SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 606 (Gonzalez)
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Fiscal: Yes
Urgency: No
TSG

SUBJECT

Workplace safety: violations of statutes: enterprise-wide violations: employer retaliation

DIGEST

This bill expands and fortifies the authority of the Division of Occupational Safety and Health (Cal/OSHA) to issue citations, require abatement, and seek court orders to address violations of workplace safety laws. The bill also establishes a presumption of unlawful retaliation if an employer takes adverse action against an employee within 90 days of when that employee tries to address unsafe working conditions.

EXECUTIVE SUMMARY

Cal/OSHA is the state agency responsible for ensuring workplace safety. The author and sponsor of this bill assert that Cal/OSHA's current enforcement tools are insufficient and fail to protect too many workers. They point to the disparate impact of COVID-19 on essential workers (who are, in turn, disproportionately individuals of color) as a prime example. This bill would fortify Cal/OSHA's enforcement powers in a number of ways. Most notably, the bill would: (1) expand the statutory basis on which citations and penalties may be issued to include Labor Code provisions related to safety in employment; (2) increase fines for willful workplace safety violations by egregious employers, as defined; and (3) authorize the imposition of enterprise-wide citations and abatement orders under specified circumstances. In addition, the bill seeks to protect workers who try to address workplace safety concerns from unlawful retaliation, by establishing a rebuttable presumption that any adverse action taken within 90 days of the worker's attempt to address a safety concern was retaliatory.

The bill is sponsored by the California Labor Federation, the United Food and Commercial Workers – Western States Council, and WorkSafe. Support is from organized labor and workers' rights advocates. Opposition comes from business and trade associations who contend that the bill adds vague and duplicative regulations to what they view as an already challenging regulatory environment. The bill passed out of the Senate Labor, Public Employment, and Retirement Committee by a vote of 4-1.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Establishes Cal/OSHA within the Department of Industrial Relations (DIR), and gives Cal/OSHA the power, jurisdiction, and supervision over every place of employment in this state which is necessary to enforce and administer all laws requiring places of employment to be safe, and requiring the protection of the life, safety, and health of every employee. (Lab. Code § 6300 *et seq*.)

2) Requires Cal/OSHA to issue a citation to an employer who it believes, upon inspection or investigation, has violated specified workplace health and safety laws or any standard, rule or order pursuant to them. Each citation must be in writing and must describe the nature of the violation, including a reference to the provision of the code, standard, rule, regulation, or order alleged to have been violated. The citation must also include a reasonable time for the abatement of the alleged violation. The period specified for abatement shall not commence running until the date the citation or notice is received or the date the return is made to the post office. (Lab. Code § 6317.)

3) Requires employers to establish, implement and maintain an effective Injury and Illness Prevention Program (IIPP) that is written, except as specified, and shall include, among other things, the following elements:
   a) a system for identifying and evaluating workplace hazards, including scheduled periodic inspections to identify unsafe conditions and work practices;
   b) the employer's methods and procedures for correcting unsafe or unhealthy conditions and work practices in a timely manner;
   c) an occupational health and safety training program designed to instruct employees in general safe and healthy work practices and to provide specific instruction with respect to hazards specific to each employee's job assignment;
   d) the employer's system for communicating with employees on occupational health and safety matters, including provisions designed to encourage employees to inform the employer of hazards at the worksite without fear of reprisal. (Lab. Code § 6401.7.)

4) Requires every employer to file a complete report with Cal/OSHA of every occupational injury or occupational illness which results in lost time beyond the date of the injury or illness, or which requires medical treatment beyond first aid. A report must be filed within five days after the employer obtains knowledge of the injury or illness. In addition to this report, in every case involving a serious injury or illness, or death, the employer is required to make an immediate report to Cal/OSHA by telephone or email. (Lab. Code § 6409.1.)

5) Requires an employer to notify all employees within one business day of learning of potential exposure to COVID-19 and provide affected workers and their exclusive representative (if applicable) with written notice of the exposure, information about accessible federal and state sick leave programs, and a reminder of existing anti-discrimination and anti-retaliation protections. (Lab. Code § 6409.6.)

6) Requires an employer to notify a local public health agency within 48 hours if an employer is notified that the number of COVID-19 cases are high enough to classify the exposure as an outbreak. (Lab. Code § 6409.6.)

7) Prohibits an employer from discharging an employee or discriminating, retaliating against, or taking any adverse action against any employee or applicant for employment because the employee or applicant filed a bona fide complaint or claim relating to that employee's employment rights. Further prohibits an employer from retaliating against an employee because of a written or oral complaint that the employee is owed unpaid wages, or because the employee has testified or is about to testify in a proceeding resulting from a code violation. (Lab. Code § 98.6.)

This bill:

1) Empowers Cal/OSHA to issue a citation for workplace safety violations based upon evidence or documents obtained by the division in lieu of or in addition to an onsite inspection.

2) Expands Cal/OSHA's citation authority to include violations of Division 5 of the Labor Code, which relates to safety in employment, and any standard, rule, order, or regulation established pursuant to that division.

3) Establishes a rebuttable presumption that if an employer operates multiple worksites and has a written policy or procedure that violates specified workplace safety laws, the violation is enterprise-wide and Cal/OSHA shall issue an order requiring enterprise-wide abatement.

4) Authorizes Cal/OSHA to issue an enterprise-wide citation requiring enterprise-wide abatement based on evidence of a pattern of practices involving more than one location of the employer.

5) Empowers Cal/OSHA to seek an injunction to halt work until the problem is corrected if Cal/OSHA issues a citation pursuant to (1) or (2), above. Specifies that a showing that Cal/OSHA issued a citation pursuant to (1) through (4), above, is sufficient grounds for a court to issue a halt work order. Prohibits a court from requiring Cal/OSHA to post a bond for such a halt work order.

6) Provides that abatement for a serious enterprise-wide citation shall not be stayed by the filing of an appeal except in accordance with specified procedures and upon a finding from the Cal/OSHA Appeals Board that:
   a) no employee is exposed to the unsafe or unhealthy condition; and
   b) the condition is not likely to cause death, serious injury or illness, or serious exposure to an employee.

7) Defines "egregious employer" as an employer who displays any of the following characteristics:
   a) the employer, intentionally through voluntary action or inaction, made no reasonable effort to eliminate the known violation;
   b) the violations resulted in worker fatalities, a worksite catastrophe, or a large number of injuries or illnesses;
   c) the violations resulted in persistently high rates of worker injuries or illnesses;
   d) the employer has an extensive history of prior violations of this section of labor code;
   e) the employer has intentionally disregarded their health and safety responsibilities;
   f) the employer's conduct, taken as a whole, amounts to clear bad faith in performance of their duties to provide occupational safety to their employees;
   g) the employer has committed a large number of violations so as to undermine the effectiveness of any safety and health program that might be in place.

8) Requires Cal/OSHA to issue a citation to an egregious employer who Cal/OSHA believes to have willfully violated an occupational safety or health standard for each violation and requires Cal/OSHA to calculate the corresponding fines and penalties treating each employee exposed to the violation as a separate violation.

9) Defines a "related employer entity" as an employer with which an employer has a direct business relationship, and with which the employer shares a reliance at least in part on their respective policies, advice, or consultation for compliance with occupational safety and health standards or regulations, implementation of safety and health programs or policies, or other employer actions involving working conditions with a direct relationship to occupational safety and health, including, but not limited to, employee wages, assignments, supervision, discipline, and termination. States that "related employer entities" includes parent corporate entities, subsidiaries, affiliates, providers of labor services, franchisees, and licensees.

10) Requires Cal/OSHA to issue a citation to an employer if, upon inspection or investigation, Cal/OSHA believes that the employer has committed multiple violations of occupational safety or health standards, orders, special orders, or regulations having the same classification. Requires Cal/OSHA to note each violation on the citation.

11) Authorizes Cal/OSHA to issue to an employer a citation that groups multiple violations into a single violation if, upon inspection or investigation, Cal/OSHA believes that the employer has committed multiple interrelated violations of different occupational safety or health standards, orders, special orders, or regulations.

12) Makes an exception to (9) and (10) above, if:
    a) the violations are discovered during separate inspections of the same place of employment or worksite;
    b) the violations occur at separate places of employment or worksites of the same employer;
    c) the violations occur at the place of employment or worksite of an egregious employer.

13) Requires Cal/OSHA to issue a subpoena if, during the investigation of the policies and practices of the employer or a related employer entity, the employer or the related employer entity fails to promptly provide the requested within a reasonable period of time.

14) Establishes a rebuttable presumption that an employer's action was retaliatory if an employer takes any adverse action against the employee within 90 days of an employee doing any of the following:
    a) disclosing a positive test or diagnosis of COVID-19 resulting from an exposure at the place of employment or worksite;
    b) requesting testing for COVID-19 as a result of an exposure at the place of employment or worksite;
    c) requesting personal protective equipment that is reasonable under the circumstances;
    d) reporting a possible violation of an occupational safety or health standard, order, special order, or regulation.

15) Extends the applicable civil penalties for other specified health and safety violations that are serious, not serious, willful and repeated, respectively, or that have not been corrected within the time given to do so, to violations of Division 5 of the Labor Code as well, which relates to safety in employment.

16) Requires the Cal/OSHA Appeals Board (OSHAB) to issue an enterprise-wide abatement order if Cal/OSHA has shown that an employer committed an enterprise-wide violation.

COMMENTS

1. The problem this bill is intended to address

Cal/OSHA is the state agency responsible for ensuring workplace safety. It does this by monitoring California worksites, responding to worker complaints, and investigating workplace accidents. When Cal/OSHA discovers violations of the state's workplace health and safety standards, it can take enforcement action, including issuing citations, assessing penalties, requesting abatement, or even seeking a court order halting work until the problem is fixed.

The author and sponsor of this bill contend that Cal/OSHA's current enforcement tools are insufficient and fail to protect too many workers. They assert that only one Cal/OSHA inspector is employed for every 103,000 workers and contrast that with what they state are the comparable figures in other West Coast states: one inspector per 28,000 workers in Washington and one inspector per 24,000 workers in Oregon. Additionally, supporters of the bill report that Cal/OSHA has 1 Spanish-speaking field inspector for every 200,000 Spanish-speaking workers in California, with over 5 million workers who speak Spanish, many of whom are monolingual. According to media reports, anonymous Cal/OSHA staffers also stated that just four people are responsible for criminal investigations of 650 worker deaths that occurred in 2020.[1] Ultimately, the author and sponsors claim, the current financial risk of incurring a fine or receiving a citation from Cal/OSHA is lower than the financial benefit to letting workplace safety slide. As a result, Cal/OSHA's enforcement is too often just a cost of doing business, rather than a deterrent.

The impact of COVID-19 on California's workforce is, according to the author and sponsors, a case in point. They note that a UCSF study of death records found that "during the COVID-19 pandemic, working age adults experienced a 22 percent increase in mortality compared to historical periods. Relative excess mortality was highest in food/agriculture workers (39 percent increase), transportation/logistics workers (28 percent increase), facilities (27 percent) and manufacturing workers (23 percent increase)." [2] To make matters worse, this impact has not been borne equally by all Californians. The same study showed that:

> Latino Californians experienced a 36 percent increase in mortality, with a 59 percent increase among Latino food/agriculture workers. Black Californians experienced a 28 percent increase in mortality, with a 36 percent increase for Black retail workers. Asian Californians experienced an 18 percent increase, with a 40 percent

[1] Zhou, *Despite Cal/OSHA's Emergency COVID-19 Safety Rule, Workers Say Little Has Changed* (Jan. 28, 2021) Los Angeles Times https://www.latimes.com/business/story/2021-01-28/cal-osha-covid-19-worker-safety-emergency-rule (as of Mar. 26, 2021).
[2] Chen et al, *Excess Mortality Associated with the COVID-19 Pandemic Among Californians 18–65 Years of Age, By Occupational Sector and Occupation: March through October 2020* (Jan. 22, 2021) MedRxiv.org https://www.medrxiv.org/content/10.1101/2021.01.21.21250266v1 (as of Mar. 26, 2021).

> increase among Asian healthcare workers. Excess mortality among White working-age Californians increased by 6 percent, with a 16 percent increase among White food/agriculture workers.

In response to these problems, this bill would expand and strengthen the tools available to Cal/OSHA for enforcement, and increase anti-retaliation protections for workers who attempt to address safety issues at their workplace.

2. Fortifying Cal/OSHA's tools for addressing workplace safety violations

The bill contains a number of components designed to bolster Cal/OSHA's enforcement powers. The three most noteworthy components, their purpose, and opposition concerns about them are briefly described in this Comment.

a. Violation-by-violation penalties for the worst of the bad actors

Since at least 1986, Cal/OSHA's federal counterpart (known simply as "OSHA") has utilized a specialized policy to deal with especially problematic employers who flout health and safety standards. It is sometimes called the "egregious employer" policy because it targets the worst of the bad actors. It is also known as the "violation-by-violation" policy because it treats each violation by an egregious employer as a separate basis for a fine, thereby dramatically increasing the total penalty incurred.[3]

Under the federal policy, OSHA can impose such violation-by violation penalties according to the following criteria:

> Cases under consideration for such treatment must be classified as willful (category (1) below) as well as at least one of the categories given in (2) through (7).
>
> (1) The employer is found in violation of an OSHA requirement:
> (a) Of which she/he has actual knowledge at the time of the violation. Such knowledge may be demonstrated through previous citation history, accident experience, widely publicized agency enforcement, direct evidence of specific recognized jobsite hazards or other appropriate factors; and
> (b) Intentionally, through conscious, voluntary action or inaction, having made no reasonable effort to eliminate the known violation.

[3] U.S. Dept. of Labor, Occup. Health & Saf. Admin., CPL 02-00-080, "Handling of Cases To Be Proposed for Violation-By-Violation Penalties" (Oct. 21, 1990) https://www.osha.gov/enforcement/directives/cpl-02-00-080 (as of Mar. 26, 2021).

> (2) The violations resulted in worker fatalities, a worksite catastrophe, or a large number of injuries or illnesses.
>
> (3) The violations resulted in persistently high rates of worker injuries or illnesses.
>
> (4) The employer has an extensive history of prior violations of the Act.
>
> (5) The employer has intentionally disregarded its safety and health responsibilities.
>
> (6) The employer's conduct taken as a whole amounts to clear bad faith in the performance of his/her duties under the Act.
>
> (7) The employer has committed a large number of violations so as to undermine significantly the effectiveness of any safety and health program that might be in place.[4]

The purpose behind the violation-by-violation policy is to impose fines that are sufficiently large to act as a deterrent. As OSHA's directive on the policy puts it:

> 1. In the context of the Act, penalties are intended to provide an incentive to employers to prevent safety and health violations in their workplaces and to correct such violations which do exist voluntarily.
>
> 2. The Act intends that this incentive be directed not only to an inspected employer but also to any employer who has hazards and violations of standards or regulations.
> a. The large proposed penalties that accompany violation-by-violation citations are not, therefore, primarily punitive nor exclusively directed at individual sites or workplaces; they serve a public policy purpose; namely, to increase the impact of OSHA's limited enforcement resources.
> b. The criteria contained in this instruction are intended to ensure that when they are proposed, large penalties serve this public purpose.[5]

Though there are minor variations, this bill would incorporate a very similar violation-by-violation or egregious employer policy into state law.

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[4] *Id*. at H.2.b.
[5] *Id*. at G.

Opponents of this provision tend to emphasize that it could result in an employer getting hit with fines that are 100 times those that would ordinarily apply. Supporters of the bill tend to emphasize that the criteria for subjecting an employer to violation-by-violation penalties mean that such large fines would only be imposed for willful violations committed by the very worst violators of workplace safety laws.

Opponents of this provision also point out that the language used to define what constitutes an egregious employer is rather broad. What exactly, for example, is a "large number of violations?" Such vague phrasing is especially problematic as the basis for potentially large fines. On the other hand, it appears that this same language has been sufficiently clear to allow the federal OSHA to operate the policy for decades. Moreover, as they do in the case of many other state statutes with a federal analog, courts would presumably look to how the federal law has been interpreted and implemented at the federal level for guidance on how to construe the state statute. Thus, altering the language in this bill might actually lead to greater confusion, since it would create uncertainty about the applicability of federal precedents and interpretations.

b. Efficiently addressing enterprise-wide workplace safety violations

Enforcing workplace safety standards can be particularly challenging when dealing with an employer that has multiple worksites. Cal/OSHA may detect a violation at one worksite and suspect that the same violation is taking place at all of the employer's locations. Unless it carries out individual inspections of every worksite, however, Cal/OSHA currently lacks efficient tools to ensure enterprise-wide abatement of the problem.

In response to this challenge, Cal/OSHA's federal counterpart has long made use of what it calls "corporate-wide abatement agreements" or CBAs, in order to maximize the impact of its enforcement efforts. Under a CBA, the federal OSHA negotiates an enterprise-wide abatement plan with the employer. The details of such agreements will vary with the circumstances, but generally include lists of all worksites, a plan for abatement of the hazards, a timeline, and a system for monitoring compliance.

According to OSHA, the use of CBAs greatly increases the agencies efficiency.

> b. These cases typically require extensive use of staff resources; concern for conservation of these resources demands that every effort be made to ensure the broadest possible effect from them. Corporate-wide abatement has been a very effective means of extending the effect of these cases. Without such abatement, the alternative is a series of similar inspections in each corporate location with similar investments of staff time and expense.

> c. With a CSA, abatement requirements are extended to all covered locations of the company, and OSHA gains the administrative flexibility of deploying its inspection resources more efficiently, provided that obligations to monitor the abatement process are fully met.

This bill proposes to provide Cal/OSHA with similar enterprise-wide enforcement tools. Instead of relying on negotiated settlements, however, the mechanism for enterprise-wide enforcement proposed by this bill directly empowers Cal/OSHA with the ability to issue enterprise-wide citations and abatement orders in two scenarios. In the first scenario, if an employer has a written policy or procedure that violates workplace safety standards, Cal/OSHA would be authorized to presume that the violation exists across all of the employer's worksites. On that basis, Cal/OSHA could issue enterprise-wide citations and order enterprise-wide abatement. The employer could only avoid such enterprise-wide application by affirmatively demonstrating that the violation is not, in fact, happening at every worksite. The bill does not specify that the written policy must explicitly apply enterprise-wide in order to trigger the rebuttable presumption. An employer could certainly seek to rebut the presumption by showing that the written policy in question was only applicable to a particular worksite.

In the second scenario, Cal/OSHA could issue an enterprise-wide citation and abatement order if it has evidence of a pattern of practices involving more than one location of the employer. The second scenario in the bill is not structured as a rebuttable presumption, though it might make better sense if it were. That would still achieve efficiency for Cal/OSHA while giving the employer a path to demonstrate that, although a violation may be taking place at more than one worksite, it is not happening across the board. With this in mind, the author proposes to offer an amendment in Committee to restructure this provision as a rebuttable presumption.

In opposition to this provision, the bill's detractors contend that it is unfair to presume that a violation is enterprise-wide and issue citations on that basis when it is possible that things vary from worksite to worksite across the enterprise. However, it seems safe to assume that when an employer's policy or procedure is written, it is followed at every worksite. Moreover, the situation presented is one of classical informational asymmetry: if the employer does not already know whether the violation is taking place at every worksite, it is easy enough for the employer to find out. For Cal/OSHA, the same inquiry would require a site inspection or a demand for records from every worksite. Given the differing access to information, it seems appropriate to place the burden of proof on the party whose access is easiest. Finally, it may be worth reiterating that the presumption is rebuttable: if, indeed, the violation in question is not enterprise-wide, all the employer needs to do is present sufficient credible evidence to that effect and Cal/OSHA will no longer be able to proceed with an enterprise-wide remedy.

c. Expanding Cal/OSHA citation and penalty powers to include direct enforcement of Division 5 of the Labor Code

Many statutes governing workplace safety can be found under Division 5 of the Labor Code. For example, Division 5 encompasses statutes relating to workplace safety around buildings, railroad, mines, ships, tanks, boilers, flammable liquids, refineries, chemical plants, and amusement park rides, among others.

Under existing law, however, Cal/OSHA is not directly authorized to issue citations or order abatement based on the *statutes* in Division 5 of the Labor Code. Rather, Cal/OSHA *enforces standards, rules, orders, or regulations* established by the Occupational Safety and Health Standards Board. Many of those standards, rules, orders, or regulations may be based upon or reflect statutes contained in Division 5 of the Labor Code, but they are not the same as the statutes themselves. There is a lag time between when a new statute appears in Division 5 of the Labor Code and when standards, rules, orders, or regulations interpreting the statute can be developed. During that lag time, Cal/OSHA lacks authority to enforce the statutes. This bill enables Cal/OSHA to enforce the statutes in Division 5 of the Labor Code directly, thus avoiding any such lag time.

3. Protections against unlawful retaliation

Cal/OSHA's enforcement activities rely, in part, on worker reports. Unless they are independently wealthy, however, workers are unlikely to make reports unless they can do so without putting their employment at risk. Strong and effective anti-retaliation laws are therefore integral to assuring workplace safety in California.

This bill would add to those protections in two important ways. First, the bill would create a rebuttable presumption, applicable during the 90 days immediately following a worker's attempt to get a workplace safety violation addressed, that any adverse action taken against the employer is retaliatory.

A rebuttable presumption of this nature ascribes motivation to the adverse action without the need for evidence of it, at least until the employer offers a different, non-retaliatory basis for its action. Absent the rebuttable presumption, the employee would bear the initial burden of convincing the Labor Commission or a court that there is a causal link between the worker's attempt to address workplace safety concerns and the adverse action taken. Proving the employer's motivations will often be exceedingly difficult for the worker. The idea behind shifting the burden to the employer is to force the employer to take extra care to make sure that there is a valid, non-retaliatory basis for any adverse action taken against an employee in the wake of something like a request for better protective equipment or making a report to Cal/OSHA.

Opponents of rebuttable presumptions of retaliation often make the argument that such presumptions give bad employees impunity to run wild in the workplace. Yet, it is to account for such situations that the presumption is *rebuttable*. A worker caught stealing the day after filing a report with Cal/OSHA would be covered by the rebuttable presumption of retaliation, for example, but if the worker was indeed caught stealing, the employer need not hesitate to fire that worker because the rebuttable presumption can easily be refuted in such a case. The rebuttable presumption is not intended to operate, and would not serve, to protect a worker actually caught stealing or anything similarly obvious and egregious.

The purpose behind the rebuttable presumption is to make it more difficult for an employer to *invent* a pretext to fire a worker who has just filed a Cal/OSHA complaint, thereby getting rid of the worker, the problem, and the associated potential for liability. The rebuttable presumption achieves that effect because it forces the employer to back up its story with valid evidence that the worker truly did something wrong. In other words, temporarily shifting the burden of proof to the employer does not prevent firing workers who misbehave; it just requires that the employer demonstrate that the misbehavior is the genuine reason for the firing.

Opponents of the bill also correctly point out that existing law already creates a number of protections for whistleblowers and even creates burden-shifting mechanisms in relation to those protections. Under existing Labor Code provisions, an employer may not retaliate against an employee for disclosing unlawful workplace misconduct to a government agency. (Lab. Code § 1102.5). Thus, an employee reporting workplace safety violations to Cal/OSHA is already protected, since such conditions are unlawful.

Related Labor Code provisions also shift who bears the burden of proof when an employer takes adverse action against an employee who has disclosed unlawful conduct, such as safety violations, in the workplace. Specifically, existing law states that once the employee has demonstrated by a preponderance of the evidence that the disclosure was a contributing factor in the adverse action taken against the employee, the employer has the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not disclosed the unlawful workplace misconduct. (Lab. Code § 1102.6.)

If this bill were enacted, the existing burden-shifting framework described here would continue to operate generally. However, as to adverse action taken in the first 90 days after the employee sought to address workplace safety violations, the employee would no longer have to show that the disclosure was a contributing factor in the employer's decision to take adverse action. The causal connection would be presumed based on the timing, and the employer would then be called upon to rebut it.

This bill's anti-retaliation provisions also extend to three types of worker actions that are not covered under the existing laws that protect whistleblowers. First, the bill offers its anti-retaliation protections when a worker discloses a positive test or diagnosis of COVID-19 resulting from an exposure at the place of employment or worksite. Second, the bill would provide the 90-day anti-retaliation protections whenever a worker requests testing for COVID-19 as a result of an exposure at the place of employment or worksite. Finally, the bill offers the protections of its 90-day rebuttable presumption of retaliation to workers who make a reasonable request for personal protective equipment under the circumstances. With regard to this last provision, while ensuring that workers feel empowered to ask for the protective equipment they need seems like sound policy, the phrasing "reasonable request" and "under the circumstances" leaves quite a bit of room for interpretation and therefore could invites legal dispute. The author therefore proposes to offer an amendment in committee to employ more of a bright-line standard. Under this change, requests for protective equipment would be protected when that equipment is legally required or recommended by official public health guidelines.

4. Tightening up drafting

There are a few points in the bill in print where the concept is relatively clear, but the language is drafted in ways that could use revision. For example, the bill's proposed new Labor Code Section 6317.8 contains a definition of "related employer entity" that is "for purposes of this section," but the phrase does not appear anywhere else in that section. Presumably, the definition belongs in proposed Labor Code Section 6317.9, where "related employer entity" does appear. Similarly, the section of the bill incorporating the egregious employer concept into state law defines an egregious employer as an employer having one or more "characteristics" on a list. The items on that list are not really characteristics, however. So while it is still possible to follow the intent behind the proposed language, the language should be clarified.

The author proposes to offer amendments in Committee that will address these issues.

5. Proposed amendments

In order to address the issues set forth in the Comments, above, the author proposes to incorporate amendments into the bill that would:

- give employers an opportunity to demonstrate that a health or safety violation is not enterprise-wide after Cal/OSHA finds the same violation at two or more worksites belonging to the same employer;
- give workers specified anti-retaliation protections if the request personal protective equipment that is legally required or recommended by official public health guidelines, rather than merely being reasonable under the circumstances; and
- make non-substantive drafting revisions.

A mock-up of the amendments in context is attached to this analysis.

6. Arguments in support of the bill

According to the author:

> Whether in grocery stores, meatpacking plants or agriculture fields, essential workers have suffered high rates of illness and death due to worksite exposure to COVID-19. Worse yet, the suffering this exposure has caused to workers and their families was often entirely preventable. These unnecessary outbreaks have in large part occurred because of widespread employer violations of basic workplace safety COVID-19 protections and guidelines. Thus, according to Cal/OSHA, COVID-19 "has killed hundreds of workers in California and sickened thousands, and workers will continue to become ill and die until the pandemic subsides. COVID-19 is an occupational health emergency causing more deaths in less time than any other workplace crisis in the nearly fifty-year existence of Cal/OSHA."
>
> We are now tragically aware that existing Cal/OSHA remedies have been provably insufficient to prevent many employers from flouting workplace safety, even when the consequences are deadly. There are two reasons for this: (1) Cal/OSHA remedies are woefully insufficient and (2) the kinds of workers who disproportionately died are the kind of workers who can least afford to complain and risk losing their jobs.
>
> SB 606 provides Cal/OSHA with the authority to impose minimum penalties per the number of exposed employees for willful violations and will serve as an incentive for large corporations to comply with the law. SB 606 provides Cal/OSHA with the necessary tools to maximize the use of their limited resources so they are able to respond more effectively to health and safety violations by large employers that put workers' lives at-risk and protects those workers from retaliation for reporting unsafe working conditions related to COVID-19.

As sponsor of the bill, the California Labor Federation and the United Food and Commercial Workers – Western States Council writes:

> Cal/OSHA must have the tools needed to address workplace spread, prevent additional outbreaks, and hold violators accountable. […] Strong laws are critical but California workers

> desperately need aggressive enforcement to help recover from this pandemic and to keep themselves and their families safe.

In support of the bill, California Nurses Association/ National Nurses United writes:

> Higher penalties for risking the safety of many employees will serve as a stronger incentive to comply with the law. Additionally, SB 606 gives Cal/OSHA the tools to respond more effectively and efficiently to health and safety violations by giving them the authority to issue companywide abatements and settlement agreements. Workers do not have months to wait for Cal/OSHA to overturn a corporate policy or procedure that is needlessly putting workers in harm's way. […] California's workers desperately need aggressive enforcement to help recover from this pandemic and to keep themselves and their families safe.

7. Arguments in opposition to the bill

In opposition to the bill, a coalition of 60 business and trade associations led by the California Chamber of Commerce writes:

> [SB 606] 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 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.

In further opposition to the bill, the Construction Employers' Association writes:

> This measure is so exceedingly vague and expansive that even the most well-intentioned employers would be subject to significant penalties and the anti-retaliation provisions are ripe for abuse and run counter to disciplinary provisions in our respective Collective Bargaining Agreements.

SUPPORT

California Labor Federation, AFL-CIO (sponsor)
United Food and Commercial Workers – Western States Council (sponsor)
Worksafe (sponsor)
Alliance of Californians for Community Empowerment
Asian Americans Advancing Justice – California
California Alliance for Retired Americans
California Employment Lawyers Association
California Federation of Teachers
California Food & Farming Network
California Immigrant Policy Center
California Institute for Rural Studies
California Nurses Association/ National Nurses United
California Professional Firefighters
California Rural Legal Assistance Foundation
Californians for Pesticide Reform
Center on Policy Initiatives
Central California Environmental Justice Network
Central Coast Alliance United for Sustainable Economy
Centro Binacional para el Desarrollo Indígena Oaxaqueño
Ceres Community Project
Comite Civico del Valle, Inc.
Consumer Attorneys of California
Courage California
Ecology Center
Environmental Working Group
Equal Rights Advocates
Fibershed
Koreatown Immigrant Workers Alliance
La Raza Centro Legal
Latino Coalition for a Healthy California
Leadership Counsel for Justice and Accountability
Legal Aid at Work
Lideres Campesinas
Marin Food Policy Council

National Employment Law Project
National Union of Healthcare Workers
National Young Farmers Coalition
Pesticide Action Network
The Praxis Project
Public Advocates
Roots of Change
SMART-Transportation Division, California State Legislative Board
Transport Workers Union, California State Conference
Warehouse Worker Resource Center
Working Partnerships USA

OPPOSITION

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
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 Cotton Ginners and Growers Association
California Farm Bureau
California Framing Contractors Association
California Fresh Fruit Association
California Grocers Association
California Hospital 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
CAWA - Representing the Automotive Parts Industry
Cemetery and Mortuary Association of California
Civil Justice Association of California
Coalition of Small and Disabled Veteran Businesses
Construction Employers' Association
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
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
United Chamber Advocacy Network
United Contractors
Western Agricultural Processors Association
Western Carwash Association
Western Growers Association
Western Steel Council
Yuba-Sutter Chamber of Commerce

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

AB 685 (Reyes, Chapter 84, Statutes of 2020): requires employers to report outbreaks to the local public health agency in the jurisdiction of the worksite within 48 hours and creates a rebuttable presumption that a "serious violation" exists in a place of

employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation.

PRIOR VOTES:

Senate Labor, Public Employment and Retirement Committee (Ayes 4, Noes 1)

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Amended Mock-up for 2021-2022 SB-606 (Gonzalez (S))

Mock-up based on Version Number 98 - Amended Senate 3/25/21

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 6317 of the Labor Code is amended to read:

6317. (a) If, upon inspection or investigation, or upon evidence or documents obtained by the division in lieu of or in addition to an onsite inspection, the division believes that an employer has violated Section 25910 of the Health and Safety Code, any standard, rule, order, or regulation established pursuant to Chapter 6 (commencing with Section 140) of Division 1 of the Labor Code, any provision of this division, or any standard, rule, order, or regulation established pursuant to this division, it shall with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the code, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the alleged violation. The period specified for abatement shall not commence running until the date the citation or notice is received by certified mail and the certified mail receipt is signed, or if not signed, the date the return is made to the post office. If the division officially and directly delivers the citation or notice to the employer, the period specified for abatement shall commence running on the date of the delivery.

(b)(1) If an employer has multiple worksites and either of the following is true, ~~T~~there shall be a rebuttable presumption that a violation is enterprise-wide:

(A) The employer has a written policy or procedure ~~of an employer with multiple worksites~~ that violates Section 25910 of the Health and Safety Code, any standard, rule, order, or regulation established pursuant to Chapter 6 (commencing with Section 140) of Division 1, any provision of this division, or any standard, rule, order, or regulation established pursuant to this division.

(B) The division has evidence of a pattern or practice of the same violation or violations involving more than one of the employer's worksites.

(2) If the employer fails to rebut a presumption raised pursuant to paragraph (1), the division may~~constitutes a violation that is enterprise-wide, and the division shall issue an enterprise-wide citation requiring enterprise-wide abatement based on that written policy or procedure. The division~~ may issue an enterprise-wide citation requiring enterprise-wide abatement~~ based on evidence of a pattern of practices involving more than one location of the employer.~~

(3) Abatement for a serious enterprise-wide citation shall not be stayed by the filing of an appeal except as set forth in this section. Upon an application accompanied by declarations and exhibits under penalty of perjury, an employer may petition the Occupational Safety and Health Appeals Board for a stay of abatement pending appeal at the time the employer files a notice of appeal. The employer shall have the burden of establishing good cause for a stay of abatement. Within 5 business days of the date of receipt of the notice of appeal and request for stay of abatement pending appeal, the division may respond to the employer's declarations and exhibits, and the division may request an expedited hearing. Within 10 business days, the Occupational Safety and Health Appeals Board shall consider the evidence submitted by the employer and the division, and shall consider oral argument if the division requests an expedited hearing, and upon all the evidence and proceedings may grant a stay of abatement pending appeal if it finds both of the following:

(A~~1~~) No employee is exposed to the unsafe or unhealthful condition.

(B~~2~~) The condition is not likely to cause death, serious injury or illness, or serious exposure to an employee.

(c)(1) A "notice" in lieu of citation may be issued with respect to violations found in an inspection or investigation which meet either of the following requirements:

(A~~1~~) The violations do not have a direct relationship upon the health or safety of an employee.

(B~~2~~) The violations do not have an immediate relationship to the health or safety of an employee, and are of a general or regulatory nature. A notice in lieu of a citation may be issued only if the employer agrees to correct the violations within a reasonable time, as specified by the division, and agrees not to appeal the finding of the division that the violations exist. A notice issued pursuant to this paragraph shall have the same effect as a citation for purposes of establishing repeat violations or a failure to abate. Every notice shall clearly state the abatement period specified by the division, that the notice may not be appealed, and that the notice has the same effect as a citation for purposes of establishing a repeated violation or a failure to abate. The employer shall indicate agreement to the provisions and conditions of the notice by their signature on the notice.

(2) A notice shall not be issued in lieu of a citation if either of the following are true:

(A) T~~t~~he violations are serious, repeated, willful, or arise from a failure to abate.

(B) The number of first instance violations found in the inspection (other than serious, willful, or repeated violations) is 10 or more violations.

(3) The director shall prescribe guidelines for the issuance of these notices.

(d) The division may impose a civil penalty against an employer as specified in Chapter 4 (commencing with Section 6423) of this part. ~~A notice in lieu of a citation may not be issued if the number of first instance violations found in the inspection (other than serious, willful, or repeated violations) is 10 or more violations.~~

(e)(1) A citation or notice shall not be issued by the division more than six months after the occurrence of the violation. For purposes of issuing a citation or notice for a violation of subdivision (b) or (c) of Section 6410, including any implementing related regulations, an "occurrence" continues until it is corrected, or the division discovers the violation, or the duty to comply with the violated requirement ceases to exist. Nothing in this ~~paragraph~~ subdivision is intended to alter the meaning of the term "occurrence" for violations of health and safety standards other than the recordkeeping requirements set forth in subdivision (b) or (c) of Section 6410, including any implementing related regulations.

(2) The director shall prescribe procedures for the issuance of a citation or notice.

(f) The division shall prepare and maintain records capable of supplying an inspector with previous citations and notices issued to an employer.

SEC. 2. Section 6317.8 is added to the Labor Code, to read:

6317.8. (a) Notwithstanding any other law, if, upon inspection or investigation, the division believes that an egregious employer has willfully violated an occupational safety or health standard, order, special order, or regulation, the division, with reasonable promptness, shall issue a citation to ~~an~~ that egregious employer for each violation, and each employee exposed to that violation shall be considered a separate violation for purposes of the issuance of fines and penalties.

(b) For the purposes of this section, an employer is an "egregious employer" if one or more of the following is true about that employer or the willful violations committed by it: ~~is an employer that has demonstrated one or more of the following characteristics:~~

(1) The employer, intentionally, through conscious, voluntary action or inaction, made no reasonable effort to eliminate the known violation.

(2) The violations resulted in worker fatalities, a worksite catastrophe, or a large number of injuries or illnesses.

(3) The violations resulted in persistently high rates of worker injuries or illnesses.

(4) The employer has an extensive history of prior violations of this part.

(5) The employer has intentionally disregarded their health and safety responsibilities.

(6) The employer's conduct, taken as a whole, amounts to clear bad faith in the performance of their duties under this part.

(7) 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.

~~(c) For the purposes of this section, a "related employer entity" is an employer with which an employer has a direct business relationship, and with which the employer shares a reliance at least in part on their respective policies, advice, or consultation for compliance with occupational safety and health standards or regulations, implementation of safety and health programs or policies, or other employer actions involving working conditions with a direct relationship to occupational safety and health, including, but not limited to, employee wages, assignments, supervision, discipline, and termination. "Related employer entities" includes parent corporate entities, subsidiaries, affiliates, providers of labor services, franchisees, and licensees.~~

SEC. 3. Section 6317.9 is added to the Labor Code, to read:

6317.9. (a) Notwithstanding any other law, if, upon inspection or investigation, the division believes that the employer has committed multiple violations of occupational safety or health standards, orders, special orders, or regulations having the same classification, the division shall, with reasonable promptness, issue a citation to the employer. The division shall note each violation on the citation.

(b) If, upon inspection or investigation, the division believes that the employer has committed multiple interrelated violations of different occupational safety or health standards, orders, special orders, or regulations, the division may, with reasonable promptness, issue a citation that groups the violations into a single violation.

(c) Subdivisions (a) and (b) do not apply under any of the following circumstances:

(1) The violations are discovered during separate inspections of the same place of employment or worksite.

(2) The violations occur at separate places of employment or worksites of the same employer.

(3) The violations occur at the place of employment or worksite of an employer that meets the definition of an egregious employer~~, as defined~~set forth in Section 6317.8.

(d) In the investigation of the policies and practices of the employer or a related employer entity, the division shall issue a subpoena if the employer or the related employer entity fails to promptly provide the requested information, and shall enforce the subpoena if the employer or the related employer entity fails to provide the requested information within a reasonable period of time.

(e) For the purposes of this section, a "related employer entity" is an entity with which an employer has a direct business relationship, and with which the employer shares a reliance at least in part on their respective policies, advice, or consultation for

compliance with occupational safety and health standards or regulations, implementation of safety and health programs or policies, or other employer actions involving working conditions with a direct relationship to occupational safety and health, including, but not limited to, employee wages, assignments, supervision, discipline, and termination. “Related employer entities” includes parent corporate entities, subsidiaries, affiliates, providers of labor services, franchisees, and licensees.

SEC. 4. Section 6323 of the Labor Code is amended to read:

6323. If the division has grounds to issue a citation pursuant to Section 6317, or 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, the division may apply to the superior court of the county in which such place of employment, machine, device, apparatus, or equipment is situated, for an injunction restraining the use or operation thereof until such condition is corrected.

SEC. 5. Section 6324 of the Labor Code is amended to read:

6324. The application to the superior court accompanied by affidavit showing that the division has grounds to issue a citation pursuant to Section 6317 or a place of employment, machine, device, apparatus, or equipment is being operated in violation of a safety order or standard, in violation of Section 25910 of the Health and Safety Code, or in violation of a provision of this division and that the use or operation constitutes a menace to the life or safety of any person employed thereabout and accompanied by a copy of the statute, order, or standard applicable thereto is a sufficient prima facie showing to warrant, in the discretion of the court, the immediate granting of a temporary restraining order. A bond shall not be required from the division as a prerequisite to the granting of any restraining order.

SEC. 6. Section 6409.7 is added to the Labor Code, to read:

6409.7. There shall be a rebuttable presumption that an employer’s action was retaliatory if an employer takes any adverse action against an employee within 90 days of an employee doing any of the following:

(a) Disclosing a positive test or diagnosis of COVID-19 resulting from an exposure at the place of employment or worksite.

(b) Requesting testing for COVID-19 as a result of an exposure at the place of employment or worksite.

(c) Requesting personal protective equipment that is legally mandated or currently recommended by official public health guidance.~~reasonable under the circumstances.~~

(d) Reporting a possible violation of an occupational safety or health standard, order, special order, or regulation.

SEC. 7. Section 6427 of the Labor Code is amended to read:

6427. (a) Any employer who violates any occupational safety or health standard, order, or special order, Section 25910 of the Health and Safety Code, or any provision of this division, and the violation is specifically determined not to be of a serious nature, may be assessed a civil penalty of up to twelve thousand four hundred seventy-one dollars ($12,471) for each violation.

(b) Commencing on January 1, 2018, and each January 1 thereafter, the maximum penalty amount specified in this section shall be increased based on the percentage increase in the Consumer Price Index for All Urban Consumers (CPI-U), not seasonally adjusted, for the month of October immediately preceding the date of the adjustment, as compared to the prior year's October CPI-U. Any regulation issued pursuant to this section increasing penalty amounts based on the annual increase in the CPI-U shall be exempt from the rulemaking provisions of the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code), except that the regulation shall be filed with the Office of Administrative Law for publication in the California Code of Regulations. Any penalty shall be calculated using the penalty amounts in effect during the calendar year in which the citation was issued.

SEC. 8. Section 6428 of the Labor Code is amended to read:

6428. Any employer who violates any occupational safety or health standard, order, or special order, Section 25910 of the Health and Safety Code, or any provision of this division, if that violation is a serious violation, shall be assessed a civil penalty of up to twenty-five thousand dollars ($25,000) for each violation. Employers who do not have an operative injury prevention program shall receive no adjustment for good faith of the employer or history of previous violations as provided in paragraphs (3) and (4) of subdivision (c) of Section 6319.

SEC. 9. Section 6429 of the Labor Code is amended to read:

6429. (a) (1) Any employer who willfully or repeatedly violates any occupational safety or health standard, order, or special order, Section 25910 of the Health and Safety Code, or provision of this division, or any employer who commits an enterprise-wide violation as specified in Section 6317, may be assessed a civil penalty of not more than 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.

(2) Commencing on January 1, 2018, and each January 1 thereafter, the penalty amounts specified in this section shall be increased based on the percentage increase in the Consumer Price Index for All Urban Consumers (CPI-U), not seasonally adjusted, for the month of October immediately preceding the date of the adjustment, as compared to the prior year's October CPI-U. Any regulation issued pursuant to this section increasing penalty amounts based on the annual increase in the CPI-U shall be

exempt from the rulemaking provisions of the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code), except that the regulation shall be filed with the Office of Administrative Law for publication in the California Code of Regulations. Any penalty shall be calculated using the penalty amounts in effect during the calendar year in which the citation was issued.

(b) Any employer who repeatedly violates any occupational safety or health standard, order, or special order, or Section 25910 of the Health and Safety Code, shall not receive any adjustment of a penalty assessed pursuant to this section on the basis of the regulations promulgated pursuant to subdivision (c) of Section 6319 pertaining to the good faith of the employer or the history of previous violations of the employer.

(c) The division shall preserve and maintain records of its investigations and inspections and citations for a period of not less than seven years.

SEC. 10. Section 6430 of the Labor Code is amended to read:

6430. (a) Any employer who fails to correct a violation of any occupational safety or health standard, order, or special order, Section 25910 of the Health and Safety Code, or any provision of this division, within the period permitted for its correction shall be assessed a civil penalty of not more than fifteen thousand dollars ($15,000) for each day during which the failure or violation continues.

(b) Notwithstanding subdivision (a), for any employer who submits a signed statement affirming compliance with the abatement terms pursuant to Section 6320, and is found upon a reinspection not to have abated the violation, any adjustment to the civil penalty based on abatement shall be rescinded and the additional civil penalty assessed for failure to abate shall not be adjusted for good faith of the employer or history of previous violations as provided in paragraphs (3) and (4) of subdivision (c) of Section 6319.

(c) Notwithstanding subdivision (a), any employer who submits a signed statement affirming compliance with the abatement terms pursuant to subdivision (b) of Section 6320, and is found not to have abated the violation, is guilty of a public offense punishable by imprisonment in a county jail for a term not exceeding one year, or by a fine not exceeding thirty thousand dollars ($30,000), or by both that fine and imprisonment; but if the defendant is a corporation or a limited liability company the fine shall not exceed three hundred thousand dollars ($300,000). In determining the amount of the fine to be imposed under this section, the court shall consider all relevant circumstances, including, but not limited to, the nature, circumstance, extent, and gravity of the violation, any prior history of violations by the defendant, the ability of the defendant to pay, and any other matters the court determines the interests of justice require. Nothing in this section shall be construed to prevent prosecution under any law that may apply.

SEC. 11. Section 6602 of the Labor Code is amended to read:

6602. If an employer notifies the appeals board that they intend to contest a citation issued under Section 6317, or notice of proposed penalty issued under Section 6319, or order issued under Section 6308, or if, within 15 working days of the issuance of a citation or order an employee or representative of an employee files a notice with the division or appeals board alleging that the period of time fixed in the citation or order for the abatement of the violation is unreasonable, the appeals board shall afford an opportunity for a hearing. The appeals board shall thereafter issue a decision, based on findings of fact, affirming, modifying, or vacating the division's citation, order, or proposed penalty, or directing other appropriate relief. If the division establishes an enterprise-wide violation, the appeals board shall include in its decision an enterprise-wide abatement order.