

**STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
Division of Labor Standards Enforcement**

NOTICE OF MODIFICATIONS TO TEXT OF PROPOSED REGULATIONS

**Subject Matter of Regulations:
Janitorial Employer Registration**

**TITLE 8, CALIFORNIA CODE OF REGULATIONS
New Sections 13810 - 13819**

NOTICE IS HEREBY GIVEN that the Labor Commissioner, Chief of the Division of Labor Standards Enforcement, Department of Industrial Relations, pursuant to the authority vested in her by Labor Code section 1422, and in accordance with Government Code section 11346.8(c), proposes to modify the text of the following proposed regulations within new Subchapter 13 of existing Chapter 6 of Division 1, of Title 8, California Code of Regulations, regarding Janitorial Employer Registration:

Section 13810	Application for Registration
Section 13811	Registration Certificate
Section 13811.5	Temporary Registration Extension
Section 13812	Online Registry
Section 13812.6	Civil Penalty for Material Misrepresentation on Application
Section 13813	Actions on Applications and Registrations
Section 13815	Failure to File Notice of Defense; Discovery; Notice of Hearing
Section 13819	Employees Covered by Recordkeeping Requirement

The Labor Commissioner is proposing these regulatory text modifications for several reasons. First, some modifications are due to review, consideration and adoption of suggestions submitted to the Labor Commissioner's Office during the 45-day public comment period and at the hearing that was held on May 21, 2019. Further modifications are being proposed to implement and interpret amendments to the law that established the janitorial registration program that is the subject of these regulations, AB 1978 (Chapter 373, Statutes of 2016, codified at Labor Code sections 1420 through 1434). Some amendments were made as part of Senate Bill ("SB") 83 (Chapter 24, Sections 26-32, Statutes of 2019), which became effective on June 27, 2019. Additional amendments were made by Assembly Bill ("AB") 547 (Chapter 715, Statutes of 2019), which will go into effect on January 1, 2020. The Labor Commissioner wishes to update these regulations to incorporate all of the above, and welcomes comments from the public regarding these proposed changes.

PRESENTATION OF WRITTEN COMMENTS AND DEADLINE FOR SUBMISSION OF WRITTEN COMMENTS REGARDING MODIFICATIONS TO TEXT

Members of the public are invited to present written comments regarding the proposed modifications. **Only comments directly concerning the proposed modifications to the text of**

the regulations will be considered and responded to in the Final Statement of Reasons.

Written comments should be addressed to:

Jennifer Stevens, Legislative Analyst and Regulations Coordinator
Department of Industrial Relations
Division of Labor Standards Enforcement, Legal Unit
2031 Howe Avenue, Suite 100
Sacramento, CA 95825

The Division's contact person must receive all written comments concerning the proposed modifications to the regulations **no later than midnight on December 10, 2019**. Written comments may also be sent electronically (via email) using the following email address: DLSERegulations@dir.ca.gov

Written comments may be submitted via facsimile transmission (FAX), addressed to the above-named contact person at (916) 263-2920. Due to the inherent risks of non-delivery by facsimile transmission, the Division suggests, but does not require, that a copy of any comments transmitted by facsimile transmission also be submitted by regular mail.

Comments sent to other email addresses or facsimile numbers will not be accepted. Comments sent by email or facsimile are subject to the deadline set forth above for written comments.

AVAILABILITY OF TEXT OF REGULATIONS AND RULEMAKING FILE

Copies of the original text and modified text with modifications clearly indicated, and the entire rulemaking file, are currently available for inspection at the Department of Industrial Relations, Division of Labor Standards Enforcement, 2031 Howe Avenue, Suite 100, Sacramento, California 95825, between 9:00 A.M. and 4:30 P.M., Monday through Friday. Please contact the Division's regulations coordinator, Ms. Jennifer Stevens, at (916) 263-3400 to arrange to inspect the rulemaking file.

FORMAT OF PROPOSED MODIFICATIONS

Proposed Text Noticed for this 15-Day Comment Period – Identifying Modified Text:

The proposed changes to the text of the regulations are indicated by bold underlined text to identify additions (e.g. **added language**) and bold strikeout to identify deletions (e.g., ~~**deleted language**~~) made upon the original proposed text.

SUMMARY OF PROPOSED TEXT CHANGES

Section 13810 (Application for Registration):

- Subsection (a)(2) is modified to require that applicants provide the physical address, a mailing address, if different, and an email address for receiving electronic mail for the applicant's main or central location as well as any separate branch locations operated

under the same legal entity. The purpose of this change is provide an explanation of the statutory term “branch” to mean separate locations operated under the same legal entity as the applicant. It is necessary to include this text in order to provide applicants with an understanding of what they need to include for their branch locations, particularly because Labor Code section 1429(a)(4) as amended by AB 547 now requires them to provide the name of any subcontractor or franchise servicing their contracts, including at branch locations. In addition, this provides the Labor Commissioner’s Office with sufficient information regarding the branch locations associated with the same legal entity as the applicant’s main or central location so that each branch location can be listed on the registration certificate.

- Subsection (a)(4) is modified to request additional information regarding any unpaid wage and hour final judgments that remain outstanding, and to delete the last part of the sentence that would have requested information regarding any unpaid wages to any employee. This change is necessary to conform to the revised statutory language in Labor Code section 1429(a)(8)(A)(ii) regarding final wage and hour judgments, as amended by AB 547.
- New subsection (a)(5) is proposed to implement the new requirement in Labor Code section 1429(a)(8)(A)(ii) as amended by AB 547 requiring applicants to provide information regarding unresolved matters arising under the Fair Employment and Housing Act. This provision is necessary for the Labor Commissioner to evaluate whether the applicant has failed to satisfy the terms of an administrative settlement as part of the Department of Fair Employment and Housing’s processes, or a final judicial decree for any final judgment for a violation of the Fair Employment and Housing Act.
- The remainder of the subsections in this section are renumbered.
- Subsection (a)(8) is modified to clarify that an applicant need only provide the number of employees used to provide janitorial services if the applicant has one or more employees. The Labor Commissioner would first have to ascertain whether the registrant has any employees. This clarification is necessary because SB 83 amended the definition of “employer” in Labor Code section 1420(e) to mean in “any person or entity that employs at least one covered worker or otherwise engages by contract, subcontract, or franchise agreement for the provision of janitorial services by one or more covered workers.” As a result, some of the applicants who are “employers” for purposes of this registration program may not actually have any employees, as “covered workers” include independent contractors and franchisees, pursuant to the definition in Labor Code section 1420(a)(1).
- Subsection (a)(11) is modified to clarify that applicants who employ one or more workers are required to provide proof of workers’ compensation coverage. This clarification is necessary because SB 83 amended the definition of “employer” to mean in “any person or entity that employs at least one covered worker or otherwise engages by contract, subcontract, or franchise agreement for the provision of janitorial services by one or more covered workers.” As a result, some of the applicants who are “employers” for purposes of this registration program may not actually have any employees, as “covered workers” include independent contractors and franchisees, pursuant to the definition in Labor Code section 1420(a)(1). Applicants are only exempt from the requirement to provide proof of workers’ compensation coverage if they truly do not employ any employees.
- New subsection (a)(12) is proposed to require that applicants indicate whether they have registered previously or had a registration suspended or revoked under the same or another business name, and if so, the business name and registration number. This provision was

adopted in response to a comment, where the Labor Commissioner agreed with the commenter that this information aids the Labor Commissioner's evaluation of the application and whether the prior registration has any impact on the applicant's ability to meet the conditions set forth in Labor Code sections 1429 and 1430 and this subchapter.

- New subsection (a)(13) is proposed in order to implement and make specific a new attestation requirement that was added by SB 83 and further refined by AB 547. SB 83 added a requirement to Labor Code section 1429(a)(10) that the applicant demonstrate completion of the sexual violence and harassment prevention training requirement prescribed by the Labor Commissioner and developed pursuant to Labor Code section 1429.5 by providing a written attestation to the Labor Commissioner that such training has been provided as required. AB 547 then added that, effective January 1, 2022, the attestation must include whether the training was provided by a peer trainer and an explanation as to why a peer trainer was not used if a peer trainer did not provide the required training. In order for the Labor Commissioner's Office to ascertain whether the training was provided as required, the Labor Commissioner is proposing to gather as part of the attestation whether the applicant provided the training or whether the training was provided by another entity, the name of the janitorial employer or entity that provided the training, and the dates on which training took place. In addition, beginning January 1, 2022, additional information regarding the peer trainer and the qualified organization that provided the peer trainer would be gathered.

The information requested under this provision is necessary for the Labor Commissioner to verify compliance, particularly because the employer may not be the entity actually providing the training even though it is arranging for or ensuring that the training is being provided as required. Under AB 547, a qualified organization will provide a peer trainer to conduct the training for nonsupervisory workers rather than the employer providing the training. Additionally, an employer may ensure that the training is provided to covered workers by another janitorial employer, e.g., a sub-contractor or a franchisee. SB 83 amended the definition of "employer" to mean "any person or entity that employs at least one covered worker or otherwise engages by contract, subcontract, or franchise agreement for the provision of janitorial services by and one or more covered workers." This broad definition captures relationships that go beyond employer-employee, and includes sub-contracting arrangements that are common in the janitorial industry. As a result, there may be a chain of contracts or agreements among several "janitorial employers" for purposes of cleaning any particular location, and the training obligation for each employer would run to the workers and their supervisors engaged in providing the janitorial services. For example, there could be a large janitorial contractor that bids on a cleaning contract, and then they subcontract out to another janitorial contractor, who may also contract out to a third contractor. In such a circumstance, there may be three registered "employers," each of whom is required to provide sexual harassment training to the nonsupervisory janitors and their supervisors. These workers could be providing janitorial services for all three employers simultaneously because the work is being done at the location covered by each of the three applicable contracts. The intent of the companion training regulation (that is proposed in a separate rulemaking) is not to require that a worker receive the training separately (i.e., three times) by each employer in order to fulfill the training

requirement. Rather, the intent of the regulation is to require that the training be conducted at least once every two years or within six months of a worker assuming a position. Janitorial employers can comply by ensuring that training is completed by any employer in the chain, as long as the training is provided in the required timeframe for each covered worker. Therefore, the Labor Commissioner is proposing to require the employer to list the entity that provided the training if it was not the employer, and the dates of the training, as part of the attestation demonstrating that the training has been completed as required.

- Subsection (b) is modified to clarify that the registration fee in Labor Code section 1427 may be paid in several different ways, and that a service fee may be charged for vendor-processed transactions where the vendor retains the service fee, and the fee does not constitute revenue for the Labor Commissioner's Office. The purpose of this modification is to provide notice to applicants that vendor-processed transactions may be associated with a service fee. This is necessary to address an operational issue for the Labor Commissioner's Office whereby the agency has not been able to retain the full amount of the registration fee due to payment of service fees to third-party vendors.

Section 13811 (Registration Certificate):

- Subsection (a) is modified to indicate that the Labor Commissioner will issue the appropriate Registration Certificate depending on whether the applicant has employees, as there will be a Registration Certificate for registrants with employees and a Registration Certification for registrants without employees. This modification is necessary to implement the new requirement in AB 547, codified at Labor Code section 1425, that the Labor Commissioner "shall issue two types of registrations, one for registrants with employees and one for registrants with no employees."
- Subsection (c)(3) adds "registrant's branch locations" to the list of information that will be included on the registration certificate. The purpose of this modification is to reflect that the Labor Commissioner will include the branch locations on the registration certification. It is necessary to include branch locations on the certificate to create an official record of registration status for each location.
- New subsection (c)(4) proposes to include on the registration certificate whether the registrant is a non-employee registrant exempt from the requirement to secure workers' compensation coverage. This provision further implements the new requirement in AB 547, codified at Labor Code section 1425, that the Labor Commissioner will issue two types of registrations – one for registrants with employee and one for registrants with no employees. The purpose of issuing two types of registrations is to indicate the very limited circumstances in which a janitorial registrant would be exempt from the requirement to secure workers' compensation coverage where that business does not employ one or more employees. Including this information on the registration certificate – and in the online registry – underscores the narrow allowance for not having workers' compensation and makes clear to the public which type of registration that business has.
- The remainder of the subsection is renumbered.

New Proposed Section 13811.5 (Temporary Registration Extension):

- A new section is proposed that would allow the Labor Commissioner to issue a temporary registration extension where a complete renewal application is submitted at least 30 days

prior to the expiration date of the registration and is otherwise eligible for renewal, but the Labor Commissioner's Office has not yet issued the renewal. This section was established in response to a comment regarding the potential need for an extension of the validity dates of a registration if there is a delay in processing renewal applications. In these situations, it would be necessary to provide for a temporary extension so that janitorial contractors would not experience difficulties in contracting for business due to an expired registration date in the online registry. The provision allows for the issuance of a temporary registration that extends the validity period of a registration for up to 90 days in certain circumstances, at the Labor Commissioner's discretion. The Labor Commissioner is proposing a 90-day extension because this time period has proven to be operationally sound based on the Labor Commissioner's Office's administration of the temporary or provisional license in the Farm Labor Contractor licensing program.

Subsection (a) would require that the renewal application be submitted at least 30 days prior to the expiration date of the registration, along with the applicable fees and proof of worker's compensation insurance. This subsection is necessary because the Labor Commissioner's Office can only process a temporary registration extension that is filed at least 30 days in advance; operationally any dates closer to the expiration date would not allow sufficient time for processing, and might encourage applicants to file for an extension at the last minute. In addition, two basic requirements would have to be met in order to warrant extending the registration: payment of the registration fee and proof of current worker's compensation insurance, as applicable.

Subsection (b) would condition the temporary registration extension on the fact that the renewal applicant has not failed to provide any missing items that the Labor Commissioner's Office has requested in order to process the renewal application. This subsection is necessary because only renewal applicants that have met all of their obligations warrant a registration extension. If a renewal applicant has failed to establish eligibility for renewal due to their own failure to act, a temporary extension is not appropriate.

Subsection (c) requires the renewal applicant to be in good standing with the Secretary of State. This subsection is necessary in order to ensure that businesses that have been suspended by the Secretary of State are not given authorization to continue their registration period.

Subsection (d) sets out the final condition for the temporary registration extension, which is that the renewal application processing has not been completed by the Labor Commissioner's Office. This provision is necessary to clarify that the temporary registration extension is only warranted due to a delay on the part of the Labor Commissioner's Office, not on the part of the renewal applicant.

Section 13812 (Online Registry):

- Subsection (a)(3) is proposed in order to reflect in the online registry when a person or entity was issued a temporary registration, and the validity dates of the temporary registration. The purpose of this new provision is to ensure that the online registry includes

all relevant information regarding registration status. This is necessary because in instances where a registration expires, the public needs to know whether a temporary registration has been issued in order to continue to be able to contract lawfully with that janitorial business.

Article 3: The title of the article is changed from “Civil Penalty” to “Civil Penalties” in order to reflect that there are now two types of civil penalties in this article.

New Proposed Section 13812.6 (Civil Penalty for Material Misrepresentation on Application):

- A new section is proposed in order to define what constitutes a “violation” for purposes of Labor Code section 1432(c), whereby a material misrepresentation made in connection with an initial or renewal application is subject to a \$10,000 civil penalty. This provision is necessary to implement and interpret a new civil penalty enacted as part of AB 547. The Labor Commissioner is proposing to treat each individual material misrepresentation as an independent violation that is subject to a \$10,000 civil penalty. The Labor Commissioner believes that this is the best interpretation of the statutory provision, which states that the penalty for making “a” material misrepresentation applies “per violation.” Alternatively, the statute could be interpreted to mean that where multiple misrepresentations are made on any particular application, “per violation” means “per application.” The Labor Commissioner does not view this alternative as being consistent with the plain language of the statute.

Section 13813 (Actions on Applications and Registrations):

- Subsection (c) is amended to substitute the word “registrant” for “person,” to add denial and suspension periods, to add the word “final” before “judgments,” and to specify that the laws applicable to janitorial employers are those set forth in Division 2, Part 4.2 of the Labor Code. Substituting “registrant” for “person” is necessary to clarify that this may be a business entity, not an individual. Adding denial and suspension periods to the sentence that explains that a registrant whose registration is revoked may apply for a new registration upon expiration of the revocation ensures that registrants who are subject to denial and suspension, in addition to revocation, may apply for a new registration at the end of those periods. Adding “final” before “judgment” makes this bar to registration consistent with the bar to registration in Labor Code section 1430 and the considerations regarding wage and hour judgments in Labor Code section 1429(a)(8)(A)(ii), which are all final determinations. As noted by a commenter, it is necessary to reflect that a judgment that is final, and not subject to appeal, in order to be a bar to registration. Finally, the modification specifying which laws are applicable to janitorial employers is intended to clarify, in response to a comment, which laws are applicable to janitorial employers and must be complied with in order to regain registration status after a denial, suspension, or revocation period. The Labor Commissioner proposes to specify that, following such a period, a registrant must come into compliance with all laws applicable to janitorial employers as set forth in Division 2, Part 4.2 of the Labor Code. This Part of the Labor Code that establishes the janitorial registration and training program sets forth numerous laws with which janitorial employers must comply. By providing this clarification, other laws that

are not referenced in this Part would not prevent a janitorial registrant from renewing their janitorial registration.

Section 13815 (Failure to File Notice of Defense; Discovery; Notice of Hearing)

- New subsection (d) is added to address a failure to produce records that are required to be maintained to substantiate compliance under Division 2, Part 4.2 of the Labor Code pertaining to the janitorial registration and training program, pursuant to a request by the Labor Commissioner. Failure to produce records would be subject to the provisions of Labor Code section 1174.1. This provision is necessary to incorporate the existing recordkeeping enforcement mechanism under section 1174.1 – which is applicable to payroll, time and employment records employers are regularly required by law to maintain, and which includes evidentiary sanctions for failure to produce required records that may be imposed at any administrative hearing or writ proceeding contesting a citation. This type of recordkeeping enforcement mechanism is necessary to ensure that the Labor Commissioner can access required records, and to maintain the efficiency and fairness of administrative proceedings.

Section 13819 (Employees Covered by Recordkeeping Requirement):

- New subsection (c) is added to clarify that the phrase “all other covered workers” in Labor Code section 1421(f) does not refer to employees, and that it refers only to the other covered workers defined in Labor Code section 1420(a)(1) -- meaning an independent contractor or franchisee working as a janitor. The purpose of this new text is to provide clarification regarding the new recordkeeping provision in SB 83, codified at Labor Code section 1421(f), that applies only to “other covered workers.” It is necessary to provide this clarification because SB 83 added a separate and less stringent recordkeeping requirement for non-employee covered workers, namely independent contractors and franchisees.

CONTACT PERSON FOR INQUIRIES REGARDING PROPOSED CHANGES

Inquiries regarding the proposed modifications may be directed to:

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