

Date of Hearing: April 24, 2013

ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT

Roger Hernández, Chair

AB 1277 (Skinner) – As Amended: April 18, 2013

SUBJECT: Occupational safety and health.

SUMMARY: Revises various provisions of law related to the issuance and adjudication of citations for alleged violation of occupational safety and health laws. Specifically, this bill:

- 1) Provides that a hearing or other action on a request from a permanent or temporary variance from a standard shall be held after "affected" employees (as defined) or employee representatives are properly notified.
- 2) Provides that an affected employee has a right to due process when a permanent or temporary variance is sought and requires an employer to post a notice of the variance and provide the notice to each collective bargaining representative who represents an employee.
- 3) Provides that the Occupational Safety and Health Appeals Board (Appeals Board) shall liberally construe the provisions of current law in order to promote safe and healthy working conditions for the working men and women of this state.
- 4) Provides that the Appeals Board, in adjudicating appeals, shall apply the regulations adopted by the Department of Industrial Relations (DIR).
- 5) Recasts and revises provisions related to the filing of complaints to, among other things:
 - a) Specify that complaints may be filed and shall be investigated (as specified) by an employee or former employee, an employee or former employee's representative, a health and safety professional, a government agency representative, a joint labor-management committee, or an employer, as specified.
 - b) Revises the procedures and timeframes for the investigation of such complaints, as specified.
- 6) Specifies that the Division of Occupational Safety and Health (DOSH) shall also issue citations for alleged violations of the relevant provisions of the Labor Code, not just DOSH regulations or standards.
- 7) Revises provisions of existing law related to a \$5,000 penalty for failure to report a serious injury or illness or death as follows:
 - a) Clarifies that the report shall be made immediately, but no longer than eight hours after the employer knew or should have known of the death or serious injury or illness.

- b) Specifies that the employer shall inform DOSH of all information in its possession, as specified, and requires the employer to inform DOSH if the employee subsequently dies, as specified.
 - c) Provides that, if the employer has never been subject to an inspection or investigation, the penalty may be reduced to not less than \$2,500 if there is documentation of any of the following:
 - i) The employer has 10 or fewer employees.
 - ii) The employer delayed in reporting to DOSH by no more than 48 hours.
 - iii) The employer delayed reporting by more than 48 hours, but states under penalty of perjury that specified other conditions were met.
 - d) Provides that the penalty may be increased if there is a finding of any of the following:
 - i) The employer failed to report a death.
 - ii) The employer did not provide documentation that the employee received prompt and adequate first aid, medical care, or both.
 - iii) The employer did not provide evidence that it had an effective injury and illness prevention program.
 - iv) The employer previously failed to report a serious injury or illness or death.
 - v) The employer interfered with DOSH's investigation, as specified.
 - e) Provides that the penalty shall not be decreased if DOSH determines that the failure to report timely impaired its investigation or that the employer did not ensure that the employee received prompt and adequate first aid, medical care, or both.
 - f) Provides that, in addition to any other penalty, an employer who willfully or repeatedly fails to report timely or who intentionally interferes with DOSH's investigation shall be subject to other specified existing penalties.
- 8) Provides that an affected employee (as defined) may appeal the terms and conditions of abatement in a citation or notice if a notice of appeal is filed by specified parties.
- 9) Requires the Appeals Board, upon a timely request as set forth in its regulations, to permit the following to participate as a party in an appeal:
- a) An affected employee, as specified, including survivors if the employee is deceased.
 - b) A union that represents an affected employee.
 - c) A union that has a collective bargaining agreement with the employer.

- 10) Provides that parties shall have the right to participate in settlement discussions, may express an objection, and shall be timely informed of any settlement, as specified.
- 11) Provides that the rules of practice and procedure of the Appeals Board shall provide for the scheduling of hearings in a manner designed to minimize inconveniences to DOSH and all parties and witnesses who are required to attend the hearings.
- 12) Provides that the rules of practice and procedure of the Appeals Board shall provide for the completion of hearings without significant lapses in time if the hearings are not completed within the scheduled time.
- 13) Provides that at any time within 30 days after the service of any final order or decision made and filed by the Appeals Board, any person aggrieved directly or indirectly may petition the Appeals Board for reconsideration in respect to any matters determined or covered by the final order or decision, as specified.
- 14) Provides that a person who was not a party to the case prior to the Appeals Board issuing the decision after reconsideration who plans to seek judicial review of the decision pursuant to shall provide a written notice to the appeals board, including a statement that the person intends to seek judicial review of the decision, a brief statement regarding the nature of the challenge to the decision after reconsideration, and a request that the Appeals Board modify or rescind its decision.
- 15) Provides that the notice and statement shall be filed with the Appeals Board within 30 days of the order or decision and shall toll, for 30 days or until the Appeals Board acts, whichever is sooner, both the finality of the decision after reconsideration and the filing deadline. After receiving notice, the Appeals Board may either rescind, modify, and reissue the decision after reconsideration, or deny the request either summarily or in writing with the reasons stating the basis for the denial. The Appeals Board's failure to act on the notice within 30 days shall be deemed a summary denial.
- 16) Makes other related technical and conforming changes to existing law.

FISCAL EFFECT: Unknown

COMMENTS: In general, this bill seeks to revise various provisions regarding citations issued by DOSH, the persons or entities who are authorized to participate as a party in an appeal before the Appeals Board, and the procedures that govern the Appeals Board in hearing and deciding appeals.

General Background on Occupational Safety and Health Law

With the passage of the Occupational Safety and Health Act of 1970, Congress created the Federal Occupational Safety and Health Administration (Federal OSHA) as part of the United States Department of Labor to ensure safe and healthful working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance. The OSH Act covers employers and their employees either directly through federal OSHA or through an OSHA-approved state program. State programs must meet or exceed federal OSHA standards for workplace safety and health.

The California Occupational Safety and Health Act of 1973 was enacted to ensure safe and healthful working conditions for all California workers by, among other things, authorizing the enforcement of effective standards as well as assisting and encouraging employers to maintain safe and healthful working conditions. The Division of Occupational Safety and Health (DOSH, also known as Cal/OSHA), within the state DIR, is charged with enforcing occupational health and safety laws, orders, and standards, including the investigation of alleged violations of those provisions.

Existing law empowers DOSH to cite an employer if, upon inspection or investigation, DOSH believes that the employer has violated safety laws or any standard, rule, order, or regulation created through existing law. The citation must be in writing and include the particular nature of the violation and a reasonable time for the abatement of the alleged violation.

The Appeals Board, also within DIR, is a three-member judicial body appointed by the Governor and confirmed by the Senate, which handles appeals from private and public-sector employers regarding citations issued by DOSH for alleged violations of workplace safety and health laws. Employers may contest the existence of violations alleged in a citation, as well as the amount of any proposed civil penalty, within 15 working days of its receipt. (Labor Code §6600) After review and/or a hearing, the Appeals Board must issue a decision, based on findings of fact, affirming, modifying, or vacating DOSH's citation, order, or proposed penalty, or directing other appropriate relief.

Recent Oversight of the Appeals Board

In recent years, concerns have been raised regarding some of the Appeal Board's operational practices and the effect of these practices on appeal outcomes. As a result of the concerns raised by stakeholders, this committee and the Senate Committee on Labor and Industrial Relations have conducted oversight hearings on the Appeals Board since 2009. Specifically, critics expressed concern that the Appeals Board's operational practices made it harder for DOSH to prosecute employers who violate the state's workplace health and safety laws and led to the more frequent use of fine and penalty reductions to settle cases -- many times settling cases that both DOSH and employers otherwise would not have agreed to.

On June 13, 2009, 47 DOSH employees wrote a letter to the Appeals Board protesting the board's policies and practices and demanding that the board "cease and desist" from practices they believe undermine their ability to protect workers. Among the concerns raised at the hearings and in the DOSH letter, were the effects of the actions taken by the Appeals Board to reduce the backlog of appeals cases such as the scheduling of several hearings per day involving the same judge and staff, denying or even ignoring justified continuance requests, the scheduling of hearings in remote locations -- making it difficult for witnesses to attend hearings, dismissing cases on technicalities, and conducting drastic penalty reductions. Some advocates have alleged that the combination of these factors have resulted in a situation where unscrupulous employers can utilize the appellate process to delay enforcement of the law designed to protect workers.

On September 28, 2010, the Federal Occupational Safety and Health Administration (Fed-OSHA), within the U.S. Department of Labor, released an audit highlighting several deficiencies both at DOSH and the Appeals Board. According to the federal audit, the state's standards and enforcement policies and procedures differ significantly from the federal and as a result raise

questions regarding their equivalent effectiveness. Of particular concern to Fed-OSHA was the appeals process administered by the Appeals Board which raised serious concerns about both the procedures and the results of the process. (*Federal Annual Monitoring and Evaluation Report (FAME), U.S. Department of Labor – Occupational Safety and Health Administration, 2010*).

ARGUMENTS IN SUPPORT:

According to the author, the Appeals Board's current procedures are not fully in keeping with the legislative directive that the purpose of the occupational safety and health laws and regulations are to promote safe and healthy working conditions for the working men and women of the state of California. The author states that this bill will ensure that California workers are protected, that due process is accorded to employers, and will make several technical changes so that workers as well as employers may participate meaningfully in the appeal process.

Supporters of this bill argue that, although the purpose of the California Occupational Safety and Health program is to protect worker safety, current practices and procedures do not assure that workers, their families, and their representatives always have the right and ability to meaningfully participate in the program. They contend that this bill will clarify existing laws in a number of ways, including the following:

- Assure that family members and legal representatives of a deceased worker may participate as "parties" in proceedings of the Appeals Board and have all appropriate rights in those hearings. Families are currently denied the right to full participation on behalf of a loved one who has been killed in a workplace incident. This bill requires employers to notify employees when they seek a permanent or temporary variance from an DOSH standard or order.
- Assure those worker representatives, such as family members, unions, or community, worker or legal organizations, may assist a worker in filing a truly confidential complaint. Organizations or individuals assisting an employee must by existing policy divulge the employee's name to DOSH when filing a complaint (the name by law must be confidential) in order for the complaint of a serious hazard to be addressed quickly (within 3 days).
- Require the Appeals Board to apply the regulations issued by the Department of Industrial Relations in the appeal process.
- Clarify that DOSH inspectors may cite violations of statute (the California State Labor Code) and laws requiring the posting a workers' comp poster, not just violations of regulations.

Other supporters argue that this bill will ensure that family members and legal representatives of a deceased worker may participate as parties in proceedings of the Appeals Board and have all appropriate rights in those hearings. They state that, unfortunately, families are currently denied the right to full participation on behalf of a loved one who has been killed in a workplace incident. Supporters conclude that, by ensuring that both the "spirit of the law" and the "letter of the law" are followed, this bill will protect worker health and safety and to assure a fair hearing for all.

ARGUMENTS IN OPPOSITION:

A coalition of employer groups, including the California Chamber of Commerce, opposes this bill and argues that the text of the bill is confusing and duplicative, creating liability for employers in ascertaining its requirements. Its language should be plain and clear rather than appear to be playing a game of deception for stakeholders in determining the impacts of its provisions. They raise particular objection to a number of specific provisions of the bill as follows:

With respect to the language related to the filing and investigation of complaints, opponents believe the entire process of prioritizing complaints on the basis of who makes them is fundamentally flawed. It results in the misdirection of valuable resources and is at odds with the need to emphasize as much as possible the prioritization of protecting employees from the most hazardous conditions to which they are exposed. Because this bill maintains a three-day response deadline for serious complaints from a specific list of complainants, it would divert resources from other situations that may pose more serious risks to employee safety, but were not delivered to DOSH via these specified reporting sources. Opponents offer alternative language that they contend would provide a sensible and effective approach to complaint inspections.

With respect to language in the bill providing for citation authority for alleged violations of statute, opponents argue that this would open up uncharted territory in legal issues for which there is no guiding case law and no demonstrated need for this broad overreach of power. The regulatory model California has followed since the 1970's has been one in which statutes define purpose and intent broadly so that the Standards Board can implement them by regulation. Since the inception of the California OSHA program, the standard practice has been to cite violations of regulations, not to cite statutes in the Labor Code. The process works well; throwing a wildcard into the mix will create confusion, excess litigation, and distraction from the mission of DOSH.

With respect to the \$5,000 penalty for failure to report, opponents state that while they appreciate the author's attempt to clarify the process and provide guidance in issuing penalties for these violations, they can find no reason that a violation of this code should be settled differently than all other citations. It is unjustified and costly to require an employer, and a representative of DOSH to participate in, and the Appeals Board to convene an appeal process for the purpose of penalty reduction rather than simply enabling the DOSH investigator to apply the penalty adjustment formula per regulation as part of the citation process. Furthermore, opponents contend that this bill specifies criteria for penalty reduction that have nothing to do with the violation in question and should not be considered for penalty adjustment. They would instead recommend the Legislature direct the Director of the Department of Industrial Relations to adopt a pertinent regulation, rather than insert this level of specificity in statute.

Finally, opponents argue that certain provisions of the bill create an unjustified and unreasonable expansion of who can participate in the appeal process as a party. It expands the definition of who can represent a deceased affected employee in some Appeals Board proceedings, contrary to a recently adopted consensus Appeals Board regulation. These provisions redefine an affected, deceased employee's representative according to the Probate Code, which has nothing to do with the family having personal knowledge or a personal, familial and/or emotional interest in participating in appeal proceedings. These provisions are clearly crafted to pave the way to a civil lawsuit.