

**PROPOSED REGULATIONS OF  
THE DEPARTMENT OF INDUSTRIAL RELATIONS  
TITLE 8, CALIFORNIA CODE OF REGULATIONS  
(Article 4, Subchapter 1, Chapter 3.2, Division 1, Section 336)**

The Division of Occupational Safety and Health (“the Division”), acting on behalf of the Department of Industrial Relations, is seeking to amend Section 336 of Title 8 of the California Code of Regulations (“Title 8”) as a “file and print” rulemaking. For the reasons set forth below, the Division also requests an expedited review of this proposed rulemaking.

**I. BACKGROUND TO THE PROPOSED RULEMAKING**

The Division issues citations to employers for violations of Title 8. (Lab. Code § 6317.) Relevant to this discussion, the Division may classify citations as either “Regulatory”, “General”, “Serious”, “Willful” or “Repeat”. (8 C.C.R. § 334.) The Division may also assess civil penalties attendant to the citations it issues to employers. (Lab. Code § 6317.) The Division calculates the civil penalties according to the Director’s Proposed Penalty Procedure, codified in Title 8 at Sections 333 through 336.1. The Proposed Penalty Procedure is based on the statutory minimums and maximums set forth in the Labor Code. (See, e.g., Lab. Code § 6423, *et seq.*) In its turn, the Legislature is guided in determining statutory civil penalty amounts by the federal OSHA penalty structure.<sup>1</sup>

Effective June 27, 2017, the Legislature enacted Senate Bill 96 as part of the budget bill to make the Division’s civil penalties consistent with changes in federal OSHA’s civil penalty structure. SB 96 increased the maximum civil penalties that the Division is authorized to propose for Title 8 violations classified as Regulatory, General, or Repeat. The bill also increased both the maximum and the minimum civil penalty for Willful violations. Finally, and most relevant to this proposed rulemaking, SB 96 amended the Labor Code to require the Director to increase specified penalties on January 1 of 2018, and each year thereafter, based on percentage increases in the Consumer Price Index for All Urban Consumers.

SB 96 made the following specific changes to the Labor Code sections relevant to this proposed rulemaking:

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<sup>1</sup> Since California’s occupational safety and health state plan is required to be “at least as effective as” the federal OSHA program (29 U.S.C. § 667; Lab. Code § 50.7,) it follows that California’s penalty structure must be at least equivalent to federal OSHA’s.

1. SB 96 amended Labor Code sections 6427(a) and 6431(a) to increase the maximum civil penalty for non-Serious violations (i.e., General and Regulatory violations, including violations of posting and recordkeeping requirements) from \$7,000 to \$12,471. In addition, the bill added new Subsection 6427(b) to require that the maximum penalty for non-Serious violations be increased annually based on the percentage increase in the Consumer Price Index for All Urban Consumers (“the CPI-U”). Section 6427 now reads:

(a) Any employer who violates any occupational safety or health standard, order, or special order, or Section 25910 of the Health and Safety Code, and the violation is specifically determined not to be of a serious nature, may be assessed a civil penalty of up to twelve thousand four hundred seventy-one dollars (\$12,471) for each violation.

(b) Commencing on January 1, 2018, and each January 1 thereafter, the maximum penalty amount specified in this section shall be increased based on the percentage increase in the Consumer Price Index for All Urban Consumers (CPI-U), not seasonally adjusted, for the month of October immediately preceding the date of the adjustment, as compared to the prior year’s October CPI-U. Any regulation issued pursuant to this section increasing penalty amounts based on the annual increase in the CPI-U shall be exempt from the rulemaking provisions of the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code), except that the regulation shall be filed with the Office of Administrative Law for publication in the California Code of Regulations. Any penalty shall be calculated using the penalty amounts in effect during the calendar year in which the citation was issued.

Section 6431 now reads:

(a) Any employer who violates any of the posting or recordkeeping requirements as prescribed by regulations adopted pursuant to Sections 6408 and 6410, or who fails to post any notice required by Section 3550, shall be assessed a civil penalty of up to twelve thousand four hundred seventy-one dollars (\$12,471) for each violation.

(b) Commencing on January 1, 2018, and each January 1 thereafter, the maximum penalty amount specified in this section shall be increased based on the percentage increase in the Consumer Price Index for All Urban Consumers (CPI-U), not seasonally adjusted, for the month of October immediately preceding the date of the adjustment, as compared to the prior year’s October CPI-U. Any regulation issued pursuant to this section increasing maximum penalty amounts based on the annual increase in the CPI-U shall be exempt from the rulemaking provisions of the Administrative

Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code), except that the regulation shall be filed with the Office of Administrative Law for publication in the California Code of Regulations. Any penalty shall be calculated using the penalty amounts in effect during the calendar year in which the citation was issued.

2. SB 96 amended Labor Code section 6429(a) to increase the maximum civil penalty for a Willful or Repeat violation from \$70,000 to \$124,709, and to increase the minimum penalty for a willful violation from \$5,000 to \$8,908. In addition, the bill added new Subsection 6429(a)(2) to require that the minimum penalty for Willful violations, and the maximum penalty for Willful and Repeat violations be increased annually based on the percentage increase in the CPI-U. Section 6429(a) now reads:

(a)(1) Any employer who willfully or repeatedly violates any occupational safety or health standard, order, or special order, or Section 25910 of the Health and Safety Code, may be assessed a civil penalty of not more than one hundred twenty-four thousand seven hundred nine dollars (\$124,709) for each violation, but in no case less than eight thousand nine hundred eight dollars (\$8,908) for each willful violation.

(a)(2) Commencing on January 1, 2018, and each January 1 thereafter, the penalty amounts specified in this section shall be increased based on the percentage increase in the Consumer Price Index for All Urban Consumers (CPI-U), not seasonally adjusted, for the month of October immediately preceding the date of the adjustment, as compared to the prior year's October CPI-U. Any regulation issued pursuant to this section increasing penalty amounts based on the annual increase in the CPI-U shall be exempt from the rulemaking provisions of the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code), except that the regulation shall be filed with the Office of Administrative Law for publication in the California Code of Regulations. Any penalty shall be calculated using the penalty amounts in effect during the calendar year in which the citation was issued.

## **II. PROPOSED AMENDMENTS TO TITLE 8 § 336 TO INCREASE STATUTORY CIVIL PENALTIES TO COMPLY WITH SB 96**

With this file-and-print rulemaking, the Division proposes to amend Section 336 to increase the maximum civil penalties for Regulatory, General and Repeat violations and the minimum and maximum civil penalties for Willful violations to conform to the percentage increase in the CPI-U, not seasonally adjusted, for October of the current year, as compared to the prior year's October CPI-U. The necessary specific regulatory changes are discussed below:

1. First, Section 336(a)(1) currently provides that the Division may assess a civil penalty of up to \$13,047 for Regulatory violations. Section 336(b) states that the maximum civil penalty for a General violation is also \$13,047. Labor Code sections 6427 and 6431 require the Director to increase the maximum civil penalty for Regulatory and General violations based on the percentage increase in the CPI-U for the month of October immediately preceding the date of the adjustment, as compared to the prior year's October CPI-U. The CPI-U published by the Bureau of Labor Statistics for the month of October of the current year is 257.346. The prior year's October CPI-U was 252.885. The percentage increase in CPI-U from October of the prior year to October of the current year was 1.764043%. Therefore, to comply with Labor Code sections 6427 and 6431, the Director must increase the maximum civil penalties set forth in Sections 336(a) and 336(b) by \$230.15 (1.764043% of \$13,047) to \$13,277.15. Following federal Office of Management and Budget guidance for the calculation of parallel federal penalty increases, including federal OSHA penalties, the new penalty amount is rounded to the nearest dollar, resulting in a maximum civil penalty of \$13,277.<sup>2</sup>

2. Second, Section 336(g) currently provides that the civil penalty for a Repeat violation shall not exceed \$130,464. Section 336(h) provides that the penalty for a Willful violation shall not be less than \$9,319 and shall not exceed \$130,464. Labor Code section 6429 requires the Director to increase these minimum and maximum civil penalties based on the percentage increase in the CPI-U for the month of October immediately preceding the date of the adjustment, as compared to the prior year's October CPI-U. The CPI-U published by the Bureau of Labor Statistics for the month of October of the current year is 257.346. The prior year's October CPI-U was 252.885. The percentage increase in CPI-U from October of the prior year to October of the current year was 1.764043%. Therefore, to comply with Labor Code section 6429, the Director must increase the maximum civil penalty set forth in Sections 336(g) for Repeat violations by \$2,301.43 (1.764043% of \$130,464) to \$132,765.43. The Director must also amend Section 336(h) to increase the minimum civil penalty for a Willful violation by \$164.39 (1.764043% of \$9,319) to \$9,483.39, and the maximum civil penalty for a Willful violation by \$2,301.43 (1.764043% of \$130,464) to \$132,765.43. Rounded to the nearest dollar, the minimum penalty for Willful violations is \$9,483, and the maximum penalty for Willful and Repeat violations is \$132,765.

(A copy of the "Actual Text" of the proposed rulemaking showing the changes described above is included with this submission.)

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<sup>2</sup> See memorandum dated December 16, 2016, from Shaun Donovan, Director, Office of Management and Budget, to Heads of Executive Departments and Agencies regarding "Implementation of the 2017 annual adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Improvements Act of 2015," pages two and three.

### **III. AUTHORITY FOR A “FILE AND PRINT” RULEMAKING**

Labor Code sections 6427(b) and 6429(a)(2) both authorize the Director to effect the annual increases to the minimum and maximum civil penalties discussed above through a file and print rulemaking. Both sections contain the following language:

Any regulation issued pursuant to this section increasing penalty amounts based on the annual increase in the CPI-U shall be exempt from the rulemaking provisions of the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code), except that the regulation shall be filed with the Office of Administrative Law for publication in the California Code of Regulations.

Accordingly, the Division proposes to promulgate the amendments shown on the “Actual Text” submitted as part of this proposed rulemaking as a “file and print” rulemaking, and requests that the Office of Administrative Law forward it to the Secretary of State for publication.

### **IV. REQUEST AND JUSTIFICATION FOR EXPEDITED REVIEW**

The Division requests that the Office of Administrative Law conduct an expedited review of this proposed rulemaking, because the Labor Code sections cited above require that the proposed annual civil penalty increases be in effect by January 1 of each year.

The Division is aware that Government Code section 11349.3 grants the Office of Administrative Law 30 working days to review proposed regulations. However, this request for expedited review is not based on any delay on the part of the Division in proposing the increases, but rather on the fact that the Bureau of Labor Statistics first published the CPI-U for October 2019) on November 13, 2019. Since the proposed civil penalty increases are linked to increases in the CPI-U, the Division was unable to calculate the proposed increases prior to that publication date. Consequently, in order to comply with the mandate that the civil penalty increases be in effect by January 1, an expedited review is required.