California says think twice before using temporary workers or others from staffing agencies and other labor contractors

By Jeffrey M. Tanenbaum and Alicia C. Anderson

At a time when employers are increasingly relying on temporary workers from staffing agencies and other labor contractors and many workers are looking for creative and more flexible alternative working relationships, California has taken a giant step backwards. Rather than encouraging workforce creativity, California has passed a sweeping new law that will increase liability for employers who use such alternative staffing.

California’s AB1897, signed by Governor Brown on September 28, 2014, adds Section 2810.3 to the California Labor Code. The new law became effective on January 1, 2015.

Labor Code Section 2810.3 contains three new requirements:

— An employer must share with a labor contractor all civil legal responsibility and civil liability for all workers supplied by that labor contractor for:
  a. the payment of wages; and
  b. any failure to secure valid workers compensation coverage. Labor Code Section 2810.3(b).
— An employer may not shift to a labor contractor any legal duties or liabilities under the provisions of Cal/OSHA. Labor Code Section 2810.3(c).
— Upon request by a state enforcement agency or department an employer and/or labor contractor must provide to that agency or department any information at all within its possession, custody or control required to verify compliance with applicable state laws. Labor Code Section 2810.3(i).

Critical definitions

— A “labor contractor” is an individual or entity that supplies a client employer with workers to perform labor “within the client employer’s usual course of business.” Labor Code Section 2810.3(a)(3). Thus this law applies to staffing agencies and other labor contractors who supply workers to a client employer.
— The term “usual course of business” means the regular and customary work of a business, performed within or upon the premises or worksite of the client employer. Labor Code Section 2810.3(a)(6).

— The term “workers” does not include exempt executive, administrative or professional employees. Labor Code Section 2810.3(a)(5).

— "Wages" includes all amounts for labor performed by employees of every description whether the amount is fixed or ascertained by standard of time task piece commission basis or other means of calculation. Labor Code Section 2810.3(a)(4) and Labor Code Section 200.

Exceptions

There are some significant exceptions to this law, which will provide some relief to a number of employers. These exceptions are as follows:

— The law does not apply to small employers—those with a work force of less than 25 workers including those obtained from or provided by a labor contractor. Labor Code Section 2810.3(a)(1)(B).

— The law does not apply to an employer that uses five or fewer workers supplied by a labor contractor or various labor contractors at any given time. Labor Code Section 2810.3(a)(1)(B). However, it appears to be an open question as to whether or not any use of more than five workers supplied by a labor contractor by an employer in the past precludes reliance on this exception.

— The law does not apply to exempt employees. Labor Code Section 2810.3(a)(5).

— The law does not apply to work away from the client employer’s worksite. However, it is not clear how broadly the term “worksite” will be defined.

— The law does not apply to work performed outside the “usual course of business” of a client employer. Again, however, it is not clear how broadly this term will be defined.

— The law does not impose liability on an employer for the use of an independent contractor other than a labor contractor and does not change the legal definition of an independent contractor. Labor Code Section 2810.3(o).

— The law does not apply if the “labor contractor” is a bona fide nonprofit community-based organization providing services to workers, a bona fide labor organization or apprenticeship program or hiring hall operated pursuant to a collective bargaining agreement, a motion picture payroll services company as defined or certain third parties who are party to an employee leasing arrangement if the employee leasing arrangement contractually obligates the client employer to assume all civil legal responsibility and civil liability under the law. Labor Code Section 2810.3(a)(3).

— The law does not impose individual liability on a homeowner for labor services received at the home of the owner of a home-based business for labor services. Labor Code Section 2810.3(n).

— There are also certain exceptions for the motor carrier industry, including for carriers of property that contract with or engage another motor carrier to provide transportation services, or employers that utilize third-party motor carriers with interstate or intrastate
operating authority to ship or receive freight. Labor Code Section 2810.3(p)(1) and (2).

— There is an exception for cable operators, satellite service providers and telephone corporations that contract with a company to build, install, maintain or perform repair work, so long as the name of the contractor is visible on employee uniforms and vehicles. Labor Code Section 2810.3(p)(3).

— There is an exception for motor clubs, if the name of the contractor is visible on the contractor’s vehicles. Labor Code Section 2810.3(p)(4).

— What is good for the goose is not good for the gander: The state of California as well as local governments and special districts are exempt from the law. Labor Code Section 2810.3(a)(1)(B).

Does the law apply to temporary service providers or independent contractors or both?

The new law clearly applies to temporary employees provided by a third-party temporary staffing agency. It also applies to other workers whose job assignments may not be temporary but are provided by a third party. However, the new law does not impose liability on a business that uses an independent contractor “other than” a labor contractor, nor does it change the definition of an independent contractor. The definition of “labor contractor” explains that the law only applies to workers who perform labor “within the client employer’s usual course of business,” as in a typical temporary worker or staffing agency arrangement, but the independent contractor exception appears to apply to workers who are solely employed by and working for a bona fide independent contractor. For example, if an accounting firm contracts with an IT services company to provide workers to resolve IT problems, the IT services company would not be a “labor contractor” within the statute, since the accounting firm is not in the business of providing IT services. However, the language is confusing and litigation may follow.

Can an employer and labor contractor obtain protection from this new law by the use of contract language between them?

To some extent. The law allows an employer and labor contractor to enter into a contract that provides lawful remedies for liability created by the acts of the other. Labor Code Sections 2810.3(g) and (h). However, the law also expressly provides that a waiver of the law is contrary to public policy and is void and unenforceable. Labor Code Section 2810.3(m). The most logical harmonizing of these different provisions would appear to allow a contractual provision for indemnity and/or defense. Contractual provisions that allow for some sort of damages at a reasonable level appear to also be permissible. However, such provisions might be claimed to be a de facto unlawful waiver if written too broadly. Additionally, under the new law, client employers cannot shift any legal duties or liabilities under workplace safety laws to the labor contractor.

What is the impact of not being able to shift legal duties or liabilities under CAL/OSHA?

While Cal/OSHA does not allow an employer to delegate legal duties, it has been possible and often sensible to delegate some Cal/OSHA responsibilities (and thus sometimes liabilities) under Cal/OSHA to another party. This new law might be interpreted as limiting or preventing employers from now doing so with regard to any work performed by non-exempt employees within the usual course of the employer’s business.
This would mean, as a practical matter, that for all such work the client employer must provide the following:

- All training needed by the workers
- All required safety and health programs
- Supervision and enforcement of the safety programs and the work in question
- Investigation of all incidents
- All corrective measures

However, the better interpretation would appear to be that it is still possible for a client employer to outsource these tasks to a labor contractor, but that the client employer will remain liable if they are not performed properly. And it appears that the law allows delegation of duties and liabilities to a third party other than the labor contractor who supplies the workers in question.

In any event, it seems a virtual certainty that the new law will result in more citations being issued to client employers.

**Increased liabilities and increased litigation**

Client employers will now be subject to all civil liability and legal responsibility if the labor contractor violates wage-and-hour laws, Cal/OSHA violations or fails to provide workers compensation coverage, even if no evidence is presented that the client entity controlled the working conditions or wages, or had knowledge that any violations were actually occurring. Prior to the passage of the law, the burden was on the employee to prove that a client employer was a joint employer. And, a violation of AB1897 may also result in a representative action under the Labor Code Private Attorney General Act (PAGA). Labor Code Section 2699 et seq.

It is thus prudent to assume that this law will both discourage the use of labor contractors and give rise to litigation between employers and labor contractors in the event an employee files a claim against one or the other or both.

The impact on workers compensation premiums remains to be seen. However, it is prudent to assume that workers compensation providers will now seek additional information from employers with regard to any workers provided by labor contractors and that they will factor that new information in setting premiums. It is also possible that employers may see more restrictive language with regard to coverage under workers compensation policies.

**Practical considerations—what should employers and labor contractors do now?**

Client employers and labor contractors now need to review all of their contractual relationships and contract language in California.

As a first step, it will be important to determine whether or not the work in question is covered or whether it fits within one of the exceptions. If the work is covered, it would be prudent to cover in contract language the following:

- How will the parties respond in the event a claim is made?
- Who will be responsible for Cal/OSHA duties and responsibilities?
- What provisions will be included with regard to indemnification, defense of claims and
damages as between the client employer and the labor contractor?

Client employers may also want to consider whether it is possible for the workers in question to be provided by an exempt labor contractor. Client employers may also want to review whether work currently done by third-party provided temporary workers should now be brought entirely in-house or whether the work should be outsourced to independent contractors.

Labor contractors who have not yet done so may now be more likely to establish independent contractor and/or workforce management divisions. Labor contractors will also need to take steps to reassure client employers of their compliance with wage and hour laws, workers compensation and Cal/OSHA requirements. For covered work, it will be important for employers to review their safety and health programs to ensure that newly covered workers are fully covered by those programs.

Finally, both client employers and labor contractors will need to ensure that they are keeping records demonstrating compliance with all applicable state laws.

If you have any other questions or need assistance complying with this new law, please contact your Nixon Peabody attorney or:

— Jeffrey M. Tanenbaum at jtanenbaum@nixonpeabody.com or (415) 984-8450
— Alicia C. Anderson at acanderson@nixonpeabody.com or (213) 629-6073