



for the abatement of the alleged violation. (Labor Code §6317)

Existing law provides that if an employer is served with a citation or special order, the employer may appeal to the Occupational Safety and Health Appeals Board (OSHAB) within 15 working days from the receipt of the citation or order with respect to violations alleged by the division, abatement periods, amount of proposed penalties, and the reasonableness of the changes required by the division to abate the condition.

(Labor Code §§ 6600 & 6600.5)

Existing law also provides that 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 DOSH 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. (Labor Code §6317)

Existing law provides that, if an employer can show a good-faith effort to comply with the abatement requirement of a citation, but the abatement has not been completed because of factors beyond his reasonable control, DOSH, after an opportunity for a hearing, must issue an order affirming or modifying the abatement requirements in such citation. (Labor Code §6319.5)

Existing law defines a "serious violation" as a violation where DOSH determines that there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use

Hearing Date: June 12, 2013 AB 1165  
 Consultant: Gideon L. Baum Page 2

Senate Committee on Labor and Industrial Relations

in a place of employment. (Labor Code §6309)

Existing California Regulations require that, unless otherwise specified by statute, all abatement periods and changes required by the Division are stayed upon the filing of a docketed appeal with the Appeals Board and remain stayed until withdrawal of the appeal or a final disposition of the proceeding by the Appeals Board. (California Code of Regulations Title 8, § 362)

This bill would provide that any appeal of a citation or special order that is classified and cited as a serious violation, a willful violation, a repeated serious violation, or a failure to abate a serious violation may not stay the abatement dates unless :

- 1) The employer requests a stay of abatement for a citation or notice of civil penalty classified as a serious violation, willful violation, repeated serious violation, or failure to abate a serious violation in a notice of appeal; and
- 2) The department determines that there is a substantial likelihood of success by the employer on the contested matters and that a stay will not adversely affect the health and safety of employees.

The decision on a request for a stay of abatement shall be final unless the employer renews the request for a stay of abatement in a direct appeal of the redetermination to the board.

This bill would also provide that the department may stay an abatement requirement while a motion to stay an abatement is pending.

#### COMMENTS

##### 1. AB 1165 and Occupational Safety and Health Appeals Board Regulations:

As noted above, existing law allows employers to contest  
 Hearing Date: June 12, 2013 AB 1165  
 Consultant: Gideon L. Baum Page 3

Senate Committee on Labor and Industrial Relations

citations or special orders issues by the Division of Occupational Safety and Health (DOSHS). However, under Occupational Safety and Health Appeals Board (OSHAB) regulations (8 CCR § 362), all abatement activity must be stayed while an issue is pending before OSHAB. According to several stakeholders, this can create a situation where workers continue to work under unsafe conditions while the appeal is pending.

In an effort to address this concern, OSHAB recently promulgated regulations, effective July 1, 2013, which would expedite hearings in order to avoid abatement delays. The OSHAB regulations create a three-step process once OSHAB is aware of that an alleged violation is classified by DOSHS as a Serious, Repeat Serious, Willful Serious, Willful, Willful Repeat or Failure to Abate, and either abatement is on appeal, or abatement has not occurred.

- 1) Within 30 days of an appeal being filed, a telephonic conference to see, among other things, if an expedited process is appropriate;
- 2) Within 60 days of the telephonic conference, the parties would hold a preconference hearing to, among other things, stipulate to undisputed facts and identify witnesses and evidence to be used by both parties.
- 3) Within 60 days of the preconference hearing, the hearing itself would be scheduled.

The regulations would also allow OSHAB or a party to bring a motion to shorten the timeframes discussed above on a showing of good cause.

##### 2. Why Didn't OSHAB End Automatic Abatement Stays in the Recent Regulations?

In the initial statement of reasons for the expedited abatement hearing process, OSHAB said the following:

Alternatives to this rule were proposed by stakeholders,

namely, repeal of the automatic stay provision. However, such  
 Hearing Date: June 12, 2013 AB 1165  
 Consultant: Gideon L. Baum Page 4

Senate Committee on Labor and Industrial Relations

alternative would not be less burdensome and equally effective. Rather, such would result in employers who contest the abatement ordered by the Division having no remedy to obtain a stay other than by seeking one from the superior court. This is costly for employers and the Division, which must respond.? A compelling argument was also made that the merits of ordering a stay turn on whether the violation occurred, and so any procedure addressing the merits of a stay requires a hearing on the merits of the alleged violation. For purposes of allowing discovery by the parties, reaching the merits consumes approximately 120 days of time.

OSHAB also noted that the "great majority of employers who appeal also voluntarily abate the cited condition" and that the 4-5 month expedited abatement process was a significant reduction over the existing process.

3. Washington State Abatement Process :

The author of this bill notes that legislation was signed into law in April 2011 in the State of Washington creates a similar process to AB 1165. The law (WAC 296-900-17006) requires that the employer request from WA's DOSH a stay of abatement for any violation classified as serious, willful, repeat serious, or failure to abate serious. WA's DOSH may only abate the hazard if doing so would not have a negative impact on the health and safety of impacted workers.

4. Possible Amendments :

Currently, AB 1165 directs the Department of Industrial Relations to stay the abatement of an occupational hazard. However, it is the Division of Occupational Safety and Health which orders the abatement and the Occupational Safety and Health Appeals Board which would order a stay of abatement. As such, the bill requires further clarification.

One such model could be the Washington State abatement process. As discussed above, Washington requires employers to abate hazards, but it allows the Division of Occupational Safety and Health to allow for a stay. The Washington State model does not address special orders, though the Committee is unaware of any special order being classified as a serious

Hearing Date: June 12, 2013 AB 1165  
 Consultant: Gideon L. Baum Page 5

Senate Committee on Labor and Industrial Relations

violation.

Therefore, the Committee may wish to make the following amendments:

On page 2, line 12, strike "An appeal" and insert "When either abatement is on appeal or abatement has not occurred, an appeal";

On page 2, line 13, strike "or a notice of proposed penalty under this part,"

On page 2, lines 14 and 15, strike "a serious violation, a willful violation, a repeated violation, or a failure to abate a serious violation" and insert "Serious violation, Repeat Serious violation, Willful Serious violation, Willful violation, or Willful Repeat violation, or Failure to Abate";

On page 2, line 16, strike "except as follows";

On page 2, line 17, after "abatement" insert "from the division.";

On page 2, line 17, strike "for a citation" and strike lines 18 to 20;

On page 2, line 21, strike "department" and insert "division";

On page 2, line 21 and 22, "a serious violation, a willful violation, a repeated violation, or a failure to abate a serious violation" and insert "Serious violation, Repeat Serious violation, Willful Serious violation, Willful violation, or Willful Repeat violation, or Failure to Abate"

On page 2, line 23, strike "department" and insert "division";

On page 2, strike line 26 and "employer on the contested matters and" on line 27;

On page 2, line 28, strike "The decision" and strike lines 29 to 31;

Hearing Date: June 12, 2013  
Consultant: Gideon L. Baum

AB 1165  
Page 6

Senate Committee on Labor and Industrial Relations

On page 2, line 32, strike "department" and insert "division";

On page 2, between lines 34 and 35, insert "(d) The employer may request an expedited appeal from the appeals board and the appeals board shall conduct an expedited hearing pursuant to regulations promulgated by the OSHAB in Title 8 California Code of Regulations Section 373."

On page 2, strike lines 35 to 38; and

Strike page 3.

5. Proponent Arguments :

Proponents note that if an employer appeals the citation existing law stays all hazard abatement during the appeal. The appeal is resolved through a hearing before the Occupational Safety and Health Appeals Board (OSHAB), which proponents note

can occur months or years after the citation is issued and a hazard identified. Proponents argue that AB 1165 requires an employer to abate any safety violations cited as "serious," "willful," or "repeat" as required by DOSH, even during an employer's appeal. Proponents believe that AB 1165 ensures places of employment can be safe without having to wait for the completion of the often timely appeals process.

6. Opponent Arguments :

Opponents argue that AB 1165 reverses the right of an employer to stay abatement while an appeal of the citation is pending. It requires an employer to specifically request a stay when filing an appeal of a serious, willful, repeat, or failure to abate citation. Opponents also note that the construction of AB 1165 is confusing and unclear. Opponents also argue that AB 1165 would require employers to specifically contest abatement where it would otherwise be stayed, creating two appeals where currently there is one to consider the merit of abatement as well as the merit of the contested citation. Opponents argue that the expedited appeal process has been created specifically to address this situation, making AB 1165 unnecessary.

Hearing Date: June 12, 2013  
 Consultant: Gideon L. Baum

AB 1165  
 Page 7

Senate Committee on Labor and Industrial Relations

7. Prior Legislation :

AB 1988 (Swanson) of 2008 would have provided that an abatement measure required by DOSH shall not be stayed pending an employer's appeal unless the employer indicated by verified petition that it seeks a stay of abatement and the reasons why abatement is not necessary to protect the health or safety of employees. AB 1988 was held in the Senate Committee on Appropriations.

SUPPORT

California Conference Board of the Amalgamated Transit Union  
 California Conference of Machinists  
 California Healthy Nail Salon Collaborative  
 California Nurses Association  
 California Rural Legal Assistance Foundation  
 California Teamsters Public Affairs Council  
 Centro Legal de La Raza  
 Employee Rights Center  
 Engineers and Scientists of California, IFPTE Local 20, AFL-CIO  
 International Longshore and Warehouse Union  
 Legal Aid Society-Employment Law Center  
 Professional and Technical Engineers, IFPTE Local 21, AFL-CIO  
 Southern California Coalition for Occupational Safety & Health  
 State Building and Construction Trades Council of California  
 United Food and Commercial Workers Western States Council  
 UNITE-HERE, AFL-CIO  
 Utility Workers Union of America  
 Worksafe

OPPOSITION

Acclamation Insurance Management Services  
 Agricultural Council of California  
 Air Conditioning Trade Association  
 Allied Managed Care  
 Associated Builders and Contractors of California  
 Associated General Contractors of California  
 Associated Roofing Contractors of the Bay Area Counties, Inc.  
 California Association of Joint Powers Authorities  
 Hearing Date: June 12, 2013 AB 1165  
 Consultant: Gideon L. Baum Page 8

Senate Committee on Labor and Industrial Relations

California Business Properties Association  
 California Chamber of Commerce  
 California Chapter of American Fence Association  
 California Construction and Industrial Materials Association  
 (CalCIMA)  
 California Farm Bureau Federation  
 California Fence Contractors Association  
 California Framing Contractors Association  
 California Grocers Association  
 California League of Food Processors  
 California Lodging Industry Association  
 California Manufacturers and Technology Association  
 California Professional Association of Specialty Contractors  
 California Restaurant Association  
 California Retailers Association  
 Construction Employers' Association  
 Desert Hot Springs Chamber of Commerce and Visitors Center  
 Engineering Contractors' Association  
 Flasher Barricade Association  
 Fullerton Chamber of Commerce  
 Irvine Chamber of Commerce  
 Marin Builders Association  
 National Federation of Independent Business  
 Palm Desert Chamber of Commerce  
 Plumbing-Heating-Cooling Contractors Association of California  
 Residential Contractor's Association  
 San Gabriel Valley Regional Chamber of Commerce  
 Walter & Prince, LLP  
 Western Electrical Contractors Association  
 Western Growers Association  
 Western States Petroleum Association  
 Western Steel Council

Hearing Date: June 12, 2013 AB 1165  
 Consultant: Gideon L. Baum Page 9

Senate Committee on Labor and Industrial Relations

