Action on Variety of Policies Lies Ahead in 2018

Employee Access to Employer's Injury and Illness Prevention Program

In 1998, California adopted rules (California Labor Code Section 6401.7 and Title 8, California Code of Regulations, Section 3203) for all employers to establish, implement and maintain an effective written Injury and Illness Prevention Program (IIPP). The program essentially creates a roadmap of how each employer will address its unique workplace hazards by outlining the employer's steps to ensure employee safety in the workplace. Implementation of the program includes a plan for how the employer will train employees and communicate information at critical times regarding working safely.

Over the years, the safety culture has evolved to adapt to the IIPP requirements and increase workplace safety throughout the state. Furthermore, the California Division of Occupational Safety and Health (Cal/OSHA) has developed a number of model IIPP programs for employers in various industries to assist them in developing their own IIPP. Most regulatory initiatives pursued by Cal/OSHA or the Legislature allow the employer to incorporate new requirements into its existing IIPP.

The regulations regarding the IIPP do not explicitly provide for employees to have access to their employer's IIPP, but rather direct employers to develop procedures to communicate with employees regarding safety in the workplace as well as procedures to find and fix hazards. Specific safety instructions and safety practices are not part of the IIPP.

There are seven elements to the program, as follows:

- Identify the person responsible for implementing the plan.
- Include a system for ensuring that employees comply with safe and healthy work practices.
- Include a system to communicate with employees in a form readily understandable by all affected employees on matters relating to occupational safety and health, including a system for employees to report hazards to the employer.
- Include procedures for identifying and evaluating workplace hazards, including inspections.
- Include a procedure to investigate injuries.
- Include methods for correcting unsafe conditions, based on the severity of the hazard.
- Provide training and instruction when the program is first established; to all new employees; for new job assignments; whenever new substances, processes, procedures or new equipment are introduced; whenever the employer is made aware of a new or previously unrecognized hazard; and for supervisors to be familiar with the hazards to which their employees may be exposed.

In 2016 and again in 2017, the Legislature considered bills that explicitly provided for employees' access to their employer's IIPP. These bills, however, went beyond providing access for employees to the program and proposed additional burdensome and unnecessary mandates on employers that would have paved the way for unwarranted litigation against employers. Accordingly, the California Chamber of Commerce led opposition to both bills. The bill in 2016 was held in the Senate in the final days of the session (AB 2895; R. Hernández; D-West Covina); and in 2017, the bill was vetoed by the Governor (AB 978; Limón; D-Goleta).

In the interim, in February 2017, with CalChamber support, a request was made to the Cal/OSHA Standards Board to develop a regulation to provide for employees' access to their employer's IIPP. The Board subsequently approved the request to explore developing such a regulation.

Governor's Veto Message on AB 978

To the Members of the California State Assembly:

I am returning Assembly Bill 978 without my signature. This bill would require employers to provide their employees, or their representative, access to an employer's written injury and illness prevention program within ten business days upon request. I support policies that promote access and transparency in order to prevent injuries and improve health and safety. This bill, however, is unnecessary and duplicative of an existing regulatory proposal that is already underway at the Occupational Safety and Health Standards Board. The Standards Board advisory committee process is better suited to determine how to properly implement requirements of this kind.

Sincerely, Edmund G. Brown Jr.

In 2018, it is anticipated that the Cal/OSHA Standards Board will begin the rulemaking process and convene an Advisory Committee of stakeholders. As directed by the board in its approval of the request, the committee will seek consensus on the appropriate process for employee access to the IIPP.

CalChamber will be engaged in the rulemaking process as it moves forward. For more information, visit the standards board website: *www.dir.ca.gov/oshsb/petition-562.html*.

Heat Illness Prevention

In 2005, California became the first state in the nation—and still is the only state—to adopt a heat illness prevention standard

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to protect outdoor workers (California Code of Regulations, Title 8, Section 3395). The heat illness prevention standard requires employers to provide agricultural workers, construction workers, landscapers, and others who work outdoors with water, shade, rest breaks, and training. Known as the high heat provisions, additional requirements apply when the outdoor temperature exceeds 95 degrees.

In 2016, the California Legislature passed, and the Governor signed SB 1167 (Mendoza; D-Artesia, Chapter 839) to require Cal/OSHA to propose to the Cal/OSHA Standards Board by January 1, 2019 for review and adoption, a heat injury and illness prevention standard applicable to workers in indoor places of employment. The CalChamber and a large coalition of businesses opposed the legislation as unnecessary because current regulations (Title 8, Section 3203 Illness and Injury Prevention Program) require employers to identify and address workplace hazards, including the risk of heat illness in indoor workplaces. Now that SB 1167 is law, the CalChamber is working with Cal/OSHA and affected stakeholders to find consensus for a reasonable and rational regulation.

2017 Stakeholder Meetings: Heat Illness Prevention for Indoor Workers

In 2017, Cal/OSHA convened two stakeholder advisory committees to attempt the challenge of reaching consensus amongst interested parties from industry, labor, management and academia on how to regulate the prevention of heat illness for indoor workers. To date, Cal/OSHA has provided draft rules for discussion only—no formal rulemaking has begun. These draft rules propose to regulate all indoor workplaces—a place of employment would be either indoors or outdoors; not neither and not both.

Defining an indoor workplace, as opposed to an outdoor workplace, has proven to be challenging, as has determining when employers would be subject to the outdoor heat illness rules, and when they would be subject to the indoor heat illness rules. Many employers have both outdoor and indoor workplaces, with some or all employees transitioning between both. These questions of scope require industry input to provide Cal/OSHA the most rational and complete understanding of operations and risks, as well as rational, feasible policies to address those identified risks.

It is anticipated that stakeholder meetings will resume in early February 2018. All industries with any indoor workplace—from warehouses to restaurants to laundry operations, delivery drivers and many others—are encouraged to participate in the stakeholder discussions. SB 1167 does not specify any exceptions, including air conditioned offices.

To participate in CalChamber's stakeholder working group, please send an email of interest with your contact information to *heatillness@calchamber.com*.

Workplace Violence Prevention

In 2014, two health care worker unions filed a petition asking the Cal/OSHA Standards Board to adopt a regulation to provide health care workers with specific protections against workplace violence. Later that same year, the Governor signed SB 1299 (Padilla; D-Pacoima; Chapter 842), consistent with the previous petitions, to require the board to adopt regulations to protect hospital workers from workplace violence. Over the following two years, an advisory committee of stakeholders considered regulatory language. The first-in-the-nation rule to protect health care workers against workplace violence was adopted by the Cal/OSHA Standards Board and went into effect in April 2017.

In 2017, Cal/OSHA began work on a workplace violence prevention standard for all industries by holding one advisory committee meeting with stakeholders as a listening session. It is anticipated that the health care worker standard will provide the backdrop for a starting point on language for the subsequent general industry rule, but at this time there is no draft language proposed by Cal/OSHA. Look for Cal/OSHA to convene advisory committees with draft language—the first step in the rulemaking process—in the first half of 2018. The CalChamber will be engaged in the process, and will be inviting members and partners to join our coalition.

Hotel Housekeeping: Musculoskeletal Injury Prevention Program

In 2012, UNITE HERE, a labor union representing workers in the hotel, gaming, food service, airport, textile, manufacturing, distribution, laundry and transportation industries, petitioned the Cal/OSHA Standards Board to develop a safety and health standard to "address the occupational hazards faced by housekeepers in the hotel and hospitality industry." Advocates called for stronger protections and better ergonomics training for hotel housekeeping workers to wrestle heavy mattresses and increased hotel room amenities, such as heavier comforters and towels.

Following the petition, Cal/OSHA convened a number of advisory committees, bringing UNITE HERE workers and advocates along with industry representatives, including CalChamber and the California Hotel and Lodging Association, to the table to discuss possible regulatory approaches and language.

Throughout the process, Cal/OSHA did adopt a number of CalChamber-recommended revisions to the regulatory language; employers maintain, however, that a separate stand-alone program specifically for preventing ergonomic injuries (also known as musculoskeletal injuries, or MSDs) exclusively for housekeepers is unwarranted. The draft regulation is overly prescriptive, departs from the plain language and intent of the IIPP model and assumes that housekeeping is hazardous and must be corrected.

Formal rulemaking began in 2017 with a public hearing by the Cal/OSHA Standards Board in May 2017. Written and oral testimony was taken, including oral testimony by CalChamber. It is anticipated the rule will come before the board for adoption in early 2018. Updates and announcements, as well as more information about the proposal, can be found on Cal/OSHA's website at *http://www.dir.ca.gov/dosh/DoshReg/Hotel_Housekeeping.html*.

Federal OSHA

The new leaders of the U.S. Department of Labor (DOL), Equal Employment Opportunity Commission, and National Labor Relations Board sponsored a panel discussion during which the speakers advocated a more common-sense approach to rulemaking, and supported the new administration's efforts to rescind or scale back some of the prior administration's more onerous rules.

Newly appointed Labor Secretary Alexander Acosta addressed transitions and regulatory plans at the DOL at a November 16, 2017 forum held by the Federalist Society, a conservative think tank. Secretary Acosta kick-started the discussion by criticizing the practice of using sub-regulatory guidance to change the law. He said he was against using "administrative fiat" to implement significant policy changes. According to Secretary Acosta, any change in substantive law should be made by Congress, not by interpretive guidance that is issued without the benefit of notice and comment. In California, such policy issued outside of the required Administrative Procedures Act generally is underground regulations and prohibited.

In determining which rules are ripe for deregulation, the Labor Secretary proposed adding a new layer of analysis. When deciding which regulations to roll back, he said the agency should not merely perform a cost/benefit analysis, but should evaluate whether revoking the rule is necessary to preserve liberty. (Michael Lotito, *Littler News & Analysis*, November 16, 2017.)

State OSHA plans such as California's must maintain safety rules at least as effective as the federal plan, and in some instances, the same as the federal rules. Many of California's rules are already more stringent, or more effective than the federal rules; therefore a rollback of federal OSHA rules may not have any impact on Cal/OSHA rules in many instances.

Recordkeeping and Injury Reporting Rule

On May 12, 2016, the Occupational Safety and Health Administration (OSHA) published a final rule (81 *Federal Register* 29624) that created a new requirement for some employers to submit to OSHA electronically their injury and illness records. Originally, employers were to have submitted these records to OSHA by July 1, 2017. Subsequently, OSHA published on November 24, 2017 a final regulation setting the new date by which employers must submit their forms at December 15, 2017.

The OSHA webpage for submitting reports is at *https://www.osha.gov/injuryreporting/ita/* and OSHA's FAQ page on reporting requirements is at *https://www.osha.gov/injuryreporting/index.html*. Requirements for employers with 250 or more employees to submit all OSHA forms (300, 301, and 300A) are set to take effect January 1, 2018 with a reporting deadline of July 1, 2018. Employers with between 20 and 249 employees will be required to submit only 300A forms going forward.

Under the Obama administration, OSHA announced that any reports submitted to OSHA would be posted to the internet. The new administration has not explicitly retracted this position, but the *Federal Register* announcement for the new reporting date stated that the administration "will use the data collected to more efficiently focus its outreach and enforcement resources towards establishments that are experiencing high rates of occupational injuries and illnesses."

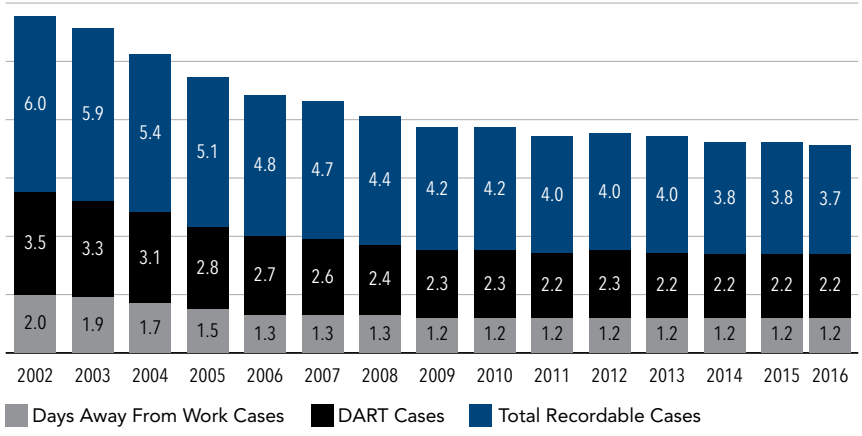
In addition to the reporting requirement, the same regulation included a provision designed to prevent retaliation against workers who report injuries or safety violations. This provision required employers to have a "reasonable" policy in place for employees to report their injuries and safety violations. Although what constitutes a "reasonable" policy is not defined, OSHA does provide guidance (not regulation) that certain mandatory post-accident drug testing programs and rate-based safety incentive programs would likely be considered unreasonable.

Under this new standard, employer policies that request or require post-accident drug or alcohol testing could now face scrutiny by federal OSHA because, the agency claims, post-accident testing potentially deters injury reporting. Cal/OSHA has not adopted the federal standard, however, but has stated that new rules are under review.

Many employers maintain post-accident drug and alcohol testing policies to promote workplace safety as part of accident investigation efforts and in the hope of reducing workplace accidents and workers' compensation claims. The new rule prohibits this procedure from deterring or discouraging a reasonable employee from accurately reporting a workplace injury or illness.

At the same time as the reporting requirement is going into effect, OSHA has announced that it will be undertaking a comprehensive rulemaking to review the full regulation and possibly revise it. When OSHA proposed extending the reporting deadline to December 1, 2017, many business groups submitted comments to OSHA recommending that OSHA suspend the

Injury/Illness Rate per 100 Full-Time Workers in California



Source: U.S. Bureau of Labor Statistics Survey of Occupational Injuries and Illnesses

reporting requirement indefinitely pending the outcome of the comprehensive rulemaking to which the agency has committed. Unfortunately, OSHA did not agree with this approach, although the agency did reiterate that such a rulemaking is forthcoming.

The regulation is being challenged in two lawsuits brought in federal courts in the Northern District of Texas and the Western District of Oklahoma. The lawsuit in Texas was led by the National Association of Manufacturers and the Associated Builders and Contractors and only goes after OSHA's identifying drug testing and safety incentive programs as being inconsistent with the requirement to have a reasonable policy in place for employees to report their injuries or safety violations. The lawsuit in Oklahoma is led by the National Association of Home Builders and the U.S. Chamber of Commerce and challenges all aspects of the regulation—the reporting requirements and the anti-retaliation provision. The Texas lawsuit has been dismissed without prejudice, meaning that it can be refiled if the parties wish. The Oklahoma lawsuit is currently stayed pending the outcome of the rulemaking.

To date, Cal/OSHA has not adopted the federal OSHA electronic reporting rules. It is anticipated that once federal OSHA completes its rulemaking, California will adopt a consistent rule.

CalChamber Position

CalChamber continues to advocate cost-effective and practical safety and health regulations while protecting the competitive position of California employers. We work to ensure that any new rules are feasible, based on sound science and assist the regulated community in its compliance efforts. Specifically, CalChamber will:

- Oppose legislation providing for any further increase in Cal/OSHA mandates, fines and penalties without a showing that an increase will be a more effective deterrent to violators.
- Oppose fees for Cal/OSHA consultations or audits.
- Oppose legislation placing "bounty hunter" or private right of action provisions in state health and safety statutes.
- Oppose expanded ergonomics rules at the state and federal levels.
- Oppose burdensome or unnecessary provisions in heat illness regulations that apply to indoor workplaces.
- Oppose efforts to undermine an employer's ability to maintain a safe and drug-free work environment.
- Oppose legislation that creates an opportunity for litigation regarding an employer's efforts to maintain a safe and drug-free work environment.
- Support legislation that establishes a safety and health audit privilege to prevent disclosure or discovery of audits required by law.

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January 2018