

SB 606 (GONZALEZ) WORKPLACE SAFETY: VIOLATIONS OF STATUTES:  
ENTERPRISE-WIDE VIOLATIONS: EMPLOYER RETALIATION  
OPPOSE



Associated General Contractors (AGC)



Coalition of Small & Disabled Veteran Businesses



AFRICAN-AMERICAN



WESTERN AGRICULTURAL PROCESSORS ASSOCIATION



June 29, 2021

TO: Members, Assembly Judiciary Committee

**SUBJECT: SB 606 (GONZALEZ) WORKPLACE SAFETY: VIOLATIONS OF STATUTES:  
ENTERPRISE-WIDE VIOLATIONS: EMPLOYER RETALIATION  
OPPOSE – AS AMENDED JUNE 14, 2021  
SCHEDULED FOR HEARING – JULY 6, 2021**

The California Chamber of Commerce and the listed organizations **OPPOSE SB 606 (Gonzalez)** as amended June 14, 2021, because it would greatly broaden Cal/OSHA's scope of enforcement into the Labor Code as well as the Health and Safety Code and create unnecessary anti-retaliation protections that will lead to meritless litigation against employers.

Employers take COVID-19 safety seriously, investing millions to upgrade California's workplace environments and processes. Proactively, CalChamber has been steadily engaged with Cal/OSHA in developing, publicizing, and implementing the COVID-19 Emergency Temporary Standard<sup>1</sup> ("ETS"). However, **SB 606** would provide for massive changes to existing Cal/OSHA precedent and enforcement practices by introducing uncertainty, vagueness, and duplication into an already complex regulatory environment. Moreover, employers are already working to comply with the rapidly-evolving COVID-19 ETS and recover from the extended economic consequences of COVID-19 – and **SB 606** will only make recovery that much harder. For these reasons, we do not see **SB 606** as improving safety and are respectfully opposed.

### **Background**

To set the context for **SB 606**, we must keep in mind the present powers of Cal/OSHA and the recent developments that are coming to the workplace in California. First, Cal/OSHA already has a range of citations at its disposal and can already multiply the penalties for employers who are repeat offenders or otherwise deserving (see more detailed discussion below). Second, Cal/OSHA is already moving aggressively to cite<sup>2</sup> employers for any violations of the COVID-19 ETS which went into effect just a few months ago – beginning November 30, 2020. Third, in addition to citations, Cal/OSHA already has the power to shut down any dangerous workplaces immediately pursuant to 2020's AB 685 (Reyes) that went into effect January 1, 2021.<sup>3</sup> Fourth, to the extent the intent that the author or others are concerned Cal/OSHA is not doing *enough* enforcing – that is likely due to a long-term staffing issue, which Cal/OSHA is addressing and is receiving increased funding in this year's budget to scale up.<sup>4</sup>

So, with all that in mind – the questions become – why are these changes necessary, and why are they necessary to make this year, as we continue to struggle with COVID-19 and many businesses remain closed?

### **SB 606 is Not COVID-19-Related or Limited in Duration.**

We must note that all of **SB 606** appears intended to capitalize on COVID-19 but none of its provisions are actually COVID-19-specific. Instead, its changes must be considered with the long-term in mind – as structural changes to Cal/OSHA citations. In that lens, we believe they are not appropriate.

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<sup>1</sup> See CCR Section 3205 et seq.

<sup>2</sup> List of up-to-date citations is available here: <https://www.dir.ca.gov/dosh/COVID19citations.html>.

<sup>3</sup> See Labor Code Section 6325(b) ("When, in the opinion of the division, a place of employment, operation, or process, or any part thereof, exposes workers to the risk of infection with severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) so as to constitute an imminent hazard to employees, the performance of such operation or process, or entry into such place of employment, as the case may be, may be prohibited by the division, . . .").

<sup>4</sup> See 2021-2022 Budget re 7350 Department of Industrial Relations, available at <http://www.ebudget.ca.gov/budget/2021-22/#/Department/7350>.

### **Proposed Section 6317's Creation of "Enterprise-Wide" Citations.**

**SB 606** creates new "enterprise-wide" liability for employers, which will allow citations for worksites which Cal/OSHA has not inspected and has not observed violations. **SB 606** provides for this in two situations: 1) for a "written policy or procedure of an employer with multiple worksites" or 2) based on practices observed at more than one location.<sup>5</sup> Strangely, **SB 606** does not require that the "written policy or procedure" actually be a company-wide policy or procedure – meaning that a policy in place at *one facility* could still trigger an *enterprise-wide liability*.<sup>6</sup>

An enterprise-wide citation (as this bill would create it) only makes sense *where there is proof that the policy at issue is in place at multiple facilities*.<sup>7</sup> Otherwise, industries with a variety of different worksites with different safety concerns (such as construction) may have a policy that only applies to one worksite, but will still be given an enterprise-wide citation presumption as if there were non-compliance at multiple locations.

### **SB 606 Gives Cal/OSHA the Ability to Enforce Straight from Statute, and Thereby Ignores the Expertise of Staff at Cal/OSHA and the Regulatory Process.**

**SB 606** inserts the ability of Cal/OSHA to enforce directly from portions of the Labor Code into statute.<sup>8</sup> This is in contravention of an Appeals Board decision that previously held Cal/OSHA can only enforce from regulations.

A quick look at the process leading to a regulation shows this value. Generally,<sup>9</sup> the legislature passes a new law, which is generally stated, and then the experts from the enforcing agency review, analyze, and convert that legislation into a precise, enforcement-oriented regulation. The precise text of the regulation is clearer and more useful for both Cal/OSHA inspectors and stakeholders to know what is required in the workplace. Moreover, the more precise regulatory text fits into the body of law that the Cal/OSHA Appeals Board (who analyzes citation appeals) has crafted and worked within already.

With **SB 606's** changes, both enforcement personnel and stakeholders, as well as the Cal/OSHA Appeals Board, are thrust into new territory. How does enforcement work when the regulatory process is skipped, and enforcement comes straight from the statute? Where the statute is vague, what are inspectors to do? And how are employers to know what is required for compliance?

In other words – **SB 606** would short-circuit the regulatory process and cut the experts at the agency out of the process. While we appreciate the desire for regulations to be drafted faster, cutting out the agency expertise is not the solution, and will lead to less clear standards and not help workplace safety.

### **Proposed Section 6317.8's Multiplication of Existing Penalties is Poorly-Defined, Ignores Present Multipliers, and Will Result in the Shutting Down of Well-Intentioned Employers.**

Section 1 of **SB 606** introduces a new definition – "egregious employer" – based on a vague list of seven potential characteristics, and then provides that any safety violation issued to such an "egregious" employer shall be multiplied by the number of employees who potentially were exposed to the violation. This effectively multiplies a single violation into potentially hundreds of separate penalties. This means a single citation could be multiplied anywhere from 2x to more than 100x, depending on the details of the case.

As an initial matter, the entire concept of an "egregious employer" for which citations are multiplied ignores that Cal/OSHA already has modifiers based on employers' conduct. For example, "willful" violations by employers already have a potential five-times multiplier applicable to them under existing law.<sup>10</sup> In addition,

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<sup>5</sup> See Proposed Labor Code Section 6317, paragraph 2.

<sup>6</sup> The prior version of **SB 606** – the introduced text – applied this to "employer-wide written polic[ies] or practice[s]," which would be more suitable than this present text.

<sup>7</sup> Notably, our coalition has provided amendment language to address this error – but it was not taken in the June 14<sup>th</sup> amends.

<sup>8</sup> See Sections 5, 7, 8, and 10 of the bill, inserting "or any provision of this division."

<sup>9</sup> A regulation can also be proposed directly to the agency, such as Cal/OSHA, but the bill would have no effect on that process, so it is not important to this analysis.

<sup>10</sup> See 8 Cal. Code Regs. § 336 available at: <https://www.dir.ca.gov/title8/336.html>

under present regulations, repeat violations can face as much as a 10x multiplier, in addition to the 5x multiplier for willful violations. In addition, California has criminal penalties applicable to such conduct that are not contained in federal law and provide for stricter enforcement than in other states.<sup>11</sup> With those penalties in mind, we would ask why multiplying non-COVID citations by such an extreme multiplier is appropriate now, as the economy is struggling to recover from the COVID-19 shutdown.

Turning to the details of the text, some context is key here. The list of potentially triggering factors listed in Section 2 of **SB 606** is copied from a federal instruction form for inspectors published in 1990 that provides for “violation-by-violation penalties”.<sup>12</sup> However, unlike the federal form, **SB 606** fails to include key limitations and clarifications on these penalties. For example, that guidance notes that “since large penalties are likely to result in investigation and widespread public attention, review at the Regional and National Offices of OSHA and the Office of the Solicitor of Labor is currently mandated.”<sup>13</sup> (emphasis added). Moreover, the related Field Operations Manual for federal OSHA notes that penalties should not be calculated using this metric without “the concurrence of the Assistant Secretary and the National Office of the Solicitor (NSOL).” **SB 606** also ignores that Cal/OSHA already has this post. After the federal manual was revised in 1990, California altered its own policies and procedures to reflect a version of this “egregious” standard – and those policies also include similar limitations and clarifications of when such a multiplier is appropriate.<sup>14</sup> Again, **SB 606** fails to include any of those supporting clarifications and guidance that are included in California’s existing form on such cases.

Further, it must be noted that the federal manual, which **SB 606** partially copies has been successfully challenged as an overreach of Cal/OSHA’s authority. In a line of cases beginning with Secretary of Labor vs. Arcadian Corp., OSHRC Docket No. 93-3270, it was held that applying these multipliers to regulatory violations that could be cured by one abatement was improper, as it was truly just one hazard.<sup>15</sup>

Clarity is also a concern regarding **SB 606**’s triggering factors for an employer to be treated as “egregious.” The clarifications of the federal and California documents related to such treatment is excluded from **SB 606**. Without such guidelines, **SB 606** means employers will be left fighting uncertainty as to when and how these factors are triggered. That uncertainty is unacceptable given the scale of multipliers that could result. For example, one factor that makes an employer an “egregious employer” is if there are a “large number of injuries or illnesses” – but what does that mean in application? Similarly, another factor asks if there is an “extensive history of prior violations” – but what does that actually require? If an employer has been in business for 100 years, and has quickly remedied all prior violations, does that history of practice transform them into an egregious employer? Without the guardrails of its sources, **SB 606** opens up uncertainty in its enforcement.

Finally, putting aside the substantive and technical issues discussed above, **SB 606** also fails to define how such “characteristics” of an “egregious employer” would be “demonstrated,” and an employer would be determined to be “egregious.”<sup>16</sup> Who will be the arbiter of determining when an employer falls into this new category of “egregious”? How long would this determination last before it must be re-examined? Will

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. Notably, under present regulations, repeat violations can face as much as a 10x multiplier, in addition to the 5x multiplier for willful violations. See also “Completion of Proposed Penalty Worksheet,” Cal/OSHA form, available at: <https://www.dir.ca.gov/DOSHPol/P&PC-10.htm>.

<sup>11</sup> See Labor Code § § 6423 (providing for jail time and monetary penalties for willful violations) and 6425 (providing for additional jail time and monetary penalties for willful violations resulting in injuries or death).

<sup>12</sup> Available at: <https://www.osha.gov/enforcement/directives/cpl-02-00-080>. Notably, “violation-by-violation” penalties is the same as the “instance-by-instance” violations discussed above, in that it provides for a multiplier of a citation by the number of employees who may have been exposed.

<sup>13</sup> See subsection G. 3. b. of <https://www.osha.gov/enforcement/directives/cpl-02-00-080>. See also <https://www.osha.gov/enforcement/directives/cpl-02-00-164/chapter-6> (“In egregious cases, violation-by-violation penalties are applied. . . . Penalties calculated under this policy shall not be proposed without the concurrence of the Assistant Secretary and the National Office of the Solicitor (NSOL).”)

<sup>14</sup> See Cal/OSHA Policies and Procedures Form 10A, available at: <https://www.dir.ca.gov/DOSHPol/P&PC-10A.htm>.

<sup>15</sup> The Commission subsequently distinguished recording failures and similar cases where the violations were individual to each employee. See Secretary of Labor vs. Caterpillar, Docket No. 87-0922.

<sup>16</sup> In relevant part, **SB 606** provides only: “[f]or purposes of this section, an ‘egregious employer’ is an employer that has demonstrated one or more of the following characteristics . . .”

employers have the right to provide evidence in such a determination? There are no answers to these questions in **SB 606**.<sup>17</sup>

**SB 606 Limits Cal/OSHA's Discretion in Citing Employers Without Consideration of Circumstances Surrounding the Citation.**

Section 3 of **SB 606** would limit Cal/OSHA's ability to group multiple violations based on the circumstances around the violation. At present, Cal/OSHA can group citations when appropriate, depending on the facts surrounding the violations, such as willfulness, history, and the type of violation. We see no benefit to removing this discretion, particularly during this difficult economic time for many small businesses.

In short – each of these policy concerns seems addressed by existing protections, and inserting new, less clear protections will not add to workers' safety, but will certainly increase litigation when employers attempt to properly terminate employees.

**Conclusion**

Employers across California are in the process of adapting to re-opening and trying to keep up with rapidly-changing state and local health guidelines related to COVID-19. At the same time, Cal/OSHA enforcement has been vigorous, and Cal/OSHA is already staffing up due to additional funding in the state budget. In light of these conditions, **SB 606** will not improve Cal/OSHA's staffing difficulties or COVID-19 enforcement – which are already being addressed – it will only add confusion and duplication with its myriad of ill-considered changes and catch well-intentioned employers in its net.

For these reasons, we **OPPOSE SB 606 (Gonzalez)**.

Sincerely,



Robert Moutrie  
Policy Advocate  
California Chamber of Commerce  
on behalf of

Acclamation Insurance Management Services  
African American Farmers of California  
Allied Managed Care  
American Pistachio Growers  
American Staffing Association  
Associated General Contractors  
Association of California Healthcare Districts  
Auto Care Association  
California Apartment Association  
California Association of Health Facilities  
California Association of Joint Powers Authorities  
California Association of Sheet Metal and Air  
Conditioning Contractors, National Association  
California Association of Winegrape Growers  
California Attractions and Parks Association  
California Beer and Beverage Distributors  
California Builders Alliance  
California Building Industry Association  
California Business Properties Association  
California Business Roundtable  
California Chamber of Commerce

California Cotton Ginners and Growers  
Association  
California Farm Bureau  
California Framing Contractors Association  
California Fresh Fruit Association  
California Grocers Association  
California Hospital Association  
California Landscape Contractors Association  
California League of Food Producers  
California Railroads  
California Restaurant Association  
California Retailers Association  
California Special Districts Association  
California Staffing and Recruiting Association  
California State Association of Counties  
California Travel Association  
California Walnut Commission  
CAWA - Representing the Automotive Parts  
Industry  
Cemetery and Mortuary Association of California  
Civil Justice Association of California

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<sup>17</sup> This very lack of detail shows the importance of allowing space for the regulatory process to interpret and operationalize legislation into a clear process.

Coalition of Small and Disabled Veteran  
Businesses  
El Dorado County Chamber of Commerce  
El Dorado Hills Chamber of Commerce  
Elk Grove Chamber of Commerce  
Family Business Association of California  
Family Winemakers of California  
Flasher Barricade Association  
Folsom Chamber of Commerce  
Housing Contractors of California  
Long Beach Area Chamber of Commerce  
National Electrical Contractors Association  
National Federation of Independent Business  
Nisei Farmers League  
Official Police Garages of Los Angeles

Public Risk Innovation, Solutions, and  
Management  
Rancho Cordova Chamber of Commerce  
Residential Contractors Association  
Roseville Area Chamber of Commerce  
Sacramento Regional Builders Exchange  
Schools Excess Liability Fund  
Southern California Contractors Association  
United Chamber Advocacy Network  
United Contractors  
Western Agricultural Processors Association  
Western Carwash Association  
Western Electrical Contractors Association, Inc.  
Western Growers Association  
Western Steel Council  
Yuba-Sutter Chamber of Commerce

cc: Legislative Affairs, Office of the Governor  
Arianna Medel, Office of Senator Gonzalez  
Consultant, Assembly Judiciary Committee  
Daryl Thomas, Assembly Republican Caucus

RM:ldl