

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

ADOPTING SECTIONS 13900 THROUGH 13904, INCLUSIVE, REGULATING
RETALIATION-RELATED PENALTY PROVISIONS

INITIAL STATEMENT OF REASONS

Background and Summary

The Labor Commissioner enforces the right of employees and applicants for employment in California to exercise their labor rights without retaliation or discrimination. These statutory provisions include, among other things, procedures for investigation, citation, and enforcement of retaliation-related claims under the Labor Code, and assessment of penalties pursuant to Labor Code sections 98.6, 1019.1, 1102.5, and 2814. California Labor Code section 98.8 authorizes the Labor Commissioner, Chief of the Division of Labor Standards Enforcement (“the Labor Commissioner’s Office”), to adopt regulations to implement Chapter 4 (sections 79 through 107), which includes the Labor Commissioner’s retaliation procedures. The proposed regulations interpret and establish criteria to be applied when assessing penalties under retaliation laws within the Labor Commissioner’s jurisdiction.

In 2003, the Legislature added a provision to Labor Code section 1102.5 providing for a “civil penalty not exceeding ten thousand dollars (\$10,000) for each violation of this section” to be assessed against an employer that is a corporation or a limited liability company.

In 2014, the Legislature added a provision to Labor Code section 98.6 providing for “a civil penalty not exceeding ten thousand dollars (\$10,000) per employee for each violation” to be assessed against employers without limitation as to corporate form. This provision was amended in 2015 to specify that the penalty is “awarded to the employee or employees who suffered the violation.”

In 2015, the Legislature added section 2814 to the Labor Code, which prohibits employers from using E-Verify (the federal electronic employment verification system) at a time or in a manner not required under federal law. Section 2814 contains a penalty provision “not to exceed ten thousand dollars (\$10,000) for each violation.”

In 2016, the Legislature added Labor Code section 1019.1, prohibiting certain unlawful employment verification practices and attempts to reverify an incumbent employee by using an unfair immigration-related practice as defined pursuant to Labor Code section 1019. Section 1019.1 contains a penalty provision that “shall not exceed ten thousand dollars (\$10,000) per violation.”

The Labor Commissioner's Office enforces each of these laws through its Retaliation Complaint Investigations Unit (RCI) pursuant to procedures set forth in Labor Code sections 98.7 and 98.74. The Labor Commissioner proposes to exercise her rulemaking authority to adopt regulations that interpret and set forth the factors to be applied when assessing penalties pursuant to retaliation laws under her jurisdiction.

Proposed new sections 13900 through 13904 of Title 8 of the California Code of Regulations are the result of extensive administrative consideration and based on experience the Labor Commissioner's Office has investigating and enforcing retaliation claims within its jurisdiction. The proposed regulations specify the factors to be applied to determine whether a penalty below the statutory maximum (\$10,000) is appropriate, set forth who bears the burden of proof for demonstrating such factors, clarify that a penalty may be assessed for each violation and for each affected employee, and clarify liability where more than one respondent is found liable for the violation. The Labor Commissioner has determined that the proposed regulatory action is necessary for efficient and consistent administration and assessment of penalties for violation of retaliation laws under her jurisdiction. Workers, employers, the Labor Commissioner's Office, the courts, and the public would benefit from clear rules regarding how these penalties are assessed.

Specific Purpose and Necessity of Proposed Action, Gov. Code § 11346.2(b)(1)

Each proposed section is reasonably necessary to carry out the authority and purposes for which that section is proposed, and each addresses an administrative requirement, or other condition or circumstance arising in connection with assessment of penalties. The Labor Commissioner's Office determined that enforcement of the penalty provisions in the manner proposed is consistent with and promotes the objectives underlying both the penalty provisions and the retaliation laws generally, which aim to deter employers from retaliating against employees because they engaged in protected activity.

Section 13900, Scope of regulations

Specific Purpose

The purpose of this proposed section is to define the scope of these regulations. The proposed regulations cover penalty provisions contained in the retaliation laws within the jurisdiction of the Labor Commissioner's Office where such provisions authorize penalties not exceeding ten thousand dollars (\$10,000). The proposed regulations specify that the laws at issue are ones that are enforced through the Labor Commissioner's Office's Retaliation Complaint Investigations Unit (RCI) and the procedures for enforcement are set forth in Labor Code sections 98.7 and 98.74.

Necessity

Defining the scope of the regulations is needed to establish when the regulations apply, establish who enforces the relevant statutes, and provide context. The public, employees, employers, the Labor Commissioner's Office, and the courts would benefit from a clear statement of the scope of the regulations so that they know which statutes are covered by these regulations and who enforces them.

Section 13901, Definitions

Specific Purpose

The purpose of defining “respondent” as used in the proposed regulations is to establish that the term refers not just to the employer who may be subject to a penalty, but may include other individuals or entities who are responsible for the violation who may also be subject to a penalty under some retaliation laws. For example, Labor Code section 1019.1(b)(1) provides that a “person” who violates the statute shall be liable for a penalty.

Necessity

A specific definition of the term “respondent” is necessary to ensure that the meaning is clear and will be interpreted consistently by the public, enforcement agencies, and the courts. This proposed definition is necessary to establish that entities and individuals who may be subject to the penalty provisions are covered by these regulations.

Section 13902, Penalty assessment

Specific Purpose

The purpose of this section is to set forth how a retaliation penalty amount will be assessed.

The purpose of proposed **subsection (a)** is to establish that each violation will generally be subject to the maximum ten thousand dollar (\$10,000) penalty. In addition, this subsection clarifies that a penalty shall be assessed for each violation and for each employee affected. An employer may take multiple adverse actions against an employee who has engaged in protected activity; the Labor Commissioner shall investigate and consider each adverse action. For example, an employer may terminate an employee because he asked to be paid his earned wages. The same employer may also threaten the same employee with deportation or other immigration-related consequences because he asked to be paid his earned wages. The two adverse actions would be considered two separate violations of the retaliation laws.

The purpose of proposed **subsection (b)** is to set forth the factors that the Labor Commissioner’s Office and the court may consider when determining whether a penalty below the statutory maximum is appropriate. The proposed section identifies three such factors, discussed below, and also provides the courts or the Labor Commissioner flexibility to consider any other relevant factors as needed.

The purpose of proposed **subdivision (b)(1)** is to identify that the nature and seriousness of the violation in a particular case is a factor that may weigh in favor of reducing the penalty. For example, employers who violate the retaliation laws due to a technical issue or where the adverse action is minimal may submit evidence of this factor.

The purpose of proposed **subdivision (b)(2)** is to identify that the size of the employer is a factor that may weigh in favor of reducing the penalty. For example, if the employer only employs one employee, that may weigh in favor of reducing the penalty.

The purpose of proposed **subdivision (b)(3)** is to identify that the employer’s commitment to future compliance is a factor that may weigh in favor of reducing the penalty. For example,

evidence that an employer immediately reinstated the affected employee or immediately revised their employment policies to comply with the retaliation laws may weigh in favor of reducing the penalty.

Necessity

Proposed section 13902 is necessary because several retaliation laws that contain penalty provisions not to exceed \$10,000 do not specify how the Labor Commissioner's Office or the courts are to exercise their discretion when assessing penalties. The Labor Commissioner's Office would like to provide notice to the regulated community about how penalties will be assessed. The proposed section balances the need for administrative efficiency and certainty with the need for flexibility when certain circumstances warrant mitigation of a maximum penalty. This provision is necessary to ensure consistent penalty assessments.

Proposed **subsection (a)** makes the maximum \$10,000 penalty the default penalty in recognition of the seriousness of a finding that respondents have violated the retaliation laws within the jurisdiction of the Labor Commissioner's Office. Retaliation against employees because they have engaged in protected activities 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. As a result, it is reasonable to assess the maximum statutory penalty as the default standard.

Proposed **subsection (b)** provides for the exercise of discretion to reduce the penalty when the maximum may be unwarranted and is necessary to identify three factors that may be considered "in addition to any other factors the Labor Commissioner or a court deems relevant." The courts and the Labor Commissioner are provided flexibility in considering other relevant factors because circumstances may vary from case to case. In providing for statutory penalties up to \$10,000, the Legislature contemplated exercise of discretion in assessing the penalty amount, and this provision is necessary to implement such authority. The three factors identified are the most common issues, but some cases may require consideration of additional relevant factors which are necessary to determine a lesser but appropriate penalty amount.

Proposed **subdivision (b)(1)** is needed because the nature and seriousness of the violation in a particular case may vary, with some violations being more or less egregious than others, and thereby warranting a greater or lesser penalty. Employers who violate the retaliation laws by making an immigration-related threat have engaged in egregious conduct that may warrant the full penalty assessment, compared with an employer who took adverse action because of a protected activity due to a technical issue.

Proposed **subdivision (b)(2)** is needed because the size of the employer may weigh in favor of reducing the penalty. Generally, larger employers may have more resources to implement and ensure full compliance with the law, compared with very small employers.

Proposed **subdivision (b)(3)** is needed because evidence of an employer's commitment to future compliance may weigh in favor of reducing the penalty. Evidence that an employer immediately reinstated the affected employee or immediately revised their employment policies to comply with the retaliation laws demonstrates that the employer is taking the retaliation laws seriously, has taken immediate steps to correct the violation, and reduces the possibility of future violations. These actions may weigh in favor of a reduced penalty assessment.

The Labor Commissioner's Office considered other factors to use when exercising its discretion to assess penalties pursuant to retaliation laws under its jurisdiction, such as the assets and liabilities of the respondent or whether the respondent has violated retaliation laws in the past. However, the Labor Commissioner's Office determined that these alternative factors could not be readily evaluated and verified, thus risking delayed remedies to the employees affected.

The Labor Commissioner's Office also considered the alternative not to propose regulations at all, and to evaluate penalty assessment on a case-by-case basis. However, not engaging in rulemaking would leave both workers and employers uncertain about how penalties are to be assessed. The Labor Commissioner's Office determined clear rules are preferable.

The Labor Commissioner's Office believes that the factors set forth in this section while retaining a level of discretion as appropriate according to the circumstances of the case, are necessary to establish a reasonable and equitable method for exercising discretion in the assessment of penalties.

Section 13903, Burden of proof

Specific Purpose

The purpose of section 13903 is to set forth who has the burden of proof to demonstrate factors favoring reduction of the statutory penalty. Specifically, the Labor Commissioner's Office proposes that the burden of proof regarding whether a reduction is warranted rests on the respondent.

Necessity

The proposed provision is needed because it provides guidance to all parties concerning their respective burdens of proof. In the Labor Commissioner Office's enforcement experience, employees lack access to information about the employer's business, the employer's knowledge at the time it took the adverse actions, or its motivations. As a practical matter, it makes sense for respondents to bear the burden of demonstrating any one or more of these factors exist when they seek a reduction in the penalty because they are the ones with access to evidence regarding the circumstances and reasons for their conduct, the size of the employer and why that should weigh in favor of reducing the penalty, and because they control decisions about reinstatement and revisions to employment policies. It would otherwise be difficult as a practical matter for employees or the Labor Commissioner's Office to have access to evidence of these factors. Clear guidance ensures that all parties understand who must come forward with evidence supporting a reduced penalty.

Section 13904, Joint and several liability

Specific Purpose

The purpose of section 13904 is to clarify that if more than one respondent is found liable for a penalty, assessment of a penalty under the retaliation laws is joint and several as to all respondents. Where not all respondents are liable for a penalty, joint and several liability does not apply, and the Labor Commissioner's Office and the court would so indicate. For example, because Labor Code section 1102.5 penalties may be assessed only against corporations and

LLCs, any respondent who is not a corporation or LLC would not be jointly and severally liable for that penalty. If two corporations are found liable for a section 1102.5 penalty, they are jointly and severally liable.

Necessity

The proposal provides guidance to ensure that parties understand respondents are generally jointly and severally liable for penalties. The proposed section clarifies that joint and several liability applies when more than one respondent is found liable for a particular penalty. Absent this clarification, liability for penalties could be misinterpreted.

Anticipated Benefits, Gov. Code § 11346.2(b)(1)

Adopting California Code of Regulations, Title 8, sections 13900 through 13904 would provide benefits for the public, regulated community, workers, the Labor Commissioner's Office and the courts. Employers and other persons who have been found liable for retaliation violations and workers who have been subjected to retaliation will benefit from regulatory standards for civil penalty assessment. Employers and other persons found liable will have clear notice as to the factors that may warrant a reduction below the maximum statutory penalty upon submission of appropriate evidence. Uniform criteria for imposition of civil penalties will improve the welfare of workers by furthering the objective of the anti-retaliation legislation to enhance the protection of employees who are the victims of retaliation and deter unlawful retaliation. Thus, the proposed regulatory action furthers the mission of the Labor Commissioner's Office, which is to ensure a just day's pay to every worker and promote economic justice. In addition, the proposed regulation increases transparency in business and government by setting forth standards for penalty assessment. Finally, the proposed action aids in preventing discrimination, and promotes fairness and social equity.

Economic Impact Assessment, Gov. Code § 11346.2(b)(2)

Because this regulation is not a major regulation, the economic impact assessment required by subdivision (b) of Section 11346.3 is provided below.

Sources Relied Upon, Gov. Code § 11346.2(b)(3)

None.

Reasonable Alternatives Rejected, Gov. Code § 11346.2(b)(4)

Alternative options were discussed in lieu of the proposed, however, the Labor Commissioner has initially determined that no alternatives would be more effective in carrying out the purpose of the proposed regulations, or would be at least as effective or less burdensome on the public, the Labor Commissioner's Office, and the courts.

Evidence Regarding Economic Impact on Business, Gov. Code § 11346.2(b)(5)

The Labor Commissioner's Office has determined that the proposal will not have a significant adverse economic impact on business.

The Creation or Elimination of Jobs Within the State, Gov. Code § 11346.3(b)(1)(A)

The proposed regulations only affect current businesses that are in violation of retaliation laws that are subject to a penalty up to \$10,000 per violation. The proposal will not likely create new jobs as a result of consideration of specified factors to justify a lesser appropriate penalty for an established violation against an employee on a case-by-case basis. The proposal will not likely eliminate existing jobs but may avoid elimination of existing jobs by allowing the Labor Commissioner or a court to reduce a \$10,000 penalty if the specified factors for reduction are shown to exist in a case. Therefore, the Labor Commissioner's Office does not anticipate the creation or elimination of jobs within the state attributed to this proposal.

The Creation of New Businesses or the Elimination of Existing Businesses Within the State, Gov. Code § 11346.3(b)(1)(B)

The costs and benefits will be only borne by existing businesses that have violated retaliation laws that are subject to a penalty not exceeding \$10,000 per violation. The proposed regulations can only potentially eliminate businesses if the business is often in violation of retaliation laws where a non-reduced penalty of \$10,000 is assessed against the business. Since this proposal allows for mitigation of the maximum penalty amount on a case-by-case basis, the Labor Commissioner's Office does not anticipate that this proposal will create or eliminate businesses within the state.

The Expansion of Businesses Currently Doing Business Within the State, Gov. Code § 11346.3(b)(1)(C)

This proposal allows for mitigation of the maximum penalty amount (\$10,000) on a case-by-case basis if specified factors exist to justify reduction of the penalty amount and only affects businesses found to be in violation of retaliation laws. The Labor Commissioner's Office does not anticipate expansion of businesses currently doing business within the state attributed to this proposal.

The Benefits of the Regulation to the Health and Welfare of California Residents, Worker Safety, and the State's Environment, Gov. Code § 11346.3(b)(1)(D)

Adopting the proposed regulation would provide benefits for the public, regulated community, workers, the Labor Commissioner's Office and the courts. Employers and other persons who have been found liable for retaliation violations and workers who have been subjected to retaliation will benefit from regulatory standards for civil penalty assessment. Employers and other persons found liable will have clear notice as to the factors that may warrant a reduction below the maximum statutory penalty upon submission of appropriate evidence. Uniform criteria for imposition of civil penalties will improve the welfare of workers by furthering the objective of the anti-retaliation legislation to enhance the protection of employees who are the victims of retaliation and deter unlawful retaliation. Thus, the proposed regulatory action furthers the mission of the Labor Commissioner's Office, which is to ensure a just day's pay to every worker and promote economic justice. In addition, the proposed regulation increases

transparency in business and government by setting forth standards for penalty assessment. Finally, the proposed action aids in preventing discrimination, and promotes fairness and social equity.