SB 606 (GONZALEZ) WORKPLACE SAFETY: CITATIONS: EMPLOYER RETALIATION
OPPOSE

March 31, 2021

TO: Members, Senate Judiciary Committee

SUBJECT: **SB 606 (GONZALEZ) WORKPLACE SAFETY: CITATIONS: EMPLOYER RETALIATION**
OPPOSE – AS AMENDED MARCH 25, 2021
SCHEDULED FOR HEARING – APRIL 6, 2021

The California Chamber of Commerce and the listed organizations **OPPOSE SB 606** (**Gonzalez**) as amended March 25, 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. Based on the August March 25th amendments, the California Chamber of Commerce is removing the Job Killer tag from **SB 606**. The amendments helped clarify the scope of the rebuttable presumptions and the scope of Cal/OSHA's enforcement as not including all of the Labor Code and Health and Safety Code. However, we remain concerned with **SB 606's** provisions on multiple fronts.

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[1] ("ETS"). However, **SB 606** would provide for massive changes to existing Cal/OSHA precedent and enforcement practices, introducing uncertainty, vagueness, and duplication into an already complex regulatory environment. Moreover, it would do so just as employers are working to comply with the expensive and demanding new ETS and recover from the extended economic consequences of COVID-19. 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 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[2] 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.[3] 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 working hard to address and is receiving increased funding in this year's budget to scale up.[4] Finally, employees *already* have protection from retaliation for reporting violations of any law or regulation, including the COVID-19 ETS, to the appropriate authority.

---

[1] *See CCR Section 3205 et seq*.
[2] List of up-to-date citations is available here: https://www.dir.ca.gov/dosh/COVID19 citations.html.
[3] *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, . . .").
[4] *See 2021-2022 Budget re 7350 Department of Industrial* Relations, available at http://www.ebudget.ca.gov/budget/2021-22/#/Department/7350.

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, Save Two Small Provisions.

First and foremost, we must note that all of **SB 606** appears aimed at COVID-19, but only two specific lines are actually tied to COVID-19: two of its four presumptions of retaliation. The majority of its changes must be considered with the long-term in mind – and, in that lens, we believe they are not appropriate.

Proposed Section 6317's Creation of "Enterprise-Wide" Citations and Vague Abatement/Appeals Process.

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.[5] 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*.[6] Similarly, **SB 606**'s introduction of "enterprise-wide" citations for practices observed at a limited number of facilities seems like a parallel overreach.

SB 606 then provides that these "enterprise-wide" citation will have a different appeals process, which is ambiguously defined. Specifically, **SB 606** changes long-standing principle that changes to worksites need not be made until the legal issue is resolved – i.e., was the condition, in fact, a violation of workplace safety regulations? **SB 606** would, instead, compel abatement of such citations regardless of whether they are presently being appealed, and thereby potentially force employers into costly company-wide changes to policies . . . even where those policies may, subsequently, be upheld as perfectly appropriate. Moreover, the process provided for in **SB 606** is vague and does not define when employers who have filed an appeal (and related stay of abatement request) must begin abatement.

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 - multiplying 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.[7] In addition, 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.[8] 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.

---

[5] See Proposed Labor Code Section 6317, paragraph 2.

[6] 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.

[7] *See 8 Cal. Code Regs.* § 336 available at: https://www.dir.ca.gov/title8/336.html . 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 "Complete of Proposed Penalty Worksheep"*, Cal/OSHA form, available at: https://www.dir.ca.gov/DOSHPol/P&PC-10.htm.

[8] *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).

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".[9] 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*."[10] (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.[11] 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.[12]

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 would convert an employer into an "egregious employer" asks if there were 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."[13] 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 employers have the right to provide evidence in such a determination? There are no answers to these questions in **SB 606**.[14]

---

[9] 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.

[10] 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).")*

[11] *See* Cal/OSHA Policies and Procedures Form 10A, available at: https://www.dir.ca.gov/DOSHPol/P&PC-10A.htm

[12] 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.

[13] 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 . . ."

[14] This very lack of detail shows the importance of allowing space for the regulatory process to interpret and operationalize legislation into a clear process – making Section 2 (discussed below) that much more troubling.

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.[15] This is in contravention of an Appeals Board decision that previously held Cal/OSHA must enforce from regulations. More generally, this would short-circuit the regulatory process which – though it can take time – allows the experts at Cal/OSHA to take the legislature's guidance and work it into detailed, specific requirements that are clear and feasible for workers and employers to understand. We are concerned that attempts to circumvent the regulatory process (such as enforcement directly from less-clear provisions of the Labor Code) will lead to less clear standards and not help workplace safety.

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.

SB 606's Rebuttable Presumptions Are Unnecessary Because Existing Law Already Protects Workers For the Covered Conduct.

Section 6 of **SB 606** veers into completely different territory and creates a rebuttable presumption of retaliation in a list of scenarios. Generally speaking, subsections (a)-(d) create a rebuttable presumption of retaliation where an employee has: (a) disclosed a positive COVID test or diagnosis of resulting from any exposure at the workplace, (b) requested COVID testing related to a workplace exposure, (c) requested personal protective equipment,[16] or (d) reporting a violation of Cal/OSHA standards. Notably, (a) and (b) are the *only* COVID-specific provisions in **SB 606**, but they are *not* tied in any way to the duration of the COVID-19 ETS or state of emergency.

First – all of the conduct which **SB 606** seeks to protect is already ensured by other standards. Labor Code § 6310(a)(4) already protects employees who are reporting a work-related illness (which is exactly the sort of illness covered by the proposed § 6409.7(a)) from being discriminated against in any manner. In addition, workers are already protected from retaliation under CFRA and the FMLA if they are on sick leave, and the ADA already protects them if their illness qualifies as a disability (which COVID-19 may, depending on the circumstances).[17] In addition, Labor Code § 1102.5(b), which forbids an employer from "retaliate[ing] against an employee for disclosing information . . . to a government or law enforcement agency . . ." for purposes of disclosing a violation of a statute or regulation. Given that the COVID-19 Emergency Temporary Regulation *already* requires testing be provided and requires employers to ask about test results, (a) and (b) are already protected here.

Subsection (c) stands out for its vagueness – it creates a presumption for "requesting protective equipment that is reasonable under the circumstances." But it does not define "reasonable PPE." Notably, this issue would be much simpler if **SB 606** utilized "legally-required" PPE, or any term with a clearly-defined list of PPE. Without such clarity, this will lead to litigation threats for good faith employers if an employee requests PPE that is not legally mandated, and then (for unrelated conduct or economic reasons) they are disciplined in any way.

---

[15] *See* Sections 5, 7, 8, and 10 of the bill, inserting "or any provision of this division".

[16] Notably, (c) contains a qualifier that PPE requested must be "reasonable under the circumstances." This seems to invite a factual determination of whether a request for PPE that goes beyond existing legal requirements might be "reasonable", which would certainly create litigation.

[17] For a quick example regarding disability, *see* https://covid19.ca.gov/workers/ ("You can file a Disability Insurance (DI) claim if you're unable to work due to having or being exposed to COVID-19. Find out if you're eligible for disability insurance benefits.")

As to how these provisions will create litigation: these presumptions will cover broad swathes of California's workforce due to the COVID-19 ETS. For example, the presumption of protection when a positive result is reported, or testing is requested, is going to cover any workplace where COVID-19 has appeared, because the COVID-19 ETS requires employers to ask about test results and provide information on testing. As a result, any employer who has seen COVID-19 in their workplace (which is most by now) will face potential litigation threats if they discipline an employee or need to shrink their workforce due to economic troubles.

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 already struggling to comprehend and keep up with rapidly-changing state and local health guidelines related to COVID-19, as well as a new and rapidly-evolving COVID-19 ETS. At the same time, Cal/OSHA is already working hard to educate, explain, and enforce the COVID-19 ETS, and is already staffing up due to support in the Governor's Budget. **SB 606** will not improve Cal/OSHA's staffing difficulties or COVID-19 enforcement – 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

Acclamation Insurance Management Services
Philip Vermeulen
African American Farmers of California
Anna Maubach
Allied Managed Care
Philip Vermeulen
American Pistachio Growers
Anna Maubach
American Staffing Association
Bridget McGowan
Associated General Contractors
Jamie Khan
Association of California Healthcare Districts
Amber King
Auto Care Association
Gary Conover
California Apartment Association
Debra Carlton
California Association of Health Facilities
Amy Blumberg
California Association of Joint Powers Authorities
Faith Borges
California Association of Sheet Metal and Air Conditioning Contractors, National Association
Chris Walker
California Association of Winegrape Growers
Michael Miller
California Attractions and Parks Association
Tami Miller
California Beer and Beverage Distributors
Victoria Horton
California Builders Alliance
Damon Conklin
California Building Industry Association
Michael Gunning
California Business Properties Association
Matthew Hargrove
California Business Roundtable
Brooke Armour
California Cotton Ginners and Growers Association
Anna Maubach
California Farm Bureau
Bryan Little
California Framing Contractors Association
Kevin Bland
California Fresh Fruit Association
Anna Maubach
California Grocers Association
Leticia Garcia
California Hospital Association
Ronald Berdugo
California League of Food Producers
Trudi Hughes

California Railroads
Don Maddy
California Restaurant Association
Katie Hansen
California Retailers Association
Steve McCarthy
California Special Districts Association
Dillon Gibbons
California Staffing and Recruiting Association
Bridget McGowan
California State Association of Counties
Ryan Souza
California Travel Association
Emellia Zamani
CAWA - Representing the Automotive Parts Industry
Gary Conover
Cemetery and Mortuary Association of California
Jerry Desmond
Civil Justice Association of California
Jaime Huff
Coalition of Small and Disabled Veteran Businesses
Philip Vermeulen
El Dorado County Chamber of Commerce
David Butler
El Dorado Hills Chamber of Commerce
David Butler
Elk Grove Chamber of Commerce
David Butler
Family Business Association of California
Faith Borges
Family Winemakers of California
Melissa Hyzdu
Flasher Barricade Association
Philip Vermeulen
Folsom Chamber of Commerce
David Butler
Housing Contractors of California
Bruce Wick
National Electrical Contractors Association
Eddie Bernacchi
National Federation of Independent Business
Kevin Pedrotti
Nisei Farmers League
Anna Maubach
Official Police Garages of Los Angeles
Chris Micheli
Public Risk Innovation, Solutions, and Management
Priscilla Quiroz
Rancho Cordova Chamber of Commerce
David Butler
Residential Contractors Association
Kevin Bland
Roseville Area Chamber of Commerce
David Butler
Sacramento Regional Builders Exchange
Damon Conklin
United Chamber Advocacy Network
David Butler
United Contractors
Eddie Bernacchi
Western Agricultural Processors Association
Anna Maubach
Western Carwash Association
Melissa Hyzdu
Western Growers Association
Matthew Allen
Western Steel Council
Kevin Bland
Yuba-Sutter Chamber of Commerce
David Butler

cc: Legislative Affairs, Office of the Governor
Consultant, Senate Judiciary Committee
Cynthia Alvarez, Office of Senator Gonzalez
Cory Botts, Senate Republican Caucus

RM:ldl