

Coffee with Counsel Agenda B. 2.

Question:

What to expect from a Cal OSHA inspection? Will they do “no fine” inspection requests? Some employers would like to invite OSHA to conduct a compliance inspection so the employer can confirm compliance with the regulations, or learn where improvements should be made in order to comply before an official inspection is conducted. But will OSHA do so without imposing fines even though invited in by the employer to help with compliance and worker safety?

Overview:

Cal OSHA has two main branches: enforcement and consultation. Cal OSHA's enforcement branch enforces worker safety and health standards. They are responsible for investigating law enforcement reports, employee complaints, and accident reports that result in serious injury or death. Additionally, they provide targeted inspections of employers in high-hazard industries. Following a work-place inspection, the Cal OSHA enforcement branch may issue citations, special orders, and orders to take special action. The Cal OSHA consultation branch is a service available on a voluntary basis that helps employers comply with workplace safety and health regulations, as well as providing best practice improvements. They offer free training, publication materials, and consultation services to employers and their employees. The consultation services include both on-site and off-site consultations, as well as participation in their partnership programs. Although these services help employers get into compliance, it does not guarantee that enforcement will not find any other violations.

On-site Consultations

The purpose of on-site consultations are to evaluate and suggest improvements in workplace safety and health programs. Only employers may request on-site assistance. If an employer does request on-site assistance, the employer and a consultation agent will participate in an opening conference, a review of the employer's safety records and all written safety programs, a walk-around hazard identification, and a closing conference. Following this process, employers will receive a written report detailing the entire process and identifying any hazards. On-site consultation services do not result in citations or penalties, however the employer must agree to timely correct any identified hazards that could lead to the injury, illness, or death of an employee. Moreover, all communications between the employer and consultation service are held in confidence and not shared with the enforcement branch because they are separate and distinct entities.

Offsite Consultations

Off-site consultations can be performed over the phone, through email, or at an off-site office meeting. Both employer and employee groups may request off-site consultations. Similar to the on-site visits, off-site consultations cover subjects such as hazard assessment, regulatory requirements, workplace improvements, and other workplace safety and health issues.

Partnership Programs

Cal OSHA's High Hazard Compliance Program (“HHCP”) identifies high hazard business establishments for targeted inspection and intends to implement effective injury and illness prevention programs. Supermarkets and other grocery stores (except convenience stores) are included in the 2020-2021 High Hazard Industry List, which is available on the linked website at the end of this memo. The Cal OSHA consultation branch has four voluntary partnership programs: the California Voluntary Protection Program (“Cal/VPP”), Safety and Health Achievement Recognition Plan (“SHARP”), Golden Gate, and Alliances. Cal/VPP and SHARP may exempt high hazard employers from targeted inspections, however an employer must meet the program's requirements.

More information regarding Cal OSHA's consultation services is linked below.

Question:

Cal OSHA passed a controversial set of emergency regulations last year intended to protect employees from COVID exposure in the workplace. OSHA has reportedly been aggressively inspecting workplaces and writing citations to employers. What is the latest information on these “Emergency Temporary Standards” (ETS)?

Overview:

This is a brief summary tracing the COVID-19 Emergency Temporary Standards (“ETS”) language development and how it could impact CGA members’ day to day operations. Even though California intends to fully re-open businesses on June 15, businesses are still required to comply with ETS until they are repealed.

On November 19, 2020, Cal OSHA approved the ETS which went into effect on November 30, 2020. The regulations are separated into five compliance categories: COVID-19 Prevention Program; Outbreaks; Major Outbreaks; Employer-Provided Housing; and Employer-Provided Transportation. The ETS requires an employer to develop a written COVID-19 Prevention Program that addresses 11 different subject matters or ensure its elements are included in an existing Injury and Illness Prevention Program (“IIPP”). On December 18, 2020, CalChamber requested a delay in enforcement until January 15, 2021 because of the lack of notice and sweeping language. At this meeting, Cal OSHA asked employers to provide feedback on their compliance difficulties so that revisions could be made.

The Cal OSHA advisory committee met on February 18, 2021, and proposed revisions that took into account employers’ feedback. The revised language proposed that ETS’s physical distancing, housing, and transportation requirements no longer apply when their employees are fully vaccinated. Other revisions brought the ETS into alignment with the May 3, 2021, California Department of Public Health’s recommendation that fully vaccinated individuals who have had a COVID-19 exposure do not need to be excluded and self-quarantine if they are asymptomatic. However, if fully vaccinated employees “are COVID-19 cases” or exhibit COVID-19 symptoms, they must be excluded. If a non-vaccinated employee is exposed to COVID-19 and is asymptomatic, they may return to work after 10 days have passed a screening since the last known exposure date. These revisions also clarified that nonemployees passing through the workplace cannot trigger an “outbreak.” Another provision requires employers to provide verbal notice “as soon as practicable” to an employee they have reason to believe has “limited literacy” or did not receive written notices regarding various communication requirements. This provision will need to be clarified in the newest revisions because it is unknown what an acceptable timeline would be or what the definition of “limited literacy” is.

Following the release of these revisions on May 7, 2020, the Cal OSHA Standards Board planned to meet on May 20, 2021 to review and re-adopt the revised ETS. If the Standards Board re-adopts the revised ETS, it will change the requirements for employers and extend its duration for another 210 days. Cal OSHA could end the regulation sooner, but it could also re-adopt it for another 210 days following the first re-adoption period. However, the Standards Board failed to readopt the revised ETS because the Cal OSHA Deputy Chief requested more time to allow Cal OSHA to update its revisions and align itself with the CDC’s guidance that fully vaccinated individuals can go without masks in some settings. Following this guidance, the California Health & Human Services Agency announced that “California plans to implement the CDC’s guidelines around masking to allow fully vaccinated Californians to go without a mask in most indoor settings” beginning on June 15, 2021. This new language was scheduled to be publicly available on May 28, 2021, and the next hearing to readopt the revised ETS is scheduled for June 3, 2021.