

THE
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Understanding the Cost for Not Understanding Cal/OSHA

(Fines, Penalties, and Sanctions...Oh My!)



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Workers' Compensation Defense

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Industrial Disability Retirement
Labor Code 132a Defense
Serious and Willful Misconduct
Cal/OSHA Defense
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DISCLAIMER

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Facts and law change frequently. Please consult your attorney for the most recent laws affecting your decisions and claims handling strategies.



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Roadmap

Cal/OSHA Penalties

- Types of Citations
- Serious Injury & Illness

Senate Bill 606

- Egregious Violation
- Presumption of Enterprise-wide Violation

Serious & Willful Misconduct

Cal/OSHA OASIS

Preventing Citations & Inspections

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BACKGROUND





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History

- Established 1973, CA Occupational Safety & Health Act
- Admin. By CA DIR
- Mission – To Protect public health and safety with research and regulations related to on the job workplace hazards
- Three Major Programs
 - Division (DOSH)
 - Standards Board
 - Appeals Board
- Penalties – Enforcement mechanism. Deterrent effect.



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Cal/OSHA PENALTIES



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OSHA Penalties – Cal v. Fed

Cal/OSHA

- Effective 1/01/2023
- General/Regulatory - \$15,374
- Serious - \$25,000
- Willful/Repeat - \$153,744

Fed/OSHA

- Effective 1/17/2023
- Other - \$15,625
- Serious - \$15,625
- Willful/Repeat - \$156,259

<https://www.osha.gov/penalties>



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Cal/OSHA Penalties

Type of Penalty - Title 8, CCR § 336

- Regulatory
- General
- Serious
- Repeat
- Willful
- Failure to Abate





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Penalties – Serious Violations

Serious Injuries - \$25,000

- Base Penalty - \$18,000

Adjustments:

- Extent (low (25% ↓), medium (N/A), high (25% ↑))
- Likelihood (low (25% ↓), medium (N/A), high (25% ↑))
- Gravity (i.e., death, serious illness)



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Penalties – Serious Violations

Serious Injuries - \$25,000 (Base \$18,000)

Adjustments:

- Size of Business
- Good faith Employer
- History of Previous Violations
- Abatement

10 or fewer employees	- 40% of the Gravity-based Penalty shall be subtracted.
11-25 employees	- 30% of the Gravity-based Penalty shall be subtracted.
26-60 employees	- 20% of the Gravity-based Penalty shall be subtracted.
61-100 employees	- 10% of the Gravity-based Penalty shall be subtracted.
More than 100 employees	- No adjustment shall be made.



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Penalties – Repeat Violations

Repeat Serious Injuries - \$25,000 (Base \$18,000)

- 1st Repeat – 2x increase
- 2nd Repeat – 4x increase
- 3rd Repeat – 10x increase

*No adjustments other than for Size, no abatement credit



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Willful & Repeat Violations

Willful and Repeat Violations

- Minimum - \$10,981
- Maximum - \$153,744

*No adjustments, abatement credit



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Serious Injury or Illness

Title 8, CCR 330(h)

"Serious injury or illness" means any injury or illness occurring in a place of employment or in connection with any employment that requires inpatient hospitalization for other than medical observation or diagnostic testing..."

Effective 1/01/2020

- AB 1804 – Amended LC 6302 by changed definitions
- AB 1805 – Amended LC 6309 to change definition of serious violation for determining Cal/OSHA compliance



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Senate Bill 606 – LC 6317.8

- Effective 1/01/2022
- Penalties – Same as willful/repeat

Senate Bill 606

- Egregious Violation - increased penalties
- Subpoena Authority
- Rebuttable Presumption of Enterprise-wide Violation



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Egregious Violation – LC 6317.8(b)

“Egregious Violation” (1 or more):

- Employer intentionally made no reasonable effort to eliminate the known violation
- Violations resulted in worker fatalities, worksite catastrophe, or a large number of injuries or illnesses
- Violation resulted in persistently high rates of worker injuries or illnesses
- Employer has an extensive history of prior violations
- Employer intentionally disregarded their health & safety responsibilities



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Egregious Violation – LC 6317.8(b) Continued

- Employer conduct, taken as a whole, amounts to clear bad faith in the performance of their duties
- Employer committed a large number of violations so as to undermine significantly the effectiveness of any safety and health program that may be in place

Within 5 years – Egregious Violation

After 5 years – Egregious Violation + “Additional Evidence” (i.e., more than 1)



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Exemptions- LC 6317.8(c)

- Department of Correction and Rehabilitation (CDCR)
- California Correctional Health Care Services
- State Department of State Hospitals





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Subpoena Authority - LC 6317.9

- Division may issue subpoena if employer fails to promptly provide requested information;
- Enforce subpoena if employer fails to provide requested information within a reasonable period of time.





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Enterprise-Wide Violation - LC 6317

Rebuttable Presumption of Enterprise-wide Violation

- The Employer has a written policy or procedure that violations H&S Code § 25910, any standard, rule, order or regulation; *or*
- Division has evidence of a pattern or practice of the same violation(s) committed by that employer involving more than one of the employer's worksites.

*If Presumption Not Rebutted – Division authority to issue enterprise-wide citation requiring enterprise-wide abatement.

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SERIOUS AND WILLFUL MISCONDUCT



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Serious & Willful – Penalties

Serious and Willful Misconduct Penalties

- A **50% increase** in the amount of compensation otherwise recoverable
 - Based on the entire award (i.e., medical, med-legal, vocab., indemnity, death benefits, costs)
- Costs/expenses not to exceed \$250 (*Ferguson v. WCAB* (1995) 33 Cal. App. 4th 1613, 1622)
- Cal. Ins. Code § 1661 - No insurance for compensation recoverable for S&W misconduct



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Serious & Willful – LC 4553.1

The Appeals Board must specifically find:

- (a) Specific manner *order* was violated
- (b) Safety order violation was *proximately cause* of injury or death
- (c) Safety order, and the conditions making the safety order applicable, were *known to, and violated by, a particular named person, either the employer or a representative*, or that the condition making the safety order applicable was obvious and created a probability of serious injury, and that the failure of the employer or a representative to correct the condition constituted a reckless disregard for the probable consequences.



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LC 4553.1 - Managing Officer

An executive or managing officer is a person in the corporation's employ, either elected or appointed, who is invested with the general conduct and control of a particular place of business of a corporation. A managing agent or a managing representative is one who has general discretionary powers of direction and control who may direct, control, conduct or carry on his employer's business or any part of branch thereof. *Bigge Crane and Rigging Company v. WCAB (Paul Hunt)* (2010)

- Not every supervisor can be classified as a managing officer (*Ibid.*)

The mere fact that an employee may have some supervisory authority and the power of authority over some employees does not make that employee a managing officer of the company for the purposes of penalties under Labor Codes § 4553. *Bechtel v. Industrial Accident Commission, 25 Cal. 2d 171 (1994)*



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Serious & Willful – LC 4553

Employee's Burden to Show the Employer:

- Knew, or should have known, of a dangerous condition;
- Knew the probable consequence of its continuance would involve serious injury to the employer; and
- Deliberately failed to take corrective action.

Johns-Manville Sales Corp. v. Workers' Comp. Appeal Bd. (1979) 96 Cal. App. 3d 923, 931.)



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S&W – LC 4553

Serious & Willful Misconduct

- Act deliberately done for express purpose of injuring another; or
- Intentional act performed with knowledge serious injury is a probable result, or
- A positive, active, wanton, reckless and absolute disregard of its possibly damaging consequences. *Ferguson v. Workers' Comp. Appeals Bd.* (1995) 33 Cal. App. 4th 1613.

Willful Misconduct

- Deliberate and intentional conduct in doing or omitting to perform acts, with the knowledge that will likely result in serious injury, or with a wanton and reckless disregard of the possible consequences.
- More than mere negligence; must be quasi-criminal in nature.
- Mere failure to perform statutory duty alone is not alone willful misconduct. *Johns-Manville Sales Corp. v. Workers' Comp. Appeals Bd.* (1979) 96 Cal. App. 3d 923.

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Cal/OSHA PROCEDURES



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Cal/OSHA: Procedural Timeline

Basis for Inspections

- Notification to Division
- Referral
- Complaint
- **After an Inspection**
- Order Prohibiting Use
- No 1BY Notice (Notice of Intent to Classify Violation as Serious)
- Issuance of Citations
- Notification of Penalty, Abatement

OSHA Appeals Board – Safety Violation

- File Appeal
- Hearings
- Stipulation & Agreement, Trial
- **(WCAB Simultaneous Proceeding)**
- Serious & Willful Misconduct Claim (generally must be filed within one year of DOI)
- Amended S&W Complaint
- Division findings/stipulation generally admissible in WCAB proceedings. (Labor Code § 6304.5)
- WCJ likely influenced by Cal/OSHA findings/Stipulation.

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Cal/OSHA OASIS -- Online Case Management System



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Cal/OSHA OASIS

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

OASIS

California Occupational Safety and Health Appeals Board
Appeals Scheduling & Information System

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Q Case Search

Case Number	Case Name	Filing Date	Status	Action
		09/20/2022	Docketed	Select Action

Cases Per Page

10

Change the number of results per page

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Case Information

Filed	Classification	Regulation	Grounds	Affirmative	Abated?	Abate By	Penalty
09/20/2022 Appealing Citation (Perfected)							
09/07/2022 Citation 1							
Item 2	GENERAL	3657 (j) (1)	GFA3 GFA2 GFA1	AD5 AD1	Yes		900.00
Item 1	REGULATORY	342 (a)	GFA3 GFA2 GFA1	AD5	No	10/12/2022	5,000.00
Item 3	NOTICE IN LIEU OF CITATION	3203 (a) (8)	GFA1	AD5	No	10/12/2022	1.00

Events

Date	ALJ	Start	End	Location	Type	Result
		1:30 PM	2:00 PM		Status Conference	

Recent Documents

Date	Type	Filed By	Status	Served Date	View
01/11/2023	Notice of Status Conference - NEW PROCEDURE	Appeals Board	Served	01/11/2023	View
12/07/2022	Order on Motion	Appeals Board	Served	12/09/2022	View
12/06/2022	Motion for Protective Order	Appeals Board	Filed		View

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[Redacted]

ALJ
SLT

[Redacted]

F 09/20/22
L
N 05/30/23

Appealing Citation (Perfected)

N-1-3 | G-1-2 | R-1-1

Regulatory/General

Case Summary

Documents

Events

Exhibits

Documents-Portal

<input type="checkbox"/>	Date	Type	Filed By	Status	Served Date	View
<input type="checkbox"/>		Appealing Citation				
<input type="checkbox"/>	01/11/2023	Notice of Status Conference - NEW PROCEDURE	Appeals Board	Served	01/11/2023	View
<input type="checkbox"/>	12/07/2022	Order on Motion re Protective Order (Granted)	Appeals Board	Served	12/09/2022	View
<input type="checkbox"/>	12/06/2022	Motion for Protective Order and Stip of Parties	Appeals Board	Filed		View
<input type="checkbox"/>	11/02/2022	Notice of Perfected Appeal	Appeals Board	Served	11/02/2022	View
<input type="checkbox"/>	11/02/2022	Notice of Regulatory/General Procedure	Appeals Board	Served	11/02/2022	View
<input type="checkbox"/>	09/20/2022	Citation Package (Citation and notification of penalty, citations, penalty notice)		Efiled		View
<input type="checkbox"/>	09/20/2022	Notice of Docketed Appeal	Appeals Board	Served	09/20/2022	View



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Occupational Safety and Health Appeals Board (OSHAB) Online Appeal Form Instructions

[+ File Appeal](#)

1. Here are some sample illustrations.
2. Documents that you will need to file an online appeal.
3. Filling out the OSHAB appeal form.
4. Filing a timely appeal.
5. You may save your work and complete the online OSHAB appeal form at another time.
6. Review the completed online OSHAB appeal form.
7. Who may file an online OSHAB appeal form?
8. Appeal type
9. Inspection number
10. Date citation issued
11. Date employer (ER) received citation
12. RID Number
13. Employer (Existing)
14. Are you handling your own appeal?
15. Representative (Existing)
16. Add New Representative



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Cal/OSHA OASIS

- 17. [Representative email](#)
- 18. [Preferred Method of Service](#)
- 19. [Add New Employer](#)
- 20. [Add Citation](#)
- 21. [Citation Number](#)
- 22. [Item Number](#)
- 23. [Classification](#)
- 24. [Abated?](#)
- 25. [Date by which violation must be abated?](#)
- 26. [Proposed Penalty](#)
- 27. [Regulation](#)
- 28. [Grounds for Appeal](#)
- 29. [Affirmative Defenses](#)
- 30. [Add Item](#)
- 31. [Add Citation \(2\)](#)
- 32. [Citation Packet](#)
- 33. [Submit to Complete](#)



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Cal/OSHA OASIS

Appeal Form - Portal

▼ Citation Information

Appeal Type	Appealing Citation	▼ ?
Inspection Number*		?
Date Citation Issued*		📅 ?
Date Employer Received Citation		📅 ?
RID Number		▼ ?
Region & District		
Location		

▼ District Manager

District Manager	
------------------	--

▼ New Employer in OASIS? ?



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Cal/OSHA OASIS

Affirmative defenses defined

Independent employee action defense:

Mercury Service, Inc., Cal/OSHA App. 77-1133, Decision After Reconsideration (October 16, 1980) defines the Independent employee action defense as follows:

"The Appeals Board has developed a test for this employer defense as it recognizes that some employees may act against their employer's best safety efforts. In order to establish the defense of independent employee action an employer must show all of the following elements:

1. The employee was experienced in the job being performed,
2. Employer has a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments,
3. Employer effectively enforces the safety program,
4. Employer has a policy which it enforces of sanctions against employees who violate the safety program, and
5. The employee caused a safety infraction which he or she knew was contra to the Employer's safety requirement."



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Cal/OSHA OASIS

The safety order did not apply to the work activity that is the subject of the citation:

Lusardi Construction Company, Cal/OSHA App. 86-1400, Denial of Petition for Reconsideration (May 31, 1989) discusses the employer's affirmative defense, that the safety order did not apply to the work activity that was the subject of the Division of Occupational Safety and Health's citation:

"Furthermore, in arguing that another safety order more closely addresses the facts, an employer must demonstrate a defense to the cited safety order by complying with the safety order the Employer claims is better suited to the actual circumstances. In other words, the employer who asserts another safety order on the grounds that it more particularly addresses the violation as alleged by the Division, must first establish that it has complied with the safety protections required under that alternative safety order (*California Erectors California Erectors, Bay Area, Inc.*, Cal/OSHA App. 84-1254, Decision After Reconsideration (Sep. 30, 1986).)"



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Cal/OSHA OASIS

A different safety order applied to the work activity that is the subject of the citation, and appellant was in compliance with that other safety order.

Dade Behring, Inc., Cal/OSHA App. 05-2203 Decision After Reconsideration (Dec. 30, 2008) provides an example of this defense as follows:

"Stamatellos was asked about the exception to §3314(c) allowing for alternative methods for performing minor adjustments and servicing of machines. He stated that the use of extension tools would constitute an alternative means[.]" [...] "According to Employer, Employer complied with §3314(c)(1) since the machine was required to be moving and Zakharnev established Employer's use of other safety methods (only trained machine operators could operate the machine, extension tools were provided and used)."



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Cal/OSHA OASIS

The inspection that gave rise to the citation was invalid because the Division employee who inspected the appellant's worksite failed to comply with laws governing administrative searches:

Bimbo Bakeries, Cal/OSHA App. 03-5215, Decision After Reconsideration (Jun. 8, 2010) defines this defense.

"This reasonable expectation of privacy in the area searched is not presumed under any rule.

It is a fact-specific expectation to be determined by a judge upon the presentation of evidence.

(*Rudolph and Sletten*, Cal/OSHA. App. 01-478, Decision After Reconsideration (March 30, 2004).)

Different buildings (homes, businesses, places open to the public, etc.) can carry different Fourth Amendment protections.

(*People v. James* (1977) 19 Cal.3d 99; *People v. Doty* (2nd Dist. 1985) 165 Cal.App.3d 1060; *Rudolph and Sletten*, supra.;

People v. Channing (4th Dist. 2000) 81 Cal.App.4th 985, 990; and *De La Cruz v. Quackenbush* (2000) 80 Cal.App. 4th 775.)

Thus, evidence of the features of the place searched must be offered in order to establish a reasonable expectation of privacy in the place searched. Without any evidence, no Fourth Amendment right can be established." [...]

"Therefore, the Division does not carry the burden to prove the lawfulness of a warrantless inspection

unless and until an employer establishes an expectation of privacy in an area searched.

Such interest will not be presumed. (Scribner, supra, citing *Metro-Young Construction Co*, Cal/OSHA App. 80-315,

Decision After Reconsideration (April 23, 1981).)"

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PREVENTING CITATIONS & INSPECTIONS



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Prevent the Citation

- Have an effective workplace safety program:
 - Leadership commitment
 - Promote safety & make it a priority.
 - Employee engagement
 - Have employees involved in the process to buy-in.
 - Communication
 - Share information different ways and regularly.



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Prevent the Citation

- Have an effective workplace safety program:
 - Identify, evaluate, and CORRECT hazards
 - Conduct inspections of the workplace. A fresh set of eyes is always helpful.
 - Review job tasks.
 - Training
 - Consider your audience and to share information.



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Cal/OSHA Inspection

- Arrival/Introduction
 - Compliance Safety & Health Officer (officer) arrives unannounced.
 - They will introduce themselves and show ID, if they don't, ask to see it.
 - They will ask for a person in charge of safety & health. This should be a manager level employee.



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Cal/OSHA Inspection

- Arrival/Introduction
 - The officer has an hour to open the investigation.
 - If the person can't make it in time, a lead or supervisor can start or consider beginning over the phone.
 - Not starting on time can be considered a *refusal of entry* and prompt an inspection warrant.



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Cal/OSHA Inspection

- Opening Conference
 - The officer will:
 - Request a private location for the opening conference.
 - Ask for business card(s), ask for one too.
 - Ask for an overview of the operations and let you know why they are there (generally).
 - Provide an overview of what to expect during the inspection (walk-through, photos, interviews, etc.)



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Cal/OSHA Inspection

- Inspection- Walk-through
 - Don't leave the officer alone.
 - Only go where they are asking to go.
 - They will ask about machines, equipment, processes, etc.
 - They will take photos. Take the same photos for your legal and management teams.



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- Inspection – Interviews
 - Employees will be interviewed separately.
 - Officer will ask if they would like their manager, supervisor, or union representative present.
 - Questions about training – IIPP/HIPP.
 - All interviewed will be asked the same questions.
 - Questions will get into actual complaint.



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Cal/OSHA Inspection

- Inspection – Exit Conference
 - Review of officer's concerns.
 - Be very professional and cooperative.
 - May request to see written program if time allows.
 - Officer will ask who to send information to – records request.



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Cal/OSHA Inspection

- Inspection – Post Inspection
 - Records request should come within a day or two.
 - Typically allowed 2-3 days to provide requested information.
 - If you don't receive the request, make sure to follow up.
 - DO NOT provide more information than requested.

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QUESTIONS

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