
March 16, 2021

TO: Members, Senate Labor, Public Employment and Retirement Committee

**SUBJECT: SB 606 (GONZALEZ) WORKPLACE SAFETY: CITATIONS: EMPLOYER RETALIATION**
**OPPOSE – AS INTRODUCED FEBRUARY 18, 2021**
**SCHEDULED FOR HEARING – MARCH 22, 2021**

The California Chamber of Commerce and the listed organizations **OPPOSE SB 606** (**Gonzalez**) as introduced February 18, 2021, because it would: (1) create a new system of vaguely-defined penalties that would punish even well-intentioned employers with penalties potentially 100x higher than the present, (2)

greatly broaden Cal/OSHA's scope of enforcement into the Labor Code and Health and Safety Code, and (3) create unnecessary anti-retaliation protections that will lead to litigation for employers.

We, as employers, take COVID-19 safety seriously. CalChamber has been steadily engaged with Cal/OSHA in developing, publicizing, and implementing the COVID-19 Emergency Temporary Standard (CCR § 3205 *et seq*, the "ETS"). However, we find **SB 606's** provisions troubling as they would provide for massive changes to existing Cal/OSHA precedent and enforcement practices, introducing uncertainty, vagueness, and duplication where it does not presently exist. Moreover, **SB 606** is not limited in any way to COVID-19, so its destructive changes will continue in effect in perpetuity. For this reason, we do not see **SB 606** as improving safety and are opposed.

**Background**

To set the context for **SB 606**, we must keep in mind the most recent developments and new powers coming to workplace safety enforcement in California. First, Cal/OSHA is *already* moving aggressively to cite[1] employers for any violations of the COVID-19 Emergency Temporary Standard[2] ("ETS") which went into effect just a few months ago – beginning November 30th of 2020. Second, 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). Third, in addition to citations, Cal/OSHA *already has* the power to shut down any dangerous workplaces immediately pursuant to 2020's **AB 605** (Reyes) that went into effect January 1, 2021.[3] Finally, employees *already* have protection from retaliation for reporting violations of any law or regulation, including the COVID-19 ETS, to the appropriate authority.

**SB 606 Is Overbroad and Would Apply to Literally Every Potential Condition, Disease, Test, or Citation.**

First and foremost, we must note that all of **SB 606** appears aimed at COVID-19, but *completely fails* to make any of its provisions COVID-19 specific. Without this specification, the duplications and ambiguities discussed below are that much more troubling because they will be long-term statutory issues applicable to every possible regulation, covering all kinds of testing, citations, or PPE in perpetuity. Similarly, the duplicative expansion of Cal/OSHA's authority in Section 2 into the realm of the Department of Public Health, Department of Health Care Services, and Labor Commissioner is all the more troubling for its broad scope.

**AB 606'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, of which an employer only needs to meet one. **SB 606** 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 issue - multiplying a single violation into hundreds of separate penalties.

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.[4] In addition, under present regulations, repeat violations can face as much as a *10x multiplier*, in addition to the *5x*

[1] List of up-to-date citations is available here: https://www.dir.ca.gov/dosh/COVID19citations.html.
[2] *See* CCR § 3205.
[3] *See Labor Code* § 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 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.

*multiplier* for willful violations. As a result, **SB 606's** multiplication of one violation into potentially hundreds[5] is both duplicative of existing regulations and absurdly draconian.

In addition, **SB 606's** seven potential characteristics of "egregious employers" are vague and will not provide clear guidance or deterrence, as discussed below:

- **6317.8(b)(1)/(5)** - *"the employer, intentionally . . . made no reasonable effort to eliminate the violation" or "the employer has intentionally disregarded their health and safety obligations."* These two characteristics appear to be circular. If a violation at issue is "willful" (which is already a pre-requisite for Section 1 of **SB 606**), then it would appear to qualify as under both of those characteristics. As a result, these are not really factors at all, but instead simply turn any employer who willfully violates any regulation into an "egregious employer," subject to an additional undefined multiplier of penalties. For example: If a small employer willfully chooses not to maintain a stockpile of N95's (required pursuant to the recent wildfire smoke regulation) because they chose to donate them to a hospital during the early days of COVID-19, is that employer an "egregious employer"? Under these elements of **SB 606**, it would appear so. To be clear: we do not stand in defense of willful violators' conduct – they should be cited and fined as provided for under the present regulations. However, we firmly believe that **SB 606**'s multiplicative penalties and vague terminology is a recipe for disaster.

- **6317.8(b)(2)** - *"the violations[6] resulted in worker fatalities . . . or a large number of injuries or illnesses."* This element is also duplicative and vague. Cal/OSHA already utilizes increased penalties for hazards resulting in death. Moreover, it is unclear how "a large number of injuries or illnesses" would be quantified. As written, if an employer had never before had a *single* citation, but one violation created multiple injuries, that employer would now be an "egregious employer" under **SB 606**.

- **6317.8(b)(3)** – *"the violations resulted in persistently high rates of worker injuries or illnesses."* **SB 606** contains no explanation of what such "high rates" might be, or how "persistent" they need to be to qualify. If an employer has, for example, workers' compensation data[7] showing an injury-rate in some aspect that is 2% higher than the industry norms, and that rate lasts for one year - does that qualify "persistently high rates"? Furthermore, **SB 606** does require the "injury rates" at issue be associated with the alleged "willful violation" that triggered this issue. For example: if an employer persistently has 5% higher than industry standard rates of violating Cal/OSHA's ergonomics standard[8] - does that qualify as a "persistently high rate" and render the employer "egregious" for purposes of totally un-related violations? Putting all of those ambiguities together – it is unclear what rates this subsection is referring to, how high the rate must be to qualify, how long the rate must remain at that undefined level, and what connection, if any, this "persistently high rate" must bear to the actual citation.

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[5] Though **SB 606** does not provide any specific multiplier, proposed Section 6317.8(a) provides that a single citation for an "egregious employers" will be multiplied by the number of employees who may have been exposed, resulting in a multiplier that could range from 2x to more than 100x, depending on the size of the workplace and the particular hazard.

[6] Notably, some of the proposed "characteristics" of an "egregious employer" reference "violations", but the Section 6316.8(a) actually does not require multiple violations for an employer to be considered egregious. *See* proposed Sections 6317.8(b)(2)-(4), (7) This is yet another vague element of **SB 606** – just how many violations are required to qualify as "egregious"? Can one violation trigger the determination that an employer is "egregious" and thereby face multiplied penalties?

[7] To be clear **SB 606** does not specify workers' compensation data as the source for this "persistently high rate" – or any other such objective source of data. We utilize workers' comp as a guess at what data might be intended for purposes of this example – but the mere fact that we must guess itself illustrates the problem.

[8] §5110 "Repetitive Motion Injuries."

- **6317.8(b)(6)** – *"The employers' conduct, taken as a whole, amounts to clear bad faith …"* – As discussed above, it is unclear who would make such a determination or how it would be quantified.

- **6317.8(b)(4)/(7)** – *"the employer has an extensive history of prior violations of this part."* This element is similarly vague and fails to recognize that, over time, mistakes occur and are rectified even by good employers. For example: if an employer receives a citation (which is paid and the hazard is addressed), then that same employer receives a similar citation five years later (with new managers and staff repeating the prior mistake), would that qualify as an extensive history? What about 3 citations over 10 years? Again, the text of **SB 606** is not clear in its application, which will lead to reasonable employers being swept into its multipliers.

Furthermore, 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."[9] 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**.

**Section 6317.10 is an Unjustified Expansion of Cal/OSHA's Scope of Authority into the Realms of Other State Agencies**

Section 2 of **SB 606** (Section 6317.10) would provide a massive expansion of Cal/OSHA's enforcement authority by allowing Cal/OSHA to issue citations or seek a temporary restraining order (TRO) for any "employer-wide written policy or practice that violates the Health and Safety Code or [Labor Code]." As an initial matter, this is an unprecedented expansion of Cal/OSHA's authority, as now Cal/OSHA inspectors would be able to cite employers for *any* issues contained in the Health and Safety Code or Labor Code, whereas presently, Cal/OSHA inspectors are limited to enforcing Cal/OSHA's regulations. To be clear – the present limitations on Cal/OSHA's scope is not some sort of trick or gimmick to avoid enforcement. To the contrary, it is simply a matter of *other agencies already enforcing those areas*. A short list of the agencies who are already charged with enforcing the H&S Code and Labor Code would include the Departments of Public Health, of Health Services, and the Division of Labor Standards Enforcement. Adding such breadth to Cal/OSHA's inspectors makes even less sense when Cal/OSHA is already understaffed[10] and should be prioritizing its staff to enforce what is probably the most important regulation in the state – the COVID-19 ETS.

**SB 606** would also create the ability to issue citations for (or even seek a TRO to close) locations where inspectors have *not visited* if the inspector believes a policy or practice may be in place in those locations. This is an unprecedented change. For context: just last year the legislature gave Cal/OSHA the authority to close down locations where the risk of COVID-19 posed an imminent hazard to employees as part of **AB 685 (Reyes – 2020).** *See Labor Code 6325*(b). It is unclear why the authority to close locations which have not even been visited or inspected is appropriate, given that Cal/OSHA continues to issue citations where necessary[11] and already has the authority to close down locations where hazards are present.

**Section 6409.7's Rebuttable Presumption Is Unnecessary Because Existing Law Already Protects Workers for the Covered Conduct.**

Section 3 of **SB 606** veers into completely different territory and creates a rebuttable presumption of retaliation in a list of scenarios. Each of the rebuttable presumptions created by § 6409.7 are unnecessary and duplicative of existing legal protections. Generally speaking, subsections (a)-(d) create a rebuttable presumption of retaliation where an employee has: (a) disclosed a positive test or diagnosis of resulting

[9] 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 . . ."

[10] Governor Newsom's budget acknowledged this shortage of staff and included funding to add positions to address it. *See 2021-2022 Budget re 7350 Department of Industrial* Relations, available at http*://www.ebudget.ca.gov/budget/2021-22/#/Department/7350*.

[11] Cal/OSHA's ongoing list of citations related to COVID-19 is available here: https://www.dir.ca.gov/dosh/COVID19citations.html

from any exposure at the workplace, (b) requested testing related to a workplace exposure, (c) requested personal protective equipment,[12] or (d) reporting a violation of Cal/OSHA standards.

Regarding subsection (a) – this provision does not define what a "positive diagnosis or test" might relate to, meaning that it appears any disclosure of any positive result for any disease or condition of any sort, regardless of whether it is harmful, helpful, or insignificant, would trigger protection.[13] Presuming it was intended to apply to COVID-19, the worker who has caught COVID-19 in the workplace and tests positive is already protected on multiple fronts. First, 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/FEHA already protects them if their illness qualifies as a disability (which COVID-19 may, depending on the circumstances).[14]

Jumping ahead to subsection (d) regarding reporting violations of safety regulations: the bill's purported goal is completely covered by 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. Similarly, to the extent that subsection (b) is concerned with employers not providing testing to employees, that is already required by California's COVID-19 ETS, which requires employers provide testing to anyone exposed to COVID-19 in the workplace.[15] Any failure to provide such testing would be something that workers are already protected in their ability to report to Cal/OSHA, pursuant to Labor Code § 1102.5(b) as noted above. Regarding (b)'s protection for requesting testing – the ETS already ***requires*** employers to provide testing to employees exposed in the workplace, and any worker who attempted to report the employers' failure would be protected by Labor Code § 1102.5(b), as discussed above. Similarly, subsection (c)'s prohibition on retaliation for "requesting protective equipment that is reasonable under the circumstances"[16] – employees already have a protected right to inform Cal/OSHA of any areas where their employers are obligated to provide PPE but are failing to do so pursuant to Labor Code § 1102.5(b). In short – employees are already covered by other provisions of law.

## 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 (as well as all their other regulations). **SB 606** will not improve this situation – it will only add confusion and duplication with its provisions and catch well-intentioned employers in its vaguely-defined net of penalties and litigation.

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[12] 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.

[13] Subsection (a) contains an apparent typographical error. Specially, it appears the last clause ("or of a communicable disease") is a fragment or error that should be removed or clarified.

[14] For a quick example re 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.")

[15] *See CCR* § 3205(c)(4)("Offer COVID-19 testing at no cost to employees during their working hours to all employees who had potential COVID-19 exposure in the workplace and provide them with the information on benefits described in subsections (c)(5)(B) and (c)(10)(C).")

[16] Notably, **SB 606's** use of ". . . reasonable under the circumstances" is problematically vague to apply. It leaves ambiguous whether PPE that is legally mandated defines what is "reasonable under the circumstances", or if the retaliation protection applies to a broader universe of PPE that is not required but *might* be reasonable to ask about. This should be clarified.

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

Sincerely,

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Policy Advocate
California Chamber of Commerce

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 Joint Powers Authorities
California Association of Sheet Metal and Air Conditioning Contractors, National 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 Framing Contractors Association
California Fresh Fruit Association
California Grocers Association
California Hospital Association
California League of Food Producers
California Restaurant Association
California Retailers Association
California Staffing and Recruiting Association
California Travel Association
CAWA - Representing the Automotive Parts Industry
Civil Justice Association of California
Coalition of Small and Disabled Veteran Businesses
El Dorado County Chamber of Commerce
El Dorado Hills Chamber of Commerce
Elk Grove Chamber of Commerce
Family Business Association of California
Family Winemakers of California
Flasher Barricade Association
Folsom Chamber of Commerce
Housing Contractors of California
National Electrical Contractors Association
Nisei Farmers League
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

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