

# AB 1127 IMPLEMENTATION PLAN

## Final Permanent Cal/OSHA Civil Penalty Regulations

On 6 October 1999, Governor Davis signed Assembly Bill 1127, authored by Assemblymember Steinberg into law (Chapter 615, Statutes of 1999). AB 1127 makes changes to twelve (12) sections of the California Labor Code. Save for one statutory change to Labor Code Section 98.7, all of AB 1127's changes involve the California Occupational Safety and Health Act (Labor Code Section 6300 et seq.).

The purpose of this memorandum is to describe the regulatory and policy changes that the Division of Occupational Safety and Health has made in order to implement the provisions of AB 1127 for Cal/OSHA inspections and investigations commencing on or after 1 January 2000.

### **REGULATORY CHANGES**

Four provisions of AB 1127 require regulatory changes to 8 CCR Section 334 or to Section 336. These AB 1127 changes to the Labor Code, with their corresponding Section 334 or 336 regulatory sections, are as follows:

- (1) Labor Code Section 6428 was amended to require that if a violation is serious, the employer shall be assessed a civil penalty of up to \$25,000 for each violation. See 8 CCR Section 336(c)(1).
- (2) Labor Code Section 6429 was amended to require that any employer who repeatedly violates a standard shall not receive any penalty adjustment for good faith or for history. See 8 CCR Section 336(d)(12).
- (3) Labor Code Section 6430 was amended to require that if a violation is for failure to abate a violation, the employer shall be assessed a civil penalty of not more than \$15,000 for each day during which failure to abate continues. See 8 CCR Section 336(f).
- (4) Labor Code Section 6432 was amended to redefine serious violation. See 8 CCR Section 334(c).

### **Emergency Cal/OSHA Civil Penalty Regulations**

In order that the four provisions of AB 1127 outlined above can be enforced on 1 January 2000, the Division submitted to the Office of Administrative Law (OAL) a rulemaking package containing changes to 8 CCR Section 334(c), 336(c)(1), 336(d)(12) and 336(f) and requested that the four changes be promulgated on an "emergency" basis. OAL

approved the Division's request and filed the "emergency regulations" with the Secretary of State on 16 December 1999.

The four (4) provisions of the "emergency" Cal/OSHA Civil Penalty regulations are enforceable for all inspections and investigations commencing on or after 1 January 2000 together with the eight (8) which are enforceable without the need for regulatory changes.

#### [§334. Classification of Violations and Definitions.](#)

#### [§336. Assessment of Civil Penalties.](#)

### **Permanent Cal/OSHA Civil Penalty Regulations - 45 - Day Notice**

The emergency Cal/OSHA Civil Penalty regulations remain in effect for 120 days and will expire on 1 May 2000. During the period of time from 1 January through 1 May 2000, the Division will submit to OAL for final approval a set of permanent Cal/OSHA civil penalty regulations which will make the changes contained in the emergency regulations permanent. Adoption of permanent Cal/OSHA Civil Penalty regulations requires that the Division conduct a hearing to receive public comment on the new Cal/OSHA Civil Penalty regulations. A public hearing is scheduled for 22 February 2000 at 10:00 a.m. in the Auditorium of the Hiram Johnson State Building in San Francisco.

#### [Proposed Permanent Cal/OSHA Civil Penalty Regulations.](#)

### **15 - Day Notice**

As a result of comments received by the Division during the 45-day Notice for the Proposed Permanent Civil Penalty Regulations, the Division has made revisions to the Proposed Regulations.

#### [15 Day Notice and Text of Revised Proposed Permanent Regulations](#)

( .pdf document, size 91 KB)

### **Permanent Cal/OSHA Civil Penalty Regulations - Final**

After reviewing comments from the 45-Day and 15-Day Notices, the Division of Occupational Safety and Health finalized its proposed amendments to Sections 334 and 336 of Title 8 and forwarded the final civil penalty package to the Office of Administrative Law (OAL) on 13 April 2000 for approval. On 11 May 2000, OAL approved the

amendments to Sections 334 and 336 and filed the amendments with the Secretary of State the same day. The AB 1127 regulatory changes are now effective on a permanent basis.

## Final Permanent Cal/OSHA Civil Penalty Regulations

### **POLICY CHANGES**

The Division has revised several sections of the Volume II (Compliance) of its Policy and Procedures Manual to enable compliance personnel to be able to enforce the provisions of AB 1127 applicable to the Division for all inspections and investigations commencing on or after 1 January 2000. The sections of the Volume II (Compliance) of the Division's Policy and Procedures Manual which have been revised to incorporate the AB 1127 changes are: P&PC-1, 1B, 1C, 2, 7, 10, 11, 13, 15, 23, 24 and 90. The following is a summary of the twelve AB 1127 changes to the Labor Code, indicating which P&P C sections have been revised and what the revisions are.

#### **(1) AB 1127 Change to Labor Code Section 98.7**

Section 98.7 extends the period of time for any person to file a Cal/OSHA discrimination complaint with the Division of Labor Standards Enforcement from 30 days to 6 months.

P&P C-11, Section B., has been changed to reflect the extension of the time to file a Cal/OSHA discrimination complaint. In addition, in P&P C-7, Letters "a," "d," "e," "f," "h" and "m" have been modified to reflect the new time of six months to file a Cal/OSHA discrimination complaint.

In P&P C-11, a non-AB 1127 change was also made in that the requirement for compliance personnel to complete a Cross-Jurisdictional Questionnaire (Cal/OSHA 11) under specified circumstances was eliminated, as was the Cal/OSHA 11. Information about an employer's workers' compensation coverage will continue to be gathered and documented on the Cal/OSHA 1.

#### **(2) AB 1127 Change to Labor Code Section 6304.5**

Section 6304.5 is amended and now includes a provision relating to the testimony of DOSH employees.

P&P C-24, Section B., has been changed to reflect new procedures affecting DOSH employee participation in depositions and administrative and civil trial proceedings.

#### **(3) AB 1127 Change to Labor Code Section 6309**

Section 6309 is amended with regard to the following three issues pertaining to complaints:

- a. Defines "employee representative" as "including, but not limited to, an attorney, health or safety professional, union representative; or representative of a [government agency](#)..."

P&P C-7, Section D., has been changed to reflect the new definition of employee representative, and inclusion of representative of a government agency as a complainant as opposed to a person who makes a referral.

b. Requires that the Division attempt to determine the period of time in the future that the complainant believes that the unsafe condition may continue to exist and to allocate inspection resources so as to respond first to those situations where time is of the essence.

P&P C-1, Section B. 2.b.(2), has been changed to reflect that, for all formal complaints, informal serious complaints and serious referrals, the Division will attempt to determine the period of time the complainant believes that the unsafe condition will exist and to allocate inspection resources so as to respond to those situations where time is of the essence.

c. Requires that when a complaint alleging a serious violation is received from a state or local prosecutor, the complaint must be investigated within 24 hours of receipt.

P&P C-1, Section B.2.b.(1), has been changed to reflect a first level inspection priority (24 hours) for a complaint made by a state or local prosecutor alleging a serious violation.

**(4) AB 1127 Change to Labor Code Section 6400**

Section 6400 is amended to codify the Division's multi-employer worksite regulation (8 CCR Section 336.10) into statute.

P&P C-1C has been finalized from its longstanding "draft" format.

**(5) AB 1127 Change to Labor Code Section 6423**

Section 6423 is amended to increase fines and prison sentence that a court may impose for certain Title 8 violations charged by a district attorney.

Section 6423 goes into effect on 1 January 2000 without need for regulatory or policy changes by the Division.

**(6) AB 1127 Change to Labor Code Section 6425**

Section 6425 is amended to increase the fines and prison terms that a court may impose for willful violations causing an employee's death or permanent or prolonged impairment of the body charged by a district attorney.

Section 6425 goes into effect on 1 January 2000 without need for regulatory or policy changes by the Division.

**(7) AB 1127 Change to Labor Code Section 6428**

Section 6428 is amended to increase the maximum statutory civil penalty for a serious violation to \$25,000. The Division's emergency Cal/OSHA Civil Penalty regulations have made changes to 8 CCR Section 336(c)(1) as follows:

"Any employer who violates any [occupational safety and health](#) standard, order, or special order, and such violation is determined to be a Serious violation (as provided in section 334c(1) of this article) shall be assessed a civil penalty of up to \$25,000 for each

such violation. Because of the extreme gravity of a Serious violation an initial base penalty of \$18,000 shall be assessed."

Thus, for all inspections and investigations commencing on or after 1 January 2000, the new initial base penalty to be used as a starting point for calculating the proposed civil penalty for a serious violation is \$18,000.

P&P C-10, Section B.3.b. and Attachment B, have been changed to reflect the new higher penalties for serious violations.

In addition, P&P C-2, Section A.2.c. (2), has been revised to increase the monetary level at which a proposed civil penalty must have upper management review prior to issuance from \$50,000 to \$75,000.

Similarly, P&P C-23, Section G.4.b., has been revised to increase the monetary level at which a proposed case disposition, which results in a change of the proposed civil penalty of \$25,000 or more, must receive Administration approval before finalization.

**(8) AB 1127 Change to Labor Code Section 6429**

Section 6429 is amended in two ways:

(a) Section 6429(b) prohibits adjustment of the proposed civil penalty for a repeat violation for anything other than Size. The Division's emergency Cal/OSHA Civil Penalty regulation made changes to 8 CCR Section 336 (d)(12) as follows:

"For any employer who commits a repeat violation (as provided under section 335(d) of this article), the penalty shall not be subject to adjustment pursuant to this subsection, other than for Size as set forth in part (1) of this subsection."

Thus, for all inspections commencing on or after 1 January 2000, the proposed civil penalty for a repeat violation shall not be adjusted except for Size.

P&P C-10, Section b.4.(a), has been changed to reflect the prohibition against adjusting the penalty for a repeat violation for anything other than for Size.

(b) Section 6429(c) requires the Division to preserve and maintain records of its investigations, inspection and citations for a period not less than seven (7) years.

In P&P C-1, Section D.5. has been added to reflect the new retention requirement for records of Cal/OSHA inspections, investigations and citations.

**(9) AB 1127 Change to Labor Code Section 6430**

Section 6430 is amended in two ways:

(a) Section 6430(a) requires that if a violation is for failure to abate a violation, the employer shall be assessed a penalty of not more than \$15,000 for each day during which the failure to abate continues. The Division's emergency Civil Penalty regulations have made changes to 8 CCR Section 336(f) as follows:

"The daily additional penalty for failure to abate a violation shall not exceed \$15,000."

P&P C-2, Attachments H (Sample 161 Reminder Letter) and J (Sample 161 Reminder Letter After Final Order) have been changed to reflect the new higher penalty for a failure-to-abate violation.

P&P C-10, Section B.7.b., and P&P C-15, Section C.1., have also been changed to reflect the new higher penalty for a failure-to-abate violation.

(b) Section 6430(c) is amended to provide that any employer who submits a signed statement of abatement, and is found by the Division not to have abated the violation is guilty of a public offense punishable in court by a fine or imprisonment.

Even though the new "public offense" of submitting a fraudulent statement of abatement is enforceable by a district attorney, new Section C.4. has been added to P&P C-15 to require that if compliance personnel determine that an employer has submitted a fraudulent statement of abatement, they shall make a referral to the Bureau of Investigations (BOI).

P&P C-90, Section C. 5. c.(2), has been changed to add a new grounds for a mandatory referral to the BOI, i.e., submission of a fraudulent statement of abatement, and the 90B has also been changed to reflect the new referral category.

#### **(10) AB 1127 Change to Labor Code Section 6432**

Section 6432 is amended to provide a revised definition of serious violation. The Division's emergency Civil Penalty regulations made changes to 8 CCR Section 334(c)(1), (2) and (3) as follows:

(1) A "serious violation" shall be deemed to exist in a place of employment if there is substantial probability that death or serious physical harm could result from a violation, including, but not limited to, circumstances where there is a substantial probability that either of the following could result in death or great bodily injury:

(A) A serious exposure exceeding an established permissible exposure limit or

(B) A condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in the place of employment.

(2) Notwithstanding subsection (c)(1), a serious violation shall not be deemed to exist if the employer can demonstrate that it did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

(3) As used in subsection (c)(1), "substantial probability" refers not to the probability that an accident or exposure will occur as a result of the violation, but rather to the probability that death or serious physical harm will result assuming an accident or exposure occurs as a result of the violation."

P&P C-1B, Section D.3., has been changed to reflect the revised definition of serious violation. Although AB 1127 places the burden for demonstrating lack of knowledge of a violative condition on the employer, P&P C-1B will continue to require compliance personnel to determine through investigation the employer's knowledge of violative conditions.

**(11) AB 1127 Change to Labor Code Section 6434**

Section 6434 is amended to delete the longstanding statutory exemption for governmental entities from imposition of Cal/OSHA civil penalties. Effective 1 January 2000, governmental entities will no longer be exempt from civil penalties, including failure-to-abate penalties.

The Note to the Policy Statement at the beginning of P&P C-10, stating that "civil penalties shall not be proposed for employers that are governmental entities," has been deleted and a statement that governmental entities are not exempt from the imposition of civil penalties has been added to P&P c-10, Section C.6..

In place of the former governmental entity exemption, new Section 6434(a) provides that the civil penalties arising from citations issued to any governmental educational entities (as enumerated) shall be deposited in the Workplace Health and Safety Revolving Fund. Furthermore, new Section 6434(b) provides that civil penalties paid by governmental educational entities (as enumerated) can be refunded by the Department of Industrial Relations (DIR) if the governmental entities meet three specified conditions.

P&P C-15, Section C.3., sets forth the three conditions under which civil penalties can be refunded to a governmental educational entity and instructs Districts to refer all refund requests to DIR Accounting.

**(12) AB 1127 Change to Labor Code Section 6719**

Labor Code Section 6719 is a new section of the Labor Code and it reaffirms the Legislature's concern over the prevalence of repetitive motion injuries and the Standards Board's continuing duty to carry out Labor Code Section 6357.

Although the Division does not have to make any regulatory or policy changes in response to Labor Code Section 6719, it is relevant to point out here that the P&P C-13 (formerly P&P C-173) has been finalized and retitled "Enforcement of 8 CCR Section 5110."

**SUMMARY**

AB 1127 makes many changes to the Cal/OSHA Enforcement Program and represents a challenge for all of Cal/Osha to implement. AB 1127 not only makes statutory, regulatory and policy changes to the Cal/OSHA Enforcement Program, it also will have a significant resource impact.

The increase in the number of complaints which must be categorized as formal, the effect of the increases in civil penalties for serious, repeat and failure-to-abate violations, the ending the exemption for governmental entity exemption from civil penalties, and the requirement to allocate resources where time is of the essence, will cumulatively have a sizeable resource impact. To meet the challenge of effectively implementing the provisions of AB 1127, the Cal/OSHA Program will need to augment its compliance personnel resources at the District level in 2000. In addition to bringing many new challenges for the Program, AB 1127 also has the potential to greatly increase the effectiveness of Cal/OSHA's enforcement efforts and, in doing so, to increase the safety and health protections afforded to California's workers.

*January 1, 2000*