McGeorge Law Review

Volume 26 | Issue 2 Article 31

1-1-1995

Labor

University of the Pacific; McGeorge School of Law

Labor

Labor; inmate labor—emergency services during a natural disaster

Penal Code § 2701 (amended).
AB 768 (Rainey); 1994 STAT. Ch. 494

Under existing law, the Department of Corrections is authorized to use state prisoners to provide labor for public use needed by or for the state or federal government, except for services under the jurisdiction of the Prison Industry Authority.[1] Chapter 494 expands existing law by authorizing the Department of Corrections to use inmate labor to provide emergency services for public or private property during a county level state of emergency[2] due to a natural disaster.[3]

---

1. CAL. PENAL CODE § 2700 (West Supp. 1994); *see id.* (requiring labor of every able-bodied state prisoner); *id.* § 2701 (amended by Chapter 494) (authorizing the use of state inmate labor to render services as needed by the state, or any political subdivision, or for public use); *see also id.* § 2690 (West 1982) (authorizing the temporary removal of inmates from prison for up to three days); *id.* § 2717.1(b) (West Supp. 1994) (defining joint venture employer as any public entity, nonprofit or for profit entity, organization, or business that contracts with the Director of Corrections for the purpose of employing inmate labor); *id.* § 2717.2 (West Supp. 1994) (creating a joint inmate labor program within state prison facilities between the state prison system and joint venture employers); *id.* § 2760 (West Supp. 1994) (allowing the Department of Transportation to use inmate labor for improvement and maintenance of state highways); *id.* § 2780 (West 1982) (authorizing labor at mobile camps); *id.* § 2780.5 (West Supp. 1994) (allowing the use of prisoner labor up to 25 miles outside California state borders during declared fire emergencies); *id.* § 2801 (West Supp. 1994) (declaring the purposes of the Prison Industry Authority); *id.* § 2805 (West Supp. 1994) (giving the Prison Industry Authority jurisdiction over certain industrial, agricultural, and service operations, and the power to establish new operations when appropriate); 33 Op. Cal. Att'y Gen. 174, 175 (1959) (allowing inmates at a California men's institution to be used to clean up adjoining private property owned by a non-profit association for sanitation and fire prevention purposes, where the clean-up would benefit both the association and the institution). *See generally* 49 CAL. JUR. 3D *Penal and Correctional Institutions* §§ 104-119 (1979 & Supp. 1994) (providing an overview of employment of state prisoners); *id.* §§ 104-110 (1979 & Supp. 1994) (giving a general overview of inmate labor, manufacture of goods, work in facilities other than state agencies, and compensation and payment); *id.* §§ 111-114 (1979 & Supp. 1994) (providing an overview of inmate labor on state highways); *id.* §§ 115-118 (1979 & Supp. 1994) (providing an overview of inmate labor in work camps); *id.* § 119 (1979 & Supp. 1994) (giving an overview of labor in institutions for women); Annotation, *Failure of Prisoners to Return at Expiration of Work Furlough or Other Permissive Release Period as Crime of Escape*, 76 A.L.R. 3D 658 (1977 & Supp. 1993) (analyzing cases which discuss whether the conduct of an inmate, confined in a correctional facility, who was permitted to leave the facility without surveillance and who failed to return to the facility, constituted the crime of escape); Timothy M. Hall, Annotation, *Coverage, Under Fair Labor Standards Act (FLSA) (29 U.S.C.A. §§ 201 et. seq.), of Prisoners Working for Private Individuals or Entities Other Than Prisons*, 110 A.L.R. FED. 839 (1992) (analyzing state and federal cases which discuss whether prisoners working for nonprison businesses and individuals entitled to the protections of the Fair Labor Standards Act).

2. *See* CAL. GOV'T CODE § 8558(c) (West 1992) (defining local emergency to be a proclaimed condition of disaster or extreme peril within a county or city, which is likely to be beyond the control of the services of that political division and requires outside aid, such as fire, flood, and epidemic aid).

3. CAL. PENAL CODE § 2701(b) (amended by Chapter 494).

INTERPRETIVE COMMENT

Prisoners already provide labor for the state and federal government, including labor during fire emergencies.[4] Chapter 494 was enacted to provide the Department of Corrections with more employment options for state prisoners.[5] Prior to the enactment of Chapter 494, there was no specific provision for the use of inmate labor to preserve private property.[6]

Maria V. Daquipa

Labor; referral fees—regulation of fees collected by talent agencies

Labor Code §§ 1700.25, 1700.40 (amended).
AB 1901 (Speier); 1994 STAT. Ch. 1032

Existing law, known as the Talent Agencies Act, generally protects persons employed in the California entertainment industry in various ways.[1] Under existing law, talent agencies[2] are required to be licensed.[3] Existing law also

---

4. *Id.* § 2700 (West Supp. 1994); *see supra* note 1 (explaining the statutory provisions for inmate labor).

5. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 768, at 2 (Mar. 8, 1994).

6. 1982 Cal. Stat. ch. 1549, sec. 7, at 6036 (amending CAL. PENAL CODE § 2701); *see* CAL. PENAL CODE § 2701 (amended by Chapter 494) (adding the provision that prisoner labor may be used for preservation of property, either public or private).

---

1. CAL. LAB. CODE §§ 1700-1700.47 (West 1989 & Supp. 1994); *see, e.g., id.* § 1700.23 (West 1989) (providing for required statements in talent agency contracts); *id.* § 1700.32 (West 1989) (forbidding false promises or representations concerning employment); *id.* § 1700.33 (West 1989) (prohibiting a talent agency from sending an artist to any place where that person's health, safety, or welfare could be adversely affected); *id.* § 1700.34 (West 1989) (restricting a talent agency from sending minors to saloons or places where intoxicating liquors are sold or consumed on the premises); *id.* § 1700.35 (West 1989) (providing that prostitutes, gamblers, intoxicated persons, or procurers cannot be employed in or allowed to frequent the place of business of the talent agency); *id.* § 1700.39 (West 1989) (making illegal the practice of fee splitting, wherein a talent agency divides fees with an employer, an agent, or other employee of an employer); *id.* § 1700.40 (West 1989) (prohibiting registration fees and requiring refunds to artists failing to procure employment); Buchwald v. Superior Court, 254 Cal. App. 2d 347, 350-51, 62 Cal. Rptr. 364, 367 (1967) (advocating the belief that the precursor to the Talent Agencies Act was a remedial statute enacted for the protection of those seeking employment and was a proper exercise of the police power of the state); *id.* at 351, 62 Cal. Rptr. at 367 (suggesting that a contract between an unlicensed talent agency and an artist is void); *see also* James M. O'Brien III, *Regulation of Attorneys under California's Talent Agencies Act: A Tautological Approach to Protecting Artists*, 80 CAL. L. REV. 471, 487-92 (1992) (explaining in detail that the Talent Agencies Act is an elaborate scheme to regulate the entertainment industry). *See generally* Gary Stern, *Guide to Agents; Securing, Signing, Freelancing, Staying or Switching*, BACK STAGE, Apr. 17, 1987, at 1A (discussing the experiences of actual performers with talent agents).

2. *See* CAL. LAB. CODE § 1700.4(a) (West 1989) (defining talent agency as a person or corporation that engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists, except that the activities of procuring, offering, or promising to procure

requires that any matter of controversy be heard and determined by the Labor Commissioner,[4] subject to *de novo* review by the superior court on appeal.[5] An

---

recording contracts for an artist or artists must not of itself subject a person or corporation to regulation and licensing); *id.* (stating that talent agencies may, in addition, counsel or direct artists in the development of their professional careers); Wachs v. Curry, 13 Cal. App. 4th 616, 621, 16 Cal. Rptr. 2d 496, 499 (1993) (asserting that several personal managers had standing to challenge the facial constitutionality of the Talent Agencies Act's licensing requirement, on its face, as they were persons aggrieved by alleged vagueness and members of the class against whom it allegedly discriminated, but several managers had no standing to challenge the particular application of the statute to them because no particular facts were before the Court of Appeal in the suit against state officials charged with enforcing the Act), *later proceeding*, 1993 Cal. LEXIS 3418 (1993); *id.* at 625-26, 16 Cal. Rptr 2d. at 501-02 (stating that the exemption from the Talent Agencies Act licensing requirement for those engaged in procuring recording contracts but not other kinds of contracts has a rational basis, and thus, the classification does not violate equal protection since negotiations for recording contracts are commonly conducted by a personal manager, rather than by a talent agent); *id.* at 627-28, 16 Cal. Rptr. 2d at 503-04 (opining that the provision of the Talent Agencies Act requiring licensing of those engaged in the occupation of procuring employment imposes a standard that measures the significance of the agent's employment procurement function compared to the counseling function taken as a whole, and thus, the provision is not void for vagueness); *id.* at 628, 16 Cal. Rptr. 2d at 503 (noting that if the employment procurement function is the significant part of the agent's business as a whole, then he or she is subject to the licensing requirement, even if, with respect to a particular client, procurement of employment was only incidental; however, if counseling and directing clients' careers is the significant part of the agent's business, then he or she is not subject to the licensing requirement, even if, with respect to a particular client, counseling was only an incidental part of the agent's overall duties).

3. CAL. LAB. CODE § 1700.5 (West Supp. 1994); *see id.* (prohibiting persons from engaging in or carrying on the occupation of a talent agency without first procuring a license from the Labor Commissioner); *id.* (requiring the license to be posted in a conspicuous place in the office of the licensee, and mandating that the license number be referred to in any advertisement for the purpose of the solicitation of talent for the talent agency); Humes v. MarGil Ventures, Inc., 174 Cal. App. 3d 486, 493-95, 220 Cal. Rptr. 186, 189-90 (1985) (noting that an actress who filed an action in superior court seeking rescission of an employment agreement with her manager based on the manager's fraud, duress, and undue influence was not precluded by the election of remedies doctrine from filing a petition before the Labor Commissioner seeking to have the employment agreement voided based on the manager's violation of the licensing requirements); Buchwald v. Superior Court, 254 Cal. App. 2d at 347, 354, 62 Cal. Rptr. 364, 369 (1967) (suggesting that it would be unreasonable to construe the precursor to the Talent Agencies Act as applying only to licensed talent agencies and thereby allow talent agencies by nonsubmission to the licensing provisions of the Act to exclude themselves from its restrictions and regulations); 11 Op. Cal. Att'y Gen. 156 (1950) (opining that agencies, bureaus, or businesses, which referred applicants for employment to prospective employers and received fees solely from the employer, came within the licensing provisions of the precursor to the Talent Agencies Act); 15 Op. Cal. Att'y Gen. 155, 156-57 (1950) (stating that one who published a "casting" directory containing photographs, descriptions, and telephone numbers of persons seeking employment in the entertainment and motion picture field, and who agreed to circulate the directory among motion picture producers and talent agents for an annual fee to be paid by those seeking employment, was not operating an employment agency and was not required to obtain a license).

4. *See* CAL. LAB. CODE § 98 (West Supp. 1994) (stating that the Labor Commissioner has the authority to investigate employee complaints and listing the procedural aspects in the event of a hearing).

5. *Id.* § 1700.44(a) (West 1989); *see id.* (requiring that in cases of controversy arising under Chapter 4 (commencing with § 1700) of the California Labor Code, the parties involved must refer the matters in dispute to the Labor Commissioner, who will hear and determine the dispute, subject to an appeal within 10 days after determination, to the superior court where the dispute will be heard *de novo*); *id.* (noting that to stay any award for money, the aggrieved party must execute a bond approved by the superior court in a sum not exceeding twice the amount of judgment, and in all other cases the bond must be in a sum not less than $1,000 and be approved by the superior court); Buchwald v. Katz, 8 Cal. 3d 493, 498-99, 503 P.2d 1376, 1378-79, 105 Cal. Rptr. 368, 370-71 (1972) (stating that the party appealing from the Labor Commissioner's determination in an arbitration proceeding under the predecessor to the Talent Agencies Act was required to file a bond in order to stay enforcement of an award although the award had not been reduced to judgment by judicial confirmation, even though California Labor Code § 1700.44 specifies a bond and refers to this bond

exception to this rule occurs if the contract of the parties contains an arbitration provision meeting certain criteria.[6] Under prior law, a talent agency was required to disburse to an artist[7] any money received on behalf of that artist within 15 days of receipt.[8]

Chapter 1032 alters the requirement for disbursement of funds, mandating such disbursement to take place within 30 days of receipt by a licensed talent agency, but would permit retention of the funds where they must be used to offset an obligation of the artist to the talent agency or where the funds are the subject of

---

in a sum not exceeding twice the amount of judgment); *id.* at 499, 503 P.2d at 1379, 105 Cal. Rptr. at 371 (declaring that on appeal from the Labor Commissioner's determination in the arbitration proceeding, the superior court may only require a bond in order to stay an award, that the superior court erred in requiring a bond in order to prosecute an appeal, and that the superior court abused its discretion in dismissing the appeal for failure to post a bond); *id.* (noting that where the party appealing from the Labor Commissioner's determination in an arbitration proceeding did not file a bond, the other party was free to enforce the Commissioner's money award, and the proper procedure is first to apply to the superior court for judicial confirmation and to then enforce the ensuing judgment); *id.* at 502-03, 503 P.2d at 1381-82, 105 Cal. Rptr. at 373-74 (stating that notice of appeal from a determination of the Labor Commissioner in an arbitration proceeding was not required to allege grounds for review, and noting that the Commissioner may call up pleadings or other papers or documents by which the parties presented their claims and defenses before the Commissioner or may require the parties to present such claims and defenses in more formal pleadings); Humes v. MarGil Ventures, Inc., 174 Cal. App. 3d 486, 494-95, 220 Cal. Rptr. 186, 190 (1985) (declaring that a petition filed by an actress before the Labor Commissioner seeking to have an employment agreement voided based on the manager's violation of the licensing requirement was properly and necessarily brought before the Labor Commissioner under the doctrine of exhaustion of remedies, since California Labor Code § 1700.44, which provides for hearing and determination of disputes by the Labor Commissioner is mandatory, and the Labor Commissioner had original jurisdiction to hear and determine the controversy); *id.* at 496, 220 Cal. Rptr. at 191 (stating that the powers of an arbitrator, which are shared by the Labor Commissioner, include the power to postpone a hearing on request of a party, for good cause, or upon his own determination); Sinnamon v. McKay, 142 Cal. App. 3d 847, 850-54, 191 Cal. Rptr. 295, 297-300 (1983) (asserting that under California Labor Code § 1700.44 the time to file an appeal does not begin to run until after service of notice of the determination).

6. CAL. LAB. CODE § 1700.45 (West 1989); *see id.* (declaring that a provision in a contract providing for the decision by arbitration of any controversy under the contract as to its existence, validity, construction, performance, nonperformance, breach, operation, continuance, or termination, will be valid if: (1) The provision is contained in a contract between a talent agency and a person for whom the talent agency under the contract undertakes to endeavor to secure employment; or (2) the provision is inserted in the contract pursuant to any rule, regulation, or contract of a bona fide labor union regulating the relations of its members to a talent agency; and the contract provides for reasonable notice to the Labor Commissioner of the time and place of all arbitration hearings; and the contract provides that the Labor Commissioner or his or her authorized representative has the right to attend all arbitration hearings); Buchwald v. Superior Court, 254 Cal. App. 2d 347, 359-60, 62 Cal. Rptr. 364, 372-73 (1967) (declaring that where artists brought a proceeding in court to restrain a representative from proceeding with arbitration provisions as provided in a contract between the representative and the artists, the artists did not waive their right to proceed before the Labor Commissioner); *id.* at 360, 62 Cal. Rptr. at 373 (stating that where evidence before the Labor Commissioner created a *prima facie* showing that a contract between artists and a representative was in fact an artists' manager contract, the Labor Commissioner had jurisdiction notwithstanding a contract provision for arbitration).

7. *See* CAL. LAB. CODE § 1700.4(b) (West 1989) (defining artists as actors and actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organizations, directors of legitimate stage, motion picture and radio productions, musical directors, writers, cinematographers, composers, lyricists, arrangers, models, and other artists and persons rendering professional services in motion picture, theatrical, radio, television, and other entertainment enterprises).

8. 1986 Cal. Stat. ch. 488, sec. 10, at 514; *see* CAL. LAB. CODE § 1700.25(a) (amended by Chapter 1032) (noting that a licensee who receives any payment of funds on behalf of an artist must immediately deposit that amount in a trust fund account maintained by him or her in a bank or other recognized depository).

a controversy before the Labor Commissioner involving a dispute as to the amount of a fee alleged to be owed to the talent agency.[9] Chapter 1032 expressly makes any withholding of funds by a talent agency beyond the thirty-day period a controversy subject to the jurisdiction of the Labor Commissioner if: (1) The withholding of funds is disputed by the artist; (2) the dispute is referred to the Labor Commissioner; and (3) the contract of the parties does not contain an arbitration provision preempting the Labor Commissioner's jurisdiction.[10] Chapter 1032 authorizes the Labor Commissioner to award attorney's fees and interest to an artist whose funds are withheld by a talent agency in willful violation of the requirement for disbursement within the thirty-day period.[11]

Chapter 1032 prohibits talent agencies from referring artists for certain types of services to persons, firms, or corporations in which the talent agency has a financial interest.[12] Chapter 1032 also prohibits talent agencies from accepting a referral fee or similar compensation from any person, firm, or corporation providing certain services to an artist under contract to the talent agency.[13]

INTERPRETIVE COMMENT

Chapter 1032 was enacted to offer further protection for artists who face difficulty in receiving compensation for their services.[14] The public perception of fraud, overreaching, misrepresentation, and deceit in the talent industry is fostered by a seemingly unending array of media reports that expose such abuses.[15]

---

9. CAL. LAB. CODE § 1700.25(a)(1)-(2) (amended by Chapter 1032).

10. *Id.* § 1700.25(c) (amended by Chapter 1032). If there is an arbitration provision in a contract, the contract need not provide that the talent agency agrees to refer any controversy between the applicant and the talent agency regarding the terms of the contract to the Labor Commissioner for adjustment, and California Labor Code § 1700.44 will not apply to controversies pertaining to the contract. *Id.* § 1700.45 (West 1989).

11. *Id.* § 1700.25(e)(1)-(2) (amended by Chapter 1032).

12. *Id.* § 1700.40(b) (amended by Chapter 1032). The financial interest for other services to be rendered to the artist includes, but is not limited to, photography, audition tapes, demonstration reels or similar materials, business management, personal management, coaching, dramatic school, casting or talent brochures, agency-client directories, or other printing. *Id.*

13. *Id.* § 1700.40(c) (amended by Chapter 1032).

14. SENATE COMMITTEE ON INDUSTRIAL RELATIONS, COMMITTEE ANALYSIS OF AB 1901, at 2 (Apr. 13, 1994); *see id.* (stating that dozens of artists have complained that they are not being paid for their services on a timely basis and sometimes are not paid at all).

15. *See* Andrea Wolper, *Sexual Harassment: Are You a Target?*, BACK STAGE, Apr. 16, 1993, at 1 (discussing how the entertainment industry is a breeding ground of exploitation embodied in such realities as sexism, racism, heterosexism, and age discrimination, and stating that artists are often naive and trusting to their own detriment); *see also* Cleveland Horton, *Coke/CAA Draws Flak; Agent Charges Conflict of Interest, Unfair Business*, ADVERTISING AGE, Sept. 30, 1991, at 1 (describing one man's attempt to point out a possible conflict of interest, unfair business practices, and restraint of trade issues with respect to a talent agency); Rob Kendt, *Who You Gonna Call? Why Most Hollywood Scams Fall Through the Cracks in Enforcement*, BACK STAGE, Nov. 19, 1993, at 1W (detailing "kickbacks" and ripoffs and offering a checklist of warnings to avoid being defrauded); David Nickell, *State Takes Aim at Bogus Talent Agencies*, S. FLA. BUS. J., Dec. 28, 1987, at 1 (documenting complaints about con artists who attempted to bypass Florida law by calling themselves casting directors, a totally unregulated profession in that state at that time); Bill Stokes, *Kid Models' Moms Charge Child Abuse*, CHI. TRIB. Mar. 14, 1985, at 3 (reporting on the concerns of parents about the disregard for the welfare of child models); Thomas Walsh, *NYC Cries Foul vs. Model/Talent Firms for Scam Rackets*,

Legislatures in other states have enacted similar protections to safeguard artists,[16] and California is following this trend by continuing to mold the Talent Agencies Act into a device which can protect artists as they seek employment or attempt to advance their careers in California's entertainment industry.[17]

Joseph A. Tommasino

Labor; smoking—statewide ban at place of employment

Labor Code § 6404.5 (new).
AB 13 (T. Friedman); 1994 STAT. Ch. 310

Existing law requires employers[1] to provide and maintain a safe and healthful place of employment.[2] This law is enforced by assessing misdemeanor penalties for violations of the California Occupational Safety and Health Act.[3] Existing law

---

BACK STAGE, Sept. 24, 1993, at 1 (stating that models and performers are often subjected to hundreds of variations on age-old "come-ons," such as paying for expensive and generally unnecessary portfolios, headshots, lessons, seminars, and other pre-employment services).

16. FLA. STAT. ANN. § 468.408 (West 1991) (allowing aggrieved parties to maintain an action upon the bond of an agency); *id.* § 468.410 (West 1991) (prohibiting registration fees and referrals); TEX. REV. CIV. STAT. ANN. art. 5221a-9 (West Supp. 1994) (prohibiting talent agencies from engaging in false, misleading, or deceptive acts or practices).

17. CAL. LAB. CODE §§ 1700-1700.47 (West 1989 & Supp. 1994) (detailing a comprehensive regulatory regime governing the business affairs of talent agencies). *But see* O'Brien, *supra* note 1, at 510 (1992) (concluding that the Act's legislative history, its ambiguous language, and California's legal-ethics rules governing attorney conduct render regulation of attorney behavior under the Act unfair, unnecessary, and redundant, thus warranting an exemption for attorneys).

---

1. *See* CAL. LAB. CODE § 3300(a)-(d) (West 1989) (defining employer as every state agency, each county, city, district, and all public and quasi public corporations and public agencies, and every person, including any public service corporation which has any natural person in service, or the legal representative of any deceased employer).

2. *Id.* § 6300 (West 1989); *see id.* (stating that the general purpose of the California Occupational Safety and Health Act of 1973 is to assure a safe and healthful working condition for all California working women and men, as well as encouraging employers to maintain safe and healthful working conditions); Carmona v. Division of Indus. Safety, 13 Cal. 3d 303, 312, 530 P.2d 161, 167, 118 Cal. Rptr. 473, 479 (1975) (declaring that under the relevant Labor Code provisions, the employer's duty to maintain a safe working environment will be interpreted in the broadest possible manner); Salwasser Mfg. Co. v. Municipal Court, 94 Cal. App. 3d 223, 227, 156 Cal. Rptr. 292, 295 (1979) (noting that the California Supreme Court has indicated that the purpose stated in California Labor Code § 6300 should be given a liberal interpretation, to ensure a safe work environment).

3. CAL. LAB. CODE § 6423(a)-(d) (West 1989); *see id.* (stating that every employer or management person in control of the place of employment or employee will be guilty of a misdemeanor for violating the standards of this Act, unless another penalty is specifically provided); *id.* (providing that violations are punishable by possible imprisonment of six months and/or a fine of up to $5000); *see also id.* §§ 6300-6717 (West 1989 & Supp. 1994) (setting forth the provisions of the California Occupational Safety and Health Act).

also bans the smoking of tobacco inside and within five feet of a main entrance of all state buildings.[4]

Chapter 310 prohibits an employer from knowingly or intentionally permitting any person to smoke any tobacco product in enclosed places of employment within the state, except in specified areas.[5] Chapter 310 provides that an employer who allows non-employees access to the place of business will not have acted knowingly or intentionally if the employer has taken reasonable steps to prevent the non-employee from smoking in the enclosed space.[6]

Chapter 310 creates a uniform state standard that supersedes all local enactments or enforcement of local ordinances that regulate the smoking of tobacco in places of employment.[7] Chapter 310 allows, but does not require, employers to provide designated breakrooms for the smoking of tobacco.[8]

---

4. CAL. GOV'T CODE § 19994.31 (West Special Pamphlet 1994); *cf.* ARIZ. REV. STAT. ANN. § 36-601.02(A)-(I) (1993) (prohibiting smoking in any building owned or directly leased by the state except under certain exceptions); MONT. CODE ANN. § 50-40-204(1)-(4) (1993) (prohibiting smoking in specified areas of buildings both owned and occupied by the state); OR. REV. STAT. § 243.350(1) (1991) (providing that rules will be adopted that restrict smoking in places of employment operated by departments or agencies of the state of Oregon); UTAH CODE ANN. § 76-10-106 (Supp. 1993) (prohibiting smoking in public places, public meetings or government buildings).

5. CAL. LAB. CODE § 6404.5(b) (enacted by Chapter 310); *see id.* § 6404.5(a) (enacted by Chapter 310) (describing legislative intent and declaring that regulation of smoking in the workplace is a matter of statewide interest and concern); *see also id.* § 6404.5(d)(1)-(12) (enacted by Chapter 310) (stating that place of employment does not include specified portions of hotels, motels, or similar transient lodging establishments, meeting and banquet rooms restricted by specified exemptions, retail or wholesale tobacco shops, private smokers' lounges, cabs of motor trucks or truck tractors if no nonsmoking employees are present, certain warehouse facilities, gaming clubs, bars and taverns subject to certain conditions, theatrical production sites, medical research or treatment sites where smoking is an integral part of the production or research, a private residence unless it is used as a family day care home, and patient smoking areas in long-term health care facilities); *id.* §6404.5(f)(1)-(3) (establishing the timeframe and manner in which a prohibitive smoking regulation will be adopted for gaming clubs, bars, and taverns); *cf.* OR. REV. STAT. §§ 433.835-.990 (1992) (providing the policy and parameters of the Oregon Indoor Clean Air Act, the designated areas where smoking is allowed, where the posting of signs are required, what the duties of the Health Division are, as well as the enforcement, waiver and penalty provisions of the act).

6. CAL. LAB. CODE § 6404.5 (enacted by Chapter 310); *see id.* § 6404.5(c)(1)-(2) (enacted by Chapter 310) (defining reasonable steps as the posting of clear and prominent signs stating, "No Smoking" or "Smoking is prohibited except in designated areas," and where the employer requests the non-employee to refrain from smoking in the enclosed areas). Reasonable steps do not include the physical ejectment of the non-employee, or requesting the non-employee to refrain from smoking where there would be a risk of physical harm in making the request. *Id.*

7. *Id.* § 6404.5(g) (enacted by Chapter 310); *see id.* (stating that the practical effect of this statute is to eliminate the need of local governments to enact enclosed workplace smoking regulations within their respective jurisdictions); *see also id.* § 6404.5(i) (enacted by Chapter 310) (stating that if this statute is repealed or modified, local governments have the power to enforce previously enacted or new restrictions on the smoking of tobacco in enclosed areas of employment, and that local regulations placed upon smoking tobacco in areas not defined as a place of employment, or regulated by this statute will be enforceable).

8. *Id.* § 6404.5(d)(13) (enacted by Chapter 310); *see id.* § 6404.5(d)(13)(A)-(C) (enacted by Chapter 310) (requiring the designated smoking rooms to dispense the air directly to the outside of the building, to comply with ventilation standards adopted by Occupational Safety and Health Standards Board or the Federal Environmental Protection Agency, to establish the rooms in a nonwork area where nonsmokers are not required to enter, and to provide sufficient nonsmoking breakrooms for nonsmokers); *see also id.* § 6404.5(h) (enacted by Chapter 310) (showing that this statute does not prevent an employer from prohibiting smoking in any enclosed place of employment for any reason).

Additionally, Chapter 310 permits an employer to allow smoking where the business employs a total of five or fewer part-time or full-time employees and other conditions are met.[9]

A violation of Chapter 310 is only punishable by specified fines.[10] The Division of Occupational Safety and Health[11] will not be required to respond to any complaint regarding the smoking restrictions, unless the employer has been found guilty of a third violation of Chapter 310 within the previous year.[12]

INTERPRETIVE COMMENT

Chapter 310 was enacted to protect California workers from the serious adverse health effects of environmental tobacco smoke.[13] A fear of increased workers' compensation claims caused by workplace exposure to tobacco smoke was a major concern of the California Restaurant Association and the Senate Judiciary Committee in passing this bill.[14]

---

9. *Id.* § 6404.5(d)(14) (enacted by Chapter 310); *see id.* § 6404.5(d)(14)(A)-(D) (enacted by Chapter 310) (requiring that the area be inaccessible to minors, that no one will be required to work in the area where smoking is permitted, that all employees who enter the area, without coercion, consent to permit smoking, that air from the smoking area be exhausted directly to the outside, and that the employer comply with any ventilation standards or use appropriate technology as adopted by either the Occupational Health Standards Board or the Federal Environmental Protection Agency); *id.* § 6404.5(d)(14)(D) (enacted by Chapter 310) (declaring that the five or fewer employee exemption does not supersede or render inapplicable any condition or limitation on smoking areas made applicable to specific business establishments by any other provision of California Labor Code § 6404.5(d)(1)-(13)).

10. *Id.* § 6404.5(j) (enacted by Chapter 310); *see id.* (stating that a violation of California Labor Code § 6404.5(b) is an infraction punishable by a fine up to $100 for the first violation, $200 for the second violation within one year, and $500 for a third and for each subsequent violation within a year). Enforcement will be carried out by local law enforcement agencies, including local health departments, as determined by local governing bodies. *Id.*

11. *See id.* § 6302(d) (West 1989) (defining the Division of Occupational Safety and Health (Division)); *id.* § 6307 (West 1989) (defining the Division's power, jurisdiction and supervision); *id.* § 6308 (West 1989) (describing the Division's enforcement powers).

12. *Id.* § 6404.5(k) (enacted by Chapter 310); *see id.* (declaring that this provision does not supersede the provisions of California Labor Code § 6309); *see also id.* 6309 (West 1989) (describing the Division's responsibilities and discretion as to investigations, response to complaints, and protection of complainants in the place of employment).

13. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 13, at 6 (Mar. 22, 1994) (stating that scientific evidence regarding the harmful effects of environmental tobacco smoke is abundant). *But see id.* (stating that the tobacco industry disputes such findings). *See generally* Sheryl Stolberg, *Unwilling Fighter in War on Secondhand Smoke*, L.A. TIMES, May 27, 1994, at A1 (establishing that tobacco industry research finds secondhand smoke is little more than a nuisance).

14. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 13, at 6 (Mar. 22, 1994) (indicating that a nonsmoking waiter recently received over $80,000 in a workers' compensation claim for a heart attack he suffered and claimed was caused by environmental tobacco smoke); *see also* Stolberg, *supra* note 13 (claiming there have been dozens of lawsuits and workers' compensation cases filed nationwide by victims of secondhand smoke, that California has long been considered the leader in the anti-smoking movement, that a former Los Angeles teacher won $29,999 in a workers' compensation claim for damaged lungs due to breathing secondhand smoke from a teachers lounge, and that a San Francisco Bay Area waiter who received a $90,000 settlement from a workers' compensation claim for a heart attack caused by years of working in a smoky restaurant). *But see* Ubhi v. Patterson, No. SFO-0341691 (Cal. Workers' Comp. App. Bd. Mar. 11, 1991) (order approving compromise and release) (copy on file with *Pacific Law Journal*) (showing that Ubhi, the San Francisco waiter that brought the heart attack claim, allegedly caused by environmental

Additionally, Chapter 310 places all businesses on equal economic footing, by preempting local ordinances with uniform state standards.[15] This ban of smoking is consistent with national trends.[16]

Cary G. Hipps

tobacco smoke, actually received a compromise settlement of $9500 from the State Compensation Insurance Fund, minus $2376 for his attorney fees, plus the cost of medical expenses).

15. CAL. LAB. CODE § 6404.5(a) (enacted by Chapter 310); *see id.* (stating that this statute eliminates the need for local governments to enact workplace smoking restrictions within their respective jurisdictions); *see also* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 13, at 5 (Mar. 22, 1994) (noting that a statewide uniform standard is necessary to ensure equal competition between cities for tourist and convention business).

16. H.R. 881, 103rd Cong., 1st Sess. § 3 (1993); *see id.* (proposing a ban on smoking tobacco in all Federal buildings); H.R. 3434, 103rd Cong., 2d Sess. §§ 2701, 2703 (1993) (proposing a ban on smoking tobacco within or near the entrance/exit of all public facilities nationwide). This proposed ban would not preempt local or state laws. *Id.*; *see also* Edwin Chen, *White House Seeks Wide Smoking Ban*, L.A. TIMES, Mar. 26, 1994, at A1 (stating the Clinton administration has proposed a nationwide ban on indoor smoking wherever people work, that the Defense Department announced a worldwide ban on smoking in its workplace, and that McDonald's, Taco Bell, and Jack-in-the-Box have banned smoking by all their customers and employees in their establishments); R.J. Ignelzi, *Flash Points in a Long-Smoldering Issue*, S.D. UNION-TRIB., May 8, 1994, at D2 (reporting that the Clintons ban smoking at the White House, Amtrak bans smoking on most nationwide routes, and Congress banned smoking in all public and some private schools).