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Cal/OSHA Regulatory and Legislative Updates

While all eyes are on the recently released Federal OSHA (“Fed/OSHA”) COVID-19 Vaccination and Testing Emergency Temporary Standard, which was released and immediately enjoined pursuant to a court order last week, our own California OSHA (“Cal/OSHA”) has been considering new regulations and making changes to existing standards which are important for employers to know about.

Update to COVID-19 Emergency Temporary Standards (ETS)

Recent updates to the Cal/OSHA ETS include updates to the Frequently Asked Questions (FAQ) sections on California Department of Public Health (CDPH) Isolation and Quarantine, Vaccines, and revisions to Exclusion and Pay. The FAQs can be accessed [here](#).

Proposed Second Re-Adoption of Cal/OSHA ETS COVID-19 Regulations

Cal/OSHA’s existing COVID-19 measures, the Emergency Temporary Standard (“ETS”), is presently set to expire in January 2022. Cal/OSHA expects to re-adopt the current ETS with some possible revisions – particularly in light of the Fed/OSHA ETS. A re-adoption of the ETS would then extend the ETS to April 14, 2022. The full text of the **proposed** second re-adoption can be found [here](#).

Proposed Semi-Permanent COVID-19 Regulations

Looking past the ETS, Cal/OSHA is considering implementing semi-permanent regulations which address COVID-19 and which would be effective for at least two years. The Cal/OSHA Advisory Committee on COVID-19 heard feedback from Advisory Committee members on September 23, 2021 and during subsequent meetings on the proposed regulation and is reviewing the written comments which were submitted in early October. The full text of the **proposed** regulation can be found [here](#). However, we can expect that Cal/OSHA will revise this proposal in light of the more restrictive Fed/OSHA ETS.

SB 606 – Cal/OSHA “Enterprise-wide” and “Egregious” violations

On September 27, 2021 Governor Newsom signed Senate Bill (“SB”) 606 which will go into effect on January 1, 2022. SB 606 creates two new categories of citations (i.e., regulatory, general, accident related, etc.) which Cal/OSHA can issue against an employer. While SB 6060 was not directly related to COVID-19, one of the authors, Senator Glenna Gonzales, has stated that this legislation will “address the need for stronger enforcement measures to keep workers safe as the COVID-19 pandemic continues.”

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The first new category created by SB 606 is a rebuttable presumption of an “enterprise-wide” violation under Labor Code §6317, which provides that “[i]f, upon inspection or investigation, the division believes that an employer has [committed a violation] it shall with reasonable promptness issue a citation to the employer.” SB 606 amends Labor Code §6317 to add subsection (b)(1) which creates a rebuttable presumption that an employer with multiple worksites has committed an “enterprise-wide” violation if either of the following is “true”:

- The employer has a non-compliant written policy or procedure; **or**
- Cal/OSHA “has evidence of a pattern or practice of the same violation or violations committed by that employer involving more than one of the employer’s worksites.”

Labor Code §6317(b)(2), also introduced by SB 606, provides for enterprise-wide citations requiring enterprise-wide abatement if an employer fails to rebut the presumption raised in (b)(1). In investigating the policies and practices of an employer, Cal/OSHA may issue and enforce a subpoena if the employer or related employer entity fails to comply within a “reasonable” period of time.

The second new category created by SB 606, through the addition of Labor Code §6317.8, is an “egregious violation.” An egregious violation occurs “if, upon inspection or investigation, the division believes that an employer has willfully and egregiously violated an occupational safety or health standard, order, special order, or regulation, the division.” For purposes of fines and penalties, “each instance of an employee exposed to that violation shall be a separate violation.” Much like with repeat citations, the applicable conduct must have occurred within the past five years. Labor Code §6317(b) defines an “egregious violation” as one or more of the following being “true” about the employer or the willful violation committed by the employer:

- (1) The employer, intentionally, through conscious, voluntary action or inaction, made no reasonable effort to eliminate the known violation;
- (2) The violations resulted in worker fatalities, a worksite catastrophe, or a large number of injuries or illnesses. For purposes of this paragraph, “catastrophe” means the inpatient hospitalization, regardless of duration, of three or more employees resulting from an injury, illness, or exposure caused by a workplace hazard or condition;
- (3) The violations resulted in persistently high rates of worker injuries or illnesses;
- (4) The employer has an extensive history of prior violations of this part;
- (5) The employer has intentionally disregarded their health and safety responsibilities;
- (6) The employer’s conduct, taken as a whole, amounts to clear bad faith in the performance of their duties under this part; or
- (7) The employer has committed a large number of violations so as to significantly undermine the effectiveness of any safety and health program that may be in place.

Cal/OSHA may seek an injunction or temporary restraining order when it alleges enterprise-wide or egregious citations. This is a massive expansion of Cal/OSHA enforcement power. Currently, Cal/OSHA may only seek an injunction if “the condition of any employment or place of employment or the operation of any machine, device, apparatus, or equipment constitutes a serious menace to the lives or safety of persons about it.”

Appeal of an enterprise-wide violation will stay abatement, but if the violation is affirmed, abatement will be required across all of the employer’s California worksites. The civil penalties for citations of enterprise-wide violations will carry the same penalties as willful or repeated citations under Labor Code § 6429 (and Title 8 C.C.R. §336), i.e., no more than \$134,334 for each violation and no less than \$9,595 per violation.

Penalty Increases

The 2021 Reconciliation Bill, which is pending a vote in the coming weeks, would increase Fed/OSHA penalties, which would also require Cal/OSHA to match or exceed the Fed/OSHA increase. The increases would apply to citation classified as “willful”, “repeat”, and “serious” and failure to correct violations. **If approved, the proposal increases the fines** as follows beginning January 1, 2022:

	<u>Cal/OSHA Current</u>	<u>Fed/OSHA Current</u>	<u>Fed/OSHA Increased</u>
<u>Willful/Repeat</u>	\$134,334 Max.	\$5,000 Min. / \$70,000 Max.	\$50,000 Min. / \$700,000 Max.
<u>Serious</u>	\$25,000 Max.	\$7,000 Max.	\$70,000 Max.
<u>Failure to Correct</u>	\$15,000 per day Max.	\$7,000 per day Max.	\$70,000 per day Max.

What This Means for Employers:

While COVID-19 slowed the occurrences of Cal/OSHA on-site inspections, it appears to have awakened a sleeping beast, and we can expect the remainder of 2021 to be filled with regulatory changes while Fed/OSHA and Cal/OSHA look to broaden their authority over employers. Employers can expect that Cal/OSHA will look for ways to issue the egregious and enterprise-wide citations early on in 2022, including but not limited to COVID violations. California employers who have been adjusting to the ever changing COVID regulations must continue to move quickly to adopt changes and adapt to the new regulations. We will keep you updated as more changes occur.

The goal of this article is to provide employers with current labor and employment law information. The contents should neither be interpreted as, nor construed as legal advice or opinion. The reader should consult with Barsamian & Moody at (559) 248-2360 for individual responses to questions or concerns regarding any given situation.