

RESOLUTION 12-03-2017 (REVISED)

DIGEST

Worker Death Prosecutions: Civil Penalty Alternative for Prosecutors.

Adds Labor Code section 6425.1 to allow prosecutors to seek civil penalties for workplace death or serious injury caused by safety violations as an alternative to criminal enforcement actions.

RESOLUTIONS COMMITTEE ANALYSIS

History:

No similar resolutions found.

Reasons:

This resolution adds Labor Code section 6425.1 to allow prosecutors to seek civil penalties for workplace death or serious injury caused by safety violations as an alternative to criminal enforcement actions. This resolution should be approved in principle because it would allow the district attorney offices throughout the state flexibility to seek civil liabilities from companies in addition to, or in lieu of, criminal prosecution for workplace deaths and injuries.

This resolution proposes a new civil penalty structure to the Labor Code, determinable in a court of law, that would be incurred only by employers' willful violations of Health and Safety Code section 25910 resulting in death, or serious injury or illness of an employee. In the way of background, where the California Department of Industrial Relations Division of Occupational Safety and Health (Division) "believes that an employer has violated Section 25910 of the Health and Safety Code or any standard rule, order, or regulation established pursuant to Chapter 6 . . . of Division 1 of the Labor Code, or any standard, rule, order, or regulation established pursuant to" Labor Code section 6417, it is required to issue a citation to the employer. (*Vial v. California Occupational Saf. & Health Appeals Bd.* (1977) 75 Cal.App.3d 997, 1005). The Division is also specifically empowered to impose a civil penalty against the employer as provided Labor Code sections 6423, 6428, and 6429. (*People v. Superior Court [Solus Industrial Innovations, LLC]* (2014) 224 Cal.App.4th 33 at p. 40).

When the Division's Bureau of Investigation finds that an employer or employee, as enumerated in Labor Code section 6425, subdivision (a), has willfully violated section 25910 of the Health and Safety Code the Division may refer the issue to the local district attorney for criminal prosecution. This resolution would allow a district attorney flexibility to determine whether civil penalties are appropriate in combination with, or in lieu of, criminal penalties and imprisonment that are authorized under Labor Code section 6425, subdivision (a). As written, this resolution would also provide district attorneys a broader range of penalties for employers who have willfully violated occupational safety or health standards in such a way that results in the death, or serious injury or illness of an employee.

There has been an increase in workplace deaths since 2013, and while Cal-Osha investigates and fines companies for workplace deaths, the fines are minimal and not a deterrent. Prosecutors need additional tools to prosecute offending companies. The dependents of workers killed on the job will have greater relief because they will be able to collect through prosecutors in the civil arena.

The Resolutions Committee initially recommended disapproval of this resolution. The full Conference voted to approve.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Labor Code section 6425.1 to read as follows:

1 § 6425.1

2 (a) In enacting this section, the Legislature declares that there exists a compelling
3 interest in protecting worker's safety and health in the workplace that cannot be addressed by
4 criminal enforcement and administrative actions alone, particularly when serious injury or
5 workplace deaths are involved. The Legislature recognizes that the conduct prohibited by this
6 section is, for the most part, already subject to criminal and administrative penalties pursuant to
7 other provisions of law, and it is not the intent of this section to substantively change the
8 standards governing workplace safety. However, the Legislature finds and declares that the
9 addition of civil monetary penalties which can be assessed by prosecutors in a court of law will
10 provide necessary enforcement flexibility and enhance enforcement of the workplace safety laws
11 to better protect workers. The Legislature, in exercising its plenary authority related to workers'
12 safety, declares that these provisions are both necessary and carefully tailored to deter workplace
13 safety violations and protect employee safety in this state.

14 (b) Any employer who violates any occupational safety or health standard, order, or
15 special order, or Section 25910 of the Health and Safety Code, if that violation is a serious
16 violation and such violation causes any employment accident that is fatal to one or more
17 employee or that results in a serious injury or illness, may be assessed a civil penalty of up to
18 twenty-five thousand dollars (\$25,000) for each violation.

19 (c) Any employer who willfully or repeatedly violates any occupational safety or health
20 standard, order, or special order, or Section 25910 of the Health and Safety Code, and such
21 violation causes any employment accident that is fatal to one or more employee or that results in
22 a serious injury or illness, may be assessed a civil penalty of not more than seventy thousand
23 dollars (\$70,000) for each violation, but in no case less than five thousand dollars (\$5,000) for
24 each willful violation. As used in this section, "willfully" has the same definition as it has in
25 Section 7 of the Penal Code.

26 (d) The penalties provided for in subdivisions (b) and (c) shall be assessed and
27 recovered in a civil action brought in the name of the people of the State of California by any
28 district attorney or the appropriate prosecuting authority having jurisdiction, in his or her
29 discretion as he or she deems appropriate, following the referral of such action by the bureau of
30 the division pursuant to Labor Code Section 6315, subdivision (g).

31 (e) In assessing the amount of the civil penalty, the court shall consider any one or more
32 of the relevant circumstances presented by any of the parties to the case, including, but not
33 limited to, the following: the nature and seriousness of the misconduct, the number of violations,
34 the persistence of the misconduct, the length of time over which the misconduct occurred, the
35 willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

36 (f) One-half of the penalties collected pursuant to this section shall be paid into the state
37 treasury to the credit of the General Fund. The Department of Industrial Relations shall account
38 to the Department of Finance and the State Controller for all moneys so received and furnish

39 proper vouchers therefor. The remaining one-half of the penalty assessed shall be paid to the
40 district attorney or prosecuting authority that brought the complaint.

41 (g) In any action brought under this Section, the district attorney or prosecuting
42 authority may also seek the reimbursement of the costs of investigation by the California
43 Occupational Safety and Health Agency associated with the action.

44 (h) Nothing in this section shall be deemed to prohibit any authorized administrative
45 action by the California Occupational Safety and Health Agency or any related criminal action,
46 including any administrative or criminal action set forth in Sections 6423 to 6435, or any other
47 action otherwise authorized by law.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

The Problem: Although the Labor Code already authorizes civil penalties against responsible parties for serious, willful or repeated violations of California's workplace safety laws and regulations (in addition to criminal action), it is currently silent with respect to who has standing to seek such penalties. (Lab. Code, §§ 6423-6436.) After an attempt by prosecutors to seek civil penalties under sections 6428 and 6429 in a worker death case, a recent published decision (*People v. Superior Court [Solus]* (2014) 224 Cal.App.4th 33.) now holds that prosecutors lack standing to seek such penalties unless and until the Legislature expressly grants prosecutorial standing to do so. As such, no one has standing to seek the civil penalties authorized under these statutes in a court of law, and the provisions cannot be enforced as intended -- to punish and deter worker safety violations that cause serious employee harm or death. Administrative civil penalties alone are not sufficient.

While there are criminal sanctions available (including a fine of up to \$1.5 million for corporations), there are many cases, particularly against corporate employers, that may be better prosecuted in a civil action. It is thus desirable for prosecutors to have flexibility in exercising their discretion to prosecute these cases in either a criminal or civil forum, whichever is most effective and efficient to secure justice in the particular case. The benefit of this flexibility is not a new concept, and has been recognized and implemented in other areas of the law. (*See, e.g.*, Lab. Code, § 3820 [worker's compensation fraud]; Pen. Code, §§ 370-373a & Civ. Code, §§ 3479-3480 [public nuisance]; Fish & Game Code §§, 5650 & 5650.1 [water pollution].) Not only would this flexibility improve enforcement efforts, but the criminal defense bar may also benefit from such flexibility. At present, all cases required to be referred to prosecutors must be treated criminally. Yet, criminal actions have substantially more negative unintended impacts on corporations than civil judgments -- including harm to bank covenants and insurance policies -- that can result in unnecessary harms to shareholders and corporate employees if a large criminal fine and judgment is assessed. These unintended harms can be avoided by assessing the exact same fine in the form of civil penalties in a civil action instead. Individual defendants could benefit from a civil judgment by not facing incarceration and not having a criminal record if convicted. The State also has a financial interest in limiting the expenses of incarceration and the criminal justice system that can be furthered by a policy providing more

civil enforcement remedies for prosecutors. In cases where justice can be achieved equally in either a civil or criminal forum, therefore, prosecutorial discretion in these cases could benefit all parties involved.

The Solution: This Resolution adds a new code section authorizing prosecutorial standing to seek civil penalties as an alternative to taking criminal action against culpable employers that violate worker safety laws and cause death or serious harm to their employees.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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