

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

**NOTICE OF PROPOSED RULEMAKING**

**Subject Matter of Regulations: Assessment of Civil Penalties for Violations of Retaliation  
Laws Within the Jurisdiction of the Labor Commissioner**

**TITLE 8, CALIFORNIA CODE OF REGULATIONS  
Sections 13900 — 13904**

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 98.8 proposes to adopt sections 13900 through 13904 within proposed Subchapter 16 of existing Chapter 6, of Division 1, of Title 8, California Code of Regulations, relating to Assessment of Civil Penalties for Violations of Retaliation Laws Within the Jurisdiction of the Labor Commissioner.

**PROPOSED REGULATORY ACTION**

The Labor Commissioner proposes to adopt Subchapter 16 of Chapter 6 of Division 1, consisting of the following:

Section 13900	Scope of Regulations
Section 13901	Definitions
Section 13902	Penalty Assessment
Section 13903	Burden of Proof
Section 13904	Joint and Several Liability

**TIME AND PLACE OF PUBLIC HEARING**

The Labor Commissioner's Office has not scheduled a public hearing on this proposed action. However, the Labor Commissioner's Office will hold a hearing if it receives a written request for a public hearing from any interested person, or their authorized representative, no later than 15 days before the close of the written comment period. A written request for a hearing must be sent to the same email address or mailing address listed below for the Contact Person for nonsubstantive inquiries.

**WRITTEN COMMENT PERIOD**

Any interested person, or their authorized representative, may submit written comments relevant to the proposed regulatory action to the Department of Industrial Relations, Division of Labor Standards Enforcement. **The written comment period closes at midnight on Tuesday, November 10, 2020.** The Labor Commissioner will consider only comments received at the

Division by that time. Equal weight will be accorded to comments presented at the hearing, if a hearing is requested, and to other written comments received by the Division by that date.

Submit written comments concerning the proposed regulations prior to the close of the public comment period 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

Written comments may also be sent electronically (via e-mail) using the following e-mail address: DLSERegulations@dir.ca.gov. Written comments may be submitted by facsimile transmission (FAX), addressed to the above-named contact person at (916) 263-2920.

### **AUTHORITY AND REFERENCE**

The Labor Commissioner's Office is undertaking this regulatory action pursuant to the authority in Labor Code sections 98.8.

Reference is to Labor Code sections 98.6, 98.7, 98.74, 1019.1, 1102.5, and 2814.

### **INFORMATIVE DIGEST AND POLICY STATEMENT OVERVIEW**

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 Labor Code sections 98.7 and 98.74, and assessment of penalties pursuant to anti-retaliation provisions in Labor Code sections 98.6, 1019.1, 1102.5, and 2814.

Existing law provides for the Labor Commissioner to enforce the provisions of the Labor Code and all labor laws of the state the enforcement of which is not specifically vested in any other officer, board or commission. Existing law further requires the Labor Commissioner to investigate and prosecute allegations of discharge or other discrimination in violation of any law under the jurisdiction of the Labor Commissioner. Existing law authorizes the Labor Commissioner to adopt regulations to implement the provisions of the Labor Code that include the Labor Commissioner's retaliation complaint, investigation, and enforcement procedures.

Existing law provides that, in addition to other remedies available, an employer who violates Labor Code section 98.6 is liable for a civil penalty not exceeding \$10,000 per employee for each violation of that section, payable to the employee or employees who suffered the violation.

Existing law provides that, in addition to other remedies available, an employer that is a corporation or limited liability company and that violates Labor Code section 1102.5 is liable for a civil penalty not exceeding \$10,000 per employee for each violation of that section.

Existing law provides that, in addition to other remedies available, any person that violates section 1019.1 to the Labor Code is liable for a civil penalty not exceeding \$10,000 for each violation.

Existing law provides that, in addition to other remedies available, an employer that violates section 2814 to the Labor Code is liable for a civil penalty not exceeding \$10,000 for each violation.

The regulatory proposal provides standards for assessment of civil penalties for violations of retaliation laws within the Labor Commissioner's jurisdiction. The proposal defines a "respondent" against whom a penalty may be assessed. In addition, the proposal establishes that the maximum statutory penalty for conduct that gives rise to a retaliation violation is the standard penalty amount that will be assessed absent submission of evidence supporting assessment of a penalty below this amount by the party seeking to reduce the penalty. The proposal further provides several factors that the Labor Commissioner or a court may consider, in addition to any other relevant factors, which may warrant a reduction of the standard penalty amount. Finally, the proposal includes a provision that establishes joint and several liability where more than one respondent is found liable for a penalty. This regulatory proposal is necessary for the Labor Commissioner to duly and efficiently administer her statutory mandate to impose and enforce penalties specifically authorized by the retaliation laws within her jurisdiction, including Labor Code sections 98.6, 1102.5, 1019.1 and 2814. This proposal is consistent with the purpose of those statutes as well as that of Labor Code sections 95, 98.7, and 98.74.

#### **OBJECTIVE AND ANTICIPATED BENEFITS OF THE PROPOSED REGULATIONS**

The objective of the regulations is to establish a framework for assessing civil penalties up to a maximum statutory penalty of \$10,000 for violations of the anti-retaliation laws within the Labor Commissioner's jurisdiction. This proposal will allow the Labor Commissioner's Office to effectively administer enforcement of the civil penalty provisions contained in Labor Code sections 98.6, 1102.5, 1019.1 and 2814 in accordance with its statutory responsibilities and obligations. Establishing standardized information regarding assessment of civil penalties will inform the public of the agency's standard procedures and provide for consistent administration of the provisions by the agency.

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' 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.

## **DETERMINATION OF INCONSISTENCY AND/OR INCOMPATIBILITY WITH EXISTING STATE REGULATIONS**

The Labor Commissioner's Office has determined that this proposed regulation is not inconsistent or incompatible with existing statutes or other regulations. After conducting a review for any regulations that would relate to or affect this area, the Labor Commissioner's Office has concluded that these are the only valid regulations to implement the statutory mandates pertaining to civil penalties contained in anti-retaliation laws within the Labor Commissioner's jurisdiction.

### **DISCLOSURES REGARDING THE PROPOSED REGULATORY ACTION**

The Labor Commissioner has made the following initial determinations:

Mandate on local agencies and school districts: None.

Cost or savings to any state agency: None.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code sections 17500 through 17630: None.

Other nondiscretionary cost or savings imposed on local agencies: None.

Cost or savings in federal funding to the state: None.

Direct cost impacts on housing: None.

Cost impacts on a representative private person or business: About \$330 in legal fees to prepare and submit evidence to the Labor Commissioner supporting a lower penalty amount. This reflects an estimate of four hours of work by an attorney at \$82.48 an hour, California's mean hourly wage for attorneys.

Effect on businesses: In a typical year, the Labor Commissioner has 45 cases in which penalties of \$10,000 or more are assessed for retaliation violations under statutes that have a maximum penalty of \$10,000. There are often multiple violations in a case, such that there are approximately 100 instances per year where a \$10,000 penalty is assessed for a retaliation violation. If half of those instances are sought to be reduced, then 50 businesses a year will each incur a cost of about \$330; over ten years, this amounts to a total of \$165,000.

Effect on small businesses: The proposed regulations may affect small business.

Significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states: None.

#### Summary Results of the Economic Impact Analysis/Assessment

The Labor Commissioner's Office concludes that it is (1) unlikely that the proposal will create any jobs within the State of California; (2) unlikely that the proposal will eliminate any jobs within the

State of California; (3) unlikely that the proposal will create any new businesses within the State of California; (4) unlikely that the proposal will eliminate any existing businesses within the State of California; (5) unlikely that the proposal would cause the expansion of businesses currently doing business within the State of California; and (6) likely that the proposal will provide clarity to businesses found liable for civil penalties for violations of retaliation laws. Accordingly, the Labor Commissioner has determined that the proposed regulatory action will not have a significant impact on business.

Benefits of the Proposed Action: 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.

### **CONSIDERATION OF ALTERNATIVES**

In accordance with Government Code section 11346.5(a)(13), the Labor Commissioner must determine that no reasonable alternative considered or that has otherwise been identified and brought to the Labor Commissioner's attention would be more effective in carrying out the purpose for which the actions are proposed, or would be as effective and less burdensome to affected private persons than the proposed actions, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The Labor Commissioner has initially determined that no alternatives would be more effective in carrying out the purpose that underlies the proposed regulatory action, or would be at least as effective or less burdensome on the regulated public (workers subjected to unlawful retaliation and employers and other persons found liable for retaliation violations).

The Labor Commissioner invites interested persons to present reasonable alternatives to the proposed regulations at the scheduled hearing or during the written comment period.

### **PUBLIC DISCUSSIONS OF PROPOSED REGULATIONS**

Prior to proposing to adopt these regulations, the Labor Commissioner's Office carefully considered its significant experience in enforcing the retaliation laws within its jurisdiction and the regular communication it has had with the regulated community regarding assessment of civil penalties.

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**AVAILABILITY OF INITIAL STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS, RULEMAKING FILE AND DOCUMENTS SUPPORTING THE RULEMAKING FILE / INTERNET ACCESS**

An Initial Statement of Reasons and the text of the proposed regulations in plain English have been prepared and are available from the contact person named in this notice. The entire rulemaking file will be made available for inspection and copying at the address indicated below.

As of the date of this Notice, the rulemaking file consists of the Notice, the Initial Statement of Reasons, and the proposed text of the regulations.

In addition, the Notice, Initial Statement of Reasons, and proposed text of regulations may be accessed and downloaded from the Department of Industrial Relations' website at <https://www.dir.ca.gov/Rulemaking/DIRProposed.html>. To access them, please scroll to Division of Labor Standards Enforcement (DLSE), and click on the link for Assessment of Civil Penalties for Violations of Retaliation Laws Within the Jurisdiction of the Labor Commissioner.

Any interested person may inspect a copy or direct questions about the proposed regulations and any supplemental information contained in the rulemaking file. The rulemaking file will be available for inspection at the Division of Labor Standards Enforcement, 2031 Howe Avenue, Suite 100, Sacramento, California, between 9:00 a.m. and 4:30 p.m., Monday through Friday, unless the state office is closed for a state holiday. Copies of the proposed regulations, initial statement of reasons and any information contained in the rulemaking file may be requested in writing to the contact person.

**CONTACT PERSON**

Nonsubstantive inquiries concerning this action, such as requests to be added to the mailing list for rulemaking notices, requests for copies of the text of the proposed regulations, the Initial Statement of Reasons, and any supplemental information contained in the rulemaking file may be requested in writing at the same address. The contact person is:

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  
E-mail: [jstevens@dir.ca.gov](mailto:jstevens@dir.ca.gov)

The telephone number of the contact person is (916) 263-1563.

**CONTACT PERSON FOR SUBSTANTIVE QUESTIONS**

In the event the contact person is unavailable, or to obtain responses to questions regarding the substance of the proposed regulations, inquiries should be directed to the following backup contact person:

Dorothy Chang, Staff Attorney  
Department of Industrial Relations  
Division of Labor Standards Enforcement, Legal Unit  
320 W. Fourth Street, Suite 600  
Los Angeles, CA 90013  
E-mail: [dchang@dir.ca.gov](mailto:dchang@dir.ca.gov)

The telephone number of the backup contact person is (213) 576-7722.

#### **AVAILABILITY OF CHANGES FOLLOWING PUBLIC COMMENT**

If the Labor Commissioner makes changes to the proposed regulations as a result of the public comment received, or as a result of any public hearing held if requested, the modified text with changes clearly indicated will be made available for public comment for at least 15 days prior to the date on which the regulations are adopted.

#### **AVAILABILITY OF THE FINAL STATEMENT OF REASONS**

Upon its completion, the Final Statement of Reasons will be available and copies may be requested from the contact person named in this notice or may be accessed on the Department of Industrial Relations' website at [www.dir.ca.gov/Rulemaking/DIRProposed.html](http://www.dir.ca.gov/Rulemaking/DIRProposed.html).

#### **AUTOMATIC MAILING**

A copy of this Notice, the Initial Statement of Reasons, and proposed text of regulations will automatically be sent to those interested persons on the Labor Commissioner's mailing list.

If adopted, the regulations as amended will appear in Title 8, California Code of Regulations, commencing with section 13900. The text of the final regulations will also be available through the website of the Office of Administrative Law at [www.oal.ca.gov](http://www.oal.ca.gov).