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OSHA NEWSLETTER

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Violating California's Occupational Safety and Health Act May Lead to Civil Penalties

Matthew Deffebach and Allan Gustin

On February 8, 2018, the California Supreme Court unanimously ruled that local prosecutors could pursue civil penalties against employers for violating workplace safety standards under California's unfair competition law[1] and fair advertising law,[2] despite the employer's federal preemption challenges. *Solus Indus. Innovations, LLC*, 228 Cal. Rptr. 3d 406 (2018). In its civil lawsuit, the Orange County District Attorney's Office claimed that (1) the employer's failure to comply with workplace safety standards represented an unlawful, unfair, and fraudulent business practice; and (2) the employer's representations concerning its commitment to workplace safety and its compliance with all applicable workplace safety standards were false and misleading in violation of California's fair advertising law. While the federal Occupational Safety and Health Act of 1970 does not allow for civil penalties against employers, California employers will now be faced with the prospect of both civil and administrative penalties for workplace safety and health violations.

[1] California Business and Professions Code section 17200.
[2] California Business and Professions Code section 17500.

Limitation on a PPE Not Recognized Where Manufacturer's SOP Did Not Contain the Limitation

Matthew Deffebach and Mini Kapoor Ph.D.

Sec'y of Labor v. Midwest Steel, Inc., is a recent reminder that employers should be aware of and stay current with the safety features in Personal Protective Equipment (PPE) that are known in the industry. OSHRC No. 15-1471, 2017 WL 7370045 (Sept. 13, 2017). There, the Commission vacated a citation for alleged violation of the General Duty Clause following a fatal accident, because based on the information existing at the time of the accident, neither the industry nor the Respondent recognized the alleged hazardous condition.

In *Midwest Steel*, an employee died when he fell from a temporary work platform on the sixth floor down to the fourth floor of a building while doing welding work. For fall protection, the employee wore a personal fall

arrest system device, which consisted of a wire rope choker, a harness, and a synthetic lanyard. It appeared that the accident happened due to melting of the synthetic lanyard while the employee was repairing a weld on the surface of a splice by preheating the welds. The employer was cited for violation of the General Duty Clause.

The Commission noted that to sustain the citation under the General Duty Clause, the Secretary needed to establish that the Respondent or the industry recognized the hazard at issue. Complainant argued that the hazard was recognized because "had Respondent read the most recent version of the Manufacturer's SOP, in accordance with the ANSI standards, it would have known not to use the synthetic lanyard in hot areas of more than 180 degrees." The Commission disagreed.

The Commission noted that the Manufacturer's SOP that was in effect at the time of the accident reflected the hazards that were recognized by the Respondent and the industry at that time. The version of the Manufacturer's SOP containing the 180 degree limitation on use of the synthetic lanyard did not exist at the time of the accident. Thus, Complainant failed to establish that the alleged hazard was recognized and did not meet its burden to sustain a citation for violation of the General Duty Clause.

Midwest Steel essentially emphasizes that employers should stay current with manufacturers' recommendations concerning the limitations and use of personal protective equipment and any relevant safety features known in the industry. Any deviation from manufacturer's recommendation or industry-known safety features should be assessed to ensure that the deviation provides the employees with at least equal protection from the hazard.

OSHA's Updated General Industry Walking-Working Surfaces and Fall Protection Standards to Become Effective in 2018

Matthew Deffebach and Jasmine Tobias

On January 17, 2017, the final rule to update the General Industry Walking-Working Surfaces and Fall Protection Standards became effective. According to OSHA, the updated rules provide greater flexibility in choosing a fall protection system.[1] The final rule applies to all walking-working surfaces, including floors, stairs, platforms, rope descent systems, ladders, ramps, scaffolds, elevated walkways and fall protection systems in all general industry workplaces. The standard has a rolling-effective date for employers to comply with provisions related to ladder safety systems and personal fall arrest systems on fixed ladders. (§1910.28(b)(9)). The final rule prohibits the use of cages and wells because there is wide recognition that they do not prevent workers from falling from fixed ladders, nor do they prevent injury if a fall occurs. Employers should begin to update their fall safety mechanisms to be complaint with the following standards:

- The final rule allows employers to use any one or more of the following fall protections in a particular area, situation, or activity: guardrail systems; safety net systems; personal fall protection systems; personal fall arrest systems; travel restraint systems; ladder safety systems; hand rails; and designated areas.
- The final rule grandfathers in cages and wells on existing ladders, but requires during the phase-in period that employers equip new ladders and replacement ladders/ladder sections with ladder safety or personal fall arrest systems.
- For fixed ladders erected before November 19, 2018, employers have up to 20 years to install ladder safety or personal fall system (§1910.28(b)(9)(i)(A)).

- For new fixed ladders erected on or after November 19, 2018, the employer must equip the ladder with a ladder safety or personal fall arrest system (§1910.28(b)(9)(i)(B)).
- For ladder repairs and replacements; when an employer replaces any portion of a fixed ladder the replacement must be equipped (§1910.28(b)(9)(i)(C).

[1] ***Final Rule to Update General Industry Walking-Working Surfaces and Fall Protection Standards***, Dep't of Labor.

California Division of Occupational Safety and Health Crafts Workplace Violence Rules

Matthew Deffebach and Allan Gustin

The California Division of Occupational Safety and Health (Cal/OSHA) held two advisory meetings in January to solicit input and comments on its proposed draft rules for workplace violence prevention that would apply to nearly all California employers. Passage of these standards would make California the first state to issue workplace violence rules, which would surpass federal protections.

What are the current rules governing workplace violence? Currently, Federal OSHA relies on its General Duty Clause established by Section 5(a)(1) of the Occupational Safety and Health Act of 1970, to cite employers for hazards that involve workplace violence. In October 2016, Cal/OSHA unanimously adopted a workplace violence prevention standard for health care workers, becoming the first state to implement regulations of this kind.[1] However, this standard only applies to healthcare employers. To address violence in the workplace for non-healthcare employers, Cal/OSHA applies Section 3203, which mandates an Injury and Illness Prevention Program.[2]

What is being proposed? The current draft proposal would require covered employers to (1) develop an effective workplace violence prevention plan, (2) provide all employees with workplace violence training, and (3) maintain thorough record keeping. "Workplace violence" is currently defined as "any act of violence or threat of violence that occurs at the work site" not including "lawful acts of self-defense or defense of others." Under the draft proposal, the standards would apply to all employers with the exception of certain healthcare providers and certain law enforcement agencies.

What are the proposed requirements for a workplace violence prevention plan? Employers must include the following elements in their plan: (1) Persons responsible for implementing the plan; (2) Procedures to obtain involvement of employees and representatives in developing, implementing, and reviewing the plan; (3) Methods the employer will use to coordinate implementation of the plan with other employers, where applicable; (4) Procedures for accepting and responding to reports of workplace violence, and prohibiting retaliation against employees; (5) Procedures to ensure employees comply with plan; (6) Procedures to communicate with employees regarding workplace violence matters without fear of reprisal; (7) Procedures to develop and provide the training; (8) Procedures to identify and evaluate workplace violence hazards; (9) Procedures to correct workplace violence hazards in a timely manner, including emergency procedures; and (10) Procedures for post-injury response and investigation. Employers would be required to make the plan available to employees at all times.

What training requirements are proposed? Employers are required to provide effective training that addresses the workplace violence risks that employees are reasonably anticipated to encounter in their jobs. All employees must be provided with initial training when the workplace violence prevention plan is first established or when an employee is newly hired or newly assigned to additional duties. Initial training would need to address the workplace violence hazards identified at the workplace, the

corrective measures the employer has implemented, an explanation of the employer's workplace violence prevention plan, how to seek assistance to prevent or respond to violence, strategies to avoid physical harm, and how to report workplace violence incidents or concerns to the employer without fear of reprisal.

What are the proposed record keeping requirements? Employers would need to maintain records of workplace violence hazard identification, evaluation, and correction as well as training records for one year. Additionally, employers would be required to keep records of workplace violence injury investigations for five years.

What is the timeline for the draft rules? The proposal is still in the pre-rulemaking stage. There have been two advisory meetings on January 12, 2017 and January 25, 2018 at the Harris State Building in Oakland. Cal/OSHA is currently soliciting comments through March 30, 2018, which will likely be discussed in another advisory meeting to be scheduled within the next year. The pre-rulemaking stage can take several years with the rule-making stage taking another year. As a comparison, the healthcare standard took about two years to draft and implement, but it was accelerated by legislative mandate.

What can employers do now? Employers have the opportunity to shape these standards by taking part in the comment period through March 30, 2018 and by attending upcoming advisory meetings. Given that the advisory committee has discussed the possibility of carving out specific industries instead of proceeding with a general standard, employers may want to comment on why these standards are ill-suited for their specific industries.[3]

[1] California Code of Regulations, Title 8, Section 3342.

[2] California Code of Regulations, Title 8, Section 3203.

[3] **Information related to the Proposed Regulation including agenda and minutes for advisory meetings.**

Cal/OSHA Prepares Drafts of Heat Illness Prevention in Indoor Places of Employment Regulation

Matthew Deffebach and Allan Gustin

In October 2016, Governor Brown signed and approved California Senate Bill 1167, which went into effect on January 1, 2017. That Bill added California Labor Code section 6720 to state, "By January 1, 2019, the division shall propose to the standards board for the board's review and adoption, a standard that minimizes heat-related illness and injury among workers working in indoor places of employment. The standard shall be based on environmental temperatures, work activity levels, and other factors."[1]

To fulfill this directive, the Division of Occupational Safety and Health (DOSH) convenes advisory meetings from time to time to develop a proposed regulation. The first advisory meeting took place about a year ago on February 28, 2017, where stakeholders and the public had an opportunity to provide input on occupational health issues and practical issues to be considered in controlling employee exposure to indoor heat. After each meeting, minutes and comments are posted online. The current proposed draft of the regulation is also posted at the same web address. Two additional advisory meetings have taken place since the February 2017 meeting: one on May 25, 2017 and another on February 8, 2018.

Current Status

Although the minutes from the February 8 meeting have not been posted yet, the firm understands that a primary focus of that meeting was whether to propose a standalone regulation or propose new language to be added to Section 3395 of the General Industry Safety Orders, which provides standards applicable to outdoor heat illness.[2]

At the February 8 meeting, both the labor and employer interests favored a standalone version of the

regulation (known as "Option B"). In response to these interests, on February 15, 2018, DOSH issued a revised draft of the standalone regulation. The current draft of the Proposed Regulation, which is attached to this memorandum, contains four key revisions:

1. Exemption of professional and administrative office settings where temperatures are less than 85 degrees Fahrenheit
2. Elimination of a "light work" exception, which labor interests claimed was a loophole for employers
3. Elimination of the need for a contingency plan that was triggered when temperatures exceeded 90 degrees Fahrenheit in exempt workplaces
4. Revision of the definition of "Indoor"[3]

The Proposed Regulation is currently in the first step of the approval process (during which DOSH conducts preliminary work to prepare proposed text for a new or updated standard"). DOSH is expected to propose the Regulation to the Cal/OSHA Standards Board by January 2019. It is unclear if there will be additional advisory meetings, but if it turns out that there are no additional meetings, there will be at least two comment periods open to the general public during which employers will have an opportunity to weigh in on the Regulation.[4]

[1] California Labor Code section 6720. This is an entirely new section that only addresses the Division's responsibility to propose a new indoor heat illness standard to the Standard's Board.

[2] California Code of Regulations, Title 8, Section 3395.

[3] It is difficult to determine the full significance of these revisions beyond their plain language until the February 8 minutes are released by the Division. Future updates will provide further analysis as additional information becomes available.

[4] **Information related to the Proposed Regulation including agenda and minutes for advisory meetings.**

OSHA's Interim Guidance on Citing Employers that Failed to Electronically Submit Injury and Illness Records

Matthew Deffebach and Mini Kapoor Ph.D.

According to a rule that became effective on January 1, 2017, OSHA requires certain employers to electronically submit injury and illness records directly to OSHA over the next several years. The information required to be electronically submitted includes that on OSHA Form 300 Log of Work-Related Injuries and Illnesses and OSHA Form 300A Summary of Work-Related Injuries and Illnesses. See 29 C.F.R. § 1904.41(a)(1)-(2).

Under the rule, employers were required to submit their OSHA 300A forms for 2016 to OSHA by December 15, 2017, although OSHA's website for electronic submission accepted injury and illness records submissions until December 31, 2017.

On February 21, 2018, OSHA issued Interim Enforcement Procedures for Failure to Submit Electronic Illness and Injury Records under 29 C.F.R. Sections 1904.41(a)(1)-(2). In this publication, OSHA provided guidance for citing employers that were required to electronically submit the injury and illness records but failed to do so. OSHA has instructed that failure to submit records should be classified as Other than Serious. In addition, under the interim guidance, area directors may direct their compliance officers to perform a full record keeping audit where there is evidence of potential systematic record keeping issues.

Employers may be able to avoid a citation and/or penalty during the interim guidance period if they fall into one or more of the following categories:

- If the employer attempted to electronically submit the information, but was unable to do so due to technical issues, employer may avoid being cited if the employer can show documentation of its

attempts to submit the information.

- If the employer failed to submit, but immediately abates during the inspection by providing a paper copy of the records, an Other Than Serious citation will be issued with no penalty.
- If the employer failed to submit its CY2016 data, but shows it has already submitted CY2017 data, an Other Than Serious citation will be issued with no penalty.

The six-month date to issue a citation for non-compliance with the requirements of 29 C.F.R. Section 1904.41 is June 15, 2018. OSHA is expected to provide separate guidance for the State Plans.

California Employers May Benefit From Confirming that Their First-Aid Kits Comply with CAL/OSHA Standard

Matthew Deffebach and Mini Kapoor Ph.D.

California Division of Occupational Safety and Health (Cal/OSHA) has recently increased enforcement of violations of a General Industry Safety Order requiring that employers' first-aid materials be approved by a consulting physician.

The **California Code of Regulations, Title 8, Section 3400 (c)** states, in relevant part:

> There shall be adequate first-aid materials, approved by the consulting physician, readily available for employees on every job.

While most employers in California may have first-aid kits in place, many may not have kits that are specifically approved by a consulting physician. Lack of approval by a consulting physician makes a first-aid kit non-compliant with the standard subjecting the employer to potential citations for violating the standard. Cal/OSHA's position is that the hazard associated with lack of approval by a consulting physician is that personal medications or unauthorized drugs might be placed inside a first-aid kit.

Although there is some push in the legislature towards changing the standard to remove the requirement for approval by a consulting physician, until the change actually happens, California employers should be aware of this trend in increased citations for non-complying first-aid kits and ensure that workplace kits are in compliance with the standard. A likely easy and simple way to become complaint could be providing for review and approval to the employer's consulting physician a written list of contents of the first-aid kit and documenting the physician's approval.[1]

[1] A generic first aid kit (see ANSI Z308.1-1998) may be sufficient to secure a physician's approval, but where special hazards exist at the workplace, additional measures may be required for physician approval. See *In the Matter of Appeal of Cybernet Entertainment*, 2015 WL 10058906 (Ca.O.S.H.A A.L.J.) (April 10, 2015).

Respirable Crystalline Silica: OSHA Updates General Industry and Maritime Standard

Matthew Deffebach and Jasmine Tobias

In an effort to better protect workers, OSHA issued an updated respirable crystalline silica standard for general industry and maritime, which became effective on June 23, 2016. This is the first update to the Standard since its adoption in 1971.[1] The updated general industry standard requires employers to limit worker exposure to respirable crystalline silica and implement other safety measures to protect employees from silicosis, lung cancer, and other respiratory diseases.

Key Revisions

Scope of the Standard: The Standard requires employers to determine the amount of silica that workers are exposed to if it may reasonably be expected to be at or above the action level of 25 µg/m³ averaged over an 8-hour day.[2] The Standard

also requires employers to protect employees from exposures above the permissible exposure limit ("PEL") of 50 µg/m³ averaged over an 8-hour day.[3] The scope of the Standard has been revised to exclude low exposure tasks, "where worker exposures to respirable crystalline silica will remain below 25 µg/m³ as an 8-hour time-weighted average under any foreseeable condition."[4] An employer is required to provide evidence of the exposure level to benefit from this exception. The Standard does not apply to exposure from processing sorptive clays. Further, the Standard allows employers to comply with the specified control methods instead of the PEL in some circumstances.

Dust Control Methods: The Standard requires employer to use dust controls and safer work methods to protect employees from silica exposures. Acceptable methods include: wet methods that apply water at the point where the silica dust is made; local exhaust ventilation that removes silica dust at or near the point it is made; and enclosures that isolate the employee or work process creating the silica dust.

Written Exposure Control Plan: The Standard requires employers to develop and implement a written exposure plan that identifies any tasks that may expose employees to silica and methods to protect employees.

Regulated Areas: The final general industry standard requires regulated areas where the exposure to workers exceeds PEL. These areas must have warning signs posted at their entrances.

Medical Surveillance: The Standard requires medical surveillance to be available to employees exposed at or above the action level for 30 or more days per year. Employers are required to obtain written medical opinions for examinations done pursuant to the Standard. Information to the employer is limited to the date of the examination, statement that the examination met the requirements and any limitation recommended regarding the employee's use of respirators. If the employee provides written authorization, the employer may also obtain any recommended limitations on the employee's exposure and any referral to a specialist.

Compliance Deadline: General industry employers have two years after the effective date to comply with most provisions. Further, there is a staggered implementation schedule to comply with medical surveillance requirements.

Deadline by which employers must comply with substantially all of the Standard	June 23, 2018
Deadline by which medical surveillance must be offered to employees who will be exposed above PEL for 30 or more days a year	June 23, 2018
Deadline by which medical surveillance must be offered for employees who will be exposed at or above the action level for 30 or more days a year.	June 23, 2018

[1] OSHA's Proposed Crystalline Silica Rule: Overview, OHSA Fact Sheet.

[2] 29 CFR 1910.1053

[3] *Id.*

[4] ***OSHA's Crystalline Silica Rule: Stakeholder Participation and Changes to the Standards***, OSHA FACT SHEET.