SEPTEMBER 30, 2021 | CAL/OSHA INSPECTIONS, CITATIONS & ENFORCEMENT

Newsom Signs Bill Vastly Expanding Cal/OSHA's Enforcement Authority

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California Governor Newsom has just signed Senate Bill 606 authored by Senator Lorena Gonzalez (D-Long Beach), broadly expanding Cal/OSHA's enforcement authority and the penalty amounts employers may be assessed. This new law targets employers with multiple work sites in California, recognizing violations on an enterprise-wide basis resulting from a written policy or procedure or otherwise a pattern of violations. SB 606 also empowers Cal/OSHA to levy penalties for each violation and each employee deemed exposed to an alleged hazard where there is a finding an employer "willfully and egregiously" violated a safety order. Lastly, the California Division of Occupational Safety and Health, also known as Cal/OSHA, is empowered to seek permanent injunctions in civil court against employers who are deemed in violation of the new law. SB 606 will take effect January 1, 2022.

SB 606 leaves little room for California employers to make an honest mistake or to be presumed by Cal/OSHA as acting in good faith. The new law is likely to foster a radical change in the way Cal/OSHA interacts with employers and weaken employers' appeal rights. It is certain that the penalties assessed for citations will increase as will the number of appeals filed with the Cal/OSHA Appeals Board. It is therefore crucial that employers, large and small, understand these regulatory changes and take steps now to strengthen their safety programs to be as bulletproof as possible. To that end, we have broken our discussion of the law into two key parts.

Enterprise-Wide Violations

SB 606 provided that where an employer has multiple worksites and **either** of the following is true, there is a rebuttable presumption that the violation is "enterprise-wide":

1. A written policy or procedure that violates any Cal/OSHA safety order, **or**
2. Evidence of a "pattern or practice" of the same violation involving more than one of the employer's worksites.

The first of these alternative grounds for an "enterprise-wide" citation makes clear that an employer depending on written safety programs applicable to all locations can be cited, in one fell swoop, at multiple locations within the state when any language in any of its safety programs is challenged. The second implies that a multi-establishment business with a history of more than one citation issued anywhere in the state for the same type of

violation, such as messy stockroom housekeeping or having a foot protection program deemed inadequate, will be vulnerable to an enterprise-wide citation.

SB 606 provides that if the employer fails to rebut this presumption, Cal/OSHA "may" issue an enterprise-wide citation requiring enterprise-wide abatement. This suggests a new iteration of the Notice of Intent (1BY) letter we have become familiar with will be created by Cal/OSHA as a precursor to issuing an enterprise-wide citation. If the employer appeals but fails to rebut the presumption successfully, the Appeals Board "shall" issue an enterprise-wide abatement order. Further, Cal/OSHA is empowered to seek a temporary restraining order and an injunction against any employer it believes has committed an enterprise-wide violation. This goes beyond Cal/OSHA's current powers to seek judicial remedies, which are primarily used to obtain inspection warrants.

The law has no safe harbor or limitation on size, and thus applies equally to the owner of a dry-cleaning shop who opens a second store across town as well as a national retailer. An employer's primary vulnerability – at least initially – will stem from technical deficiencies in written programs such as the Injury and Illness Prevention Program and Heat Illness Prevention Program. Cal/OSHA may very well try out their new powers on such low hanging fruit before moving on to more substantive regulations.

"Egregious" Employers

This second part of the new law could be more dangerous than the first. Certainly, the terms used are both more ominous and their ambiguity can be expected to lead to litigation. SB 606 provides that if Cal/OSHA believes upon inspection or "investigation" that an employer has "**willfully and egregiously**" committed a violation, Cal/OSHA must issue a citation to that employer "for each egregious violation," and "**each instance** of an employee exposed to that violation shall be considered a **separate violation** for purposes of the issuance of fines and penalties." What this means is that a single violation – for example, the existence of combustible dust – can result in multiplied penalties based on each affected employee.

Cal/OSHA has recognized "violation-by-violation" penalties under its Policy and Procedures Manual, specifically contemplated for recordkeeping violations. Yet, Cal/OSHA has rarely cited violation-by-violation penalties. So, while there seems to be some precedent for this approach, this law goes well beyond current practice.

The law provides no less than seven bases for finding an employer's conduct "egregious," and proof of only one will be sufficient to uphold a citation. Each basis except the first contains undefined terms so ambiguous that they beg for litigation: "persistently high" injury rates; an "extensive history" of prior violations; "intentional disregard of health and safety responsibilities"; "conduct, taken as a whole, [which] amounts to clear bad faith"; and a "large number" of violations that "undermine significantly the effectiveness of any safety and health program."

But Cal/OSHA is likely to follow the path of least resistance and just seek to prove the first basis for a finding of "egregious" conduct – that is, "the employer **intentionally**, through conscious, voluntary action or inaction, made no **reasonable effort** to eliminate the known violation." Here's why. For the employer's conduct to be found "willful," the Appeals Board has held that Cal/OSHA must prove that the employer "intentionally" violated a safety order, or if there is no proof of intent to ignore a regulation, that the employer had "actual knowledge" of the hazard. With either of these elements established, Cal/OSHA next must prove that the employer made no

"reasonable effort" to correct the hazard. The same evidence that supports a finding of "egregious" conduct will also establish that the conduct was "willful." Conversely, where Cal/OSHA cannot prove the employer's conduct was egregious – that is, intentional – it will only be able to prove willfulness by using the second part of the definition requiring an awareness of the hazard. Cal/OSHA may face dilemmas when deciding whether to allege that an employer's conduct was solely willful or was both willful and egregious.

In light of SB 606's anticipated impact on Cal/OSHA enforcement, we recommend that employers spend some time between now and New Year's Day, when the law takes effect, reviewing their safety policies, procedures and practices to eliminate as many potential vulnerabilities as possible. This would also be a good time to beef up training programs and increase the frequency and scope of internal inspections and audits.

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