

## Cal/OSHA Enforcement Authority Expands Significantly in 2022

Effective January 1, 2022, [SB 606](#) significantly expands Cal/OSHA's enforcement powers and the potential penalties for workplace health and safety violations. Specifically, this bill (1) enhances Cal/OSHA compliance and enforcement tools, including its ability to issue injunctions, subpoenas, and temporary restraining orders against employers; and (2) expands and modifies penalties for noncompliant employers, in particular by establishing a rebuttable presumption that a violation is occurring "enterprise-wide" under certain circumstances.

### Enforcement Tools

Under the bill, Cal/OSHA may issue a subpoena to an employer that fails to promptly provide information in response to a document request during an OSHA inspection. Cal/OSHA may enforce the subpoena if the employer fails to provide such information within a "reasonable" period of time, which is not defined.

The bill further provides that Cal/OSHA may seek an injunction or temporary restraining order against certain workplace operations when it has grounds to issue a citation—a dramatic expansion over Cal/OSHA's existing authority to seek an injunction only when employment conditions constitute a "serious menace" to the lives or safety of persons.

### Rapidly Scaling Penalties

**Rebuttable Presumption of Enterprise-wide Violations.** The bill establishes a rebuttable presumption that an employer's violation is enterprise-wide if (1) the employer has a written policy or procedure that violates relevant health and safety regulations, or (2) there is evidence of a pattern or practice of the *same violation* involving more than one worksite. If the employer fails to rebut the presumption, Cal/OSHA may issue an enterprise-wide citation requiring enterprise-wide abatement.

This is significant because Cal/OSHA may assess a penalty for each enterprise-wide violation of up to \$134,334. The definition of a "pattern or practice" at multiple facilities is unclear. If this is taken to mean that a rebuttable presumption of an "enterprise violation" is established the next time a particular past violation is cited at another facility, this provision could apply to a relatively large number of employers and facilities in California. This is particularly true if the assessment of a "pattern or practice" follows precedent in other OSHA contexts by using a five-year looking-back period regarding the employer's Cal/OSHA history. If past violations are ultimately considered evidence of a "pattern," any subsequent violation could potentially trigger global abatement requirements.

**Egregious Violations.** SB 606 also creates a new penalty category of an "egregious violation" where the employer "willfully and egregiously" violates an occupational safety or health standard, order, special order, or regulation.

A violation will be "egregious" if:

- The employer, intentionally, through conscious, voluntary action or inaction, made no reasonable effort to eliminate the known violation;
- The violations resulted in worker fatalities, a worksite catastrophe, or a large number of injuries or illnesses;
- The violations resulted in persistently high rates of worker injuries or illnesses;
- The employer has an extensive history of prior violations of this part;
- The employer has intentionally disregarded their health and safety responsibilities;
- The employer's conduct, taken as a whole, amounts to clear bad faith in the performance of their duties under this part; or
- The employer has committed a large number of violations so as to undermine significantly the effectiveness of any safety and health program that may be in place.

Once an egregious violation is established, the bill allows for per-employee penalties for the violation, creating the potential for significant, large penalties for noncompliant employers.

Cal/OSHA may assess a penalty for each egregious violation of up to \$134,334. In addition, the bill *requires* that a separate violation be assessed for each instance of employee exposure to an egregious violation. This significantly increases the risk of rapidly scaling compound penalties.

## **What Employers Should Do**

SB 606 presents considerable risks to California employers, and in particular employers with multiple worksites. Accordingly, employers with California operations should consider engaging counsel to do the following:

- Prepare a specific plan for addressing the next Cal/OSHA program inspection, complaint investigation, or accident investigation at its facilities;
- Ensure prompt responses and assistance with all current and future Cal/OSHA inspections, investigations, and citations, to minimize the potential for escalating consequences arising from future claims; and
- Establish a narrative to rebut assertions that any past or current actions can be construed as meeting the criteria for a "pattern or practice" or for "egregious" violations.

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