

# Joint Liability

## Legislature Shifts Workplace Labor Enforcement to Private Sector by Expanding Joint Liability

There are two ways in which one employer can be held liable for the actions of another employer in employment law: if the employer exercises sufficient control over the second employer's workers, or if it is statutorily liable.

The Industrial Wage Orders define “employer” as any person “who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person.”

In *Martinez v. Combs*, 49Cal.4th 35 (2010), the California Supreme Court explained that under this language, an entity that contracts with another may be a joint employer to the second entity's workers where the contracting entity (1) exercises control over wages, hours or working conditions; (2) suffers or permits the employee to work; or (3) engages with the worker such that a common law employment relationship exists, such as by providing workers with tools, using them as an integral part of their business, or holding the workers out to the public as their own.

The test applies to claims under the Wage Orders or the California Labor Code. In evaluating whether joint liability exists, courts consider factors such as whether the contracting entity has authority to negotiate or set wages, control working conditions, hire, fire, supervise day-to-day activities, cause the employee to work or prevent work. Many courts construe the Wage Orders' definition broadly to ensure that businesses are not turning a blind eye to other companies they contract with that are failing to properly pay their workers.

### STATUTORY JOINT LIABILITY

In addition to the three factors explained by *Martinez*, the California Legislature has identified specific industries in which joint liability automatically attaches. Generally, those laws have emerged in industries where wage theft has historically been more prevalent, such as the construction or garment industries,

and industries where the Legislature believes that a business should always have a higher burden to oversee its contractors, like property services or long-term care services.

- **Garment Industry:** Any person who contracts for garment manufacturing is jointly liable for any failure to pay workers minimum wage and overtime compensation. Effective January 1, 2022, under SB 62 (Durazo; D-Los Angeles; Chapter 329, Statutes of 2021), that joint liability will be extended to any entity that falls under the newly added group called “brand guarantors.” That broad definition encompasses any person that contracts for the making, processing, repairing, altering, or finishing of garments, which can include retailers, small or large, or companies that license a logo. The joint liability applies to any wages owed, expense reimbursements, attorney fees, penalties, and workers' compensation coverage. Finally, SB 62 eliminates existing law that apportions liability where a worker worked on multiple garments during the same pay period. *It instead makes all businesses jointly and severally liable for all wages owed to a worker.* If a worker spends 5% of their time on shirts for Company A and 95% of their time on shirts for Company B, Company A would now be liable for 100% of the worker's wages. This is a significant expansion beyond other joint liability laws.

- **Construction:** Direct contractors are jointly liable for any wages owed by a subcontractor to a worker. Effective January 1, 2022, under SB 727 (Leyva; D-Chino; Chapter 338, Statutes of 2021), that liability will extend to penalties, liquidated damages, and interest as long as the direct contractor had knowledge of the subcontractor's failure to pay wages, or the direct contractor meets certain requirements regarding monitoring the subcontractor's payroll.

- **Property Services** (janitorial, valet, security, landscaping, and gardening): Any person that contracts for property services is jointly liable for any unpaid wages where the entity has been provided notice of any proceeding or investigation by the Labor Commissioner in which the employer is found liable.

- **Long-Term Care Services:** Any person that contracts for long-term care services is jointly liable for any unpaid wages

# Agenda for California Recovery

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where the entity has been provided notice of any proceeding or investigation by the Labor Commissioner in which the employer is found liable.

The key difference between statutory joint liability and joint liability imposed by the *Martinez* tests is that statutory joint liability imposes liability even where a third party may have little to no control over another employer's workers or conduct. Many of these laws implement what is essentially strict liability: it is irrelevant whether the employer knew or even had reason to know that the other employer violated the law.

Although asking companies to contract only with other reputable, lawful companies is laudable, policy makers must recognize that there are inherent limitations on one employer's ability to audit another. One employer cannot subpoena another's records or monitor another's employee interactions day in and day out. Even if the other employer is complying with the law, the complexity and vagueness of California's labor laws means good faith mistakes are easy to make. These strict statutes therefore make companies hesitant to conduct business in California because of the high level of risk that they will be held liable as a joint employer.

#### LEGISLATORS SEEK TO EXPAND STATUTORY JOINT LIABILITY

Several bills introduced in the 2021 legislative session sparked debate about how far statutory joint liability should extend. Many in the targeted industries commented about the need for enforcing the robust laws that already exist to address the perceived issues regarding unpaid wages and health and safety laws rather than simply increasing joint liability. As described above, SB 62 and SB 727 ultimately were passed and signed by the Governor, expanding liability in the garment and construction industries. Both bills included provisions expanding liability far beyond any prior law.

##### **AB 257: Fast Food Industry**

Another bill that proposed to extend liability but did not make it out of the Assembly was **AB 257 (Lorena Gonzalez; D-San Diego)**. Among other changes to regulation of the fast food industry, AB 257 would have held a franchisor jointly liable for any penalties imposed on a franchisee for violations of any worker and health and safety laws and regulations. As described above, just like any other potential joint employer, a franchisor may already be liable for the actions of a franchisee if it has the right to control day-to-day operations at the workplace and the workers. As the California Supreme Court has noted:

[F]ranchisees are owner-operators who hold a personal and financial stake in the business. A major incentive is the franchisee's right to hire the people who work for him, and to oversee their performance each day. A franchisor enters this arena, and becomes potentially liable for actions of the franchisee's employees, only if it has retained or assumed a general right of control over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of the franchisee's employees. **Any other guiding principle would disrupt the franchise relationship.** *Patterson v. Domino's Pizza, LLC*, 60 Cal.4th 474, 497-98 (2014) (*emphasis added*).

Franchisees are essentially small business owners who have been granted permission to operate under the name of a larger, well-known brand. That is often the extent of their relationship and the franchisor has little to no control over the day-to-day operations of the franchisee. Automatically imposing liability on franchisors that are not involved in their franchisees' daily operations would be another example of overreach by the California Legislature and will surely decrease the number of franchisees in the state.

#### INCREASED STATE ENFORCEMENT BENEFITS WORKERS AND EMPLOYERS

It is undeniable that there are certain industries where wage theft is more prevalent than others. Despite robust regulations, including registration requirements or industry-specific wage and hour requirements, these issues have persisted.

Data demonstrates that the Labor Commissioner has not been enforcing those laws. For example, less than 2% of Bureau of Field Enforcement investigations in 2017–2018 and 2018–2019 and less than 3% in 2016–2017, 2015–2016, and 2014–2015 were in the garment industry despite it being one of the industries the Labor Commissioner has flagged as needing more oversight. Proponents of SB 727 admitted that enforcement in the construction industry remains "rare."

The state should increase enforcement of the laws that already exist to address these exact problems. Through joint efforts between the business community and worker representatives, the state has the power to:

- Place a lien on any of the employer's property in California to satisfy wages owed to an employee.
- Require an employer to post a surety bond if they haven't paid a final judgment within 10 days.
- Issue a stop order if any employer operates without a bond.

- Impose successor liability for unpaid wages, so that an employer cannot shut down and reopen as a different company to avoid liability.
- Impose personal liability for managing agents of employers.
- Deny registration to businesses in known problematic industries such as car washes or garment manufacturers.
- Subpoena records from employers.

Shifting enforcement to the private sector often means delayed outcomes for workers, significant money going to attorneys instead of workers, and higher costs for employers in settlement costs and attorney fees. A perfect example of this problem is the Private Attorneys General Act (PAGA). Available data shows that the average payment a worker receives from a PAGA case filed in court is \$1,300, whereas it is \$5,700 if the worker files a claim that is then adjudicated by the state labor agency. Notably,

even though workers receive more through state-handled claims, employers are paying out less. This is due to the large attorney fees that are levied in court cases, usually totaling around 33% or more of the total settlement amount. Court cases are also slower. Workers wait on average 23 months for payment in a court case and only an average of 12 months in state cases.

#### CALCHAMBER POSITION

The California Chamber of Commerce believes the state should focus on enforcing existing laws instead of placing more burdens on private businesses that face automatic liability under these laws, even if the businesses have little to no control over the workers. California has the most protective, robust employment laws in the country. We must enforce those laws so that the bad actors are held accountable instead of simply passing the buck to others.



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