

AMENDED IN ASSEMBLY JULY 1, 2011

AMENDED IN SENATE MAY 31, 2011

AMENDED IN SENATE MAY 3, 2011

AMENDED IN SENATE MARCH 24, 2011

SENATE BILL

No. 829

Introduced by Senator DeSaulnier

February 18, 2011

An act to amend Sections 148.5, 148.6, 148.8, 6309, 6317, 6600, 6601, 6601.5, 6602, 6603, 6610, 6625, and 6630 of, to add Sections 6319.6, 6603.1, 6603.2, and 6603.3 to, and to repeal Section 149.5 of, the Labor Code, relating to employment safety.

LEGISLATIVE COUNSEL'S DIGEST

SB 829, as amended, DeSaulnier. Division of Occupational Safety and Health: Occupational Safety and Health Appeals Board.

Existing law establishes the Division of Occupational Safety and Health in the Department of Industrial Relations to enforce employment safety laws. Existing law authorizes the division to conduct hearings, inspections, and investigations regarding alleged violations of employment safety laws and to issue citations to employers. Existing law establishes the Occupational Safety and Health Appeals Board in the department and prescribes procedures for the appeals board to hear and decide employer appeals of the division's enforcement actions.

This bill would revise and recast various provisions regarding citations issued by the department, the persons or entities who are authorized to participate as a party in an appeal before the appeals board, and the procedures that govern the appeals board in hearing and deciding

appeals. The bill also would make other related clarifying and conforming changes.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 148.5 of the Labor Code is amended to
2 read:

3 148.5. The appeals board, in adjudicating appeals, shall liberally
4 construe the provisions of Division 5 (commencing with Section
5 6300), as well as the standards and orders adopted by the Division
6 of Occupational Safety and Health or the department pursuant to
7 that division, and the standards and orders adopted by the
8 Occupational Safety and Health Standards Board pursuant to
9 Chapter 6 (commencing with Section 140) in order to ~~ensure~~
10 *promote* safe and healthy working conditions for the working men
11 and women of this state. A decision of the appeals board is final,
12 except for any rehearing or judicial review as permitted by Chapter
13 7 (commencing with Section 6600) of Part 1 of Division 5.

14 SEC. 2. Section 148.6 of the Labor Code is amended to read:

15 148.6. A decision of the appeals board is binding on the director
16 and the Division of Occupational Safety and Health with respect
17 to the parties involved in the particular appeal. ~~The director, a~~
18 ~~party, and any affected person~~ *director and a party* may seek
19 judicial review of an appeals board decision irrespective of whether
20 or not he or she appeared or participated in the appeal to the appeals
21 board or its hearing officer. *An affected person may seek judicial*
22 *review of a final decision of the appeals board, but if the affected*
23 *person did not participate in an appeal to the appeals board or*
24 *its hearing officer, the affected person may seek judicial review if*
25 *he or she seeks to enforce the right of the public to safe and healthy*
26 *working conditions on behalf of working men and women in the*
27 *state and the issues that form the basis of the affected person's*
28 *petition for writ were considered by the appeals board. Nothing*
29 *in this section is intended to eliminate or limit any other exceptions*
30 *to any requirement under law that administrative remedies be*
31 *exhausted before judicial action is sought.*

32 SEC. 3. Section 148.8 of the Labor Code is amended to read:

1 148.8. The appeals board and its duly authorized representatives
2 in the performance of its duties has the powers of a head of a
3 department as set forth in Article 2 (commencing with Section
4 11180) of Chapter 2 of Part 1 of Division 3 of Title 2 of the
5 Government Code, except for Section 11185 of the Government
6 Code. In adjudicating appeals, the appeals board is subject to and
7 shall apply—~~the~~ *those* rules and regulations adopted by the
8 department for the purpose of assisting in the enforcement of the
9 provisions of this code regarding occupational safety and health.

10 SEC. 4. Section 149.5 of the Labor Code is repealed.

11 SEC. 5. Section 6309 of the Labor Code is amended to read:

12 6309. (a) If the division learns or has reason to believe that an
13 employment or place of employment is not safe or is injurious to
14 the welfare of an employee, it may, on its own motion, or upon
15 complaint, summarily investigate the same with or without notice
16 or hearings. However, if the division receives a complaint from
17 (1) an employee, (2) an employee's representative, including, but
18 not limited to, an attorney, a family member, a union representative,
19 regardless of whether the representative's union has a collective
20 bargaining agreement with the employer, or a community,
21 employee, or legal organization, (3) a health or safety professional,
22 (4) a government agency representative, or (5) an employer of an
23 employee directly involved in an unsafe place of employment, that
24 the employment or place of employment is not safe, it shall, with
25 or without notice or hearing, summarily investigate the complaint
26 as soon as possible, but not later than three working days after
27 receipt of a complaint charging a serious violation, and not later
28 than 14 calendar days after receipt of a complaint charging a
29 nonserious violation. The division may investigate and conduct
30 an onsite inspection of a serious violation charged in a complaint
31 from a source other than those described in (1) to (5), inclusive,
32 of this subdivision before investigating any nonserious violation.
33 The division shall attempt to determine the period of time in the
34 future that the complainant believes the unsafe condition may
35 continue to exist, and shall allocate inspection resources so as to
36 respond first to those situations in which time is of the essence.
37 For purposes of this section, a complaint is deemed to allege a
38 serious violation if the division determines that the complaint
39 charges that there is a substantial probability that death or serious
40 physical harm could result from a condition which exists, or from

1 one or more practices, means, methods, operations, or processes
2 which have been adopted or are in use in a place of employment.
3 When a complaint charging a serious violation is received from a
4 state or local prosecutor, or a local law enforcement agency, the
5 division shall summarily investigate the employment or place of
6 employment within 24 hours of receipt of the complaint. All other
7 complaints are deemed to allege nonserious violations. The division
8 may enter and serve any necessary order relative thereto. The
9 division is not required to respond to a complaint within this period
10 where, from the facts stated in the complaint, it determines that
11 the complaint is intended to willfully harass an employer or is
12 without any reasonable basis.

13 (b) The division shall keep complete and accurate records of
14 all complaints, whether verbal or written, and shall inform the
15 complainant, whenever his or her identity is known, of any action
16 taken by the division in regard to the subject matter of the
17 complaint, and the reasons for the action, within 14 calendar days
18 of taking any action. The records of the division shall include the
19 dates on which any action was taken on the complaint, or the
20 reasons for not taking any action on the complaint. The division
21 shall, pursuant to authorized regulations, conduct an informal
22 review of any refusal by a representative of the division to issue
23 a citation with respect to an alleged violation. The division shall
24 furnish the employee or the representative of employees requesting
25 the review a written statement of the reasons for the division's
26 final disposition of the case.

27 (c) The name of a person who submits to the division a
28 complaint regarding the unsafe condition of an employment or
29 place of employment shall be kept confidential by the division,
30 unless that person requests otherwise.

31 (d) The division shall annually compile and release on its
32 Internet Web site data pertaining to complaints received and
33 citations issued.

34 (e) The requirements of this section do not relieve the division
35 of its requirement to inspect and ensure that all places of
36 employment are safe and healthful for employees. The division
37 shall maintain the capability to receive and act upon complaints
38 at all times.

39 SEC. 6. Section 6317 of the Labor Code is amended to read:

6317. (a) If, upon inspection or investigation, the division believes that an employer has violated Section 25910 of the Health and Safety Code, Article 4 (commencing with Section 3550) of Chapter 2 of Part 1 of Division 4 of this code, Division 5 (commencing with Section 6300) of this code, or any standard, rule, order, or regulation adopted pursuant to Chapter 6 (commencing with Section 140) of Division 1 of this code, or any standard, rule, order, or regulation established pursuant to this code regarding occupational safety and health, it shall with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the code, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the alleged violation. The period specified for abatement shall not commence running until the date the citation or notice is received by certified mail and the certified mail receipt is signed, or if not signed, the date the return is made to the post office. If the division officially and directly delivers the citation or notice to the employer, the period specified for abatement shall commence running on the date of the delivery.

(b) A “notice” in lieu of citation may be issued with respect to violations found in an inspection or investigation which meet either of the following requirements:

(1) The violations do not have a direct relationship upon the health or safety of an employee.

(2) The violations do not have an immediate relationship to the health or safety of an employee, and are of a general or regulatory nature. A notice in lieu of a citation may be issued only if the employer agrees to correct the violations within a reasonable time, as specified by the division, and agrees not to appeal the finding of the division that the violations exist. A notice issued pursuant to this paragraph shall have the same effect as a citation for purposes of establishing repeat violations or a failure to abate. Every notice shall clearly state the abatement period specified by the division, that the notice may not be appealed, and that the notice has the same effect as a citation for purposes of establishing a repeated violation or a failure to abate. The employer shall indicate agreement to the provisions and conditions of the notice by his or her signature on the notice.

(c) Under no circumstances shall a notice be issued in lieu of a citation if the violations are serious, repeated, willful, or arise from a failure to abate.

(d) The director shall prescribe guidelines for the issuance of these notices.

(e) The division may impose a civil penalty against an employer as specified in Chapter 4 (commencing with Section 6423). A notice in lieu of a citation may not be issued if the number of first instance violations found in the inspection (other than serious, willful, or repeated violations) is 10 or more violations.

(f) No citation or notice shall be issued by the division for a given violation or violations after six months have elapsed since occurrence of the violation, except that a citation may be amended pursuant to Section 6603.2.

(g) The director shall prescribe procedures for the issuance of a citation or notice.

(h) The division shall prepare and maintain records capable of supplying an inspector with previous citations and notices issued to an employer.

SEC. 7. Section 6319.6 is added to the Labor Code, to read:

6319.6. If an employer or employee contests the period of time fixed for correction of a violation classified and cited as serious, willful, repeated serious, or a failure to abate a serious violation, any hearing on that issue shall be conducted as soon as *reasonably* possible and shall take precedence over other hearings conducted by the board.

SEC. 8. Section 6600 of the Labor Code is amended to read:

6600. (a) Any employer served with a citation or notice pursuant to Section 6317, or a notice of proposed penalty under this part, or any other person obligated to the employer as specified in subdivision (b) of Section 6319, may appeal to the appeals board within 15 working days from the receipt of the citation or the notice with respect to violations alleged by the division, abatement periods, amount of proposed penalties, and the reasonableness of the changes required by the division to abate the condition.

~~(b) Whenever a citation has been issued or a notice served pursuant to Section 6308 or 6317, the appeals board shall permit any of the following, within 15 working days of actual notice of the citation or notice, to participate in an appeal and to contest the~~

1 ~~reasonableness of the terms and conditions of the abatement of the~~
2 ~~violation, the characterization of the violation, or both:~~

3 *(b) Any individual or entity described in subdivision (c) may*
4 *submit an appeal to the appeals board, within 15 working days of*
5 *actual notice of a citation or notice pursuant to Section 6308 or*
6 *6317, regarding the period of time fixed in the citation or order*
7 *for abatement.*

8 *(c) The appeals board shall permit any of the following to*
9 *participate as a party in an appeal by the employer pursuant to*
10 *subdivision (a) or to file an appeal pursuant to subdivision (b):*

11 *(1) An employee or his or her representative, as described in*
12 *Section 6309.*

13 *(2) A union that has a collective bargaining agreement with any*
14 *employer that covers the cited employer's place of employment.*

15 *(3) A deceased worker's successor in interest, heir, beneficiary,*
16 *or other representative.*

17 *(e)*

18 *(d) The division is a party to all proceedings before the appeals*
19 *board, whether or not the division has appeared or participated in*
20 *a given proceeding.*

21 SEC. 9. Section 6601 of the Labor Code is amended to read:

22 6601. If, within 15 working days from receipt of the citation
23 or notice of civil penalty issued by the division, the employer fails
24 to notify the appeals board that it intends to contest the citation or
25 notice of proposed penalty, and no notice contesting the ~~terms and~~
26 ~~conditions of abatement, the characterization of any violation, or~~
27 ~~both,~~ *abatement period* is filed by any party described in
28 subdivision (b) of Section 6600 within that time, the citation or
29 notice of proposed penalty shall be deemed a final order of the
30 appeals board and not subject to review by any court or agency.
31 The 15-day period may be extended by the appeals board for good
32 cause.

33 SEC. 10. Section 6601.5 of the Labor Code is amended to read:

34 6601.5. If, within 15 working days from receipt of a special
35 order or action order by the division, the employer fails to notify
36 the appeals board that he or she intends to contest the order, and
37 no notice contesting the ~~terms and conditions of abatement, the~~
38 ~~characterization of any violation, or both,~~ *is filed* *abatement period*
39 *is filed* by any party described in subdivision (b) of Section 6600
40 within that time, the order shall be deemed a final order of the

1 appeals board and not subject to review by any court or agency.
2 The 15-day period may be extended by the appeals board for good
3 cause.

4 SEC. 11. Section 6602 of the Labor Code is amended to read:

5 6602. If an employer notifies the appeals board that he or she
6 intends to contest a citation issued under Section 6317, or notice
7 of proposed penalty issued under Section 6319, or order issued
8 under Section 6308, or if, within 15 working days of the issuance
9 of a citation or order, any employee or representative of an
10 employee files a notice with the division or appeals board alleging
11 ~~that the terms and conditions of abatement are unreasonable or~~
12 ~~that the characterization of any violation is improper, the appeals~~
13 ~~board that the period of time fixed in the citation or order for~~
14 ~~abatement is unreasonable, the appeals board shall afford an~~
15 opportunity for a hearing. The appeals board shall thereafter issue
16 a decision, based on findings of fact, affirming, modifying, or
17 vacating the division's citation or order, and may modify the
18 proposed penalty, if the penalty modification is not in conflict with
19 any other section of this code or regulation of the department, or
20 direct other appropriate relief.

21 SEC. 12. Section 6603 of the Labor Code is amended to read:

22 6603. (a) The rules of practice and procedure adopted by the
23 appeals board shall do all of the following:

24 (1) Be consistent with Article 8 (commencing with Section
25 11435.05) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of, and
26 Sections 11507, 11507.6, 11507.7, 11513, 11514, 11515, and
27 11516 of, the Government Code, and shall provide affected
28 employees or representatives of affected employees an opportunity
29 to participate as parties to a hearing under Section 6602.

30 ~~(2) Ensure that all parties~~ *Provide parties with the opportunity*
31 *to participate fully in any hearing, receive notices, be permitted to*
32 *subpoena witnesses and documents at any time before the*
33 *completion of the hearing, offer evidence, examine and*
34 *cross-examine witnesses, and argue and submit briefs. Parties shall*
35 *also have the right to participate fully in the settlement of a matter*
36 *settlement discussions at the prehearing conference, hearing, or in*
37 *any other appeals board proceedings where settlement may be*
38 *reached.*

39 *(3) Provide for the scheduling of hearings in a manner designed*
40 *to minimize inconvenience to the division and all parties and*

witnesses who are required to attend the hearings, and for the completion of the hearings without significant lapses in time if the hearings are not completed within the scheduled time. The appeals board shall set the initial hearing dates, subject to change upon agreement of the parties within 30 days of the notice of the initial hearing date, and shall not grant subsequent continuances absent good cause.

(b) The superior courts shall have jurisdiction over contempt proceedings, as provided in Article 12 (commencing with Section 11455.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code.

SEC. 13. Section 6603.1 is added to the Labor Code, to read:

6603.1. (a) The Legislature finds and declares that it is the duty of the appeals board to further the purposes of ~~this division, which include ensuring~~ Division 5 (commencing with Section 6300), the standards and orders adopted by the division or the department pursuant to Division 5, and the standards and orders adopted by the Occupational Safety and Health Standards Board pursuant to Chapter 6 (commencing with Section 140 of Division 1), in order to promote safe and healthful working conditions for all working men and women in the state. The appeals board and its administrative law judges shall, in the conduct of hearings, gather evidence through oral testimony and records that ~~the board and its judges determine~~ is best ~~calculated to ascertain the substantial rights of the parties and carry out justly the letter and spirit of this division, make a complete inquiry into the facts as to whether the employer committed the violation or violations alleged in the citation, and ensure that a full hearing record is obtained.~~ calculated to fully ascertain the facts necessary to determine whether the employer committed the violation or violations alleged in the citation or whether the employer has a defense to the allegations. Any party may object to questions propounded or evidence sought by the appeals board or administrative law judge in the same manner and subject to the same standards as if the appeals board or administrative law judge were a party.

(b) It is the intent of the Legislature that hearings held pursuant to this division be conducted in an informal setting that preserves the rights of the parties. In conducting hearings, the appeals board shall permit hearsay and opinion evidence, according it the weight that is appropriate under the circumstances, call and examine a

1 party or any witness, and on its own motion may admit any relevant
2 and material evidence.

3 SEC. 14. Section 6603.2 is added to the Labor Code, to read:

4 6603.2. (a) The appeals board ~~shall~~ *may*, at any time before
5 ~~an appeal is submitted for decision at the close of the hearing,~~
6 ~~regardless of whether the statute of limitations has run, allow the~~
7 ~~division to add or delete a citation or amend a citation or order a~~
8 *decision becomes final, regardless of whether the statute of*
9 *limitations has run, allow the division to add or amend a citation*
10 *or order if the amendment is consistent with the transaction or*
11 *occurrence contained in the original citation or order according*
12 *to proof presented. The appeals board may allow the employer to*
13 *amend, according to proof presented by the employer, the basis*
14 *of its appeal. Leave to amend shall be liberally granted if the factual*
15 *circumstances serving as the basis for the amendments have been*
16 *litigated by the parties.*

17 (b) Each party shall be given notice of the intended amendment
18 and an opportunity to object on the basis of prejudice. If prejudice
19 is shown, the amendment shall not be granted. However, if the
20 prejudice can be remedied by a continuance of the hearing, a
21 continuance for further proceedings shall be granted in lieu of
22 denying the amendment.

23 SEC. 15. Section 6603.3 is added to the Labor Code, to read:

24 6603.3. Whenever a case is within the jurisdiction of the Bureau
25 of Investigations pursuant to Section 6315, *or is being actively*
26 *investigated or prosecuted by a prosecuting attorney with*
27 *jurisdiction over a criminal case involving a citation for which an*
28 *appeal has been filed pursuant to Section 6602,* the appeals board
29 shall continue any ~~hearing proceeding before it~~ upon the written
30 request of the division, employer, or any prosecuting attorney with
31 jurisdiction over ~~a criminal case involving the citation for which~~
32 ~~an appeal has been filed pursuant to Section 6602~~ *the case.* In lieu
33 of a continuance, the appeals board may dismiss the employer's
34 appeal with leave to refile within 15 calendar days of the
35 completion of the criminal case. Completion of the criminal case
36 shall be deemed to occur on the date of a verdict of not guilty or
37 the date of sentencing after a verdict or plea of guilty or no contest.

38 SEC. 16. Section 6610 of the Labor Code is amended to read:

39 6610. (a) Any notice, order, or decision required by this part
40 to be served upon any person either before, during, or after the

1 institution of any proceeding before the appeals board, shall be
2 served in the manner provided by Chapter 5 (commencing with
3 Section 1010) of Title 14 of Part 2 of the Code of Civil Procedure,
4 unless otherwise directed by the appeals board. In the latter event,
5 the document shall be served in accordance with the order or
6 direction of the appeals board. The appeals board may, in the
7 circumstances addressed in the Code of Civil Procedure, order
8 service to be made by publication of notice of time and place of
9 hearing. Where service is ordered to be made by publication, the
10 date of the hearing shall be fixed more than 30 days from the date
11 the application was filed.

12 (b) The employer shall give notice of any appeal filed pursuant
13 to Section 6602 to its employees by posting the docketed appeal
14 form, participation notice, and notice of hearing at or near the site
15 of the alleged violation, or, if that is not practicable, at a
16 conspicuous place where it will be readily observable by employees
17 or at a location where employees report each day. The employer
18 shall provide notice to each union, if any, with which it has a
19 collective bargaining agreement. If the employer is cited as a
20 controlling employer pursuant to paragraph (3) of subdivision (b)
21 of Section 6400, it shall provide notice to the employers at the
22 place of employment on the dates of any alleged violations. If an
23 employee was injured, made ill, or killed as a result of the alleged
24 violation that is being appealed, the employer shall also provide
25 notice to the employee or, if the employee is deceased, the
26 employee's family.

27 SEC. 17. Section 6625 of the Labor Code is amended to read:

28 6625. The filing of a petition for reconsideration shall suspend
29 for a period of 10 days the order or decision affected, insofar as it
30 applies to the parties to the petition, unless otherwise ordered by
31 the appeals board. The appeals board upon the terms and conditions
32 that it by order directs, may stay, suspend, or postpone the order
33 or decision during the pendency of the reconsideration, except as
34 to requirements for abatement ~~set forth in Section 6319.6.~~

35 SEC. 18. Section 6630 of the Labor Code is amended to read:

36 6630. The findings and conclusions of the appeals board on
37 questions of fact are conclusive and final and are not subject to
38 review. Such questions of fact shall include ultimate facts and the
39 findings and conclusions of the appeals board. The appeals board
40 and each party to the action or proceeding before the appeals board,

1 and any person affected as defined in Section 6627, shall have the
2 right to appear in the mandate proceeding. Upon the hearing, the
3 court shall enter judgment either affirming or annulling the order
4 or decision, or the court may remand the case for further
5 proceedings before the appeals board.

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