

# California Senate Bill 606 Enhances Cal/OSHA's Enforcement Authority

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**PRACTICES** Labor and Employment, Litigation, OSHA, Employment Litigation

On September 27, 2021, Governor Gavin Newsom signed Senate Bill 606 ("SB 606") into law. Effective on January 1, 2022, SB 606 expands the California Division of Occupational Safety and Health's (Cal/OSHA) enforcement authority as follows:

## Rebuttable Presumption of Enterprise-Wide Violations

For employers with multiple worksites in California, SB 606 creates a rebuttable presumption that a violation is occurring "enterprise-wide" at all of the employer's locations in the state if either of the following is true:

- The employer has a noncompliant written health and safety policy or procedure; or
- Cal/OSHA "has evidence of a pattern or practice of the same violation or violations committed by that employer involving more than one of the employer's worksites."

If the employer fails to rebut this presumption, Cal/OSHA may issue an enterprise-wide citation requiring abatement at every employer worksite in the state. Employers who commit an enterprise-wide violation may be assessed a civil penalty of up to one hundred twenty-four thousand seven hundred nine dollars (\$124,709) for each violation, but in no case less than eight thousand nine hundred eight dollars (\$8,908) for each willful violation.

**Takeaways:** Employers should revisit their written policies to ensure compliance with Cal/OSHA standards. Equally important, employers need to be mindful of the communications and information exchange with Cal/OSHA during an inspection to ascertain if there is any risk of Cal/OSHA pursuing enterprise-wide relief. Regarding the noncompliant policy trigger, it would seem prudent to train managers who may interface with Cal/OSHA to provide site-specific answers to Cal/OSHA's requests. In other words, while the employer may have enterprise-wide safety policies, it would seem helpful to stress any site-specific nuances in policies and, where possible, identify how hazards are assessed in a site-specific manner dependent on the unique circumstances at each location. Regarding the pattern and practice trigger, employers will now need to be particularly thoughtful about how they handle Cal/OSHA citations as more will be at stake than just the exposure to "repeat" citations based on a similar infraction at another worksite. Under SB 606, an employer's history could presumably be used by Cal/OSHA to also assert a pattern and practice for pursuing enterprise-wide relief. On the Cal/OSHA side, SB 606 may allow Cal/OSHA to achieve enterprise-wide action by the employer without the need for multiple inspections or reliance on settlement negotiations to reach that outcome.

## Egregious Violations

SB 606 also authorizes Cal/OSHA to issue a citation for an "egregious violation" if it believes that an employer has willfully and egregiously violated an occupational safety or health standard, order,

special order, or regulation. A violation is considered “egregious” if one or more of the following is true:

- 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. “Catastrophe” means the inpatient hospitalization, regardless of duration, of three or more employees resulting from an injury, illness, or exposure caused by a workplace hazard or condition.
- The violations resulted in persistently high rates of worker injuries or illnesses.
- The employer has an extensive history of prior violations.
- The employer has intentionally disregarded its health and safety responsibilities.
- The employer’s conduct, taken as a whole, amounts to clear bad faith in the performance of its duties under this part.
- 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.

For purposes of fines and penalties, each instance of an employee exposure to an egregious violation will be considered a separate violation, which could result in an assessment of very large penalties. Additionally, the egregious conduct underlying a violation must have occurred within the five years prior to the citation for an egregious violation. Once a violation is determined to be egregious, that determination remains in effect for five years.

**Takeaways:** Employers should continue their good faith efforts to comply with Cal/OSHA standards, and when compliance is not feasible or otherwise not possible, it would seem prudent for employers to explore and implement alternative safety measures that are at least as effective as the standard’s requirements. Even employers with robust and effective safety programs may still encounter workplace fatalities or catastrophes that could trigger egregious violations; however, the majority of the other egregious violation triggers seem less problematic for employers with strong safety cultures and programs that include effective communication, training, and auditing for compliance.

## Subpoena Power

SB 606 authorizes Cal/OSHA to issue a subpoena to employers who fail to promptly provide requested information during an inspection, and Cal/OSHA may enforce the subpoena if the employer fails to provide the requested information within a reasonable period of time. The bill does not define the term “reasonable.”

**Takeaways:** Employers receiving a document request from Cal/OSHA during an inspection should communicate with Cal/OSHA with respect to the expectation on timing of the production of documents. This may be especially helpful in situations where the employer expects a delay and may require additional time for gathering the documents for production.

## Injunction and Temporary Restraining Order

Additionally, under SB 606, Cal/OSHA may seek an injunction restraining certain operations at a workplace merely on the basis that it has grounds to issue a citation. This is a significant expansion of Cal/OSHA's current ability to seek injunctive relief, which it could only seek before SB 606 if "the condition of any employment or place of employment or the operation of any machine, device, apparatus, or equipment constitutes a serious menace to the lives or safety of persons about it." SB 606 provides for a similar expansion with respect to Cal/OSHA's authority to seek a temporary restraining order.

**Takeaways:** Shutting down operations at a workplace pursuant to an injunction could have a significant effect on a business, especially if the shutdown continues for a significant period of time. Employers should be mindful of the requests by Cal/OSHA in the course of an inspection and utilize their best efforts in cooperating with Cal/OSHA to minimize the potential for the agency to seek injunctive relief.