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New Strict Liability for Subcontracted Labor – A.B. 1897

by Brandon L. Sylvia, Associate, Rutan & Tucker, LLP

Businesses that use workers supplied by other companies (such as staffing agencies) are now directly responsible for paying wages and providing valid workers' compensation insurance to those workers. On September 28, 2014, Governor Jerry Brown signed A.B. 1897 into law, which adds Section 2810.3 to the California Labor Code effective January 1, 2015. This new statute creates a direct avenue of liability for California employees to pursue what will inevitably be the "deep pocket" company to which they are assigned. Prior to this law's enactment, a worker was required to prove that a joint employment relationship was formed, which involves a fact-intensive legal test. As of January 1st, there is no need for an employee to meet that burden; Section 2810.3 makes the "client employer" automatically liable for certain violations of its "labor contractors." California businesses should pay close attention to the statute's definitions and exceptions to determine when they may be liable under this statute.

Statutory Purpose

Section 2810.3 arose from the Legislature's perception of a trend away from traditional employment and towards business models that use subcontracted or contingent workers. These "non-traditional" relationships take on many forms, and include the use of staffing agencies, "seasonal" workers, "contract" employees, and other structures whereby the main company – the company that is producing the widgets, for example – utilizes a workforce comprised in whole or in part of employees obtained from another entity. Section 2810.3 is intended to encourage the use of reputable suppliers of labor by making the company that benefits from the borrowed employees liable for wage-and-hour and workers' compensation compliance.

Key Terms

Section 2810.3 provides that "[a] client employer shall share with a labor contractor all civil legal responsibility and civil liability for all workers supplied by that contractor" for wage-and-hour and workers' compensation violations. The key terms from this quoted language illustrate the breadth of the new law.

A "client employer" is defined as any business entity that "obtains or is provided workers to perform labor within its usual course of business from a labor contractor." All employers in all industries are subject to the law, except for (1) employers with fewer than 25 total workers, including those supplied by a labor contractor;
(2) employers with fewer than five workers supplied by a labor contractor; and
(3) the state and any political subdivision thereof. A company's "usual course of business" is defined circularly as the "regular or customary work of a business" on the client employer's premises or worksite.

A "labor contractor" is defined as an individual or entity who supplies "workers to perform labor within the client employer's usual course of business." Specifically excluded from this definition are (1) bona fide nonprofits; (2) bona fide labor organizations, apprenticeship programs, or hiring halls; and (3) motion picture payroll services companies. The new law also does not apply to individuals who satisfy the executive, administrative, or professional employee exemptions.

Section 2810.3 specifically exempts the following from liability under the statute:

- Labor and services provided to home-based businesses at the home;

Brandon L. Sylvia

Brandon L. Sylvia is an attorney in Rutan & Tucker's Employment & Labor Section. His practice involves representing and counseling employers in all areas of employment law, including harassment, workplace discrimination, terminations, employment agreements, leaves of absence, wage and hour issues, trade secrets, unfair competition, accommodating disabilities, and employment policies and procedures. Mr. Sylvia has represented employers in various civil litigation matters - including appellate proceedings before the California Courts of Appeal, the California Supreme Court, and the Ninth Circuit Court of Appeals - and before state administrative agencies. Mr. Sylvia can be reached at either bsylvia@rutan.com or 714.338.1806.

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▶ The bona-fide use of independent contractors other than labor contractors;

▶ Cable operators, home satellite service providers, and telephone companies that use another company's workers to build, install, maintain, or perform repair work;

▶ Motor clubs that use a third-party contractor; and

▶ Various exclusions for motor carriers.

Scope of Liability and Notification Requirement

Section 2810.3(b) imposes strict liability on a client employer in two situations:
(1) wage violations; and (2) the failure to secure workers' compensation coverage. Unlike previous drafts, the final bill does not impose joint liability in two other areas, which would have greatly expanded its already considerable scope: (1) failure to report and pay all required employer contributions, worker contributions, and personal income tax withholdings; and (2) the obligation to provide a safe work environment.

Before workers may pursue a civil action pursuant to Section 2810.3, they must first provide notification of the impending lawsuit at least 30 days before filing the action. The statute prohibits retaliation against workers who provide notification of violations, or who file a claim or civil action.

Implications of A.B. 1897

Section 2810.3 represents the latest in California's expansion of employee protection. The new law provides a direct avenue to recover unpaid wages and penalties, so that employees can recover even if the staffing agency or other "labor contractor" which directly employed them is unable to pay a judgment. The legislative history of the bill explains that Section 2810.3 was designed to "incentivize the use of responsible [labor] contractors, rather than a race to the bottom" (*i.e.*, the use of the cheapest labor available). Unfortunately for California businesses, even responsible labor contractors can make mistakes – especially in the "gotcha" realm of wage-and-hour laws – which can spawn costly lawsuits.

The statute also poses difficulties with its less-than-lucid definition of "usual course of business." Section 2810.3 arguably does not apply to the use of workers from a labor contractor if those workers perform work that is ancillary to the business. However, it is unclear how far from the "usual course of business" a task must be in order for Section 2810.3 to not apply. For example, if the main business purpose of a manufacturer is the creation and sale of products, would Section 2810.3 make the business liable for its customer service call center employees whom it obtained from a labor contractor? These and similar questions will likely be answered in the coming years through litigation.

California companies that use staffing agencies or which are otherwise "client employers" must carefully weigh the amount of oversight they want to engage in when using workers provided by staffing agencies. Determining whether the labor contractor has valid workers' compensation insurance should be fairly straightforward. Attempting to oversee the labor contractor's wage-and-hour compliance practices is trickier. On one hand, client employers now share joint liability for payment of wages, and so may wish to ensure that the labor contractor has good practices in place. On the other hand, too much oversight could expose a company to arguments that it has a joint employment relationship with the labor contractor, which could give rise to liability for other employment claims.

Perhaps the best way to avoid this "heads I win, tails you lose" territory is for client employers to contract for contribution and indemnity from the labor contractor. Although a waiver of the protections provided by Section 2810.3 is void and unenforceable, the statute provides that a client employer may enter into a contract that creates a remedy for liability created by the labor contractor (and vice-versa). Thus, careful contract drafting at an early stage of the relationship can provide some peace of mind for a client employer.

Although the unanswered questions abound, one thing is clear: Section 2810.3 has raised the stakes of using "alternative" employment arrangements. Companies using workers supplied by other companies should be wary of the risks that such arrangements may pose, and should carefully consider strategies to mitigate these new risks.