

AMENDED IN ASSEMBLY MARCH 21, 2013

CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

ASSEMBLY BILL

No. 1138

Introduced by Assembly Member Chau

February 22, 2013

~~An act to amend Section 106 of the Labor Code, relating to employment.~~ *An act to amend Sections 3550, 3551, and 3602 of, and to add Sections 3554, 3555, and 3556 to, the Labor Code, relating to workers' compensation.*

LEGISLATIVE COUNSEL'S DIGEST

AB 1138, as amended, Chau. ~~Joint Enforcement Strike Force on the Underground Economy.~~ *Workers' compensation: notice: records: liability.*

(1) Existing law establishes a workers' compensation system, administered by the Administrative Director of the Division of Workers' Compensation, to compensate an employee for injuries sustained in the course of his or her employment. Existing law establishes the Department of Industrial Relations. Existing law provides for specified procedures to be used in notifying employees regarding workers' compensation benefits and required actions in pursuing a workers' compensation claim.

This bill would require employers to post a notice of covered employees showing the full names of employees covered by the employer's workers' compensation carrier, and updated quarterly, as specified. The employer would also be required to keep separate lists of covered employees, that would include specified identifying information for each covered employee, and make those lists available in written and electronic form, as specified, upon request, to specified

governmental entities and the workers' compensation insurer. The bill would require the employer to retain a copy of each notice and each list for 5 years. Except as provided, failure by an employer to retain or provide copies to specified government agencies of these notices or lists and the absence of the name of any employee from the notices or lists would conclusively establish that the employer did not obtain workers' compensation insurance as required by law. The bill would provide that these lists are not public records subject to California Public Record Act.

(2) Existing law requires every employer required to obtain workers' compensation coverage, except as provided, to give every new employee, either at the time the employee is hired or by the end of the first pay period, a written notice of specified workers' compensation information.

This bill would require every notice required to be given to the employee to contain his or her name and last four digits of the employee's social security number. Every employer would be required to retain a copy for 5 years thereafter, and make it available to specified governmental entities and the insurer upon request. These notices would not be public records subject to California Public Record Act.

This bill would provide that any employer that violates these new notice provisions would be subject to citation and civil penalty by the Labor Commissioner, as provided.

(3) Existing law, except as provided, requires workers' compensation benefits to be the exclusive remedy for workers injured on the job.

This bill would add an exception to the exclusive remedy provision when the compensable injury or illness was suffered during a period that the employee was not listed on the notice of covered employees or the list of covered employees or the employee was not provided with the required written notice of specified workers' compensation information.

(4) Existing constitutional provisions require that a statute that limits the right of access to the writings of public officials and agencies be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

This bill would make legislative findings to that effect.

~~Existing law establishes the Joint Enforcement Strike Force on the Underground Economy to combat tax violations and cash-pay employment. Existing law authorizes the Labor Commissioner to authorize an employee of any of the agencies that participate in the strike force to issue citations and issue and serve a penalty assessment~~

order. Existing law prohibits an employee from issuing citations or penalty assessment orders unless the employee has been specifically designated, authorized, and trained by the Labor Commissioner for this purpose.

This bill would make nonsubstantive changes to that prohibition.

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

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

1 SECTION 1. Section 3550 of the Labor Code is amended to
2 read:

3 3550. (a) (1) Every employer subject to the compensation
4 provisions of this division shall post and keep posted in a
5 conspicuous location frequented by employees, and where the
6 notice may be easily read by employees during the hours of the
7 workday, a notice that states the name of the current compensation
8 insurance carrier of the employer, or ~~when such is the fact,~~ fact
9 that the employer is self-insured, *if applicable*, and who is
10 responsible for claims adjustment.

11 (2) (A) *Every employer that secures payment of compensation*
12 *from an insurer duly authorized to write compensation insurance*
13 *in this state shall post a notice of covered employees that lists only*
14 *the full name of each person that is covered by the policy with the*
15 *compensation insurance carrier identified in paragraph (1),*
16 *immediately adjacent to the notice required in paragraph (1). This*
17 *notice of covered employees shall be updated quarterly, or if there*
18 *are no changes, upon each addition or removal of a covered*
19 *employee.*

20 (B) *A list of covered employees, including name, address, last*
21 *four numbers of the employee's social security number, and the*
22 *employee identification number shall be made available to the*
23 *Director of Industrial Relations, the Division of Labor Standards*
24 *Enforcement, the Department of Insurance, the Employment*
25 *Development Department, and the insurer, upon request. The list*
26 *of covered employees shall be made available in written form, and*
27 *also in electronic form by employers that utilize a computerized*
28 *payroll system. These lists are not public records subject to the*
29 *California Public Records Act (Chapter 3.5 (commencing with*
30 *Section 6250) of Division 7 of Title 1 of the Government Code).*

1 (C) Every employer shall retain copies of all notices of covered
2 employees required by subparagraph (A) and copies of all lists of
3 covered employees required by subparagraph (B) for a period of
4 not less than five years.

5 (3) (A) Except where an employer establishes workers'
6 compensation coverage for an employee that is provided by another
7 employer pursuant to subdivision (d) of Section 3602, absence of
8 the name of any employee on any notice of covered employees or
9 any list of covered employees required by paragraph (2)
10 conclusively establishes that the employer did not secure payment
11 of compensation from an insurance carrier, as required by Section
12 3700, for the purposes of any proceeding pursuant to Sections
13 3710.1, 3710.2, and 3722.

14 (B) Failure by an employer to retain each notice of covered
15 employees or each list of covered employees or provide copies to
16 the Director of Industrial Relations or the Division of Labor
17 Standards Enforcement in compliance with paragraph (2)
18 conclusively establishes that the employer failed to secure payment
19 of compensation from an insurance carrier, as required by Section
20 3700, for the purposes of any proceeding pursuant to Sections
21 3710.1, 3710.2, and 3722, unless the employer establishes that
22 there was coverage pursuant to subdivision (d) of Section 3602.

23 (b) Failure to keep any notice required by ~~this section~~ paragraph
24 (1) of subdivision (a) conspicuously posted shall constitute a
25 misdemeanor, and shall be prima facie evidence of noninsurance.

26 (c) This section shall not apply with respect to the employment
27 of employees as defined in subdivision (d) of Section 3351.

28 (d) The form and content of the notice required by ~~this section~~
29 paragraph (1) of subdivision (a) shall be prescribed by the
30 administrative director, after consultation with the Commission
31 on Health and Safety and Workers' Compensation, and shall advise
32 employees that all injuries should be reported to their employer.
33 The notice shall be easily understandable. It shall be posted in both
34 English and Spanish where there are Spanish-speaking employees.

35 The notice shall include the following information:

36 (1) How to get emergency medical treatment, if needed.

37 (2) The kinds of events, injuries, and illnesses covered by
38 workers' compensation.

39 (3) The injured employee's right to receive medical care.

1 (4) The rights of the employee to select and change the treating
2 physician pursuant to the provisions of Section 4600.

3 (5) The rights of the employee to receive temporary disability
4 indemnity, permanent disability indemnity, supplemental job
5 displacement, and death benefits, as appropriate.

6 (6) To whom injuries should be reported.

7 (7) The existence of time limits for the employer to be notified
8 of an occupational injury.

9 (8) The protections against discrimination provided pursuant to
10 Section 132a.

11 (9) The Internet Web site address and contact information that
12 employees may use to obtain further information about the
13 workers' compensation claims process and an injured employee's
14 rights and obligations, including the location and telephone number
15 of the nearest information and assistance officer.

16 (e) Failure of an employer to provide the notice required by ~~this~~
17 ~~section~~ *paragraph (1) of subdivision (a)* shall automatically permit
18 the employee to be treated by his or her personal physician with
19 respect to an injury occurring during that failure.

20 (f) The form and content of the notice required to be posted by
21 ~~this section~~ *paragraph (1) of subdivision (a)* shall be made
22 available to self-insured employers and insurers by the
23 administrative director. Insurers shall provide this notice to each
24 of their policyholders, with advice concerning the requirements
25 of this section and the penalties for a failure to post this notice.

26 *SEC. 2. Section 3551 of the Labor Code is amended to read:*

27 3551. (a) Every employer subject to the compensation
28 provisions of this code, except employers of employees defined
29 in subdivision (d) of Section 3351, shall give every new employee,
30 either at the time the employee is hired or by the end of the first
31 pay period, written notice of the information contained in
32 *subdivision (d) of Section 3550*. The content of the notice required
33 by this section shall be prescribed by the administrative director
34 after consultation with the Commission on Health and Safety and
35 Workers' Compensation.

36 (b) The notice required by this section shall be easily
37 understandable and available in both English and Spanish. In
38 addition to the information contained in *subdivision (d) of Section*
39 *3550*, the content of the notice required by this section shall
40 include:

1 (1) Generally, how to obtain appropriate medical care for a job
2 injury.

3 (2) The role and function of the primary treating physician.

4 (3) A form that the employee may use as an optional method
5 for notifying the employer of the name of the employee's "personal
6 physician," as defined by Section 4600, or "personal chiropractor,"
7 as defined by Section 4601.

8 (c) The content of the notice required by this section shall be
9 made available to employers and insurers by the administrative
10 director. Insurers shall provide this notice to each of their
11 policyholders, with advice concerning the requirements of this
12 section and the penalties for a failure to provide this notice to all
13 employees.

14 (d) *Notices required by this section shall be made available to*
15 *the Director of Industrial Relations, the Division of Labor*
16 *Standards Enforcement, the Department of Insurance, the*
17 *Employment Development Department, and the insurer upon*
18 *request. These documents are not public records subject to the*
19 *California Public Records Act (Chapter 3.5 (commencing with*
20 *Section 6250) of Division 7 of Title 1 of the Government Code).*

21 *SEC. 3. Section 3554 is added to the Labor Code, to read:*

22 3554. (a) *Any employer who violates subparagraph (A) of*
23 *paragraph (2) of subdivision (a) of Section 3550 shall be subject*
24 *to citation, pursuant to Section 3555, and a civil penalty in the*
25 *amount of one hundred dollars (\$100) per employee for the first*
26 *violation, and five hundred dollars (\$500) per employee for each*
27 *violation in a subsequent citation.*

28 (b) *Any employer that fails to turn over records pursuant to*
29 *subparagraph (B) of paragraph (2) of subdivision (a) of Section*
30 *3550 shall be subject to citation, pursuant to Section 3555, and a*
31 *civil penalty in the amount of two hundred fifty dollars (\$250) per*
32 *employee for the first violation, and one thousand dollars (\$1,000)*
33 *per employee for each violation in a subsequent citation.*

34 *SEC. 4. Section 3555 is added to the Labor Code, to read:*

35 3555. *If, upon inspection or investigation, the Labor*
36 *Commissioner determines that an employer is in violation of*
37 *Section 3550, the Labor Commissioner may issue a citation to that*
38 *person. The citation may be served personally or by registered*
39 *mail in accordance with subdivision (c) of Section 11505 of the*
40 *Government Code. Each citation shall be in writing and shall*

1 *describe the nature of the violation, including reference to the*
2 *statutory provision alleged to have been violated.*

3 *SEC. 5. Section 3556 is added to the Labor Code, to read:*

4 *3556. The procedures for contesting and enforcing judgments*
5 *for citations or civil penalties issued by the Labor Commissioner*
6 *for a violation of this chapter shall be the same as those set out in*
7 *Section 226.5.*

8 *SEC. 6. Section 3602 of the Labor Code is amended to read:*

9 3602. (a) Where the conditions of compensation set forth in
10 Section 3600 concur, the right to recover compensation is, except
11 as specifically provided in this section and Sections 3706 and 4558,
12 the sole and exclusive remedy of the employee or his or her
13 dependents against the employer. The fact that either the employee
14 or the employer also occupied another or dual capacity prior to,
15 or at the time of, the employee's industrial injury shall not permit
16 the employee or his or her dependents to bring an action at law for
17 damages against the employer.

18 (b) An employee, or his or her dependents in the event of his
19 or her death, may bring an action at law for damages against the
20 employer, as if this division did not apply, in the following
21 instances:

22 (1) Where the employee's injury or death is proximately caused
23 by a willful physical assault by the employer.

24 (2) Where the employee's injury is aggravated by the employer's
25 fraudulent concealment of the existence of the injury and its
26 connection with the employment, in which case the employer's
27 liability shall be limited to those damages proximately caused by
28 the aggravation. The burden of proof respecting apportionment of
29 damages between the injury and any subsequent aggravation
30 thereof is upon the employer.

31 (3) Where the employee's injury or death is proximately caused
32 by a defective product manufactured by the employer and sold,
33 leased, or otherwise transferred for valuable consideration to an
34 independent third person, and that product is thereafter provided
35 for the employee's use by a third person.

36 (c) In all cases where the conditions of compensation set forth
37 in Section 3600 do not concur, the liability of the employer shall
38 be the same as if this division had not been enacted.

39 (d) (1) For the purposes of this division, including Sections
40 3700 and 3706, an employer may secure the payment of

1 compensation on employees provided to it by agreement by another
2 employer by entering into a valid and enforceable agreement with
3 that other employer under which the other employer agrees to
4 obtain, and has, in fact, obtained workers' compensation coverage
5 for those employees. In those cases, both employers shall be
6 considered to have secured the payment of compensation within
7 the meaning of this section and Sections 3700 and 3706 if there is
8 a valid and enforceable agreement between the employers to obtain
9 that coverage, and that coverage, as specified in subdivision (a)
10 or (b) of Section 3700, has been in fact obtained, and the coverage
11 remains in effect for the duration of the employment providing
12 legally sufficient coverage to the employee or employees who
13 form the subject matter of the coverage. That agreement shall not
14 be made for the purpose of avoiding an employer's appropriate
15 experience rating as defined in subdivision (c) of Section 11730
16 of the Insurance Code.

17 (2) Employers who have complied with this subdivision shall
18 not be subject to civil, criminal, or other penalties for failure to
19 provide workers' compensation coverage or tort liability in the
20 event of employee injury, but may, in the absence of compliance,
21 be subject to all three.

22 *(e) Notwithstanding the provisions of subdivisions (a) to (c),*
23 *inclusive, the exclusive remedy provision shall not apply for*
24 *compensable injuries and illnesses suffered during a period that*
25 *an employee is not included in a notice of covered employees or*
26 *list of covered employees as required pursuant to Section 3550.*

27 ~~(e)~~

28 (f) As provided in paragraph (12) of subdivision (f) of Section
29 1202.4 of the Penal Code, in cases where an employer is convicted
30 of a crime against an employee, a payment to the employee or the
31 employee's dependent that is paid by the employer's workers'
32 compensation insurance carrier shall not be used to offset the
33 amount of the restitution order unless the court finds that the
34 defendant substantially met the obligation to pay premiums for
35 that insurance coverage.

36 *SEC. 7. The Legislature finds and declares that Sections 1 and*
37 *2 of this act impose a limitation on the public's right of access to*
38 *the writings of public officials and agencies within the meaning*
39 *of Section 3 of Article I of the California Constitution. Pursuant*
40 *to that constitutional provision, the Legislature makes the following*

1 *findings to demonstrate the interest protected by this limitation*
2 *and the need for protecting that interest:*

3 *In order to protect the inalienable right to privacy pursuant to*
4 *Section 1 of Article I of the California Constitution, it is necessary*
5 *to enact legislation that the documents containing employee*
6 *personal information provided pursuant to this act are maintained*
7 *confidential.*

8 SECTION 1. ~~Section 106 of the Labor Code is amended to~~
9 ~~read:~~

10 ~~106. (a) The Labor Commissioner may authorize an employee~~
11 ~~of any of the agencies that participate in the Joint Enforcement~~
12 ~~Strike Force on the Underground Economy, as defined in Section~~
13 ~~329 of the Unemployment Insurance Code, to issue citations~~
14 ~~pursuant to Sections 226.4 and 1022 and issue and serve a penalty~~
15 ~~assessment order pursuant to subdivision (a) of Section 3722.~~

16 ~~(b) An employee shall not issue a citation or penalty assessment~~
17 ~~order pursuant to this section unless the employee has been~~
18 ~~specifically designated, authorized, and trained by the Labor~~
19 ~~Commissioner for this purpose. Appeals of all citations or penalty~~
20 ~~assessment orders shall follow the procedures prescribed in Section~~
21 ~~226.5, 1023, or 3725, as applicable.~~