TITLE 8. INDUSTRIAL RELATIONS
DIVISION 1. DEPARTMENT OF INDUSTRIAL RELATIONS
CHAPTER 6. DIVISION OF LABOR STANDARDS ENFORCEMENT
ADDING SUBCHAPTER 16: ASSESSMENT OF CIVIL PENALTIES FOR VIOLATIONS OF RETALIATION LAWS WITHIN THE JURISDICTION OF THE LABOR COMMISSIONER

FINAL STATEMENT OF REASONS & UPDATED INFORMATIVE DIGEST

UPDATED INFORMATIVE DIGEST

The purpose of these regulations is to provide guidance on how to assess penalties under the Labor Code's anti-retaliation provisions, such as sections 98.6, 1019.1, 1102.5, and 2814, which provide that the Labor Commissioner may assess penalties up to $10,000.00. Under the regulations, each violation will generally be subject to the maximum statutory penalty, but a respondent may argue that a lower penalty is appropriate based on the nature and seriousness of the violation.

There is no further update to the Informative Digest contained in the Notice of Proposed Rulemaking.

No bills amending the relevant penalty provisions have been passed while these regulations were pending.

UPDATE OF INITIAL STATEMENT OF REASONS

Pursuant to Government Code section 11346.9, subdivision (d), the Labor Commissioner's Office incorporates the Initial Statement of Reasons prepared in this rulemaking.

Following the agency's review and consideration of comments provided during the initial 45-day comment period, the Division of Labor Standards Enforcement ("DLSE" or "Labor Commissioner") issued a "Notice of Modifications to Text of Proposed Regulations" and text of the proposed modifications. A 15-day comment period was provided pursuant to Government Code section 11347.1, and then the regulations were submitted to the Office of Administrative Law ("OAL") for review. Following consideration of the issues identified by OAL during its review, the Labor Commissioner re-opened the rulemaking record and adopted further modifications. A second 15-day comment period was provided pursuant to Government Code section 11347.1.

Further discussion of the specific proposed regulatory provisions, a summary of the modifications made to the proposed regulations, and the reasons for those changes are included in the charts below.

REVISIONS FOLLOWING THE INITIAL 45-DAY COMMENT PERIOD (First 15-day Notice of Modifications)

After the initial public comment period, the following section was revised substantively and circulated for further public comment on January 19, 2021:

Section 13902(b)(2):

Initial Proposed Text	Modifications	Justification
(2) The size of the employer. Size may be determined by the number of employees employed around the time of the violation.	~~(2) The size of the employer. Size may be determined by the number of employees employed around the time of the violation.~~	After consideration of public comments, the Labor Commissioner determined that the removal of this subsection is necessary because employer size at the time of the violation would not ordinarily be a reliable factor for determining the appropriate penalty amount in retaliation cases. Employer behavior that results in unlawful retaliation is a necessary focus, and consideration of employer size at the outset could undermine a penalty determination. In the context of retaliation cases, standard consideration of employer size without regard to the industry, region, employment conditions, or other circumstances—all better addressed under the particular facts in a case—could inappropriately undercut both consideration of the nature and seriousness of the violation specified in subsection (b)(1) and an employer's demonstrated commitment to future compliance specified in subsection (b)(3). For example, in the agricultural sector, the

		number of employees can vary greatly between the seasons; there may be 20-30 employees during the off-season but hundreds during harvest time. In this context, the size of the employer at any given time does not correlate with the amount of an effective financial penalty, and it creates a perverse incentive for an employer to wait to retaliate when employee numbers are lower. If small employers feel that in their particular situation, reduction of a penalty based on size is appropriate, the relevant evidence can still be submitted since the Labor Commissioner or a court "may consider and give appropriate weight . . . to any other factors the Labor Commissioner or a court deems relevant . . . ." which is otherwise permitted under subsection (b).

Former Section 13902(b)(3), current (b)(2):

Initial Proposed Text	Modifications	Justification
(3) The employer's commitment to future compliance, as demonstrated by actions such as the employer's unconditional offer to reinstate the affected employee within 18 months of the termination or revision of employment policies to comply with applicable laws.	(2) ~~(3)~~ The employer's commitment to future compliance, as demonstrated by ~~actions such as the employer's unconditional offer to reinstate the affected employee within 18 months of the termination or revision of employment policies to comply with applicable laws.~~ the employer's actions subsequent to the violation that relate to the subject of	The proposed modification is necessary to clarify an employer's future commitment to compliance as a basis for reduction of the penalty by setting forth standardized criteria requiring that employer's actions be subsequent to the violation, relate to the violation, and mitigate the impact on affected employee(s) or similarly situation employees.

	the violation and mitigate the impact of the violation on the affected employee(s) or similarly situated employees. Such employer actions may include, but not be limited to, the following: i. An unconditional offer to reinstate the affected employee to the same position within 18 months of a termination or demotion; ii. Restoring lost scheduled hours or pay to the affected employee(s); iii. Removing related disciplinary or other personnel records; or iv. Instituting an improved disciplinary or other policy (e.g., sick leave) applicable to the affected employee(s) or similarly situated employees.	These criteria are necessary to ensure that the employer's action relates temporally to the violation and mitigation upon employees. The proposed modification further clarifies what actions may be a commitment to compliance by providing a non-exhaustive list of examples. An unconditional offer of reinstatement is not the only option to demonstrate a commitment to future compliance, and it may often not be possible. Instead, other employer actions subsequent to the violation relating to the subject of the violation and mitigating the impact of the violation on affected employee(s) or similarly situated employees, such as restoration of lost hours, removal of related disciplinary records, improving disciplinary or other relevant policies, or other similar affirmative acts may be properly considered by the Labor Commissioner or a court to justify penalty reduction. By providing further guidance and examples, the Labor Commissioner intends to encourage the important public policy of employer compliance with anti-retaliation laws and reduce the impact of a violation upon affected employees.

FURTHER REVISIONS FOLLOWING OAL'S REVIEW (Second 15-day Notice of Modifications)

Upon consideration of the issues identified by OAL during its review, the following sections were revised substantively and circulated for further public comment on June 9, 2022:

Section 13900:

Previous Modified Text	Modifications	Justification
These regulations shall apply to the penalty provisions contained in the retaliation laws within the jurisdiction of the Labor Commissioner's Office which authorize penalties not exceeding ten thousand dollars ($10,000) per violation, per employee affected. These laws are enforced through the Division of Labor Standards Enforcement's Retaliation Investigations Unit, pursuant to procedures set forth in Labor Code sections 98.7 and 98.74. Note: Authority: Sections 98.8, Labor Code. Reference: Sections 98.6, 98.7, 98.74, 1019.1, 1102.5, and 2814, Labor Code.	These regulations shall apply to the penalty provisions contained in the retaliation laws within the jurisdiction of the Labor Commissioner's Office which authorize penalties not exceeding ten thousand dollars ($10,000) per violation, per employee affected. These laws are enforced ~~through~~ ***by*** the Division of Labor Standards Enforcement's Retaliation Investigations Unit, pursuant to procedures set forth in Labor Code sections 98.7 and 98.74. Note: Authority: Sections ***95,*** 98.8***, 1019.1***, Labor Code. Reference: Sections 98.6, 98.7, 98.74, 1019.1, 1102.5, and 2814, Labor Code.	The word "through" is replaced with "by" in the second sentence to more accurately state the enforcement authority that enforces the retaliation laws providing for recovery of the penalties that are the subject of the regulations. The change is necessary to more clearly and directly state the unit within the Labor Commissioner's Office responsible for enforcement. Labor Code sections 95 and 1019.1 are added to the list of statutes regarding "Authority" for the section. The additions of these sections are necessary to capture the broad authority of the Labor Commissioner regarding enforcement of the various statutes to which the regulations apply.

Section 13901:

Previous Modified Text	Modifications	Justification
As used in this subchapter, "respondent" shall mean an employer or individual against whom a penalty has been assessed. Note: Authority: Sections 98.8, Labor Code. Reference:	As used in this subchapter, "respondent" shall mean ~~an~~ ***the*** employer or individual ***person*** against whom a penalty has been assessed ***or could be assessed, under the applicable statute authorizing the penalty***.	The definition of "respondent" is modified to specify that the applicable definition of a respondent, whether an employer or individual person, is derived from the statute authorizing the penalty in question. The

Sections 98.6, 98.7, 98.74, 1019.1, 1102.5, and 2814, Labor Code.	Note: Authority: Sections ***95***, 98.8***, 1019.1***, Labor Code. Reference: Sections 98.6, 98.7, 98.74, 1019.1, 1102.5, and 2814, Labor Code.	modification is necessary since different statutes create the potential for different liability, requiring that the definition be specific to the statute in question. Further, the definition of "respondent" is clarified to include an employer or individual person against whom a penalty could be assessed; this more accurately encompasses a party engaging in the administrative investigative process but who has not yet been assessed a penalty. Labor Code sections 95 and 1019.1 are added to the list of statutes specifying "Authority" for the section. The additions of these sections are necessary to capture the broad authority of the Labor Commissioner regarding enforcement of the various statutes to which the regulations apply.

Section 13902(a):

Previous Modified Text	Modifications	Justification
(a) Each retaliation violation will generally be subject to the maximum statutory penalty of ten thousand dollars ($10,000) per employee affected.	(a) Each ~~retaliation~~ violation will generally be subject to the maximum statutory penalty of ten thousand dollars ($10,000) per employee affected.	The word "retaliation has been struck to more accurately capture the range of violations that are subject to the regulations. For example, section 98.6, the main anti-retaliation provision in the Labor Code prohibits a person from discharging or "in any manner discriminat[ing], retaliate[ing], or tak[ing] any adverse action" against an applicant or employee. The

		change is necessary to accurately acknowledge the various violations for engaging in prohibited conduct that is not limited to retaliation strictly, but rather, will be based on the appropriate statute upon which the subject penalty is based.

Section 13902(b):

Previous Modified Text	Modifications	Justification
(b) In determining whether a penalty below the statutory maximum of ten thousand dollars ($10,000) is appropriate, the Labor Commissioner in an administrative proceeding or the court in a civil action, may consider and give appropriate weight to the following factors in addition to any other factors the Labor Commissioner or a court deems relevant: (1) The nature and seriousness of the violation. (2) The employer's commitment to future compliance, as demonstrated by the employer's actions subsequent to the violation that relate to the subject of the violation and mitigate the impact of the violation on the affected employee(s) or similarly situated employees. Such employer actions may include, but not be limited to, the following:	(b) ***If during an investigation, a respondent argues that the appropriate penalty is*** ~~**In determining whether a penalty**~~ below the statutory maximum of ten thousand dollars ($10,000) ~~**is appropriate**~~, the Labor Commissioner ~~**in an administrative proceeding or the court in a civil action, may**~~ ***shall*** consider ~~**and give appropriate weight to the following factors in addition to any other factors the Labor Commissioner or a court deems relevant:**~~ ~~**(1) The**~~ **the** nature and seriousness of the violation ***based on the evidence obtained during the course of the investigation***. ***Consideration of the nature and seriousness of the violation will include, but is not limited to, the type of violation, the economic or mental harm suffered, and the chilling effect on the exercise of employment rights in the workplace, and***	Subsection (b) has been modified to focus on the nature and seriousness of the violation in order to determine whether a reduction in penalty is appropriate. Whether a reduced penalty is appropriate shall be an argument raised by the respondent, and consideration of the nature and seriousness of a violation shall be based on the evidence submitted during the course of the investigation. As a result, subsection (b)(2) was struck in its entirety and subsection (b)(1) was revised to be subsection (b). This change to subsection (b) was necessitated in an effort to provide a streamlined investigative process that prioritizes the most important factors in considering the reduction of a penalty, and simplifies the considerations for penalty reduction when the agency is investigating a violation. The type of violation, economic or mental harm suffered, and the

i. An unconditional offer to reinstate the affected employee to the same position within 18 months of a termination or demotion; ii. Restoring lost scheduled hours or pay to the affected employee(s); iii. Removing related disciplinary or other personnel records; or iv. Instituting an improved disciplinary or other policy (e.g., sick leave) applicable to the affected employee(s) or similarly situated employees.	***shall be considered to the extent evidence obtained during the investigation concerned any of these or other relevant factors.*** ~~**(2) The employer's commitment to future compliance, as demonstrated by the employer's actions subsequent to the violation that relate to the subject of the violation and mitigate the impact of the violation on the affected employee(s) or similarly situated employees. Such employer actions may include, but not be limited to, the following:**~~ ~~**i. An unconditional offer to reinstate the affected employee to the same position within 18 months of a termination or demotion;**~~ ~~**ii. Restoring lost scheduled hours or pay to the affected employee(s);**~~ ~~**iii. Removing related disciplinary or other personnel records; or**~~ ~~**iv. Instituting an improved disciplinary or other policy (e.g., sick leave) applicable to the affected employee(s) or similarly situated employees.**~~	chilling effect on the exercise of employment rights are typical considerations (non-exhaustive) the Labor Commissioner encounters and observes in her experience with violations of retaliation and other employee protections against prohibited employer conduct.

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Section 13902(c):

Previous Modified Text	Modifications	Justification
	(c) In an appeal proceeding under Labor Code section 98.74, review of an assessed penalty shall be based on the evidence obtained during the investigation.	New subsection (c) was added to clarify that during an appeal of a citation issued under Labor Code section 98.74, a respondent may argue for the reduction of a penalty; however, in doing so, it may not introduce new evidence that was not submitted to the Labor Commissioner during her investigation. This approach bolsters respondent cooperation and engagement during an investigation, while preventing against surprise and disruption at a citation appeal hearing. The change is necessary to accommodate and confirm the procedural posture in administrative citation appeals that differs from court actions where a court may determine the facts on its own, i.e., make its own fact determinations independently. Under this subsection which only applies to administrative citation appeal proceedings, the determination for a reduced penalty is to be determined based upon facts obtained during the investigation which, if raised by an appellant, is reviewed at an administrative appeal hearing for sufficiency of the evidence obtained by the investigative unit.

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Section 13902:

Previous Modified Text	Modifications	Justification
Note: Authority: Sections 98.8, Labor Code. Reference: Sections 98.6, 98.7, 98.74, 1019.1, 1102.5, and 2814, Labor Code.	Note: Authority: Sections ***95,*** 98.8***, 1019.1***, Labor Code. Reference: Sections 98.6, 98.7, 98.74, 1019.1, 1102.5, and 2814, Labor Code.	Labor Code sections 95 and 1019.1 are added to the list of statutes specifying "Authority" for the section. The additions of these sections are necessary to capture the broad authority of the Labor Commissioner regarding enforcement of the various statutes to which the regulations apply.

Former Section 13903:

Proposed Text	Modifications	Justification
Where the respondent seeks to reduce the penalty, the burden shall be on the respondent to submit evidence supporting assessment of a penalty amount below the maximum per violation, per employee.	~~**Where the respondent seeks to reduce the penalty, the burden shall be on the respondent to submit evidence supporting assessment of a penalty amount below the maximum per violation, per employee.**~~	This section was deleted as unnecessary; revised section 13902 provides that reduction of penalty amounts shall be based on evidence obtained during the investigation.

Former Section 13904, current 13903:

Proposed Text	Modifications	Justification
If more than one respondent is found liable for a penalty under these statutes, each respondent shall be jointly and severally liable. Note: Authority: Sections 98.8, Labor Code. Reference: Sections 98.6, 98.7, 98.74, 1019.1, 1102.5, and 2814, Labor Code.	If more than one respondent is found liable for a penalty ~~**under these statutes**~~, each respondent shall be jointly and severally liable. Note: Authority: Sections ***95,*** 98.8***, 1019.1***, Labor Code. Reference: Sections 98.6, 98.7, 98.74, 1019.1, 1102.5, and 2814, Labor Code.	Prior section 13904 has now been renumbered as section 13903. For clarity, "under these statutes" was struck from the proposed regulatory text. The presence of the language is unnecessary since the scope of the regulations described in Section 13900 sufficiently describe the penalty statutes to which these regulations apply.

		Labor Code sections 95 and 1019.1 are added to the list of statutes specifying "Authority" for the section. The additions of these sections are necessary to capture the broad authority of the Labor Commissioner regarding enforcement of the various statutes to which the regulations apply.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE INITIAL COMMENT PERIOD OF SEPTEMBER 25, 2020 THROUGH NOVEMBER 9, 2020.

Commenter(s)	Comment	DLSE's Response
Section 13901		
California Chamber of Commerce	"Respondent" is defined as "an employer or individual against whom a penalty has been assessed." The Department of Industrial Relations (the "Department") states in its Initial Statement of Reasons ("ISOR") that there may be cases in which it or a court intends to enforce penalties against individuals. Aside from an employer who is a sole proprietor, or perhaps in the limited circumstances set forth in Section 1019.1, the plain language of the statute does not provide the Labor Commissioner with authority to impose penalties against any individual other than the employer. Labor Code Sections 98.6, 1102.5, and 2814 provide that an "employer" who violates those sections may be liable for the penalty. There is no implication that an individual person can be liable under those statutes. Section 1019.1 provides that it is unlawful for an "employer" to engage in certain conduct. The statute then provides that "[a]ny person who violates this section shall be subject to a penalty imposed by the Labor Commissioner and liability for equitable relief."	The Labor Commissioner declines to make the suggested modification. Commenter misreads the proposed section, which only defines the meaning of "respondent" for purposes of the subchapter. Individual liability is determined pursuant to the particular statute that was violated. A statute may provide for individual liability against a person pursuant to the Labor Code's anti-retaliation provisions. (E.g., Lab. Code § 1102.5, subd. (b) ["An employer, or any person acting on behalf of the employer . . . ."]; Lab. Code § 98.6, subd. (a) ["Any person shall not . . . ."]; see also Lab. Code § 18 ["Person" includes individual persons].) The proposed regulation simply recognizes that "respondent" may include an individual as allowed by the applicable

	Even if the statute on its face could be interpreted as permitting the Labor Commissioner or a court to impose penalties on individuals who are not the claimant's employer, such as an individual supervisor, doing so would violate longstanding public policy. Courts have repeatedly recognized that individuals should not be held personally liable for retaliation because supervisors would be at risk for personal liability whenever they make a personnel decision and doing so "would add little to an alleged victim's legitimate prospects for monetary recovery" while threatening individual employees with financial ruin. *Haligowski v. Superior Court*, 200 Cal. App. 4th 983, 981 (2011). For that reason, the California Supreme Court has refused in multiple instances to impose liability for retaliation on individual supervisors under the Fair Employment and Housing Act despite the fact that its provisions could theoretically be read to hold individuals personally liable. *Id.* at 990-91; *Jones v. Lodge at Torrey Pines Partnership*, 42 Cal. 4th 1158, 1165-66 (2008); *Reno v. Baird*, 18 Cal. 4th 640, 651-654 (1998). That same rationale has been applied to dismiss cases to hold individuals personally liable under Section 1102.5. *See, e.g.,Tillery v. Lollis*, 2015 WL 4873111, at *8-10 (E.D. Cal. Aug. 13, 2015, 1:14-cv-02025-KJM-BAM). We therefore request that the Department eliminate "individual" from its proposed definition of respondent. To hold an individual who is not the claimant's employer personally liable under any of these statutes would violate longstanding public policy established by the California Supreme Court, appellate courts, and federal courts interpreting California law. If the Department is not willing to do so, we at least recommend clarifying in the	underlying statute that would determine liability. To the extent that Commenter argues that the Labor Code's anti-retaliation statutes do not provide for individual liability at all, that is a question of statutory interpretation that should be raised before the courts and is not properly addressed by these proposed regulations.

	proposed regulations that Section 1019.1 is the only one of the four Labor Code provisions under which an individual may be personally liable for monetary penalties.	
Section 13902(a)		
California Rural Legal Assistance, Inc.	CRLA represents hundreds of low wage workers every year who work as farmworkers, domestic workers, restaurant and construction workers, landscapers and in other occupations around the state. Workers who encounter retaliation for complaining about working conditions are often reluctant to come forward because of the limited recovery available to them, and the chance of blacklisting. The addition of the $10,000.00 penalty to the remedies available to such victims provides not only economic relief to them, but also is the first real disincentive to employers who have ignored anti-retaliation laws for decades. It is, therefore, critical that the penalty be applied in a manner that furthers the stated legislative purpose of the anti-retaliation protections and $10,000.00 penalty "It is essential to the enforcement of this state's labor laws that we have broad, clear, and effective protections for workers engaging in conduct protected by law from all forms of employer retaliation…" (Stats 2013 ch 732) We believe that proposed subdivision 13902(a) appropriately furthers that purpose by clarifying that the penalty is to be assessed for "each" violation and "per employee." This construction ensures that all workers receive the penalty when there is unlawful action that affects multiple workers and that they recover for each discrete violation suffered.	The Labor Commissioner appreciates the comment in support of assessing penalties for each violation and per employee. Such a construction is supported by the language of the statute and case law, and as noted, furthers legislative intent by disincentivizing retaliation.
California Chamber of Commerce	This section explains that the maximum penalty amount of $10,000 is the default penalty to be imposed on an employer who is found to have violated one of the four anti-retaliation statutes. The burden falls on	The relevant penalty statutes provides for the exercise of the Labor Commissioner's discretion of assessing penalties up to $10,000.00;

	the employer to prove why a lesser penalty is in fact appropriate. While we agree that there is a need for clarity as to how penalties are assessed and what factors are to be taken into account by the Labor Commissioner and the courts, we disagree with the proposed framework for multiple reasons. First, making $10,000 the default penalty for every alleged adverse action rests on the presumption that all retaliatory conduct is sufficiently egregious to warrant the maximum penalty. That is a flawed presumption. Retaliation claims are highly fact-specific. Indeed, the Department acknowledges in the ISOR that not all violations deserve the same penalty and that some violations are the result of a technical issue or have minimal impact on an employee. It is troubling that one of the justifications offered for this proposal is that the Department believes that retaliation "typically involves intentional conduct, and is often motivated by a desire not only to punish the employee who exercised her rights, but also a desire to chill other employees from engaging in protected activity." While that may be true in some instances, the Department's position that this is "typical" implies the Department has predetermined that all violations of these statutes are severe enough to warrant the maximum penalty. This proposal undermines the Department's and the court's roles as neutral, objective fact-finders charged with enforcing these statutes. While we appreciate the Department is in search of a way to more efficiently assess penalties, it should not sacrifice fair, just application of the law in the process. Second, issuing the maximum penalty as the default penalty is contrary to the legislative	the proposed regulations reflect the agency's proposal on how to exercise that discretion by utilizing the stated criteria. The proposed approach implements a simple way to determine an appropriate penalty in the absence of any more specific circumstances that are raised by an employer. It is not a prejudgment of the merits of any particular case or treating all violations the same. Rather, the proposed approach recognizes that most retaliation claims, by nature, are going to involve intentional conduct. The investigation may, however, reveal facts for a basis of reducing the penalty so long as the respondent cooperates with providing sufficient information for doing so. The regulations are intended to provide a framework for considering or exploring the facts to arrive at a deserving penalty and not for determining the penalty at the outset. Under the Labor Code's anti-retaliation provisions that are subject to the proposed regulation, the Labor Commissioner has broad discretion in enforcement of a penalty amount. The proposed regulations are within the relevant parameters provided by the controlling anti-retaliation

	purpose of the statutes at issue. Each of the four statutes provide that there may be liability for a civil penalty "not exceeding ten thousand dollars ($10,000)." Placing a cap on the penalty award implies that $10,000 should be awarded for the worst offenders, it should not be the default amount. When the legislature intends for all violations of a statute to be treated the same, it prescribes exact penalty amounts to be issued in all cases (See, e.g., Labor Code Sections 203, 226, 226.7, and 558). Further, where the legislature intends for the maximum penalty to be the default penalty, unless the facts of the case warrant otherwise, it has made that clear in the underlying statute. For example, Labor Code Section 2699(e)(2) specifically states that the penalties provided for in the Private Attorneys General Act apply unless the facts and circumstances at hand warrant a lesser penalty: "In any action by an aggrieved employee seeking recovery of a civil penalty available under subdivision (a) or (f), a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory. (emphasis added) None of these four Labor Code sections contain similar language to Section 2699(e)(2). It is impermissible to read words into a statute that do not exist. *Vasquez v. State of California*, 45 Cal. 4th 243, 253 (2008). Third, imposing the maximum penalty for each alleged adverse employment action will lead to inequitable results. Employees alleging retaliation often allege that a pattern	statutes, and not the other statutes that Commenter has raised where the Legislature has otherwise provided penalty determinations under different statutory schemes. The Labor Commissioner also does not anticipate inequitable results as a result of adopting the proposed regulations. The Labor Commissioner and a court may consider other relevant factors as necessary, so in a case where there are multiple, ongoing violations, other factors may be considered to reach the appropriate amount for a penalty or penalties. Again, the regulations are intended to provide guidance for the exercise of discretion; they do not require the Labor Commissioner or a court to reach a certain required result.

	of conduct occurred over a long period of time. For example, an employee may allege that they were excluded from weekly meetings and given worse assignments than their peers. If successful, that employee would conceivably be entitled to $10,000 for each of those events, whereas an employee who successfully claims that they were immediately terminated will only be entitled to one penalty. Identifying the maximum penalty as the default penalty for every single adverse action simply does not make sense. There should be no default penalty amount. Rather, the proposed factors should be used to assess the appropriate penalty amount for each violation.	
Bet Tzedek Legal Services, on behalf of: Asian Americans Advancing Justice – Asian Law Caucus, California Immigrant Policy Center, California Rural Legal Assistance Foundation, Inc., Center for Workers' Rights, Centro Legal de la Raza, Employee Rights Center, Graton Day Labor Center, La Raza Centro Legal, Legal Aid at Work, Legal	We are pleased to see that the proposed regulations are generally consistent with this legislative history. In particular, by explicitly establishing the maximum statutory penalty of ten thousand dollars ($10,000) per employee per violation as the baseline presumption, Section 13902(a) provides clarity to the parties and the Labor Commissioner staff or court that is adjudicating the claim.	The Labor Commissioner appreciates the comment in support of assessing penalties for each violation and per employee. Such a construction is supported by the language of the statute and case law, and as noted, furthers legislative intent by disincentivizing retaliation.

Aid of Marin, The Maintenance Cooperation Trust Fund, National Employment Law Project, Santa Clara County Wage Theft Coalition, Warehouse Worker Resource Center, Women's Employment Rights Clinic – Golden Gate University, Worksafe		
Section 13902(b)(1)		
California Chamber of Commerce	This section provides that one factor that the Labor Commissioner may consider in assessing a penalty is the seriousness of the violation. We propose that this should be the primary factor that is considered in assessing the penalty and that the regulation should specify that this is the most important factor. We also propose that the regulations explain that the Labor Commissioner or court should take into account whether the employer acted in good faith when taking the alleged adverse action and/or disputing the employee's retaliation claim. As explained below, application of the remaining two factors can be problematic in certain situations and the factors should therefore not be treated equally.	The Labor Commissioner appreciates that the seriousness of a violation is an important consideration, but declines to adopt it as the primary factor, so that factors may be weighed freely in a way that makes sense for a particular case. The Labor Commissioner also declines to adopt a subjective standard for good faith as it is redundant. Whether an employer's reasons are in good faith is already considered as a factor during the analysis of the underlying retaliation claim (e.g., is there mixed motive where there are both legitimate and illegitimate

		reasons for the adverse action?). Meaning, whether an employer acted in good faith would automatically be considered when weighing the nature and seriousness of the violation for purposes of determining the penalty pursuant to proposed Section 13902(b)(1).
Section 13902(b)(2)		
California Rural Legal Assistance, Inc.	However, we feel that some of the language in proposed subdivision (b) will be construed in a manner that improperly reduces an employer's liability. Subdivision 13902(b)(2) allows consideration of the number of employees "around the time of the violation." Particularly in seasonal work such as agriculture and food processing this will create a difference in protections depending on what time of the year someone is working. A multi-million dollar farming operation might go from as few as 20 or 30 employees, off-season or year round, to hundreds at the time of harvest. The mere size of the workforce does not necessarily bear any relationship to whether an employer will be appropriately financially impacted by a penalty; nor does it necessarily impact whether they are likely to engage in retaliation again. This language could be used to dramatically reduce a retaliation penalty for a worker who was fired during the pruning season for complaining about a minimum wage violation, while supporting the full penalty for that same worker if they complain and are fired at harvest time. Perversely, the employer could actually wait a few months to fire a year round-employee who complained during harvest and fire them during the off season, and thereby trigger consideration of 13902(b)(2). Currently under many business models for restaurants a single individual may own independent franchises each employing just a handful of	In light of this comment and others, the Labor Commissioner adopts the recommended modification. Initially proposed Section 13902(b)(2) was removed because employer size would not be reliably related to the size of an appropriate penalty in retaliation cases, generally.

	workers. That individual may find even a $10,000 penalty negligible. Reducing the amount based on the fact that the violation was proved up at just one of the independent enterprises does not fulfill the statutory purpose of ensuring effective protections for workers. . . . We appreciate that these are merely considerations to be applied, and not mandatory reductions. However, we anticipate that if, after consideration, such reductions are not made based on these subdivisions, it will encourage employers to challenge the penalty. The increase in appeals will have a financial impact on the Division, and will delay even further justice for injured workers. For the above reasons we urge you to reconsider and withdraw subdivisions 13902(b)2) . . . from the proposed regulation.	
California Chamber of Commerce	This section provides that the Labor Commissioner may consider the size of the employer to determine the appropriate penalty amount. While we appreciate this factor as it relates to small businesses that may not have a dedicated human resources employee or access to counsel, there is concern that this factor could be unfairly applied against large businesses. There is a general presumption that large businesses have the means to hire more human resources employees and/or legal counsel and legal violations are therefore inexcusable. This is not always the case. Personnel decisions are made by individual supervisors daily and require considerable discretion. Alleged retaliatory acts are fact-specific and often involve a sequence of acts or personnel decisions that span a large period of time. Even if it is true that a larger employer has trained human resources employees or legal counsel, a large	In light of this comment and others, the Labor Commissioner has deleted the subdivision because employer size would not be reliably related to the size of an appropriate penalty in retaliation cases, generally.

	employer that commits only a technical violation of one of the statutes or that has a supervisor make what they genuinely believe is the correct personnel decision should not be penalized solely because of the size of the company. This is one of the reasons the first factor, the seriousness of the violation, should be identified as the most important factor in the Labor Commissioner's or court's decision in the penalty amount that should be imposed.	
Bet Tzedek Legal Services, on behalf of: Asian Americans Advancing Justice – Asian Law Caucus, California Immigrant Policy Center, California Rural Legal Assistance Foundation, Inc., Center for Workers' Rights, Centro Legal de la Raza, Employee Rights Center, Graton Day Labor Center, La Raza Centro Legal, Legal Aid at Work, Legal Aid of Marin, The Maintenance Cooperation Trust Fund, National	Nonetheless, we have concerns about Section 13902(b)(2), which would allow the Labor Commissioner or court to consider an employer's size (specifically the number of employees at the time of the violation) as a potential mitigating factor to reduce the penalty from the $10,000 per employee per violation. We do not believe that this subsection is necessary and urge the Division to eliminate it from the final regulations. We are not aware of any retaliation statutes that carve out from their important protections small employers or employers that do not have a human resources department. Furthermore, purported ignorance of the law is not an excuse for violating the law, which all California employers have a responsibility to be aware of and comply with. As an example, a client of Bet Tzedek Legal Services in Los Angeles worked for a small construction company whose owner terminated him and threatened to report him to immigration authorities when the employee asked for his wages that were late. The Retaliation Complaint Investigation unit of the Labor Commissioner investigated the complaint and issued a determination in the employee's favor for two separate $10,000 civil penalties under Labor Code section 98.6 for each act of retaliation, the termination and the immigration threat, as well as a $10,000 civil penalty payable to the Labor Commissioner under Labor Code	In light of this comment and others, the Labor Commissioner adopts the recommended modification. This subdivision was removed because employer size would not be reliably related to the size of an appropriate penalty in retaliation cases, generally.

Employment Law Project, Santa Clara County Wage Theft Coalition, Warehouse Worker Resource Center, Women's Employment Rights Clinic – Golden Gate University, Worksafe	section 1102.5(f). Under the proposed Section 13902(b)(2), the employer could have argued for a reduction in the penalties simply because it has a small number of employees, a fact that is irrelevant to its compliance with the law and the seriousness of its violations.	
Section 13902(b)(3)		
California Rural Legal Assistance, Inc.	Similarly, we are concerned that application of subdivision 13902(3) may be a get out of penalty almost free card for employers. Retaliation is not the kind of violation that can be considered inadvertent, committed in good faith, or based on a misunderstanding of the law. A commitment to future compliance should be a condition imposed as part of the penalty process. Likewise, reinstatement is a remedy expressly provided for in Labor Code § 98.6(b)(1). Why should a penalty be reduced because an employer complied with his or her legal obligation -- not to mention cut-off back pay liability -- by reinstating the victim within 18 months? In fact, for many workers who have suffered from retaliation an unconditional offer of reinstatement is of no value, and employers know it. Most will have found other work within 18 months and would not risk going back to a work environment where they are labeled a complainer. We appreciate that these are merely considerations to be applied, and not mandatory reductions. However, we anticipate that if, after consideration, such reductions are not made based on these	The Labor Commissioner declines to make the suggested modification, but in light of this comment, this subsection was clarified to provide further guidance on what the Labor Commissioner or a court may consider. Reinstatement is certainly not available in many circumstances, but it is not the only way that an employer can demonstrate commitment to future compliance. Other proactive actions by an employer, like a commitment to change a relevant policy during the course of an investigation, may independently justify the reduction of a penalty. The Labor Commissioner certainly imposes compliance as a part of its investigative process, but encouraging employers to be proactive and voluntarily come into compliance during an investigation also upholds

	subdivisions, it will encourage employers to challenge the penalty. The increase in appeals will have a financial impact on the Division, and will delay even further justice for injured workers. For the above reasons we urge you to reconsider and withdraw . . . [subdivision 13902](b)(3) from the proposed regulation.	and furthers important public policy considerations underlying the statutory objective. In cases where reinstatement is offered, the Labor Commissioner does not anticipate that it will function as a free pass for employers. Case law recognizes that an offer of reinstatement is not appropriate if the employer/employee relationship has broken down and is no longer viable. Both the Labor Commissioner and a court would consider whether reinstatement is appropriate before limiting back pay or reducing a penalty award; employers cannot attempt to limit their liability merely by making an offer of reinstatement. In regards to whether this factor will encourage appeals, employers already raise similar arguments throughout the Labor Commissioner's process; the arguments would arise regardless of the regulations, and having the regulations in place provides clarity.
California Chamber of Commerce	This section provides that the Labor Commissioner may consider an employer's commitment to future compliance when determining the appropriate penalty amount. While we appreciate that an employer's commitment to future compliance should be considered in imposing penalties, we have concerns about the application of this factor. One of the examples of future compliance	In light of this comment and others, the Labor Commissioner has modified this factor to provide greater clarity as to what the Labor Commissioner or a court may consider. An employer does not have to be placed in a "Hobson's Choice." While an employer may continue to

	provided in the ISOR is "evidence that an employer immediately reinstated the affected employee or immediately revised their employment policies to comply with the retaliation laws." These examples imply that this factor can only be applied where an employer took some kind of immediate action before the Labor Commissioner completes their investigation and determines a statutory violation has occurred or a court reaches a conclusion in a case. An employer who has a good faith belief that they did not violate the law should not be punished for defending itself against a retaliation claim. In fact, forcing an employer to take one of these actions before the investigation is complete to avoid a penalty would place the employer in a Hobson's choice: (1) abandon its defense of what the employer believes in good faith to be a valid personnel action; or (2) continue its defense and risk being assessed the full penalty, despite the seriousness of the allegation, simply because it did not take "immediate" action. This is another reason why the first factor, the seriousness of the violation, should be identified as the most important and the Labor Commissioner or the court should consider whether an employer who disputes a retaliation claim is acting in good faith and that the "immediate" action interpreted as any action implemented after the investigation is complete.	defend itself against a particular claim against a worker, an employer could also commit to taking further actions—like creating policies—that could prevent further misunderstandings or claims and would help demonstrate a commitment to future compliance with the Labor Code. Moreover, an employer who has a true good faith reason for their actions would not be placed in any such dilemma. Whether an employer has a legitimate reason for their actions is considered in the analysis of the underlying retaliation claim, and it would therefore, be considered when weighing the nature and seriousness of the violation.
Section 13903		
California Rural Legal Assistance, Inc.	Likewise, subdivisions 13903 and 13904 provide clarity, consistent with statute and case law, regarding the burden of proof and joint and several liability and we support their being added to Title 8.	The Labor Commissioner appreciates this comment in support of the burden of proof and agrees that it is consistent with both the statute and current case law.
California Chamber of Commerce	For the reasons explained above, the framework of these sections should be rewritten so there is no "default" penalty	The Labor Commissioner declines to adopt the suggested modifications. The

	amount and the Labor Commissioner or court uses specific factors to assess a penalty on a case-by-case basis. Therefore, this provision is unnecessary and should be eliminated.	regulations are intended to provide a framework for considering or exploring the facts to arrive at a deserving penalty, and employers hold the key facts to determining whether a certain penalty is appropriate. Placing the burden of proof on employers ensures that the Labor Commissioner and the courts will be presented with the relevant information and provides a clear process.
Section 13904		
California Rural Legal Assistance, Inc.	Likewise, subdivisions 13903 and 13904 provide clarity, consistent with statute and case law, regarding the burden of proof and joint and several liability and we support their being added to Title 8.	The Labor Commissioner appreciates this comment in support of joint and several liability and agrees that it is consistent with both the statute and current case law.

SUMMARY AND RESPONSE TO ADDITIONAL COMMENTS RECEIVED DURING THE 15-DAY PUBLIC COMMENT PERIOD OF JANUARY 19, 2021 THROUGH FEBRUARY 3, 2021.

Commenter(s)	Comment	DLSE'S Response
Former Section 13902(b)(2)		
Bet Tzedek Legal Services, on behalf of: California Immigrant Policy Center, California Rural Legal Assistance Foundation, Inc., Center for Workers' Rights, Centro Legal de la Raza,	We are pleased to see that the proposed modifications to the regulations addressed our concerns about Section 13902(b)(2). That section would have allowed the Labor Commissioner or court to consider an employer's size (specifically the number of employees at the time of the violation) as a potential mitigating factor to reduce the penalty from the $10,000 per employee per violation. We did not believe that this subsection was necessary, and we agree with the modification to eliminate it from the regulations.	The Labor Commissioner appreciates this comment in support of the proposed modifications.

Employee Rights Center, Graton Day Labor Center, KIWA (Koreatown Immigrant Workers Alliance), La Raza Centro Legal, Legal Aid at Work, Legal Aid of Marin, The Maintenance Cooperation Trust Fund, National Employment Law Project, Santa Clara County Wage Theft Coalition, Women's Employment Rights Clinic-Golden Gate University, Worksafe		
California Chamber of Commerce	The proposed revised regulations delete subsection (b)(2) (employer size) from the list of factors that may be considered by the Labor Commissioner in determining whether the statutory maximum penalty of $10,000.00 is appropriate. As stated in our original comment letter, taking the size of the business into consideration can be beneficial for small businesses in particular. Small businesses are disproportionately affected by California's complex labor and employment laws and accompanying regulations because they do not have the resources to hire human resources personnel and/or legal counsel to	The Labor Commissioner declines to adopt the proposed modification. In light of the California Chamber of Commerce's prior comments and others, an employer's size was removed as a consideration because it would not be reliably tied to the appropriate size of a penalty in retaliation cases, generally. The Labor Commissioner appreciates that small businesses may still face

	advise them on employment-related situations. It is also difficult for these small businesses to afford such a steep penalty as proposed in this regulation. We did have concern that the factor may be unfairly applied against large businesses because there is a general presumption that large businesses have the means to hire more human resources employees and/or legal counsel and legal violations are therefore inexcusable. We therefore recommend that the first factor under subsection (b), the seriousness of the violation, should be identified as the most important factor in the Labor Commissioner's or court's decision in the penalty amount that should be imposed. This way, a small business that makes a technical violation or good faith mistake will have a strong case for a reduced penalty. By simply deleting subsection (b)(2) without emphasizing that the seriousness of the violation should be the most important factor, we fear that the Labor Commissioner or court will not take into account the difficulties small businesses face in implementing California's complex labor and employment laws. Even if the Department does not designate the first factor as the most important, rather than deleting subsection (b)(2), this subsection should remain in the regulation and include language stating that the purpose of this factor is to take into account the struggles of small businesses, as stated in the Department's Initial Statement of Reasons.	struggles, and if it is appropriate, small businesses may continue to offer up size as a relevant factor, since the Labor Commissioner and the courts can consider relevant factors outside of those enumerated in the regulations.
Current Section 13902(b)(2), Former Section 13902(b)(3)		
Bet Tzedek Legal Services, on behalf of: California Immigrant Policy Center,	Furthermore, we support the clarifications to the former Section 13902(b)(3), now listed as 13902(b)(2), which provide examples of potential employer actions evincing a commitment to future compliance that DLSE can consider as mitigation.	The Labor Commissioner appreciates this comment in support of the proposed modifications.

California Rural Legal Assistance Foundation, Inc., Center for Workers' Rights, Centro Legal de la Raza, Employee Rights Center, Graton Day Labor Center, KIWA (Koreatown Immigrant Workers Alliance), La Raza Centro Legal, Legal Aid at Work, Legal Aid of Marin, The Maintenance Cooperation Trust Fund, National Employment Law Project, Santa Clara County Wage Theft Coalition, Women's Employment Rights Clinic-Golden Gate University, Worksafe		

SUMMARY AND RESPONSE TO ADDITIONAL COMMENTS RECEIVED DURING THE 15-DAY PUBLIC COMMENT PERIOD FROM JUNE 9, 2022 TO JUNE 24, 2022.

No comments were received.

LOCAL MANDATE DETERMINATION

The proposed regulations do not impose any mandate on local agencies or school districts.

ALTERNATIVES DETERMINATION

The Labor Commissioner's Office has determined that no alternative it considered or that was otherwise identified and brought to its attention would be (1) more effective in carrying out the purpose for which the action is proposed, (2) as effective and less burdensome to affected private persons than the proposed action, or (3) more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The new sections adopted by the Labor Commissioner's Office are the only regulatory provisions identified that accomplish the goal of effectively implementing guidance on how to assess statutory penalties under certain anti-retaliation provisions that permit the Labor Commissioner to assess penalties "up to $10,000." The facts and evidence adduced through this rulemaking have not presented any other alternative that would more effectively achieve the same result. Except as set forth and discussed in the summary and responses to comments, no other alternatives have been proposed or otherwise brought to the Labor Commissioner's Office's attention.

UPDATE TO INITIAL DISCLOSURES IN NOTICE OF PROPOSED RULEMAKING

Economic cost impacts: During the rulemaking process following the initial Notice of Proposed Rulemaking, there have been no changes in the initial public disclosures. The disclosures made in the Notice of Proposed Rulemaking, pages 4-5, published on September 25, 2020, are incorporated herein and remain the same.