Am I My Brother's Keeper? New California Law Says If You Do Business With a Port Trucking Company Then, "Yes You Are!"

Insights
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On September 22, Governor Brown signed SB 1402, a bill that establishes joint and several liability for customers who contract with or use port drayage motor carriers who have unpaid wage, tax and workers' compensation liability. SB 1402 is effective January 1, 2019.

California is home to the two busiest ports in the United States (Los Angeles and Long Beach) which, combined, represent the tenth busiest ports in the world. For at least the last decade, labor groups (including the Teamsters Union) have alleged that truck drivers at the ports have been misclassified as independent contractors rather than employees. A number of legislative efforts have been attempted over the years including efforts to statutorily mandate that port truck drivers are employees, rather than independent contractors.

Senate Bill 1402 (Lara) represents an effort to put pressure on retailers and other customers of port trucking companies by putting them potentially "on the hook" for joint liability under certain conditions. Because of the wide range of industries that depend on port trucking (agriculture, retailers, manufacturing, car dealers), the potential impact of this new law is far-reaching.

The "Blacklist"
SB 1402 requires the Division of Labor Standards Enforcement (DLSE) to compile a list (and post it on its website) of any port drayage motor carrier with any unsatisfied judgments, including for failure to pay wages, imposing unlawful expenses, failure to remit payroll taxes, failure to provide workers' compensation insurance, or misclassification of employees as independent contractors. DLSE is not allowed to place a port trucking company on the "blacklist" until the period of time for all judicial appeals has expired – so this list is for unsatisfied *final* judgments.

Contract With These Companies At Your Own Peril
The potential "skin in the game" for businesses that rely on port trucking companies comes in the addition of new Labor Code Section 2810.4(b)(3). This provision states that a customer that engages or uses a port trucking company on the "blacklist" shall share all civil legal responsibility and civil liability owed to a driver for services obtained after the date the company appeared on the "blacklist."

The new law specifies that this means joint and several liability with the trucking company for the full amount of unpaid wages, unreimbursed expenses, damages and penalties. Every customer that

uses a port trucking company on the "blacklist" in a given workweek shall be jointly and severally liable for unpaid wages and other damages which are found to be owed by the port trucking company for that workweek.

SB 1402 contains an expansive definition of "customer" of a port trucking company. Specifically, "customer" means a business that engages or uses a port trucking company to perform services on the customer's behalf, whether the customer directly engages or uses a port trucking company or indirectly uses a company through the use of an agent such as a freight forwarder, motor transportation broker, ocean carrier, or other motor carrier. However, "customer" does not include (1) a business with fewer than 25 workers, (2) public entities, or (3) a marine terminal operator or similar business who has incidental relationships with port trucking companies.

SB 1402 provides that joint liability under this new law may be determined by the Labor Commissioner, or by a court in a civil action (following 30 days' notice to the customer). However, the good news is that the bill specifies that no civil action for joint liability may be brought pursuant to the Labor Code Private Attorneys General Act of 2004 (PAGA).

Notice Requirements

In order to place customer on notice about any potential joint liability, SB 1402 establishes several notice requirements for port trucking companies. First, a port trucking company, prior to providing services to a customer, shall provide written notice of any unsatisfied final judgments. However, the failure to provide the notice shall not absolve the customer of joint liability under the new law. Second, the law requires a port trucking company to notify a customer within 30 days of a final entry of judgment for specified claims. This appears designed to put the customer on notice whether they may have originally contracted with a trucking company that was not on the "blacklist," but the trucking company may subsequently have an unsatisfied judgment.

Exceptions

Like most legislation, SB 1402 has a number of exceptions that were negotiated during the legislative process. SB 1402 specifies that the joint liability provisions do not apply to the following:

- Customers who engage with port trucking companies whose employees are covered by a bona fide collective bargaining agreement.
- Where the customer and the trucking company had an existing contract at the time the company is listed on the "blacklist," joint liability shall not apply until the expiration of that contract or 90 days, whichever is shorter.
- Where a port trucking company is not listed on the DLSE "blacklist."
- Where the port trucking company satisfied the judgment prior to the time period for which the joint and several liability is alleged.

Next Steps

SB 1402 goes into effect on January 1, 2019. Because of the wide range of companies that could potentially be deemed "customers" of port trucking companies, the impact of the new law could be far reaching.

Companies that engage with or use port trucking companies will need to develop protocols to monitor the DLSE "blacklist" to determine whether any potential contractor falls on that list. Businesses may wish to build in disclosure and notification requirements (or other due diligence processes) before engaging the services of a port trucking company. Finally, potential "customers" may wish to consult with counsel to discuss contract provisions or other methods to minimize any potential liability when dealing with port trucking companies.

For more information about this new law, please contact your regular Fisher Phillips attorney, or one of the attorneys in any of our California offices:

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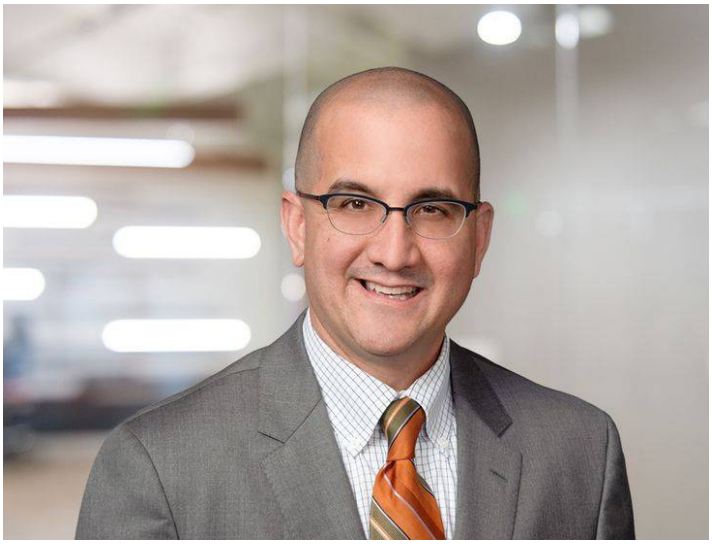

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