

Assembly Bill No. 621

Passed the Assembly September 10, 2015

Chief Clerk of the Assembly

Passed the Senate September 9, 2015

Secretary of the Senate

This bill was received by the Governor this _____ day
of _____, 2015, at _____ o'clock ____M.

Private Secretary of the Governor

CHAPTER _____

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, 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.

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

SECTION 1. Section 2750.8 is added to the Labor Code, to read:

2750.8. (a) The Labor Commissioner and the Department of Employment Development shall administer the Motor Carrier Employer Amnesty Program pursuant to which, notwithstanding any law, an eligible motor carrier performing drayage services at any port shall be relieved of liability for statutory or civil penalties associated with the misclassification of commercial drivers as independent contractors, as provided by this program, if the eligible motor carrier executes a settlement agreement with the Labor Commissioner whereby the eligible motor carrier agrees to, among other things, properly classify all of its commercial drivers as employees.

(b) As used in this section, the following terms shall have the following meanings:

(1) “Commercial driver” means a person who holds a valid commercial driver’s license who is hired or contracted to provide port drayage services.

(2) “Department” means the Employment Development Department.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(k) (1) Notwithstanding any other law and pursuant to the program, an eligible motor carrier that executed and performed its obligations pursuant to a settlement agreement shall not be liable,

and the Labor Commissioner or the department shall not enforce, any civil or statutory penalties, including, but not limited to, remedies available under subdivision (e) of Section 226, that might have become due and payable for the time period covered by the settlement agreement, except for the following penalties:

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

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

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

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

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

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

(B) For purposes of paragraph (1), state personal income taxes required to be withheld by Section 13020 of the Unemployment Insurance Code and owed by the motor carrier pursuant to Section 13070 of the Unemployment Insurance Code shall not be collected,

if the eligible motor carrier issued an information return pursuant to Section 6041A of the Internal Revenue Code reporting payment or if the commercial driver certifies that the state personal tax has been paid or that he or she has reported to the Franchise Tax Board the payment against which the state personal income tax would have been imposed.

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

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

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

(m) The recovery obtained by the Labor Commissioner on behalf of a reclassified commercial driver pursuant to a settlement agreement shall be tendered to the commercial driver on the condition that the commercial driver shall execute a release of all claims the commercial driver may have against the eligible motor carrier based on the eligible motor carrier's failure to classify the commercial driver as an employee. A commercial driver shall not be under any obligation to accept the terms of a settlement agreement. If a commercial driver declines to accept the terms of a settlement agreement, the commercial driver shall not be bound by the settlement agreement, except that the eligible motor carrier shall still reclassify the commercial driver as an employee and that commercial driver shall be precluded from pursuing a claim for civil penalties or statutory penalties covered by the period of time covered by the settlement agreement. If a commercial driver does not accept the terms of a settlement agreement, the motor carrier

shall be excused from performing its requirement under the settlement agreement to pay the amount acknowledged in the settlement agreement to be due to that commercial driver.

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

(2) (A) If the Labor Commissioner files a civil action seeking only recovery of the amounts due to commercial drivers under the settlement agreement, the Labor Commissioner may obtain judicial enforcement by filing a petition for entry of judgment for the liabilities due and remaining pursuant to the settlement agreement.

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

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

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

Article 8.6. Motor Carrier Employer Amnesty Program

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

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

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

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

Approved _____, 2015

Governor