

DEALER ALERT

TO: Clients
FROM: Sam Celly, MS JD CSP
DATE: November 6, 2014
SUBJECT: **California Employers Face Great Liability Under AB1897**

Background: Many dealerships use a subcontractor on premises to wash automobiles and for other operations. Current law regulates the terms and conditions of employment and establishes specified obligations of employer and employees. Dealers can control the liability by having the subcontractor work under a written contract that indemnifies the dealership and also, provide the dealership with General Liability (GL) & Auto Insurance (dealer as additional insured) and Workers' Compensation (WC) Insurance (with waiver of subrogation and dual employer endorsement). Dealers must maintain arm's length distance with contractor operations so as to avoid *active supervision*. Also, liability accrues when the *equipment provided* by the dealership to the subcontractor, such as forklift or a ladder, is involved in an accident resulting in an injury to the contractor employee.

New Law AB 1897 Effective January 1, 2015: The Legislative Counsel's Digest for AB1897 is as follows: "This bill would require a client employer to share with a labor contractor all **civil legal responsibility and civil liability for all workers supplied by that labor contractor for the payment of wages and the failure to obtain valid workers' compensation coverage**. The bill would prohibit a client employer from shifting to the labor contractor **legal duties or liabilities under workplace safety provisions** with respect to workers provided by the labor contractor. [...] The bill would authorize the Labor Commissioner, the Division of Occupational Safety and Health, and the Employment Development Department to adopt necessary regulations and rules to administer and enforce the bill's provisions. The bill would provide that waiver of its provisions is contrary to public policy, void, and unenforceable." Bolded sections above added by the author of this Newsletter.

Source: http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1897

LIABILITY

Liability for Payment of Wages: Dealers have often been bruised by *wage and hour* violations of their own. To become liable under the new law for "all civil liability for all workers supplied by labor contractors for the payment of wages" when there is no control over the contractors' books, time cards, or payroll is bound to result in a nosebleed. Proper wages are deemed to include withholdings and their submittal to the state!

Liability for Failure to Obtain Workers' Compensation Coverage: If the subcontractor has not obtained WC coverage, then the subcontractors' employee is free to pursue a claim against the dealership resulting from any injury incurred while working there. Dealerships' WC coverage for the dealer is not applicable here as the subcontractor employee is not a dealership employee.

Legal Liability for Workplace Safety Provisions: The bill prohibits a client employer from shifting to the labor contractor legal duties or liabilities under workplace safety provisions with respect to workers provided by the labor contractor. In summary, safety of contract workers on premises is the dealers' liability. Wow! Also, any act of negligence on the part of the dealership is not protected under the WC regime as is the protection available from dealers own employees under the WC statutes. The bill expressly provides that it does not limit any other theories of liability or requirements established by other statutes or common law.

Legal Morass: All in all, this bill creates tremendous liability in the Labor Code arena for the dealerships. Dealers should contact their labor lawyer ASAP, to understand and minimize liability created under this bill and its many provisions.

MISCELLANEOUS

Exemptions: There are certain exemptions in the code when fewer than 5 employees are supplied by the labor contractor at any one time or if the total number of employees at the site is below 25. Certain apprentice and non-profit community-based organizations may be exempt from the provisions of this law.

Waivers: Any waiver of statute by labor contractor or their employees is contrary to public policy and is unenforceable.

Protected Species: Once the subcontractors' employee files a claim or provides notification to the dealership or employer of intent to file for violations, the employee is protected from any adverse action.

Exhaust Remedy Against Subcontractor: The subcontractor employee may not exhaust his remedy for payroll or other violations and resulting damages from those violations against his primary employer prior to seeking remedy from the dealerships. Lawsuits somehow follow deep pockets.

Usual Course of Business: The subcontractors' employees are deemed to be the ones provided for regular and customary work of a business, performed within the premises or worksite of the client employer.

Effective January 1, 2015: You have very little time to determine the legal pathway for minimizing the liability created by this bill. Trial lawyers have probably read the bill and have determined the legal theories, both novel and time-tested, to go after employers under this new bill. You cannot wait, but must act fast and decisively.

DISCLAIMER: *This is a Newsletter and nothing in this Newsletter constitutes legal advice. Employers must consult their lawyer for legal matters and safety consultants for matters related to safety. The article was authored by Sam Celly of Celly Services, Inc. who has been helping automobile dealers comply with EPA & OSHA regulations since 1987. Sam received his BE (1984) and MS (1986) in Chemical Engineering followed by a J.D. from Southwestern University School of Law (1997). Our newsletters can be accessed at www.epaoshablog.com. Your comments/questions are always welcome. Please send them to sam@cellysolutions.com.*