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9:19 AM
11/4/2013

Introduced by Senator Wright

February 20, 2013

An act to amend Section 227 of the Labor Code, relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

SB 390, as introduced, Wright. Employee wage withholdings: failure to remit.

(1) Existing law makes it a crime for an employer to fail to make agreed-upon payments to health and welfare funds, pension funds, or various benefit plans. Existing law provides that the crime be punished as felony or a misdemeanor, as specified, if the amount unpaid exceeds \$500, and as a misdemeanor, if the amount is less than \$500.

This bill would make it a crime, as described above, for an employer to fail to remit withholdings from an employee's wages that were made pursuant to state, local, or federal law.

(2) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Section 227 of the Labor Code is amended to
2 read:

1 227. ~~Whenever~~*If an employer has made withholdings from*
2 *an employee’s wages pursuant to state, local, or federal law, or*
3 *has agreed with any employee to make payments to a health or*
4 *welfare fund, pension fund, or vacation plan, or other similar plan*
5 *for the benefit of the employees, or a negotiated industrial*
6 *promotion fund, or has entered into a collective bargaining*
7 *agreement providing for these payments, it shall be unlawful for*
8 *that employer willfully or with intent to defraud to fail to remit*
9 *the withholdings to the proper agency or to fail to make the*
10 *payments required by the terms of that agreement. A violation of*
11 *any provision of this section*~~where~~ *when the amount the employer*
12 *failed to pay into the fund or funds exceeds five hundred dollars*
13 *(\$500) shall be punishable by imprisonment pursuant to subdivision*
14 *(h) of Section 1170 of the Penal Code, or in a county jail for a*
15 *period of not more than one year, by a fine of not more than one*
16 *thousand dollars (\$1,000), or by both that imprisonment and fine.*
17 *All other violations shall be punishable as a misdemeanor.*

18 SEC. 2. No reimbursement is required by this act pursuant to
19 Section 6 of Article XIII B of the California Constitution because
20 the only costs that may be incurred by a local agency or school
21 district will be incurred because this act creates a new crime or
22 infraction, eliminates a crime or infraction, or changes the penalty
23 for a crime or infraction, within the meaning of Section 17556 of
24 the Government Code, or changes the definition of a crime within
25 the meaning of Section 6 of Article XIII B of the California
26 Constitution.

Senate Committee on Labor and Industrial Relations
Ted W. Lieu, Chair

Date of Hearing: April 10, 2013
Session
Consultant: Gideon L. Baum
2013-2014 Regular
Fiscal: Yes
Urgency: No

Bill No: SB 390
Author: Wright
As Introduced/Amended: February 20, 2013

SUBJECT

Employee wage withholdings: failure to remit.

KEY ISSUE

Should the Legislature empower the Labor Commissioner or the Commissioner's agents to pursue non-remitted payroll taxes from employers?

ANALYSIS

Existing law provides that it is illegal for an employer to willfully or with the intent to defraud fail to remit payments to a health or welfare fund, pension fund or vacation plan, or other similar plan for the benefit of the employees. (Labor Code §227)

Existing law provides that if an employer fails to remit \$500 or more in payments to an above-described fund, the employer's violation is a misdemeanor and shall be punishable by imprisonment in a county jail for a period of not more than one year, by a fine of not more than one thousand dollars (\$1,000), or both. (Labor Code §227)

Existing Federal law provides that any person who willfully fails to collect or truthfully account for and pay over taxes shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. (26 USC §7202)

Existing Federal law also provides that any person who willfully

fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. (26 USC §6672)

Existing law provides that it is a violation of the law for any employer or employing unit to willfully fail or refuse to make any contributions which are due under the Unemployment Insurance or Disability Insurance programs. (Unemployment Insurance Code §2108)

Existing law provides that, after an employer has been appropriately notified, any employer or person failing to withhold the personal income tax (PIT) amount due from any taxpayer and to transmit the same to the department is liable for such amounts.

Existing law also requires any employer or person required to withhold and transmit shall comply with the requirement without resort to any legal or equitable action in a court of law or equity. (Unemployment Insurance Code §§13073 & 13074)

Existing law provides that any person or employer who, with or without intent to evade , fails to withhold or fails to pay over any personal income tax withheld, is guilty of a misdemeanor and, upon conviction, shall be fined an amount not to exceed one thousand dollars (\$1,000), or imprisoned for not more than one year, or both the fine and imprisonment, at the discretion of the court. (Unemployment Insurance Code §2118)

Existing law provides that any person required to collect, account for, and pay over any personal income tax or amount required to be withheld who willfully fails to collect or truthfully account for and pay over the tax or amount shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined an amount not more than twenty thousand dollars (\$20,000), or imprisoned

Hearing Date: April 10, 2013 SB 390
Consultant: Gideon L. Baum Page 2

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16 months to 3 years, or both the fine and imprisonment, at the discretion of the court. (Unemployment Insurance Code §2118.5)

This bill would provide that it is illegal for an employer to

willfully or with the intent to defraud fail to remit withholding's from an employee's wages pursuant to local, state or federal law to the proper agency.

This bill would also provide that if an employer fails to remit \$500 or more in wage withholdings, the employer's violation is a misdemeanor and shall be punishable by imprisonment in a county jail for a period of not more than one year, by a fine of not more than one thousand dollars (\$1,000), or both.

COMMENTS

1. Failure to Remit Taxes and Criminal Penalties:

Both federal and California law require certain taxes to be withheld from an employee's wages. These include state disability insurance (SDI), personal income taxes (PIT), and Federal Insurance Contribution Act (FICA) taxes, which fund Social Security and Medicare. These taxes are then remitted to the appropriate authority, which then deposits those funds into the appropriate trust fund. It is these payroll taxes and wage remittances that allow these programs to function.

Noting the importance of these programs to workers, both California law and federal law provide significant criminal penalties, including both jail and civil penalties. For example, the federal government has held the owners of a business personally liable for unpaid FICA taxes since 1978 (see *Slodov v. United States*, 436 U.S. 238 (1978)). This liability can also extend to members of a board of directors (see *Verret v. United States*, 542 F.Supp.2d 526 (2008)). In one recent case, an operator of a temporary healthcare provider which provided nurses to hospitals was found guilty of tax fraud and sentenced to 37 months in jail and nearly \$2.2 million in restitution.

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Consultant: Gideon L. Baum

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Senate Committee on Labor and Industrial Relations

2. Committee Comments:

As noted above, both California law and federal law contain both criminal and civil penalties for failing to remit wages that were withheld due to federal and state law. These can include felony convictions, significant civil penalties, and

prison time. The Committee may wish to consider how this requirement will impact existing statutory frameworks for enforcing unremitted tax withholdings.

Additionally, as currently written, SB 390 does not require that the tax remittances are remitted to the relevant governmental entity. This creates the possibility that the Labor Commissioner (or a private attorney) would pursue the remittances from the employer, settle for less, and then the funds would go to either the general fund or the impacted parties. This creates several challenges.

For one, unlike wages, full restitution would not be the return of the funds - it would be the ability to draw upon the relevant program. Second, the federal government, as an administrative policy, allows workers to draw Social Security even if the employer didn't remit the funds. This creates a significant problem for the Trust Fund: benefits are going out, money didn't go in, but the employer already went through an administrative process. Finally, due to double jeopardy protections, this bill could prevent the Social Security Administration and Employment Development Department from ever collecting on the unpaid payroll taxes.

3. Proponent Arguments :

Proponents note that they are seeing a significant number of cases where workers are having their payroll taxes removed from their wages but then simply pocket the withholdings. Proponents also note that employees find out about it after they receive their W-2 Forms which show much lower wages than they actually received or when they receive a 1099 Form, illegally classifying them as independent contractors.

Proponents argue that it is difficult for to pursue these cases, as the employers generally do not have any assets, leaving the employers unpunished and not penalized for their

Hearing Date: April 10, 2013

Consultant: Gideon L. Baum

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illegal conduct. Proponents believe that SB 390 is necessary because it will create a criminal provision in the Labor Code, allowing the Labor Commissioner to pursue a criminal misdemeanor prosecution.

4. Prior Legislation :

AB 469 (Swanson), Statutes of 2011, Chapter 655, also known as

the Wage Theft Prevention Act of 2011, requires the provision of a notice at the time of hiring that lists the relevant details of a worker's employment.

SUPPORT

California Rural Legal Assistance Foundation (Sponsor)
California Employment Lawyers Association
Construction Employers' Association
United Farm Workers (UFW)

OPPOSITION

None on file.

Hearing Date: April 10, 2013
Consultant: Gideon L. Baum

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Senate Committee on Labor and Industrial Relations

Senate Appropriations Committee Fiscal Summary
Senator Kevin de León, Chair

SB 390 (Wright) - Employee Wage Withholding: Failure to Remit

Amended: As Introduced Policy Vote: L&IR 5-0
Urgency: No Mandate: Yes
Hearing Date: May 6, 2013 Consultant: Robert Ingenito

This bill does not meet the criteria for referral to the
Suspense File.

Bill Summary: SB 390 would empower the Labor Commissioner to
pursue non-remitted payroll taxes from employers.

Fiscal Impact: The Department of Industrial Relations (DIR)
estimates that it would need two partial-year, ongoing positions
totaling \$130,000 (special funds) to implement the provisions of
the bill.

Background: Current federal and state law both require employers
to withhold certain taxes from an employee's wages. These taxes
include personal income tax, state disability insurance, and
Federal Insurance Contribution Act (FICA) taxes, whose proceeds
fund Social Security and Medicare. The withheld taxes are then
remitted to the appropriate taxing authority. Current federal
and state law both provide for significant criminal and civil
penalties for employers who fail to comply, including felony
convictions, fines, and prison time.

Nevertheless, some employers are withholding payroll and income
taxes from employees, but not remitting them as required by
current law. In these instances, the Internal Revenue Service
and the Franchise Tax Board hold the affected employees liable
for the entire amount of the tax owed (including the amount
withheld by the employer but not remitted to the taxing agency).
The Social Security Administration, conversely, does credit the
employee with the value of the unremitted withholding.

Proposed Law: This bill would create a criminal provision in the
Labor Code, thereby allowing the Labor Commissioner to pursue a
criminal misdemeanor prosecution against employers who do not
remit payroll taxes. Specifically, this bill would:

Provide that it is illegal for an employer to willfully or with the intent to defraud fail to remit withholding's from an employee's wages pursuant to local, state or federal law to the proper agency, and;

Provide that if an employer fails to remit \$500 or more in wage withholdings, the employer's violation is a misdemeanor and shall be punishable by imprisonment in a county jail for a period of not more than one year, by a fine of not more than one thousand dollars (\$1,000), or both.

Related Legislation: AB 469 (Swanson), Statutes of 2011, Chapter 655, requires the provision of a notice at the time of hire that lists the relevant details of a worker's employment.

SENATE RULES COMMITTEE	SB 390
Office of Senate Floor Analyses	
1020 N Street, Suite 524	
(916) 651-1520 Fax: (916)	
327-4478	

THIRD READING

Bill No: SB 390
Author: Wright (D)
Amended: As introduced
Vote: 21

SENATE LABOR & INDUSTRIAL RELATIONS COMMITTEE : 5-0, 4/10/13
AYES: Lieu, Wyland, Leno, Padilla, Yee

SENATE APPROPRIATIONS COMMITTEE : 5-2, 5/6/13
AYES: De León, Hill, Lara, Padilla, Steinberg
NOES: Walters, Gaines

SUBJECT : Employee wage withholdings: failure to remit

SOURCE : California Rural Legal Assistance Foundation

DIGEST : This bill provides that it is illegal for an employer to willfully or with the intent to defraud fail to remit withholdings from an employees wages pursuant to local, state or federal law to the proper agency, and also provides that if an employer fails to remit \$500 or more in wage withholdings, the employer's violation is a misdemeanor and shall be punishable by imprisonment in a county jail for a period of not more than one year, by a fine of not more than \$1,000, or both.

ANALYSIS :

Existing federal law:

1. Provides that any person who willfully fails to collect or

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truthfully account for and pay over taxes shall, in addition to other penalties provided by law, be guilty of a felony

and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than five years, or both, together with the costs of prosecution.

2. Provides that any person who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

Existing state law:

1. Provides that it is illegal for an employer to willfully or with the intent to defraud fail to remit payments to a health or welfare fund, pension fund or vacation plan, or other similar plan for the benefit of the employees.
2. Provides that if an employer fails to remit \$500 or more in payments to an above-described fund, the employer's violation is a misdemeanor and shall be punishable by imprisonment in a county jail for a period of not more than one year, by a fine of not more than 1,000, or both.
3. Provides that it is a violation of the law for any employer or employing unit to willfully fail or refuse to make any contributions which are due under the Unemployment Insurance or Disability Insurance programs.
4. Provides that, after an employer has been appropriately notified, any employer or person failing to withhold the personal income tax (PIT) amount due from any taxpayer and to transmit the same to the department is liable for such amounts.
5. Requires any employer or person required to withhold and transmit shall comply with the requirement without resort to any legal or equitable action in a court of law or equity.
6. Provides that any person or employer who, with or without intent to evade, fails to withhold or fails to pay over any

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personal income tax withheld, is guilty of a misdemeanor and, upon conviction, shall be fined an amount not to exceed \$1,000, or imprisoned for not more than one year, or both the fine and imprisonment, at the discretion of the court.

7. Provides that any person required to collect, account for, and pay over any personal income tax or amount required to be withheld who willfully fails to collect or truthfully account for and pay over the tax or amount shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined an amount not more than \$20,000, or imprisoned 16 months to three years, or both the fine and imprisonment, at the discretion of the court.

This bill creates a criminal provision in the Labor Code, thereby allowing the Labor Commissioner to pursue a criminal misdemeanor prosecution against employers who do not remit payroll taxes. Specifically, this bill:

1. Provides that it is illegal for an employer to willfully or with the intent to defraud fail to remit withholding's from an employee's wages pursuant to local, state or federal law to the proper agency.
2. Provides that if an employer fails to remit \$500 or more in wage withholdings, the employer's violation is a misdemeanor and shall be punishable by imprisonment in a county jail for a period of not more than one year, by a fine of not more than \$1,000, or both.

Comments

Failure to Remit Taxes and Criminal Penalties . Both federal and California law require certain taxes to be withheld from an employee's wages. These include state disability insurance, PIT, and Federal Insurance Contribution Act (FICA) taxes, which fund Social Security and Medicare. These taxes are then remitted to the appropriate authority, which then deposits those funds into the appropriate trust fund. It is these payroll taxes and wage remittances that allow these programs to function.

Noting the importance of these programs to workers, both California law and federal law provide significant criminal

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penalties, including both jail and civil penalties. For example, the federal government has held the owners of a business personally liable for unpaid FICA taxes since 1978 (see *Slodov v. United States*, 436 U.S. 238 (1978)). This liability can also extend to members of a board of directors (see *Verret v. United States*, 542 F.Supp.2d 526 (2008)). In one recent

case, an operator of a temporary healthcare provider which provided nurses to hospitals was found guilty of tax fraud and sentenced to 37 months in jail and nearly \$2.2 million in restitution.

Prior legislation

AB 469 (Swanson, Statutes of 2011, Chapter 655), also known as the Wage Theft Prevention Act of 2011, requires the provision of a notice at the time of hiring that lists the relevant details of a worker's employment.

FISCAL EFFECT : Appropriation: No Fiscal Com.: Yes
Local: Yes

According to the Senate Appropriations Committee, the Department of Industrial Relations estimates that it will need two partial-year, ongoing positions totaling \$130,000 (special funds) to implement the provisions of the bill.

SUPPORT : (Verified 5/7/13)

California Rural Legal Assistance Foundation (source)
California Employment Lawyers Association
Construction Employers' Association
United Farm Workers

ARGUMENTS IN SUPPORT : Proponents note that they are seeing a significant number of cases where workers are having their payroll taxes removed from their wages but then employers simply pocket the withholdings. Proponents also note that employees find out about it after they receive their W-2 Forms which show much lower wages than they actually received or when they receive a 1099 Form, illegally classifying them as independent contractors. Proponents argue that it is difficult for to pursue these cases, as the employers generally do not have any

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assets, leaving the employers unpunished and not penalized for their illegal conduct. Proponents believe that SB 390 is necessary because it will create a criminal provision in the Labor Code, allowing the Labor Commissioner to pursue a criminal misdemeanor prosecution.

PQ:d 5/7/13 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

Date of Hearing: June 12, 2013

ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT
Roger Hernández, Chair
SB 390 (Wright) - As Introduced: February 20, 2013

SENATE VOTE : 27-6

SUBJECT : Employee wage withholdings: failure to remit.

SUMMARY : Makes it a crime under the Labor Code for an employer who willfully or with intent to defraud, fails to remit to the proper agency any withholdings made from a worker's wages pursuant to local, state or federal law.

EXISTING FEDERAL LAW :

- 1) Provides that any person who willfully fails to collect or truthfully account for and pay over taxes shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than five years, or both, together with the costs of prosecution.
- 2) Provides that any person who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

EXISTING STATE LAW :

- 1) Provides that it is illegal for an employer to willfully or with the intent to defraud fail to remit payments to a health or welfare fund, pension fund or vacation plan, or other similar plan for the benefit of the employees.
- 2) Provides that if an employer fails to remit \$500 or more in payments to an above-described fund, the employer's violation is a misdemeanor and shall be punishable by imprisonment for a period of not more than one year, by a fine of not more than \$1,000, or both.

- 3) Provides that it is a violation of the law for any employer or employing unit to willfully fail or refuse to make any contributions which are due under the Unemployment Insurance (UI) or Disability Insurance programs.
- 4) Provides that, after an employer has been appropriately notified, any employer or person failing to withhold the personal income tax (PIT) amount due from any taxpayer and who fails to transmit the same to the appropriate department is liable for such amounts.
- 5) Requires any employer or person required to withhold and transmit shall comply with the requirement without resort to any legal or equitable action in a court of law or equity.
- 6) Provides that any person or employer who, with or without intent to evade, fails to withhold or fails to remit any personal income tax withheld, is guilty of a misdemeanor and, upon conviction, shall be fined an amount not to exceed \$1,000, or imprisoned for not more than one year, or both the fine and imprisonment, at the discretion of the court.

FISCAL EFFECT : According to the Senate Appropriations Committee analysis the Department of Industrial Relations (DIR) estimates that it would need two partial year ongoing positions totaling \$130,000 (special funds) to implement the provisions of this bill.

COMMENTS : The author states, "Unscrupulous employers operating in the underground economy, and particularly labor contractors, have been implicated in a whole host of illegal wage-related practices in many industries in the last several decades.

Although California law requires employers to disclose all deductions made from pay on their workers' itemized wage statements, workers often do not learn that their employers has pocketed their tax contributions for Social Security or Medicare until they have some reason to contact those agencies. Then, unfortunately, their remedies are quite limited.

Finally, the author argues, employers generally are required to withhold applicable local, state and federal taxes from their employees' paychecks and are also required to remit withholding amounts to the proper agency. There are varying state and federal civil and criminal penalties for violations of these

differing requirements, but we are unaware of any specific California law which targets underground economy actors with criminal penalties for pocketing the Social Security or Medicare taxes they withhold from their employees' paychecks."

Failure to Remit Taxes and Criminal Penalties : Both federal and California law require certain taxes to be withheld from an employee's wages. These include state disability insurance, PIT, and Federal Insurance Contribution Act (FICA) taxes, which fund Social Security and Medicare. These taxes are then remitted to the appropriate authority, which then deposits those funds into the appropriate trust fund. It is these payroll taxes and wage remittances that allow these programs to function.

Noting the importance of these programs to workers, both California law and federal law provide significant criminal penalties, including both jail and civil penalties.

Related Legislation :

AB 469 (Swanson) Chapter 655, Statutes of 2011, also known as the Wage Theft Prevention Act of 2011, made a number of changes related to "theft" of wages, employee wage claims and related provisions.

ARGUMENTS IN SUPPORT :

According to the sponsor of this bill, the California Rural Legal Assistance Foundation (CRLAF) and other low wage worker advocates have always had cases where a particularly unscrupulous employer's wage theft conduct extends beyond just stealing wages but also extends to pocketing taxes or worker contributions instead of remitting them to the appropriate agency.

With the exception of farm workers employed by a farm labor contractor, (FLC), who can seek to have the FLC's license suspended or revoked if he fails to pay required taxes into the UI benefit system, there has never been a remedy in the Labor Code for this broader kind of criminal conduct.

Low-wage worker advocates are now seeing what seems to be an uptick in these kinds of cases, and existing civil and criminal remedies under state or federal tax laws seem to us to be

inadequate. CRLAF argues that bringing the Labor Commissioner's office into these types of egregious misconduct, this bill has the potential to expand workers' protections.

REGISTERED SUPPORT / OPPOSITION :

Support

California Employment Lawyers Association
California Rural Legal Assistance Foundation (sponsor)
Construction Employers' Association
United Farm Workers

Opposition

None on file.

Analysis Prepared by : Lorie Alvarez / L. & E. / (916)
319-2091

Introduced by Senator Wright

February 20, 2013

An act to amend Section 227 of the Labor Code, relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

SB 390, as amended, Wright. Employee wage withholdings: failure to remit.

(1) Existing law makes it a crime for an employer to fail to make agreed-upon payments to health and welfare funds, pension funds, or various benefit plans. Existing law provides that the crime be punished as a felony or a misdemeanor, as specified, if the amount unpaid exceeds \$500, and as a misdemeanor, if the amount is less than \$500.

This bill would make it a crime, as described above, for an employer to fail to remit withholdings from an employee's wages that were made pursuant to state, local, or federal law. *The bill would prescribe how recovered withholdings or court-imposed restitution, if any, are to be forwarded or paid.*

(2) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Section 227 of the Labor Code is amended to
2 read:

3 227. If an employer has made withholdings from an employee's
4 wages pursuant to state, local, or federal law, or has agreed with
5 any employee to make payments to a health or welfare fund,
6 pension fund, or vacation plan, or other similar plan for the benefit
7 of the employees, or a negotiated industrial promotion fund, or
8 has entered into a collective bargaining agreement providing for
9 these payments, it shall be unlawful for that employer willfully or
10 with intent to defraud to fail to remit the withholdings to the proper
11 agency or to fail to make the payments required by the terms of
12 that agreement. A violation of any provision of this section when
13 the amount the employer failed to pay into the fund or funds
14 exceeds five hundred dollars (\$500) shall be punishable by
15 imprisonment pursuant to subdivision (h) of Section 1170 of the
16 Penal Code, or in a county jail for a period of not more than one
17 year, by a fine of not more than one thousand dollars (\$1,000), or
18 by both that imprisonment and fine. All other violations shall be
19 punishable as a misdemeanor. *In a criminal proceeding under this*
20 *section, any withholdings that are recovered from an employer*
21 *shall be forwarded to the appropriate fund or plan and, if*
22 *restitution is imposed, the court shall direct to which agency, entity,*
23 *or person it shall be paid.*

24 SEC. 2. No reimbursement is required by this act pursuant to
25 Section 6 of Article XIII B of the California Constitution because
26 the only costs that may be incurred by a local agency or school
27 district will be incurred because this act creates a new crime or
28 infraction, eliminates a crime or infraction, or changes the penalty
29 for a crime or infraction, within the meaning of Section 17556 of
30 the Government Code, or changes the definition of a crime within
31 the meaning of Section 6 of Article XIII B of the California
32 Constitution.

O

Date of Hearing: July 3, 2013

ASSEMBLY COMMITTEE ON APPROPRIATIONS
Mike Gatto, Chair

SB 390 (Wright) - As Amended: June 25, 2013

Policy Committee: Labor and
Employment Vote: 7-0

Urgency: No State Mandated Local Program:
Yes Reimbursable: No

SUMMARY

This bill enables the Labor Commission (LC) to enforce a violation for an employer who willfully, or with intent to defraud, fails to remit to the proper agency any withholdings made from a worker's wages pursuant to state and federal law, as specified.

Requires any withholdings recovered from an employer in a criminal proceeding to be forwarded to the appropriate fund or plan, and requires the court to direct any restitution to the agency, entity, or person, as specified.

FISCAL EFFECT

On-going special fund costs, between \$150,000 and \$250,000, to the Department of Industrial Relations to enforce this measure.

COMMENTS

1)Rationale . Current federal and state law requires employers to withhold certain taxes from an employee's wages. These taxes include personal income tax, state disability insurance, and Federal Insurance Contribution Act (FICA) taxes, whose proceeds fund Social Security and Medicare. The withheld taxes are then remitted to the appropriate taxing authority. Current federal and state law provide for significant criminal and civil penalties for employers who fail to comply, including felony convictions, fines, and prison time.

According to the author, "Although California law requires

employers to disclose all deductions made from pay on their workers' itemized wage statements, workers often do not learn that their employers has pocketed their tax contributions for Social Security or Medicare until they have some reason to contact those agencies. Then, unfortunately, their remedies are quite limited.

"Employers generally are required to withhold applicable local, state and federal taxes from their employees' paychecks and are also required to remit withholding amounts to the proper agency. There are varying state and federal civil and criminal penalties for violations of these differing requirements, but we are unaware of any specific California law which targets underground economy actors with criminal penalties for pocketing the Social Security or Medicare taxes they withhold from their employees' paychecks."

2)Existing state law specifies it is unlawful for an employer to willfully or with intent to defraud to fail to make payments to a health or welfare fund, pension fund, or vacation plan, as specified. Statute further makes it a misdemeanor when the amount an employer fails to pay into this fund exceeds \$500. This bill would add the failure to remit employee's withholdings to these statutory provisions.

Analysis Prepared by : Kimberly Rodriguez / APPR. / (916)
319-2081

SENATE THIRD READING

SB 390 (Wright)
As Amended June 25, 2013
Majority vote

SENATE VOTE :27-6

LABOR & EMPLOYMENT 7-0 APPROPRIATIONS 17-0

Ayes:	Roger Hernández, Morrell, Alejo, Chau, Gomez, Gorell, Holden	Ayes:	Gatto, Harkey, Bigelow, Bocanegra, Bradford, Ian Calderon, Campos, Donnelly, Eggman, Gomez, Hall, Holden, Linder, Pan, Quirk, Wagner, Weber
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SUMMARY : Enables the Labor Commission (LC) to enforce a violation for an employer who willfully, or with intent to defraud, fails to remit to the proper agency any withholdings made from a worker's wages pursuant to state and federal law, as specified.

Requires any withholdings recovered from an employer in a criminal proceeding to be forwarded to the appropriate fund or plan, and requires the court to direct any restitution to the agency, entity, or person, as specified.

FISCAL EFFECT : According to the Assembly Appropriations Committee on-going special fund costs, likely less than \$50,000, to the Department of Industrial Relations to enforce this measure.

COMMENTS : The author states, unscrupulous employers operating in the underground economy, and particularly labor contractors, have been implicated in a whole host of illegal wage-related practices in many industries in the last several decades.

Although California law requires employers to disclose all deductions made from pay on their workers' itemized wage statements, workers often do not learn that their employers has pocketed their tax contributions for Social Security or Medicare until they have some reason to contact those agencies. Then,

unfortunately, their remedies are quite limited."

Finally, the author argues, employers generally are required to withhold applicable local, state and federal taxes from their employees' paychecks and are also required to remit withholding amounts to the proper agency. There are varying state and federal civil and criminal penalties for violations of these differing requirements, but we are unaware of any specific California law which targets underground economy actors with criminal penalties for pocketing the Social Security or Medicare taxes they withhold from their employees' paychecks.

Failure to Remit Taxes and Criminal Penalties : Both federal and California law require certain taxes to be withheld from an employee's wages. These include state disability insurance, Personal Income Tax (PIT), and Federal Insurance Contribution Act (FICA) taxes, which fund Social Security and Medicare. These taxes are then remitted to the appropriate authority, which then deposits those funds into the appropriate trust fund. It is these payroll taxes and wage remittances that allow these programs to function.

Noting the importance of these programs to workers, both California law and federal law provide significant criminal penalties, including both jail and civil penalties.

Arguments in Support : According to the sponsor of this bill, the California Rural Legal Assistance Foundation (CRLAF) and other low wage worker advocates have always had cases where a particularly unscrupulous employer's wage theft conduct extends beyond just stealing wages but also extends to pocketing taxes or worker contributions instead of remitting them to the appropriate agency.

With the exception of farm workers employed by a farm labor contractor (FLC), who can seek to have the FLC's license suspended or revoked if he/she fails to pay required taxes into the Unemployment Insurance (UI) benefit system, there has never been a remedy in the Labor Code for this broader kind of criminal conduct.

Low-wage worker advocates are now seeing what seems to be an uptick in these kinds of cases, and existing civil and criminal

remedies under state or federal tax laws seems to be inadequate. CRLAF argues that by bringing the Labor Commissioner's office

into this type of egregious misconduct, this bill has the potential to expand workers' protections.

Analysis Prepared by : Lorie Alvarez / L. & E. / (916)
319-2091

FN: 0002138

SENATE RULES COMMITTEE	SB 390
Office of Senate Floor Analyses	
1020 N Street, Suite 524	
(916) 651-1520 Fax: (916)	
327-4478	

UNFINISHED BUSINESS

Bill No: SB 390
Author: Wright (D)
Amended: 6/25/13
Vote: 21

SENATE LABOR & INDUSTRIAL RELATIONS COMMITTEE : 5-0, 4/10/13
AYES: Lieu, Wyland, Leno, Padilla, Yee

SENATE APPROPRIATIONS COMMITTEE : 5-2, 5/6/13
AYES: De León, Hill, Lara, Padilla, Steinberg
NOES: Walters, Gaines

SENATE FLOOR : 27-6, 5/13/13
AYES: Beall, Block, Cannella, Corbett, Correa, De León,
DeSaulnier, Evans, Galgiani, Hancock, Hernandez, Hill, Hueso,
Jackson, Lara, Leno, Lieu, Liu, Monning, Padilla, Pavley,
Roth, Steinberg, Wolk, Wright, Wyland, Yee
NOES: Anderson, Berryhill, Fuller, Huff, Knight, Nielsen
NO VOTE RECORDED: Calderon, Emmerson, Gaines, Price, Walters,
Vacancy, Vacancy

ASSEMBLY FLOOR : 78-0, 9/9/13 - See last page for vote

SUBJECT : Employee wage withholdings: failure to remit

SOURCE : California Rural Legal Assistance Foundation

DIGEST : This bill provides that it is illegal for an employer
to willfully or with the intent to defraud fail to remit
withholding's from an employee's wages pursuant to local, state

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Page

an employer fails to remit \$500 or more in wage withholdings, the employer's violation is a misdemeanor and shall be punishable by imprisonment in a county jail for a period of not more than one year, by a fine of not more than \$1,000, or both.

Assembly Amendments specify how recovered withholdings or court-imposed restitution, if any, are to be forwarded or paid.

ANALYSIS :

Existing federal law:

1. Provides that any person who willfully fails to collect or truthfully account for and pay over taxes shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than five years, or both, together with the costs of prosecution.
2. Provides that any person who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

Existing state law:

1. Provides that it is illegal for an employer to willfully or with the intent to defraud fail to remit payments to a health or welfare fund, pension fund or vacation plan, or other similar plan for the benefit of the employees.
2. Provides that if an employer fails to remit \$500 or more in payments to an above-described fund, the employer's violation is a misdemeanor and shall be punishable by imprisonment in a county jail for a period of not more than one year, by a fine of not more than 1,000, or both.
3. Provides that it is a violation of the law for any employer or employing unit to willfully fail or refuse to make any contributions which are due under the Unemployment Insurance

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or Disability Insurance programs.

4. Provides that, after an employer has been appropriately

notified, any employer or person failing to withhold the personal income tax (PIT) amount due from any taxpayer and to transmit the same to the department is liable for such amounts.

5. Requires any employer or person required to withhold and transmit shall comply with the requirement without resort to any legal or equitable action in a court of law or equity.
6. Provides that any person or employer who, with or without intent to evade, fails to withhold or fails to pay over any personal income tax withheld, is guilty of a misdemeanor and, upon conviction, shall be fined an amount not to exceed \$1,000, or imprisoned for not more than one year, or both the fine and imprisonment, at the discretion of the court.
7. Provides that any person required to collect, account for, and pay over any personal income tax or amount required to be withheld who willfully fails to collect or truthfully account for and pay over the tax or amount shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined an amount not more than \$20,000, or imprisoned 16 months to three years, or both the fine and imprisonment, at the discretion of the court.

This bill creates a criminal provision in the Labor Code, thereby allowing the Labor Commissioner to pursue a criminal misdemeanor prosecution against employers who do not remit payroll taxes. Specifically, this bill:

1. Provides that it is illegal for an employer to willfully or with the intent to defraud fail to remit withholding's from an employee's wages pursuant to local, state or federal law to the proper agency.
2. Provides that if an employer fails to remit \$500 or more in wage withholdings, the employer's violation is a misdemeanor and shall be punishable by imprisonment in a county jail for a period of not more than one year, by a fine of not more than \$1,000, or both.

CONTINUED

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3. Requires any withholdings recovered from an employer in a criminal proceeding to be forwarded to the appropriate fund or plan, and requires the court to direct any restitution to the agency, entity, or person, as specified.

Comments

Failure to Remit Taxes and Criminal Penalties . Both federal and California law require certain taxes to be withheld from an employee's wages. These include state disability insurance, PIT, and Federal Insurance Contribution Act (FICA) taxes, which fund Social Security and Medicare. These taxes are then remitted to the appropriate authority, which then deposits those funds into the appropriate trust fund. It is these payroll taxes and wage remittances that allow these programs to function.

Noting the importance of these programs to workers, both California law and federal law provide significant criminal penalties, including both jail and civil penalties. For example, the federal government has held the owners of a business personally liable for unpaid FICA taxes since 1978 (see *Slodov v. United States*, 436 U.S. 238 (1978)). This liability can also extend to members of a board of directors (see *Verret v. United States*, 542 F.Supp.2d 526 (2008)). In one recent case, an operator of a temporary healthcare provider which provided nurses to hospitals was found guilty of tax fraud and sentenced to 37 months in jail and nearly \$2.2 million in restitution.

Prior legislation

AB 469 (Swanson), Statutes of 2011, Chapter 655, also known as the Wage Theft Prevention Act of 2011, requires the provision of a notice at the time of hiring that lists the relevant details of a worker's employment.

FISCAL EFFECT : Appropriation: No Fiscal Com.: Yes
Local: Yes

According to the Senate Appropriations Committee, the Department of Industrial Relations estimates that it will need two partial-year, ongoing positions totaling \$130,000 (special

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funds) to implement the provisions of the bill.

SUPPORT : (Verified 5/7/13 - unable to reverify at time of writing)

California Rural Legal Assistance Foundation (source)
California Employment Lawyers Association

Construction Employers' Association
United Farm Workers

ARGUMENTS IN SUPPORT : Proponents note that they are seeing a significant number of cases where workers are having their payroll taxes removed from their wages but then simply pocket the withholdings. Proponents also note that employees find out about it after they receive their W-2 Forms which show much lower/ wages than they actually received or when they receive a 1099 Form, illegally classifying them as independent contractors. Proponents argue that it is difficult for to pursue these cases, as the employers generally do not have any assets, leaving the employers unpunished and not penalized for their illegal conduct. Proponents believe that SB 390 is necessary because it will create a criminal provision in the Labor Code, allowing the Labor Commissioner to pursue a criminal misdemeanor prosecution.

ASSEMBLY FLOOR : 78-0, 09/09/13
AYES: Achadjian, Alejo, Allen, Ammiano, Atkins, Bigelow, Bloom, Bocanegra, Bonilla, Bonta, Bradford, Brown, Buchanan, Ian Calderon, Campos, Chau, Chávez, Chesbro, Conway, Cooley, Dahle, Daly, Dickinson, Donnelly, Eggman, Fong, Fox, Frazier, Beth Gaines, Garcia, Gatto, Gomez, Gonzalez, Gordon, Gorell, Gray, Grove, Hagman, Hall, Harkey, Roger Hernández, Holden, Jones, Jones-Sawyer, Levine, Linder, Logue, Lowenthal, Maienschein, Mansoor, Medina, Melendez, Mitchell, Morrell, Mullin, Muratsuchi, Nazarian, Nestande, Olsen, Pan, Patterson, Perea, V. Manuel Pérez, Quirk, Quirk-Silva, Rendon, Salas, Skinner, Stone, Ting, Wagner, Waldron, Weber, Wieckowski, Wilk, Williams, Yamada, John A. Pérez
NO VOTE RECORDED: Vacancy, Vacancy

PQ:AB:d:n 9/9/13 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

Senate Bill No. 390

Passed the Senate September 10, 2013

Secretary of the Senate

Passed the Assembly September 9, 2013

Chief Clerk of the Assembly

This bill was received by the Governor this _____ day
of _____, 2013, at _____ o'clock ____M.

Private Secretary of the Governor

CHAPTER _____

An act to amend Section 227 of the Labor Code, relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

SB 390, Wright. Employee wage withholdings: failure to remit.

(1) Existing law makes it a crime for an employer to fail to make agreed-upon payments to health and welfare funds, pension funds, or various benefit plans. Existing law provides that the crime be punished as a felony or a misdemeanor, as specified, if the amount unpaid exceeds \$500, and as a misdemeanor, if the amount is less than \$500.

This bill would make it a crime, as described above, for an employer to fail to remit withholdings from an employee's wages that were made pursuant to state, local, or federal law. The bill would prescribe how recovered withholdings or court-imposed restitution, if any, are to be forwarded or paid. By broadening the definition of a crime, this bill would impose a state-mandated local program.

(2) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. Section 227 of the Labor Code is amended to read:

227. If an employer has made withholdings from an employee's wages pursuant to state, local, or federal law, or has agreed with any employee to make payments to a health or welfare fund, pension fund, or vacation plan, or other similar plan for the benefit of the employees, or a negotiated industrial promotion fund, or has entered into a collective bargaining agreement providing for these payments, it shall be unlawful for that employer willfully or

with intent to defraud to fail to remit the withholdings to the proper agency or to fail to make the payments required by the terms of that agreement. A violation of any provision of this section when the amount the employer failed to pay into the fund or funds exceeds five hundred dollars (\$500) shall be punishable by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code, or in a county jail for a period of not more than one year, by a fine of not more than one thousand dollars (\$1,000), or by both that imprisonment and fine. All other violations shall be punishable as a misdemeanor. In a criminal proceeding under this section, any withholdings that are recovered from an employer shall be forwarded to the appropriate fund or plan and, if restitution is imposed, the court shall direct to which agency, entity, or person it shall be paid.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

Approved _____, 2013

Governor

Senate Bill No. 390

CHAPTER 718

An act to amend Section 227 of the Labor Code, relating to employment.

[Approved by Governor October 10, 2013. Filed with
Secretary of State October 10, 2013.]

LEGISLATIVE COUNSEL'S DIGEST

SB 390, Wright. Employee wage withholdings: failure to remit.

(1) Existing law makes it a crime for an employer to fail to make agreed-upon payments to health and welfare funds, pension funds, or various benefit plans. Existing law provides that the crime be punished as a felony or a misdemeanor, as specified, if the amount unpaid exceeds \$500, and as a misdemeanor, if the amount is less than \$500.

This bill would make it a crime, as described above, for an employer to fail to remit withholdings from an employee's wages that were made pursuant to state, local, or federal law. The bill would prescribe how recovered withholdings or court-imposed restitution, if any, are to be forwarded or paid. By broadening the definition of a crime, this bill would impose a state-mandated local program.

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dollars (\$1,000), or by both that imprisonment and fine. All other violations shall be punishable as a misdemeanor. In a criminal proceeding under this section, any withholdings that are recovered from an employer shall be forwarded to the appropriate fund or plan and, if restitution is imposed, the court shall direct to which agency, entity, or person it shall be paid.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.