

23 (B) For purposes of paragraph (1), state personal income taxes
24 required to be withheld by Section 13020 of the Unemployment
25 Insurance Code and owed by the motor carrier pursuant to Section
26 13070 of the Unemployment Insurance Code shall not be collected,
27 if the eligible motor carrier issued an information return pursuant
28 to Section 6041A of the Internal Revenue Code reporting payment
29 or if the commercial driver certifies that the state personal tax has
30 been paid or that he or she has reported to the Franchise Tax Board
31 the payment against which the state personal income tax would
32 have been imposed.

33 (3) A refund or credit for any penalty or interest paid prior to
34 the date an eligible motor carrier applied to participate in the
35 program shall not be granted.

36 (4) Except for violations described in Section 2119 of the
37 Unemployment Insurance Code, the department shall not bring a
38 criminal action for failing to report tax liabilities against an eligible
39 motor carrier that executed and performed its obligations pursuant

1 to a settlement agreement for the tax reporting periods subject to
2 the settlement agreement.

3 ~~(k)~~

4 (l) The statute of limitations on any claim or liability that might
5 have been asserted against a motor carrier based on the motor
6 carrier having misclassified a commercial driver as an independent
7 contractor shall be tolled from the date a motor carrier applies for
8 participation in the program through the date the Labor
9 Commissioner either denies the motor carrier participation in the
10 program or the motor carrier, as an eligible motor carrier, has failed
11 to perform an obligation under the settlement agreement, whichever
12 is later.

13 ~~(t)~~

14 (m) The recovery obtained by the Labor Commissioner on behalf
15 of a reclassified commercial driver pursuant to a settlement
16 agreement shall be tendered to the commercial driver on the
17 condition that the commercial driver shall execute a release of all
18 claims the commercial driver may have against the eligible motor
19 carrier based on the eligible motor carrier’s failure to classify the
20 commercial driver as an employee. A commercial driver shall not
21 be under any obligation to accept the terms of a settlement
22 agreement. If a commercial driver declines to accept the terms of
23 a settlement agreement, the commercial driver shall not be bound
24 by the settlement agreement, except that the eligible motor carrier
25 shall still reclassify the commercial driver as an employee and that
26 commercial driver shall be precluded from pursuing a claim for
27 civil penalties or statutory penalties covered by the period of time
28 covered by the settlement agreement. If a commercial driver does
29 not accept the terms of a settlement agreement, the motor carrier
30 shall be excused from performing its requirement under the
31 settlement agreement to pay the amount acknowledged in the
32 settlement agreement to be due to that commercial driver.

33 ~~(m)~~

34 (n) (1) If the Labor Commissioner determines an eligible motor
35 carrier violated or failed to perform any of its obligations under a
36 settlement agreement, the Labor Commissioner may file a civil
37 action to enforce the settlement agreement.

38 (2) (A) If the Labor Commissioner files a civil action seeking
39 only recovery of the amounts due to commercial drivers under the
40 settlement agreement, the Labor Commissioner may obtain judicial

1 enforcement by filing a petition for entry of judgment for the
2 liabilities due and remaining pursuant to the settlement agreement.

3 (B) After filing a petition pursuant to subparagraph (A), the
4 Labor Commissioner may file an application for an order to show
5 cause and serve it on the eligible motor carrier. Within 60 days of
6 the date the Labor Commissioner filed the order to show cause,
7 the court shall hold a hearing and enter a judgment. The judgment
8 shall be in amounts which are due and owing to commercial drivers
9 pursuant to the settlement agreement with credits, if any, for
10 applicable payments the eligible motor carrier made under the
11 settlement agreement. A judgment entered pursuant to this
12 paragraph shall not preclude subsequent action to recover civil
13 penalties or statutory penalties by the Labor Commissioner, or by
14 an employee pursuant to Section 2698 to 2699.5, inclusive.

15 (3) If the court determines in any action filed by the Labor
16 Commissioner that a motor carrier has violated or otherwise failed
17 to perform any of its obligations under a settlement agreement,
18 the court shall award the Labor Commissioner costs and reasonable
19 attorney's fees.

20 SEC. 2. Article 8.6 (commencing with Section 1160) is added
21 to Chapter 4 of Part 1 of Division 1 of the Unemployment
22 Insurance Code, to read:

23

24 Article 8.6. Motor Carrier Employer Amnesty Program

25

26 1160. (a) The department shall collaborate with the Labor
27 Commissioner to administer the Motor Carrier Employer Amnesty
28 Program established by Section 2750.8 of the Labor Code and as
29 provided by this article.

30 (b) The definitions set forth in Section 2750.8 of the Labor Code
31 shall apply to this article.

32 1162. Commercial drivers who are classified as employees
33 pursuant to a settlement agreement shall be eligible to receive a
34 refund of elective coverage contributions pursuant to Section 708
35 and may submit a claim for refund pursuant to Section 1178.

36 1164. The department may promulgate regulations and take
37 any other actions necessary or appropriate to implement this article
38 and further its participation in the program.

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