Date of Hearing: April 20, 2021

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
AB 364 (Rodriguez) – As Introduced February 1, 2021

SUBJECT: FOREIGN LABOR CONTRACTOR REGISTRATION: AGRICULTURAL WORKERS

KEY ISSUE: SHOULD THE REQUIREMENTS OF CALIFORNIA'S "FOREIGN LABOR CONTRACTOR" STATUTE BE EXTENDED TO INCLUDE TEMPORARY FOREIGN FARMWORKERS AND LICENSED FARM LABOR CONTRACTORS, TO THE EXTENT THAT THE LATTER OPERATE AS FOREIGN LABOR CONTRACTORS?

SYNOPSIS

Since 1988, California has regulated "foreign labor contractors" who recruit and solicit temporary foreign workers from outside of the United States to work in California. As enacted, this law only applied to temporary "non-agricultural" workers (H-2B visa holders). The original legislation also expressly exempted from its provisions "farm labor contractors," as defined in the Labor Code. The original law required foreign labor contractors to provide certain disclosures; refrain from making false or misleading claims about the nature of the work available; and to not recruit minors. In 2014, SB 477 (Chap. 711, Stats. 2014) strengthened this law by requiring foreign labor contractors to register with the Labor Commissioner, post a surety bond, make specified disclosures to employers and foreign workers, and refrain from certain exploitive and discriminatory practices. SB 477 required employers to use only registered foreign labor contractors in order to recruit foreign workers and to notify the Labor Commissioner if they used a foreign labor contractor. According to its findings, SB 477 sought to protect workers from contractors who charged illegal fees, made false promises and, in the worst cases, participated in illegal human trafficking. When the Labor Commissioner submitted proposed rules to implement SB 477, those rules did not apply to agricultural workers or farm labor contractors. That the Labor Commissioner interpreted SB 477 in this way should not have been surprising given that the provisions of SB 477 were placed within the existing chapter regulating foreign labor contractors, which expressly states that the chapter only applies to "nonagricultural" H-2B workers and expressly exempts any person licensed as a "farm labor contractor." The author and supporters of SB 477, however, claim that the bill was never intended to be so limited, and thus describe the bill before the Committee as a "technical fix" to SB 477. Opponents of the bill, a coalition of farm and grower associations, contend that SB 477 was never intended to apply to H-2A farm workers and farm labor contractors, in part because farm labor contractors are already licensed, bonded, and regulated under the state's farm labor contractor law, and because the recruitment of foreign farmworkers is already regulated by federal law. While this analysis takes note of the conflicting arguments about the intent of SB 477, it nonetheless concludes that the intent of SB 477 is irrelevant. The Legislature is free to change any statute (other than one adopted by voter initiative), regardless of its original purpose. Courts may be bound by legislative intent, but legislators most certainly are not.

The proper question before the Committee, therefore, is not the intent of SB 477, but whether or not it is good policy to remove the limitation in existing law and apply the regulations of the foreign labor contractor law to include H-2A farmworkers and foreign labor contractors. The sponsors of this legislation, when not arguing the intent of SB 477, make a compelling case that

all *categories of foreign workers* should *enjoy the more robust protections added by SB 477, and that farm labor contractors, to the extent that they engage in both contracting and recruiting,* should *be subject to regulations that apply to both of these distinct activities. The bill is co-sponsored by the Coalition to Abolish Slavery & Trafficking (Cast) and the district attorneys of Alameda and San Diego counties. It is supported by several civil rights and labor groups and opposed by several farm organizations and the California Chamber of Commerce.*

SUMMARY: Extends the existing foreign labor contractor law to cover temporary foreign farm workers and farm labor contractors by deleting a section that expressly limits the law's application to "nonagricultural" workers and that expressly exempts farm labor contractors.

EXISTING LAW:

1) Requires the California Labor Commissioner (LC) to enforce and administer a program to register and supervise foreign labor contractors, as defined. Specifies that the program only applies to "nonagricultural" H-2B workers and that it does not apply to any person licensed as a "farm labor contractor," as defined. Exempts additionally foreign workers recruited by talent agencies and persons participating in economic or cultural changes with a J-1 work visa. (Business & Professions Code Section 9998 *et seq*. The following code sections refer to this code unless otherwise noted.)

2) Defines, for purposes of the registration program described above, the following terms:

   a) "Foreign labor contractor" means any person who performs "foreign labor contracting activity" wholly outside of the United States, but not including any local, state, or federal government entity.

   b) "Foreign labor contracting activity" means recruiting or soliciting for compensation a "foreign worker" who resides outside of the United States in furtherance of that worker's employment in California, even when that activity occurs wholly outside of the United States.

   c) "Foreign worker" means any person seeking employment who is not a United States citizen or permanent resident but who is authorized by the federal government to work in the United States on a temporary basis. (Section 9998.1.)

3) Requires any person acting as a foreign labor contractor to register with the LC, as specified, and to pay a registration fee to be established by the LC and to post a surety bond based upon the foreign labor contractor's gross receipts. (Section 9998.1.5.)

4) Requires persons who know or should know that they are using a foreign labor contractor to procure foreign workers to disclose specified information to the LC. (Section 9998.2.)

5) Requires a foreign labor contractor to disclose specified information in writing to each foreign worker, in that worker's primary language. The information must include a form specified by the Labor Commissioner that informs workers about their rights, including a notice that workers cannot be forced to pay processing, placement, transportation, or legal fees, which, by law, are the responsibility of the foreign labor contractor. The statement must also inform workers of their contractual rights and protections afforded to them under the federal Trafficking Victims Protection Act of 2000. (Section 9998.2.5.)

6) Prohibits a foreign labor contractor from engaging in certain activities, including making false or misleading claims about the terms and conditions of work, recruiting minors, intimidating or in any manner discriminating against a foreign worker or a member of the workers' family in retaliation for the foreign worker's exercising a legal right under the foreign labor contractor law, or promising workers that they will be offered an opportunity for citizenship or legal permanent residence in the United States. Subjects any person who violates provisions of the foreign labor contractor's law to civil penalties and civil actions for damages or injunctive relief. (Sections 9998.3 to 9998.9.)

7) Creates a program for licensing and regulating "farm labor contractors," defined as any person who, for a fee, employs workers to render personal services in connection with the production of any farm products to, for, or under the direction of a third party, or who recruits, solicits, supplies, or hires workers on behalf of an agricultural employer and who, for a fee, provides one or more of the following services: furnishes board, lodging, or transportation for those workers; supervises, times, checks, counts, weighs, or otherwise directs or measures their work; or disburses wage payments to those workers. Prohibits a person from acting as a farm labor contractor without first meeting licensing, fee, and bonding requirements established by the LC. Permits the LC to revoke, suspend, or refuse to renew a license if the farm labor contractor fails to comply with specified state or federal laws, or has been found by a court or administrative agency to have committed sexual harassment of an employee. (Labor Code Sections 1682 to 1694.)

8) Requires every licensed farm labor contractor to, among other things, make specified disclosures to employers and workers, maintain specified records, promptly pay all moneys owed to workers, conspicuously post information related to workers' rights, provide mandated training, including sexual harassment prevention training for all supervisors and farm workers, and comply with all federal law requirements, including the Migrant and Seasonal Agricultural Workers Protection Act. (Labor Code Section 1695 to 1695.8.)

9) Prohibits a farm labor contractor from making false or misleading representations concerning the terms, places, or conditions of employment, sending workers to any place where the contractor knows a strike or lockout exists without notifying the worker of this fact, or doing any act that constitutes a crime of moral turpitude. (Labor Code Section 1696.)

10) Establishes, under the federal Migrant and Seasonal Agricultural Worker Protection Act (MSPA), employment standards for migrant and seasonal farmworkers related to wages, housing, transportation, disclosures and recordkeeping. The MSPA also requires farm labor contractors to register with the U.S. Department of Labor. (29 U.S.C. Sections 1801, *et seq.;* 29 C.F.R. Part 500.)

11) Authorizes, under the federal Immigration and Naturalization Act, the lawful admission of temporary foreign workers who have no intention of abandoning their country of origin or becoming citizens or legal permanent residents in the United States. Distinguishes between foreign temporary workers (H-2A workers) who perform agricultural labor or services of a temporary or seasonal nature, and foreign temporary workers who perform nonagricultural labor or services (H-2B workers) of a temporary or seasonal nature. (8 U.S.C. 1101 (a) (15) (H) (i)-(ii).)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: According to the author and sponsor, this bill is intended as a "technical fix" to SB 477 (Chap. 711, Stats. 2014), which established a registration program for "foreign labor contractors" who, for compensation, recruit and solicit foreign workers residing in other countries to perform temporary and seasonal work in California. Whatever the intent of SB 477, when the Labor Commissioner submitted proposed regulations for public comment, it excluded foreign temporary farmworkers and farm labor contractors from its provisions. The Labor Commissioner understandably reached this conclusion because the chapter in which the provisions of SB 477 were inserted expressly stated that the chapter applied only to foreign "nonagricultural" workers (H-2B visa holders) and expressly excluded persons who were already licensed in California as "farm labor contractors." However, the author and sponsor of the bill now before the Committee contend that SB 477 was always intended to protect all foreign workers, including temporary foreign farmworkers (H-2A visa holders). Therefore, this bill would delete the language that limits the pertinent chapter's application to nonagricultural workers. Beyond the question of the intent of SB 477, the author and sponsor more persuasively contend that the regulations promulgated pursuant to the state's foreign labor contractor law *should* be applied agricultural workers and farm labor contractors, because H-2A agricultural workers are subject to the same forms of abuse and exploitation as nonagricultural H-2B workers.

***Federal Law Background: the H-2A and H-2B Programs**:* The Omnibus Immigration and Naturalization Act of 1952, or the McCarran-Walter Act, authorized non-immigrant foreign workers to work temporarily in the United States as "guest workers." Section 101(a)(15)(H(ii) of the Act (the H-2 provision) allowed admission for foreign workers who had no intention of becoming citizens or legal permanent residents to enter the United States on a temporary basis. As a condition of admission, a sponsoring employer must demonstrate to the U.S. Department of Labor that there are not a sufficient number of workers within the United States who are willing and able do the work, and that the employment of foreign workers would not adversely affect wages and working conditions of similarly employed workers already within the United States. (8 U.S.C. 1101 (a)(15)(H)(ii).) All work authorization visas issued under the program are temporary, with most work authorizations lasting less than ten months. Beginning with the Immigration Reform and Control Act (IRCA) of 1986, the H-2 program was divided into two categories: H-2A visa holders who perform agricultural labor, and H-2B visa holders who perform non-agricultural labor. Other temporary work visas allow admission of highly skilled workers (H-1 visas), as well as work visas for persons participating in educational or cultural exchange programs (J-1 visas). Of particular importance for this analysis, the H-2A program defines and recognizes a role for "H-2A Labor Contractors" who recruit, solicit, hire, employ, furnish, house, or transport H-2A workers. While federal "H-2A Labor Contractors" are considered "employers" for certain purposes under federal law, they are nonetheless distinguished from "fixed-site" employers who own the agricultural operations where workers perform the labor. In short, while the H-2A Labor Contractor may legally "employ" the worker, the contractor more significantly acts as an intermediary between the farm owner, who wants the work done, and the farmworker who performs the work.

Federal law also provides protections for migrant and seasonal agricultural workers, whether foreign or domestic. The Migrant and Seasonal Agricultural Worker Protection Act (MSPA) establishes employment standards for migrant and seasonal farmworkers related to wages, housing, transportation, disclosures and recordkeeping. The MSPA also requires farm labor contractors to register with the U.S. Department of Labor. Under the MSPA, a "farm labor contractor" is defined as someone who hires, recruits, solicits, employs, furnishes, or transports

any migrant or seasonal worker for compensation. Although the MSPA is not part of the H-2A regulations (20 C.F.R. Part 655), a farm labor contractor who is registered under MSPA could also register as an "H-2A Labor Contractor," at least to the extent that recruitment and solicitation efforts were directed at foreign workers residing outside of the United States. It is not entirely clear to the Committee, however, how *most* "farm labor contractors" acquire temporary guest workers. If they acquire them directly by recruiting and soliciting abroad, then they would seemingly be deemed to be H-2A labor contractors and thus subject to H-2A regulations. On the other hand, if the farm labor contractor obtains foreign workers from an H-2A labor contractor, then the farm labor contractor would presumably be an "employer" rather than a "contractor" for purposes of H-2A regulations. Significantly, federal law defines an H-2A labor contractor as a person who "meets the definition of an employer," but who "is not a fixed-site employer, an agricultural association, or an employee of a fixed-site employer or agricultural association." It appears, therefore, that contractors are "employers" to the extent that they "hire" foreign workers; but they are "contractors" to the extent that they hire them for the purpose of providing a labor service to "fixed-site" agricultural employers.

State Law Background: Chapter 21.5 of the B&P Code (Sections 9998 *et seq.)* – generally known as the state Foreign Labor Contractor Law – was enacted in 1988 to provide for regulation of "foreign labor contractors," meaning persons who, for compensation, recruited or solicited persons abroad who were authorized by federal law to work as temporary guest workers in the United States. From the start, this chapter expressly provided that its terms applied only to "nonagricultural workers" (H-2B visa holders). The chapter also expressly stated that it did not apply to a "farm labor contractor," as that term is defined in Labor Code Section 1682, or to any employer of H-2A agricultural workers.

Prior to 2014, Chapter 21.5 imposed fairly minimal requirements on anyone operating as a "foreign labor contractor" in California. It required the foreign labor contractor to disclose certain information to the State Labor Commissioner; it prohibited the contractor from making any false or misleading representations about the terms and conditions of promised employment; it prohibited the recruitment of minors; it required any person who recruited a foreign worker when there was in fact no bona fide job offer to pay the promised wages; and, finally, the law provided that no person could discriminate or retaliate against a foreign worker who exercised any rights under law.

SB 477, signed into law in 2014, made several changes to Chapter 21.5. Most notably, it required foreign labor contractors to register with the Labor Commissioner, which included payment of a licensing fee and the posting of a surety bond; required the foreign labor contractor to make certain disclosures to workers and employers; imposed penalties on any employer who used an unregistered foreign labor contractor; expanded the remedies available to foreign workers aggrieved by a violation of the law; and extended the prohibition against retaliation to include acts of retaliation against a worker's family members. According to SB 477's author and sponsor, the bill was intended to address shortcomings in then-existing law that effectively allowed foreign labor contractors to engage in, or be complicit with, the worst kinds of human trafficking. SB 477 expressly exempted two categories of foreign workers: foreign workers recruited by talent agencies, because talent agencies were already licensed and subject to protective regulations; and holders of J-1 visas that authorize persons participating in an educational or cultural program to work while they are in the United States. H-2A workers were, of course, already excluded from Chapter 21.5.

Would this bill create a "duplicative" system of regulation for farm labor contractors?
Opponents of this bill, when not arguing about the intent of SB 477, contend more relevantly that this bill is unnecessarily duplicative, given that farm labor contractors who employ foreign workers will have to register twice (with the same Labor Commissioner), pay both fees, post both surety bonds, and comply with both sets of regulations. Moreover, opponents contend that farm workers are already protected under the state Labor Code and that temporary H-2A farm workers are already protected under federal laws governing their recruitment and treatment.

Evaluating the opposition's claim that this bill would create "duplicative" regulatory schemes is difficult to evaluate, largely because of a lack of empirical data about the overlap between "farm labor contractors" and "foreign labor contractors." To what extent, for example, do farm labor contractors qualify as "foreign labor contractors" under state law? In 2018, this Committee heard AB 1913 (Kalra), which was identical to the bill now before the Committee. As noted in the Assembly Judiciary Committee analysis of AB 1913, if most farm labor contractors were also recruiters of H-2A farmworkers, then there was some merit to the opponents' claim that extending the foreign labor contracting law, as proposed by both AB 1913 and the bill now under consideration, would produce "duplicative" (and perhaps unnecessary) sets of regulations and bonding requirements. In analyzing AB 1913, Committee staff asked both proponents and opponents to provide data on the degree of overlap between farm labor contractors and foreign labor contractors, but neither side was able to provide relevant data at that time. Committee staff also made inquiries to the Department of Industrial Relations and the staff responsible for drafting regulations, but again relevant information was not provided. The Committee analysis of AB 1913 thus urged the author to consider ways in which to reduce or eliminate duplicative regulations and bond requirements – to the extent that they were duplicative – as the bill moved forward. (*See* Assembly Judiciary Committee, *Analysis of AB 1913,* April 10, 2018.) AB 1913 subsequently failed to pass off the Assembly Floor. However, for the bill at hand, the sponsor has provided the Committee with substantial evidence and arguments that clarify the relationship between farm labor contractors and foreign labor contractors in the real world. It appears, therefore, that farm labor contractors and foreign labor contractors engage in distinct activities, and the respective statutory frameworks for each have different, rather than duplicative, requirements.

First, the sponsor contends that most farm labor contractors do not recruit directly from abroad, but instead rely upon intermediaries, who would presumably qualify as either "foreign labor contractors" under California law, or as "H-2A Labor Contractors" under federal law. If that were the case, then most farm labor contractors would be deemed "employers" for purposes of the foreign labor contractor law and would not, therefore, be required to register with the Labor Commissioner as a foreign labor contractor; however, like all employers, they would need to use only registered foreign labor contractors and notify the Labor Commissioner if they were using a foreign labor contractor. Moreover, if licensed farm labor contractors do, in fact, engage in the recruitment of foreign labor, then they are engaging to two distinct activities – both with their own kinds of potential abuses – then perhaps they should be subject to the regulations governing both activities.

Second, and closely related to the first point, the sponsor correctly contends that the regulations contained in the foreign labor contractor law (Chapter 21.5 of the Business & Professions Code) are substantially different than those found in either the federal law governing H-2A recruitment or the California farm labor contracting law. While the opponents of this bill are correct that both laws contain registration requirement, the regulations in the state foreign labor contracting law

and the state farm labor contractor licensing law speak to very different parts of the process. That is, the foreign labor contractor law speaks mainly to the activity of recruiting foreign workers, whereas the farm labor contractor licensing law speaks mainly to providing workers for employers. For example, the foreign labor contractor law ensures that foreign workers are not charged a recruiting fee; that only registered foreign labor recruiters may legitimately recruit foreign workers; and that during the recruiting process they are entitled to a contract that spells out the terms and conditions of employment in the worker's primary language. The farm labor contractor law on the other hand (Labor Code Section 1682 *et seq.*) seeks to protect workers who are already in California, by requiring registration with the county agricultural commissioner, ensuring adequate workers' compensation insurance, requiring contractors to have training in sexual harassment prevention, and generally to ensure fair payment of wages and a safe and healthy working environment. In short, the opponents are correct that both laws have bonding requirements, but both bonds would only be paid if the farm labor contractor acted as both a labor contractor and a recruiter of foreign workers, and the bond would ensure different types of harms and violations – those that occur in the recruitment process, versus those that occur once the workers are working in California.

In sum, the bill does not appear to impose "duplicative" requirements. The regulations under the foreign labor contractor law are different from the requirements under the farm labor contractor law, despite similar registration and bonding requirements. If farm labor contractors do not engage in foreign recruitment, as defined in state and federal law, then they will *not* be subject to requirements in the foreign labor contractor law. If they do engage in foreign recruitment, as defined in state and federal law, then perhaps they *should* be subject to additional and different requirements that apply to recruiters of foreign labor, as well as to those that regulate the quite distinct activity of farm labor contracting within California.

ARGUMENTS IN SUPPORT: The Coalition to Abolish Slavery & Trafficking (Cast), the sponsor of AB 364, supports this bill because it will ensure that "critical protections are in place to prevent human trafficking among all temporary visa holders coming to California in the aftermath of the pandemic, a time when migrant workers are even more vulnerable to exploitation, abuse and human trafficking. In Cast's on-the-ground experience working with survivors in California, almost 2/3 of the foreign workers who seek Cast's services are labor trafficking victims on temporary visa." Cast contends that AB 364 is a "technical fix" to prior legislation, SB 477 (Chap. 711, Stats. 2014), the language of which was inadvertently inserted into a chapter of the code that was limited to nonagricultural workers and that did not apply to farm labor contractors. Cast claims that SB 477 was always intended to cover *all* foreign temporary workers, including agricultural H-2A workers. Indeed, Cast writes that agricultural workers are among the most exploited workers, and it would have made no sense to exclude them given the bills overall intent. Moreover, Cast contends that "the policy reasons behind SB 477 that made it essential for protecting all temporary workers coming to California in 2013, remain the same. In fact, the temporary work visa system has been increasingly used . . . and the simple fact is that no provisions in California law currently address the vulnerability of migrant workers coming to California *at the point of recruitment*." [Emphasis in original.]

Cast also argues that AB 364 protects "both workers and businesses in California," because fraudulent practices not only encourage labor trafficking, but also "precipitate an unfair advantage" for the bad actors "over businesses who seek to comply with state and federal law laws." Cast strongly challenges the claims of the opposition that this bill will impose "duplicative" regulations on farm labor contractors. In a supplemental document that Cast sent

the Committee, Cast points out that the foreign labor contractor law and the farm labor contracting licensing law have different requirements and serve different purposes. Cast adds that "businesses are routinely subject to obligations arising under separate legal requirements on both the federal and state level depending on the activities they undertake. Compliance with one law does not excuse from, or equate with, compliance with laws covering different conduct."

Finally, Cast writes that "both the difficult political climate immigrants have been facing and the disproportionate impact from the Covid 19 pandemic, reveal that SB 477's protections are even more necessary today than when the legislation was originally introduced."

Several other groups civil rights and labor groups, as well as law enforcement groups, support this bill for substantially similar reasons as those articulated by Cast.

ARGUMENTS IN OPPOSITION: Several organizations, including the Western Growers Association and the California Chamber of Commerce, oppose this bill because it "unnecessarily expands the provisions of California's foreign labor contracting regulations to now include agricultural workers under the H-2A visa program." Opponents contend, contrary to the author and supporters of this bill, that "H-2A visa program was NOT overlooked during the discussion and negotiations on SB 477." Rather, the opponents contends that foreign agricultural workers were not included in the original law, or in SB 477, "because the H-2A visa program is already regulated by a restrictive application and enforcement program at the federal level and California has a specific farm labor contractor (FLC) licensing program that is managed by the California Labor Commissioner's Office." Opponents cite a long list federal regulations that employers and recruiters must already comply and also lists the many requirements in the farm labor contractor licensing law and the means by which a license may be revoked if the farm labor contractor fails to comply with all relevant laws. The opponents conclude that "California's FLCs were regulated before the creation of SB 466, and in fact formed the model for that legislation. To now loop them into the foreign labor contracting regulations is nonsensical and ignores that they are already covered by pre-existing legislation."

REGISTERED SUPPORT / OPPOSITION:

Support

Coalition to Abolish Slavery & Trafficking (co-sponsor)
Alameda County District Attorney's Office (co-sponsor)
San Diego County District Attorney's Office (co-sponsor)
ACLU of California
Alliance to End Slavery and Trafficking
Bet Tzedek Legal Services
California State Council of Service Employees International Union (seiu California)
Centro De Los Derechos Del Migrante
Dolores Street Community Services
Equal Rights Advocates
Freedom United
Heal Trafficking
Hewlett Packard Enterprise
Justice in Motion
Legal Aid of Marin
Los Angeles Center for Law and Justice

Mayor Darrell Steinberg, City of Sacramento
Mayor Eric Garcetti
Monterey Peninsula Unified School District
North County Lifeline
Pilipino Workers Center
Richards Grassfed Beef
Santa Barbara Women's Political Committee
Sustainable Food Policy Alliance
The University Corporation Dba Strength United
Verite
Verity, Compassion, Safety, Support
Waymakers
Womankind

Opposition

African-American Farmers of California
Agricultural Council of California
California Association of Winegrape Growers
California Chamber of Commerce
California Citrus Mutual
California Cotton Ginners & Growers Association
California Farm Bureau Federation
California Fresh Fruit Association
Family Winemakers of California
Far West Equipment Dealers Association
Nisei Farmers League
Western Agricultural Processors Association
Western Growers Association
Western Plant Health Association

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