

CELLY SERVICES, INC.

Environmental, Health and Safety Services

Ex-Employees and Employees Can Seek Penalties for Cal-OSHA Violations

January 09, 2004

He is the Son of 17200, cousin of Proposition 65 and was born on January 1, 2004. His name is SB 796, alias 'frivolous litigation.' Conceived in the dark of the night by the legislative subcommittees, lubed by trial attorneys, and when the prophylactic efforts of business and trade associations failed, the last Governor blessed its delivery for January 1. This new law allows an "aggrieved employee" (which even includes ex-employees) to institute a civil lawsuit against the employer for Labor Code (including Cal-OSHA) violations and recover penalties. Until this bill came along, only Cal-OSHA or the government was allowed to enforce the Labor Code violations. In summary, a new bounty hunter "private attorney general" law has been enacted to the chagrin of employers statewide.

LEGALESE

We are not a law firm and nothing in this memo constitutes legal advice. We recommend that you discuss this matter with your lawyer immediately. If anything in this memo is in conflict with your lawyers' advice, the lawyers' advice prevails. The sinister part of the act is that it allows 25% of the penalties collected from the employer to go to the employee but also includes attorney's fees and costs. In short, a bonanza for trial lawyers. Other remedies such as those under Worker Compensation remain unaffected. In short, this law, which is called THE LABOR CODE PRIVATE ATTORNEYS GENERAL ACT OF 2004, sounds more like a lawsuit machine and a potential headache.

MOUNT YOUR DEFENSES

Even though the bill is new, and it will be some time before its scope and breadth is known, it is sensible to ask your attorney for the procedural safeguards to protect your business from unnecessary lawsuits. After your lawyer advises you, please contact our office for action that your lawyer recommends. Some preventive action may be as follows:

Privileged & Confidential: Reports prepared by our office may be sent to your lawyers at their request. Reports then may be classified as "Privileged and Confidential" and sent to your dealership for action later. Under appropriate circumstances, such reports may not be accessible by opposing counsel and these reports (which may incorporate your safety committee reports) may stay confidential.

Correct all Safety Hazards Immediately: If all the safety hazards and other Labor Code violations have been corrected, the aggrieved employee has no ability to bring action for present matters. Though past or existing hazards may be a basis for an action, keeping your facility free of Labor Code violation helps.

Train All Your Employees: We have been sending safety training information to you on a monthly basis. However, a basic training is required for all employees depending upon their work area hazards. An updated version of the "Employee Safety Training Handout" is enclosed and every employee--*Porter to the President*--should review it and be provided with extra training as discussed in the Handout. It should become a critical part of your "New Employee Package" that every employee reviews before commencement of work. Save the "Employee Safety Training Handout" in the three-ring EHS binder. Document the training and keep it at a safe location.

Document Retention Policy: The corporate lawyer should prepare a 'Document Retention Policy' for the corporation. Thereafter, all documents including Safety Committee Meeting Minutes may be destroyed as part of the policy. Generally, the Labor Code requires that Safety Committee and Safety inspection documents be kept in file for one year.

Notification: Keep all your labor law posters and other notifications current and complete. Site-specific information for the Labor Law Poster should also be completed by your HR Department. Contrary to our earlier advice recommending posting Safety Committee Meeting Minutes (minutes), please do not post them any more. Our earlier advice was based on OSHA regulations as found in 8 CCR 3203(c)(2) and other codes, that are still in effect, which state that

CELLY SERVICES, INC.

Environmental, Health and Safety Services

communication should be maintained with employees on health and safety issues and posting of minutes was one of the tool to achieve that goal. OSHAs' argument was that once employees were aware of the hazards, they could better protect themselves while the hazards were being corrected by the employer. Under the new law, a copy of minutes in an employee's hand can be a potent weapon. **SO DO NOT POST OR CIRCULATE YOUR SAFETY COMMITTEE MEETING MINUTES TO ANY EMPLOYEE FOR THE TIME BEING.** As keeping minutes confidential is in violation of California law, we recommend that you resolve conflict on this matter with your lawyer. Monthly safety training is an effective tool to achieve communication with employees on safety as well.

Prevent Unauthorized Access: Restrict all visitors to the shop area and other areas where they do not have any business dealings. A plaintiff lawyer may seek evidence of labor code violations by walking through your shop. Verify identification of all regulatory officials such as the Fire Department, County Environmental Health or other such staff visiting your premises and keep a record. Visitors such as those from the insurance company or consulting firms must have preauthorized access from senior management. OSHA officials have a right to access your premises only after your informed consent. However, you may choose to have a 'Warrant Policy' where OSHA has access to you facility after obtaining a search warrant. Inspection warrants are limited in scope regarding the areas that can be inspected. Again, a lawyer can draft the warrant policy for you.

PENALTIES*

The penalties under the act are gruesome. Some of the existing penalties in the Labor Code penalties are as follows:

- \$25,000 for a serious violation; for hazards capable of causing serious bodily harm or death.
- \$7,000 for minor violations such as recordkeeping

For penalties not described in the Labor Code, SB 796 enacts penalties at the rate of \$100 for first violation per aggrieved employee per pay period and \$200 for next violation per aggrieved employee per pay period. For example, an employer of 100 employees with 24 pay periods, your first violation of failure to post labor code poster is computed as follows:

$\$100 \times 100 \text{ employees} \times 24 \text{ pay periods} = \mathbf{\$ 240,000 !!!!!!!!!}$

*The defenses and mitigation available with Cal-OSHA are available in any case brought under SB 796.

Attorneys have advised CSI that there may be a lot of legal challenges to this law, both at the trial level and the appellate level. Procedurally, SB 796 affects current Cal-OSHA law and hence portions of SB 796 that impact Cal-OSHA program will require approval by the Fed-OSHA. For example, Proposition 65 provisions had to be approved by the Fed-OSHA before merging it into the California code. So in the absence of Federal support for this law being merged into the Cal-OSHA program, SB 796 may be limited to exclude enforcement of Cal-OSHA regulations. However, so long as the legislature, judiciary, or some administrative body does not say *hasta la vista* to this law, it remains a fierce animal and something the employers must be vigilant of!

The article was authored by Sam Celly of Celly Services, Inc. Sam has been helping automobile dealers comply with EPA & OSHA regulations in California, Nevada, Arizona, Hawaii & Idaho since 1987. Sam received his BS & MS in Chemical Engineering followed by a JD from Southwestern University. Sam is a Certified Safety Professional & a Registered Environmental Assessor (CA). Your comments/questions are always welcome. Please send them to sam@cellyservices.com.