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COUNTY OF LOS ANGELES DEPARTMENT OF CONSUMER AND BUSINESS AFFAIRS

Members of the Board

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"To Enrich Lives Through Effective and Caring Service"

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To: Supervisor Michael D. Antonovich, Mayor
Supervisor Hilda Solis
Supervisor Mark Ridley-Thomas
Supervisor Sheila Kuehl
Supervisor Don Knabe

From: Brian J. Stiger
Director 

REPORT – CLASSIFICATION OF PORT TRUCK DRIVERS AT THE PORTS OF LOS ANGELES AND LONG BEACH

At the meeting of the Los Angeles County Board of Supervisors on April 28, 2015, your Board directed the Department of Consumer and Business Affairs (DCBA) and County Counsel to report back on an issue concerning the classification of truck drivers who provide services to port trucking companies. This report provides your Board an overview of the subject as well as potential actions the County could implement.

ISSUE:

A number of port truck drivers in Los Angeles and Long Beach are involved in a dispute with their employers concerning their employment classification as independent contractors. Port truck drivers argue that they are employees and their employers have misclassified them as independent contractors. These truck drivers are engaging in large-scale, collective use of legal remedies by filing numerous private wage and hour lawsuits, in addition to petitioning federal, state, and local agencies to address their alleged misclassification issue.

BACKGROUND:

A majority of shipping companies operating at the ports have historically classified their drivers, referred to as drayage drivers, as independent contractors, rather than employees. Independent contractors are not entitled to minimum wage and overtime pay; cannot join unions and are not entitled to workers' compensation or unemployment insurance. They are also required to absorb a large portion of business costs, as trucking companies regularly deduct money out of paychecks for fuel and maintenance.

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This has led to various civil lawsuits and complaints to government agencies. Due to drivers' private lawsuits and complaints filed with the Labor Commissioner, several port trucking companies have had judgments entered against them. In some instances, courts have ruled in these cases that the employers have misclassified their employees as independent contractors.

Last year, the National Labor Relations Board ruled workers for a major motor carrier at the Port of Long Beach were misclassified. Earlier this year, the company reclassified its 111 drivers as employees and recognized the Teamsters union. A month later, these drivers voted on a one year contract that increased their hourly wages from \$18 to \$21 per hour. The new contract also includes full medical insurance, paid leave, and overtime after 40 hours. Additionally, another large national motor carrier decided to settle a class-action misclassification suit and, facing other lawsuits, converted all California drayage drivers to employees on September 9, 2014.

Despite movement toward reclassification, many companies operating at the Port of Los Angeles and the Port of Long Beach still classify their drayage drivers as independent contractors. Some companies who have had substantial civil judgments entered against them have filed for bankruptcy instead of paying the judgments.

FEDERAL AND STATE JURISDICTION:

Oversight of employers regarding various employment issues can be provided by both federal and State agencies. Federal agencies include the National Labor Relations Board, the Department of Labor, and the Internal Revenue Service. California agencies with oversight responsibilities include the Employment Development Department, the Department of Labor Standards Enforcement, and the Fair Employment and Housing Commission.

Employees, independent contractors, or employers may consult with any of these agencies for assistance with employment issues. These issues typically relate to income tax withholding, unemployment and disability insurance, wage claims, discrimination, misclassification of independent contractors, and protection of the rights of private sector employees to join together, with or without a union, to improve wages and working conditions. Many of these issues are also ultimately resolved by legal action.

Whether enforced by the appropriate oversight agency or through legal action, consequences may include additional tax liabilities, assessments for State unemployment insurance, training taxes, and disability contributions. In addition, employers could be subject to additional penalties and fines, including possible criminal charges in certain circumstances.

Individuals who believe that they have been misclassified as independent contractors rather than employees can file a claim with the Labor Commissioner's Office, also known as the Department of Labor Standards Enforcement (DLSE) to recover wages they believe they are owed.

There are two different ways the Labor Commissioner's Office addresses wage claims:

- The majority of claims brought to the State Labor Commissioner are addressed through informal proceedings, such as a conference between the parties and the Labor Commissioner's Office. The process includes the submission of documents and does not involve investigators. This process only occurs when a person is submitting a wage claim on their own behalf. Informal proceedings include hearings on claims in which the parties present evidence and the Labor Commissioner's Office can issue an Order Decision or Award (ODA) that can become a final judgment if not appealed or upheld on appeal. The Labor Commissioner's Office reaches a judgment within fifteen days and either party may appeal to civil court.
- Claims submitted to the Labor Commissioner that involve multiple employees involve investigators from DLSE's Bureau of Field Enforcement. This type of claim includes on-site inspections in addition to a review of documents. The Labor Commissioner can issue criminal as well as civil citations under this process.

After a decision is made by the Labor Commissioner's Office either party can appeal the decision in civil court. If an employer is found liable by the Labor Commissioner's Office in a formal hearing and appeals this decision to civil court, then they are required to file a bond or make a cash deposit with the court in the full amount awarded by the Labor Commissioner's Office.

The California Department of Industrial Relations (DIR) reported that over the last three years, the Labor Commissioner's Office has received 550 complaints relating to misclassification of workers in the trucking industry. The DIR notes that hearings have been fairly fact intensive, taking from half of a day to a week to complete. As of May 2015, of the 550 complaints, the Labor Commissioner has issued 113 ODAs finding for the employees and totaling almost \$5 million. Of these, 46 ODAs had been appealed by the employer. This represents \$3.9 million of the \$5 million in awards.

COUNTY JURISDICTION:

The County's regulatory and oversight jurisdiction is limited to areas within the unincorporated County or where otherwise provided by law. If federal and state laws govern, then the County may be further preempted from providing additional regulations. This is particularly true where the employer engages in interstate commerce, over which the federal government has jurisdiction.

Your Board continues to have significant influence over important labor issues within the County.

In this regard, the Board's support for a particular position which may be provided to an oversight agency or the State legislature can have an impact on an issue.

In addition, the County as an organization and market participant, may determine that businesses who wish to contract with the County must meet certain requirements. The County currently does this by requiring contractors to pay living wages in Prop A contracts or provide paid employee jury service. If the County chooses to require additional restrictions of businesses that it contracts with, then it may do so as long as it is not preempted by federal or State law.

POTENTIAL COUNTY ACTIONS:

There are a number of actions your Board could consider to address the misclassification of workers in the County:

A. Prevention

DCBA could conduct outreach and education workshops throughout Los Angeles County for workers and employers to learn about their rights and obligations. The workshops could include information on how to prevent, identify and report wage theft violations. DCBA could work with the Los Angeles County business community to educate businesses about their rights and responsibilities under the law. DCBA would develop an outreach program and deliver to businesses as part of the Small Business Services workshops and as part of the Small Business Concierge counseling for those interested in starting a business in the County.

B. Information and Referrals

DCBA could be a source of information for any individuals wishing to file a complaint against their employer alleging that they are not being paid all of the wages that they are owed. DCBA could provide assistance to individuals interested in filing a complaint and refer the individuals to the appropriate governing agency or agencies if applicable.

When jurisdiction permits, DCBA could investigate allegations of unlawful employment classification. DCBA could work closely with regulatory agencies and refer information related to allegations of unlawful employment classification to the appropriate governing agencies.

C. Partnerships

Where feasible, DCBA can partner with other governmental agencies to share information and monitor the constantly evolving situation at the ports. Through these partnerships, the agencies could collaborate and refer information regarding cases in order to stay informed and share resources.

D. County Contracting

The County could explore implementing policies that prohibit County departments from contracting with companies that have judgments related to workers' employment status or other determinations of wage and hour law violations.

E. Pending Legislation

There are currently three bills for consideration by the California Legislature that would affect the situation with the drayage drivers. DCBA consulted with the Chief Executive Office Legislative Affairs and Intergovernmental Relations, and while the Board-approved 2015-16 State Legislative Agenda does not contain specific policies for the County to advocate on this specific matter, your Board could consider taking action to direct the Sacramento advocates to support these bills. The bills include:

Senate Bill 588, introduced by Senator Kevin De Leon, would authorize the Labor Commissioner to file a lien on all property of the employer in California for the full amount of any wages and other compensation, penalties, and interest owed to the employee. This serves to address the problem of unpaid judgments in wage and hour cases. The Labor Commissioner would have the authority to levy an employer's bank accounts, accounts receivable, and real and personal property, and the authority to provide for third-party claims against the employer's property. Moreover, under SB 588, the Labor Commissioner may require businesses that have failed to pay court orders for employee wages to post a bond of \$150,000 before continuing to do business. Businesses in the long term care industry (e.g.- hospice, skilled nursing facilities, etc.) that violate this bill may be prevented from obtaining or renewing their licenses. This would strengthen the State's authority to enforce judgments by the Labor Commissioner.

Assembly Bill 621, introduced by Assembly Member Roger Hernandez, would enact a limited amnesty program with respect to the misclassification of port truck drivers if the trucking company enters into a consent decree with the Labor Commissioner prior to January 1, 2017 where the company agrees to convert all of its commercial drivers to employees.

Under the terms of this consent decree, the motor carrier must agree to pay all wages and benefits owed to previously misclassified independent contractors and all taxes owed to the State. In exchange, the motor carrier will be relieved of all liability for statutory or civil penalties.

Assembly Bill 970, introduced by Assembly Member Nazarian, would authorize the Labor Commissioner to issue a citation should an inspection or investigation find that an employer has violated local overtime law, has paid an employee less than local minimum wage, or has failed to reimburse an employee for expenses. This bill serves to give the Labor Commissioner increased enforcement authority. The Labor Commissioner has been enforcing local wage requirements in wage claim hearings, and this bill extends the authority to issue citations for those local violations when encountered in the field.

Questions:

DCBA is continuing to monitor this issue. If you have questions or need additional information, please contact me at (213) 974-9750.