

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL  
State of California

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OPINION	:	No. 12-901
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of	:	December 20, 2013
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THE HONORABLE JEFF GORELL, MEMBER OF THE STATE ASSEMBLY,  
has requested an opinion on the following question:

Under what circumstances does an owner-operated business with no employees nevertheless constitute a “place of employment” under Labor Code section 6404.5, which prohibits smoking in a workplace?

CONCLUSION

An owner-operated business with no employees nevertheless constitutes a “place of employment” under Labor Code section 6404.5 when employment of any kind is carried on at the business location—that is, even when such employment is carried on by persons who are employed by someone other than the business owner.

## ANALYSIS

Labor Code section 6404.5 (section 6404.5) states, in relevant part: “No employer shall knowingly or intentionally permit, and no person shall engage in, the smoking of tobacco products in an enclosed space at a place of employment.”<sup>1</sup> A violation of the prohibition is an infraction, punishable by fine.<sup>2</sup> The statute is enforced by local law enforcement agencies, including local health departments.<sup>3</sup>

The question presented for our consideration is whether and under what circumstances an owner-operated business with no employees of its own may nevertheless be considered a “place of employment” subject to section 6404.5’s smoking prohibition.<sup>4</sup> We begin our analysis by defining some critical terms. For purposes of occupational safety and health protections, the term “employee” means “every person who is required or directed by any employer to engage in any employment or to go to work or be at any time in any place of employment.”<sup>5</sup> And, as relevant here, the term “employer” takes the same broad definition used in the workers’ compensation context—i.e., “[e]very person including any public service corporation, which has any natural person in service.”<sup>6</sup> Finally, the phrase “place of employment” is similarly broadly defined to mean “any place, and the premises appurtenant thereto, where employment is carried on, . . . .”<sup>7</sup>

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<sup>1</sup> Lab. Code § 6404.5(b); *see also* Cal. Code. Regs. tit. 8, § 5148.

<sup>2</sup> Lab. Code § 6404.5(j).

<sup>3</sup> Lab. Code § 6404.5(j).

<sup>4</sup> We assume for purposes of this opinion that the owner-operator is a bona fide owner-operator, and not using any techniques of evasion designed to thwart the aims of occupational health and safety protections. For example, we are aware of occasions in which business owners have (unsuccessfully) sought to avoid the strictures of section 6404.5 by issuing a percentage interest in the business to their employees and then characterizing the establishment as “owner-operated.” *See e.g. People v. Apache Corral*, Riverside Co. Super. Ct. No. E02686 AC (Dec. 8, 2000).

<sup>5</sup> Lab. Code § 6304.1(a) (*italics added*).

<sup>6</sup> Lab. Code § 3300 (“employer” for purposes of workers’ compensation); *see* Lab. Code § 6304 (“employer” for purposes of occupational safety and health has the meaning stated in section 3300).

<sup>7</sup> Lab. Code § 6303(a).

Applying these definitions, we find that where, for example, a business owner-operator performs *all* of his or her own services—without utilizing the services or assistance of any compensated employees on any occasion—that owner-operator would fall outside the definition of “employer” because he or she does not have “any natural person in service,”<sup>8</sup> and that business location would similarly fall outside the definition of “place of employment” because no “employment is carried on” there. Under such narrow circumstances, then, section 6404.5 would not apply.

That is not the end of our inquiry, however, because even if we assume that the owner-operator of the business in question is not himself or herself a *direct* employer of any person on the business premises, there is still the consideration that individuals directly employed *by someone else* may be carrying out their employment on those premises. Thus, we believe that the key question for purposes of our analysis is whether any employment whatsoever “is carried on” at the location, regardless of who the direct employer might be. We illustrate our point in more detail below.

As mentioned above, the Legislature has given the term “employer,” as used in connection with section 6404.5, the same inclusive meaning that the term has for workers’ compensation purposes—i.e., “[e]very person . . . [who] has any natural person in service.”<sup>10</sup> Under this definition, the owner-operator of a business with no direct employees may still be treated as a “secondary” or “special” employer with respect to persons who work for the business but are directly employed by someone else—e.g., those performing “temp” clerical or accounting services, janitorial or maintenance services, or repair services.<sup>11</sup> “General and special employments occur when a general employer furnishes an employee to another person and during this engagement both employers have some right of control over the performance of the employee’s services.”<sup>12</sup>

Because California law requires that “[e]very employer shall furnish employment and a place of employment that is safe and healthful for the employees therein,”<sup>13</sup> the

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<sup>8</sup> Lab. Code §§ 3300, 6304.

<sup>9</sup> Lab. Code § 6303(a).

<sup>10</sup> See Lab. Code § 6304.

<sup>11</sup> See *Sully-Miller Contracting Co. v. California Occupational Safety And Safety Appeals Bd.*, 138 Cal. App. 4th 684, 692-694 (2006) (applying dual-employer principles in the context of worker safety).

<sup>12</sup> *In-Home Supportive Services v. Workers’ Comp. Appeals Bd.*, 152 Cal. App. 3d 720, 732 (1984).

<sup>13</sup> Lab. Code § 6400 (*italics added*).

Occupational Safety and Health Appeals Board—which is one of those agencies whose expertise we must respect<sup>14</sup>—has ruled that both primary and secondary employers must provide a safe workplace to the employees.<sup>15</sup>

We are persuaded that, for purposes of section 6404.5, the owner-operator of a particular business need not be the primary employer of persons working on the business premises for those premises to be characterized as a “place of employment.” It is enough that the business location is a “place . . . where employment is carried on,”<sup>16</sup> even if the workers are directly employed by someone else and only secondarily employed by the owner-operator. Although we do not have the assistance of any appellate court construction of the statute’s coverage,<sup>17</sup> this is not the first time that we have had occasion to interpret section 6404.5.<sup>18</sup> As we have previously, we rely on settled principles of statutory construction. The guiding principle “is to ascertain the intent of the Legislature so as to effectuate the purpose of the law.”<sup>19</sup> In determining that intent, we

must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. . . . The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the

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<sup>14</sup> See *United Ass’n Local Union 246, AFL-CIO v. Occupational Safety and Health Appeals Bd.*, 199 Cal. App. 4th 273, 281 (2011).

<sup>15</sup> See *In the Matter of the Appeal of: Labor Ready, Inc, Employer*, 2001 WL 575152 (Cal. O.S.H.A., May 11, 2001); *In the Matter of the Appeal of: Strategic Outsourcing, Inc., Employer*, 2011 WL 5016849, at 3 (Cal. O.S.H.A., Sept. 16, 2011); see also *In The Matter of the Appeal of: Kelly Services, Employer*, 2011 WL 2881536 (Cal. O.S.H.A., June 15, 2011), at 2.

<sup>16</sup> Lab. Code § 6303(a).

<sup>17</sup> *But see City of San Jose v. Dept. of Health Services*, 66 Cal. App. 4th 35, 43 (1998) (noting Legislature’s intent to leave smoking in long-term health facilities subject to local regulation).

<sup>18</sup> See 94 Ops.Cal.Atty.Gen. 46 (2011); 82 Ops.Cal.Atty.Gen. 190 (1999); 81 Ops.Cal.Atty.Gen. 122 (1998); 79 Ops.Cal.Atty.Gen. 8 (1996).

<sup>19</sup> *Dyna-Med, Inc. v. Fair Empl. & Hous. Commn.*, 43 Cal. 3d 1379, 1386 (1987).

extent possible. Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation.<sup>20</sup>

As the Supreme Court reminds us, “[w]e must . . . give the provision a reasonable and commonsense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity.”<sup>21</sup> Furthermore, we are mindful that, as a remedial statute, section 6404.5 should be “liberally construed on behalf of the class of persons it is designed to protect.”<sup>22</sup>

Again, the phrase “place of employment” is broadly defined to mean “any place, and the premises appurtenant thereto, where employment is carried on, except a place where the health and safety jurisdiction is vested by law in, and actively exercised by, any state or federal agency other than the division [of Occupational Safety and Health].”<sup>23</sup> The term “employment” is likewise broadly defined; the term “includes the carrying on of any trade, enterprise, project, industry, business, occupation, or work, including all excavation, demolition, and construction work, or any process or operation in any way related thereto, in which any person is engaged or permitted to work for hire, except household domestic service.”<sup>24</sup>

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<sup>20</sup> *Id.* (citations omitted).

<sup>21</sup> *In re Reeves*, 35 Cal. 4th 765, 771 (2005); *see also Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th 554, 567 (2007).

<sup>22</sup> *California Assn. of Health Facilities v. Department of Health Services*, 16 Cal. 4th 284, 295 (1997).

<sup>23</sup> Lab. Code § 6303(a). This “statutory exception simply reflects a legislative assumption that the division’s jurisdiction is not necessary when the exemption applies because the safety of the place of employment will be adequately protected by another agency.” *United Air Lines, Inc. v. Occupational Safety & Health Appeals Bd.*, 32 Cal. 3d 762, 770 (1982). For purposes of this opinion, we will assume that the business in question here does not come within the stated exception. In addition, some specific places of employment are expressly exempted from statewide regulation. *See* Lab. Code § 6404.5(d); *see also* 94 Ops.Cal.Atty.Gen. 46 (smokers’ lounge); 79 Ops.Cal.Atty.Gen. 8 (coffee shop having five or fewer employees). Likewise, we will assume that the business in question is not among any of those exempt places—which nonetheless remain subject to local regulation. Lab. Code § 6404.5(a); *see City of San Jose v. Department of Health Services*, 66 Cal. App. 4th at 43.

<sup>24</sup> Lab. Code § 6303(b).

Critically, here, the Legislature used the passive voice in section 6404.5 to define both “employment” and “place of employment.” Thus “employment” is defined as “the carrying on” of a wide variety of work activities.<sup>25</sup> “Place of employment,” is defined as “any place . . . where employment is carried on.”<sup>26</sup> To be sure, the work activities must be undertaken by a person “who is engaged or permitted to work for hire,”<sup>27</sup> which we understand to exclude volunteers.<sup>28</sup> But no essential connection is drawn between “place of employment” and the direct employer of those who are carrying on the employment. By its use of the passive voice, the Legislature evinced a belief that the “carrying on” of employment at a place is more relevant to the statute’s purpose than are the specifics of the employment relationship.<sup>29</sup>

This interpretation is consistent with the Legislature’s choice to prohibit *all persons*—not only the employer and his or her employees—from “engag[ing] in the smoking of tobacco products in an enclosed space at a place of employment.”<sup>30</sup> Thus, under the plain language of the statute, if employment is being carried on in an owner-operated business, then the owner-operator and all other persons are forbidden from smoking in any enclosed space therein, whether or not the owner-operator is the direct

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<sup>25</sup> Lab. Code § 6303(b).

<sup>26</sup> Lab. Code § 6303(a).

<sup>27</sup> See Lab. Code § 6303(b) (defining employment).

<sup>28</sup> See 62 Ops.Cal.Atty.Gen. 115, 117 (1979).

<sup>29</sup> See e.g. *Rey v. Madera Unified School Dist.*, 203 Cal. App. 4th 1223, 1233 (2012), quoting *Dean v. United States*, 556 U.S. 568, 572 (2009) (legislative use of the passive voice suggests that, “It is whether something happened—not how or why it happened—that matters”); see also *Capo for Better Representation v. Kelley*, 158 Cal. App. 4th 1455, 1463 (2008) (Legislature’s use of the passive voice suggests focus on the thing to be done rather than on the person doing it).

<sup>30</sup> Lab. Code § 6404.5(a). “Under Labor Code section 6404.5, if an employer permits any one [sic] to light a cigar, cigarette or pipe in an enclosed workplace, the employer and the person who lit the tobacco product have committed infractions of the law.” *In The Matter of the Appeal of: Robert D. Schultz and James A. Noll dba The Showboat Lounge, Employer*, 2003 WL 21374502, at 7 (Cal. O.S.H.A., May 29, 2003). <sup>31</sup> Lab. Code § 6404.5(a). The Legislature has also found and declared that “(1) Nonsmokers have no adequate means to protect themselves from the damage inflicted upon them when they involuntarily inhale tobacco smoke[; and] (2) Regulation of smoking in public places is necessary to protect the health, safety, welfare, comfort, and environment of nonsmokers.” Health & Safety Code § 118920(b) (regulation of smoking on public transportation vehicles).

employer of those carrying on the employment. The statute's absolute prohibition on smoking in places where it applies supports our conclusion that, while direct "employees" of an owner-operator are certainly entitled to the protections of section 6404.5, there is no reason why other employees working at the same location should be excluded from them.

In enacting section 6404.5, the Legislature declared its intent “to create a uniform and statewide standard to restrict and prohibit the smoking of tobacco products in enclosed places of employment, as specified in [section 6404.5], in order to reduce employee exposure to environmental tobacco smoke to a level that will prevent anything other than insignificantly harmful effects to exposed employees.”<sup>31</sup> We believe that all employees who work at, and for the benefit of, an owner-operated business are within the statute’s intended coverage, even if their direct employment relationship is with someone other than the owner-operator.<sup>32</sup> Indeed, a liberal construction of this remedial statute dictates that its protections apply in this broad manner.

We conclude, then, that an owner-operated business with no employees nevertheless constitutes a “place of employment” under Labor Code section 6404.5 when employment of any kind is carried on at the business location—that is, even when such employment is carried on by persons who are employed by someone other than the business owner.

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<sup>32</sup> *Cf. Bragg v. Mobilehome Co. of Los Angeles*, 145 Cal. App. 2d 326, 331 (1956) (“While the definition of ‘employee’ brings in all workmen who are required or directed by an employer to go to work or be in a place of employment, it is not to be understood as excluding workmen who may not precisely fit into the definition but are clearly of a class for whose protection the safety measures are required.”).