

Calif. Employers May See COVID-19 Safety Citations Soon

By **Thomas Song** (August 10, 2020, 2:13 PM EDT)

The California Division of Occupational Safety and Health won the reputation of taking a backseat in response to the COVID-19 pandemic, having been anointed a remote investigatory agency in the press.[1]

However, Gov. Gavin Newsom, on July 24, indicated plans were underway to change that image when he disclosed efforts for targeted and strategic enforcement of labor laws, no doubt in response to the recent rise in COVID-19 infections, and the perceived lackluster enforcement of workplace safety laws.

While the governor did not expressly mention the California Division of Occupational Safety and Health as his lead agency to spearhead the enhanced enforcement effort, the agency is the obvious choice with a statewide system of enforcement, and a uniquely adaptable standard — namely the injury and illness prevention program — at its ready disposal.

Most California employers realize they need to have some form of a workplace safety plan in place, but many still do not realize that all employers must have an injury and illness prevention program in both written format and enforced in the workplace. The injury and illness prevention program regulation[2] requires all employers in California to effectively implement a safety program which will, among other requirements, identify, address and correct workplace hazards, including the threat of COVID-19.[3]

Prepandemic, it was not uncommon for employers to be deemed as having a compliant injury and illness prevention program, despite having a very basic, bare-bones program — one that more or less checked all the boxes required under the regulation.

For instance, if someone fell from a ladder, the employer could often raise a viable defense that it still briefed safe ladder operations — orally, on paper or both — and trained the employee on the associated hazards.

The exact methodology for training and assessing the hazard was not the central focus. In fact, the California Division of Occupational Safety and Health Appeals Board — the quasi-judicial body that decides all occupational safety and health appeals in California — described the injury and illness prevention program's hazard identification and assessment requirement[4] as



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contain[ing] no requirement for an employer to have a written procedure for each hazardous operation it undertakes. What is required is for Employer to have procedures in place for identifying and evaluating workplace hazards, and these procedures are to include "scheduled periodic inspections." (Section 3203(a)(4).)[5]

Thus, even though the procedure used was not the safest procedure and still resulted in an accident, the appeals board found "that does not demonstrate that Employer's [injury and illness prevention program] lacked a system of hazard identification and evaluation."

The above example illustrates how the injury and illness prevention program is a performance standard, which is defined to "establish a goal or requirement for employers to meet, while leaving the employer latitude in designing an appropriate means of compliance." [6]

The appeals board described the California Division of Occupational Safety and Health's recommendations in certain contexts as just one option: "a suggestion only, and Employer has latitude under a performance standard to fashion other means to address the hazard." [7]

However with the COVID-19 threat, the traditional latitude provided to employers in fashioning appropriate measures in response to a workplace safety threat may have been replaced by recent industry guidelines issued by the California Division of Occupational Safety and Health, and interim general guidelines to protect and train employees on the dangers of COVID-19. [8]

While labeled as guidelines, beware that the guidelines are enforceable by the California Division of Occupational Safety and Health under its injury and illness prevention program regulation, since the program requires all employers to have effective measures to identify and address the threat of COVID-19.

This was reinforced by the California Division of Occupational Safety and Health's July 16 press release urging "all employers in California to carefully review and follow the state's COVID-19 workplace safety and health guidance to ensure their workers are protected from the virus." [9]

The new California Division of Occupational Safety and Health chief, Doug Parker, announced, "[w]e've designed guidance documents for more than 30 industries so employers have a roadmap," and reminded employers that "[e]xisting regulations require employers to implement effective measures to protect employees from worksite hazards, including recognized health hazards such as COVID-19." [10]

The chief need not specifically mention the injury and illness prevention program regulation as it will be the California Division of Occupational Safety and Health's enforcement weapon of choice to cite employers for purported COVID-19 safety violations.

For the record, requiring employers to modify and update their injury and illness prevention programs in response to changing workplace hazards is not new. The program regulation has been successfully used against an employer for failing to effectively guard against the hazard of indoor (as opposed to outdoor) heat illness, even though the current standard regulating heat illness prevention only applies to outdoor places of employment. [11]

The relatively strict guidelines and constraints imposed on employers regarding how to effectively guard against the spread of COVID-19 effectively changes the injury and illness prevention program regulation into less of a performance standard, and more of a prescriptive standard. [12]

Finally, employers should be aware of being cited for a serious violation. A serious violation carries the risk of increased penalties over a general violation: starting at a baseline of \$18,000 and up to \$25,000 per citation.

A repeat violation looks back over the last five-year period for any "essentially similar conditions or hazards," and carries with it multipliers of two, four and 10, for first, second and third repeat violations, respectively.[13] Beyond the pure numbers, serious citations are also much more coveted by California Division of Occupational Safety and Health enforcement personnel, and they are notoriously difficult to reach settlement on, even when the employer has a solid safety program and took reasonable steps to avoid the violation.

All that is required under California law for a serious violation is a "realistic possibility that death or serious physical harm could result from the actual hazard created by the violation." [14] The appeals board defined a "realistic possibility" to mean "within the bounds of human reason, not pure speculation," [15] and "serious physical harm" includes any amount of time spent as an inpatient at a hospital for purposes other than medical observation. [16]

In other words, an "anything but pure speculation" standard carries a low burden of proof for the California Division of Occupational Safety and Health to demonstrate a serious violation.

Therefore, even though the risk of death from COVID-19 is small — at least among the nonelderly and those without preexisting health conditions — should an employee become infected at work, employers risk being cited for a serious violation. Employers need to recognize that it will be some time before there is further guidance from the appeals board and that they will likely have a difficult time defending against a COVID-19 citation issued as serious under the current standard.

Conclusion

There is much unknown about how the California Division of Occupational Safety and Health will enforce safety measures in an effort to flatten the curve and stop the spread of the virus. Given the governor's directive and focus on bad actors failing to comply with safety guidelines, rest assured that the agency is going to come knocking on employers' doors sooner than later, and it will not be pretty.

Be sure to review the most recent industry safety guidelines, which provide greater clarity as to what is expected. Hopefully, in this time of change, the California Division of Occupational Safety and Health will not bear down and get tunnel vision when it comes to issuing citations on employers who put forth a sincere effort to update their injury and illness prevention programs and comply with evolving guidelines.

Therefore, the time is now to update injury and illness prevention programs and training to implement the actions in the workplace that will have great savings on the time and expense otherwise spent fighting an uphill battle after citations issue.

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[1] <https://www.latimes.com/politics/story/2020-07-16/california-agency-responsible-for-protecting-workers-is-missing-in-action-critics-say>.

[2] Cal. Code Regulations, Title 8, section 3203.

[3] <https://www.dir.ca.gov/title8/3203.html>.

[4] Section 3203(a)(4).

[5] IN THE MATTER OF THE APPEAL OF: BRUNTON ENTERPRISES, INC., EMPLOYER, 2013 WL 12051034, at *3.

[6] IN THE MATTER OF THE APPEAL OF: BHC FREMONT HOSPITAL, INC, EMPLOYER, 2014 WL 2624406, at *3.

[7] *Id.*

[8] <https://www.dir.ca.gov/dosh/coronavirus/General-Industry.html>.

[9] <https://www.dir.ca.gov/DIRNews/2020/2020-63.html>.

[10] *Id.*

[11] <https://www.dir.ca.gov/title8/3395.html>; *(Note: current rulemaking is underway by the Cal/OSHA Standards Board to issue a specific indoor heat illness regulation.) <https://www.dir.ca.gov/dosh/doshreg/Heat-illness-prevention-indoors/>.

[12] Government Code section 11342.570 defines a performance standard as follows: "'Performance standard' means a regulation that describes an objective with the criteria stated for achieving the objective." Government Code section 11342.590 defines a prescriptive standard as follows: "'Prescriptive standard' means a regulation that specifies the sole means of compliance with a performance standard by specific actions, measurements, or other quantifiable means."

[13] <https://www.dir.ca.gov/title8/334.html>.

[14] Labor Code § 6432(a).

[15] IN THE MATTER OF THE APPEAL OF: BELLINGHAM MARINE INDUSTRIES, INC., EMPLOYER, 2014 WL 6491672.

[16] Labor Code § 6432(e).