

When Cal/OSHA Comes Knocking

2022 Professional Development Conference – San Diego

Presented by

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Deakins**

Employers & Lawyers. Working Together

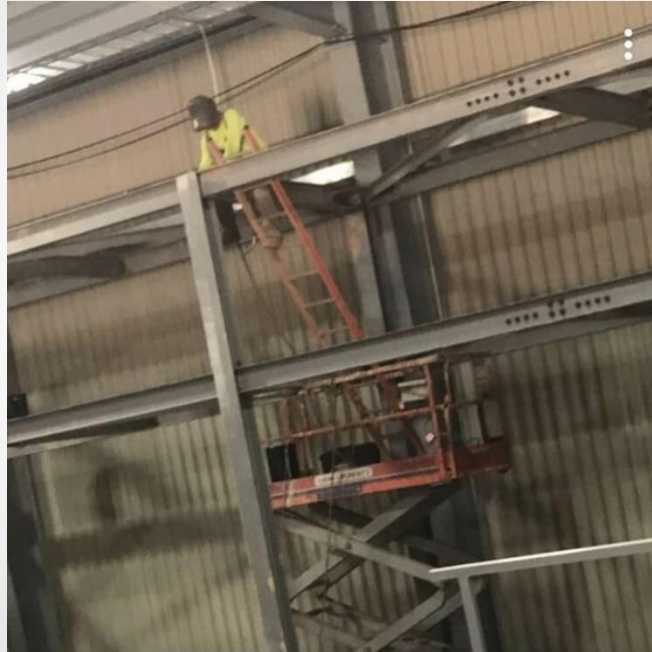
Top Things to Remember When Cal/OSHA is Knocking



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- Don't delay in reporting a serious injury.
 - Title 8, Section 342(a) states:
 - “Every employer shall report immediately by telephone or telegraph to the nearest District Office of the Division of Occupational Safety and Health any serious injury or illness, or death, of an employee occurring in a place of employment or in connection with any employment. Immediately means as soon as practically possible but not longer than 8 hours after the employer knows or with diligent inquiry would have known of the death or serious injury or illness. If the employer can demonstrate that exigent circumstances exist, the time frame for the report may be made no longer than 24 hours after the incident.”
 - Report anytime 911 is called and retract if necessary.
 - Less is more. You can always follow up.
- Do keep a record of the report

Top Things to Remember When Cal/OSHA is Knocking



Top Things to Remember When Cal/OSHA is Knocking

- Don't put safety requirements in your program you don't follow
 - What if it's more than required under the law?
 - Becomes your law
 - NFPA 70E
 - Consider Cal-OSHA and Criminal proceeding case
- Do follow your safety program

Top Things to Remember When Cal/OSHA is Knocking



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- Don't forget to document it
 - Training (including on the job training).
 - Tail Gates
 - Content
 - Attendance
 - Instructor
 - Site Inspections
 - Daily Reports
 - JHA Content
 - Safe practices
- Do everything you say you do

Top Things to Remember When Cal/OSHA is Knocking



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- Don't forget your IIPP and your safety program are multiple and different documents
 - 8 core elements
 - Responsibility, Compliance, Communication, Hazard Assessment, Hazard Correction, Training, Record Keeping and Accident Investigation
- Heat illness program separate
- LOTO Program
- Code of Safe Practices
- Hazcom (GHS)

Top Things to Remember When Cal/OSHA is Knocking



Top Things to Remember When Cal/OSHA is Knocking

- Don't think the inspector is your friend
- "I'm from the Government and I'm here to help!"
- Remember the inspector's sole purpose



Top Things to Remember When Cal/OSHA is Knocking

- Don't mistake enforcement for consultation
 - Go directly to the location, but sometimes take the long way
 - It's not the time for questions
 - Focus on the end goal
- Do answer the inspector's questions
 - Short and to the point

Top Things to Remember When Cal/OSHA is Knocking



Top Things to Remember When Cal/OSHA is Knocking

- Don't respond to a "Notice of Intent to Issue a Serious Citation" without counsel.
 - Form 1BY
 - Only applies to reasonable and responsible defense
 - DOSH can go up as well as down
 - Do not sign under penalty of perjury
- Do use the response as a tool to change classification in some cases.

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- Don't participate in an informal conference before you have DOSH's investigation file.
 - Employer's right anytime before a hearing
 - Remember it is the same district manager and inspector that issued the citations
 - DOSH can amend citations upward easily before the 6 month time period expires
- Do request an informal after prehearing but before hearing.

Top Things to Remember When Cal/OSHA is Knocking



Top Things to Remember When Cal/OSHA is Knocking

- Remember you only have 15 working days to file the appeal
 - Assert ALL possible affirmative defenses
 - Practice Point – Do NOT appeal classification on General citations
 - Only appeal abatement on serious if at issue
- Filing stops all the clocks EXCEPT abatement credit (discussed later)

Top Things to Remember When Cal/OSHA is Knocking

- Don't let your lawyer practice safety and don't let your safety director practice law



Criminal Liability



Willful Safety Violations Causing Death (Labor Code 6425)

- “Willful” safety violations causing death (Labor Code 6425)
 - “Willful” – refers to CONDUCT (no knowledge of illegality is necessary);
AND
 - Causation – true as long as it was a “substantial factor” (contributory negligence of others or of deceased is not defense)

Criminal Liability

- “Willful” violation of a safety order causing death:
 - “Willful” – refers to CONDUCT (Section 7 of the Penal Code) (no knowledge of illegality is necessary); AND
 - Causation – true as long as it was a “substantial factor” (contributory negligence of others or of deceased is not a defense)

Criminal Penalties

- Labor Code 6425 – The willful violation of a safety order causing death
- Corporations:
 - FELONY
 - UP TO APPROX \$6 MILLION (\$1.5 MM, PLUS 310%)
 - Victim Restitution
- Individuals:
 - FELONY
 - UP TO 3 YEARS STATE PRISON
 - UP TO APPROX \$1 MILLION (\$250K, PLUS 310%)
 - Victim Restitution

Who Can Be Criminally Liable

- ***Labor Code Section 6425:*** “Any ***employer*** and any ***employee*** having direction, management, control, or custody of any employment, place of employment, or of any other employee, who willfully violates *any* occupational safety or health standard...”
 - Individual employee liability: supervisors who knew about, and could have stopped, the violation(s) but chose not to.

What “Unlawful” Act? (Labor Code 6407)

“Every employer and every employee shall comply with occupational safety and health standards...and with all rules, regulations and orders pursuant to this division which are applicable to his own actions and conduct”

Bonner v. WCAP (1990) 225 Cal.App.3d 1023:

“an employer's duty to furnish employees with a safe workplace is non-delegable.”

California Approved Civil Instructions 3722:

“An employee’s wrongful or criminal conduct may be within the scope of employment even if it breaks a company rule or does not benefit the employer”

See also Purton v. Marriott (2013) 218 Cal.App.4th 499, 505

When *Can* the Individual Supervisor, Manager, or Officer, be Charged?

CAL CRIM 450 (Liability For Crime of Corporation):

- Personal Knowledge of CONDUCT (Ignorance of Law Is Not a Defense).
- Authority and Duty To Stop the Conduct.
- Failure To Stop the Conduct.

Signs that a Criminal Investigation is Occurring

A workplace fatality has occurred in California

Establishing Independent Employee Act Defense

EMPLOYER HAS BURDEN TO PROVE BY PREPONDERANCE OF EVIDENCE
ALL FIVE OF FOLLOWING ELEMENTS:

1. The employee was experienced in the job being performed (**TRAINING**),
2. Employer has a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments (**GOOD PLAN**),
3. Employer effectively enforces the safety program (**HONEST EFFORT TO ENFORCE**),
4. Employer has a policy which it enforces of sanctions against employees who violate the safety program (**DISCIPLINE**), and
5. The employee caused a safety infraction which he or she knew was contrary to the Employer's safety requirement (**TRAINING**).

What is New and On the Horizon

Workplace Violence in Construction

- Likely becomes effective late 2022 or 2023
- Proposed Draft Text Title 8 Section 3343– Comments open until December 14
- Modeled after the Health Care WPV regulation
- Broad application “ANY act of violence or *threat* that occurs in the place of employment”
- Defines 4 types of violence
 - Type 1 – Committed by a person with legitimate business and criminal acts
 - Type 2 - Directed at employee by visitor
 - Type 3 - Employee on employee (present or former)
 - Type 4 – Does not work there but has or known to have a personal relationship with an employee

Key Components WPV Regulation

- Written program
 - Active involvement of employees and the union in development of the plan
 - Requires coordination with other contracted employers on multi-employer sites and dual employers
 - Response procedures
 - Training, Site Inspection, etc.
- Violent *incident* log
- Recordkeeping
 - Inspections – 1 year
 - Training – 1 year
 - Incident Logs – 5 years

The Indoor Heat is Coming...Still...

- Required by Labor Code Section 6720 – directs the Division to propose to Standards Board by January 1, 2019 – Did not happen
- Priority for adoption 2022
- Applies to all indoor work areas when temp is 82 degrees
- Second trigger for 87 degrees
- What is indoor?
 - “Indoor” refers to a space that is under a ceiling or overhead covering; and is enclosed along its perimeter by walls, doors, windows, dividers, or other physical barriers, whether open or closed. All work areas that are not indoor are considered outdoor and covered by section 3395.
 - EXCEPTION: “Indoor” does not refer to a shaded area that meets the requirements of section 3395 **and is used exclusively** as a source of shade for employees covered by section 3395
- 11 page regulation – compare to 3 pages for outdoor

The Indoor Heat is Coming...Still...

- Big issue – Record Keeping – 30 year exposure record?
 - *“The employer shall establish and maintain accurate records of temperature or heat index measurements, as applicable. The records shall include the date, time, and specific location of all measurements.”*
 - *“NOTE: The records shall be retained and made available in accordance with section 3204.”*
- Outdoor Employers pushing to attempt to comply with only outdoor
- Regulation likely to be adopted 2020
- Wild card – the new California Governor and appointees

COVID 3.0

DATE	EVENT/EXPLANATION
November 30, 2020	Original ETS
June 17, 2021	First Amendment / Readoption
January 14, 2022	Second Amendment / Readoption
February 28, 2022	Governor Newsome Order
April 21, 2022	Vote on Proposed Third Amendment
May 6, 2022	Third Amendment / Readoption

COVID ETS 3.0

■ Changes Overview

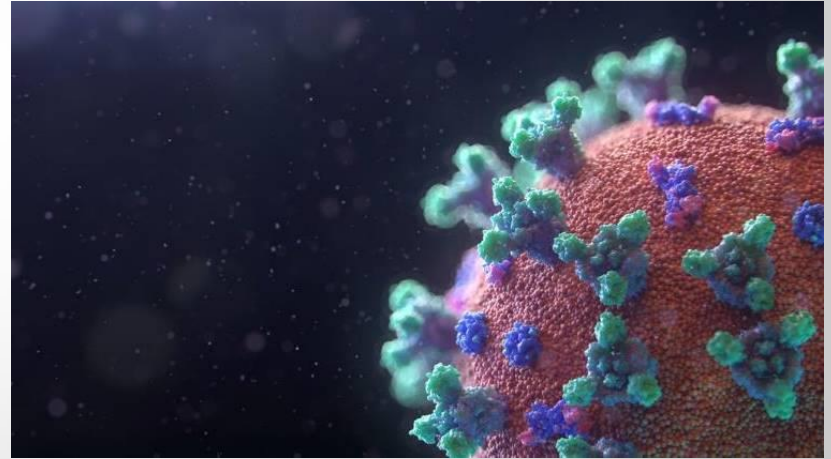
- Definitions – close contact, infectious period, covid-19 test, face covering, fully vaccinated, returned case;
- Testing Change
- Face Covering
- Cleaning and Disinfection
- Close Contacts governed by CDPH
- Returned to Work Changes
- Outbreaks



COVID ETS 3.0

■ But What didn't change?

- ✓ Scope of Regulation
- ✓ Written Covid-19 Plan Requirements
- ✓ Identification of Hazards
- ✓ Investigating Covid-19 cases
- ✓ Notices
- ✓ Correcting Hazards
- ✓ Training (except for a tiny nuance)
- ✓ Ventilation
- ✓ PPE
- ✓ Recording and Reporting



QUESTIONS?

“I’d say we’re in for contentious times and for too many rules, too many constricting mandates and probably too much spending.”

Governor Jerry Brown, 12/18/18



Thank you!

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