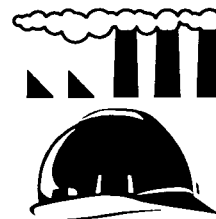


# Cal-OSHA

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California's Occupational Safety and Health Administration (Cal-OSHA) is part of the cabinet-level Department of Industrial Relations (DIR). The agency administers the California Occupational Safety and Health Act, Labor Code section 6300 *et seq.*, California's program ensuring the safety and health of its workers.

Cal-OSHA was created by statute in October 1973. It is approved and monitored by, and receives some funding from, the federal Occupational Safety and Health Administration (Fed-OSHA). Cal-OSHA's regulations are codified in Titles 8, 24, and 26 of the California Code of Regulations (CCR).

Cal-OSHA's Occupational Safety and Health Standards Board (OSB), authorized in Labor Code sections 140-49, is a quasi-legislative body empowered to adopt, review, amend, and repeal health and safety regulations which affect California employers and employees. Under section 6 of the Federal Occupational Safety and Health Act of 1970, California's worker safety and health standards must be at least as effective as Fed-OSHA's standards within six months of promulgation of a given federal standard. Current procedures require OSB to justify its adoption of standards that are more stringent than the federal standards. OSB is authorized to grant interim or permanent variances from occupational safety and health standards to employers who can show that an alternative process would provide equal or superior safety to employees. The Board may also consider petitions for new or revised regulations proposed by any interested person concerning occupational safety and health. OSB holds monthly meetings to permit interested persons to address the Board on any occupational safety and health matter.

The seven members of OSB are appointed by the Governor to four-year terms. Labor Code section 140 mandates the composition of the Board. At this writing,

OSB is comprised of occupational health representative Jere Ingram, who serves as Board Chair; occupational safety representative Gwendolyn Berman; management representatives William Jackson and Victoria Bradshaw; labor representatives Elizabeth Lee and Kenneth Young; and public member Sopac Tompkins. The terms of Board members Berman, Jackson, and Young all expired on June 1; however, under Labor Code section 141 members of OSB may continue to serve until replaced, and Governor Davis has yet to replace any of them at this writing.

The duty to investigate complaints and enforce OSB's safety and health regulations rests with the Division of Occupational Safety and Health (DOSH). DOSH issues citations

and abatement orders (granting a specific time period for remedying the violation), and levies civil penalties for serious, willful, and repeated violations; additionally, egregious violations may be referred to a public prosecutor for criminal prosecution. In addition to performing routine investigations, DOSH is required by law to investigate employee complaints and accidents causing serious injuries, and to make follow-up inspections at the end of abatement periods. The Occupational Health and Safety Appeals Board adjudicates disputes arising out of DOSH's enforcement of OSB's standards. Cal-OSHA's Consultation Service provides onsite health and safety recommendations to employers who request assistance. Consultants guide employers in adhering to Cal-OSHA standards without the threat of citations or fines.

Effective September 27, OSB moved its headquarters to 2520 Venture Oaks Way, Suite 350; Sacramento, CA 95833. Its telephone number is (916) 274-5721 and its fax number is (916) 274-5743.

## MAJOR PROJECTS

### **Emergency Procedures Plan for Powered Platforms and Equipment for Building Maintenance**

On October 29, OSB published notice of its intent to amend sections 3292(d)(1) and 3294(i), Title 8 of the CCR; the amendments will ensure that building owners have developed adequate plans for the safe use of powered platforms and equipment for building maintenance.

Appendix A of Article 5 of OSB's General Industry Safety Orders (GISO) contains the requirements for an operating procedures outline sheet (OPOS). An

OPOS establishes safe window cleaning and exterior maintenance procedures for buildings and structures. An OPOS is required for buildings 36 feet or more in height that do not have established window cleaning procedures meeting the requirements specified in GISO Articles 5 and 6. An OPOS is also required for buildings 36 feet or more in height with extreme architectural features that require the use of complex rigging or equipment.

When powered platform installations are permanently dedicated to interior or exterior maintenance of a building, the owners of such buildings are required by section 3292(d)(1) to develop an emergency procedures plan to assure safe access to and egress from suspended platform

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equipment. OSB proposes an amendment to section 3292(d)(1) to ensure that a building owner's emergency procedures plan is incorporated into the development of an OPOS, when an OPOS is required. Additionally, section 3294(i) requires employers whose employees use suspended platform equipment for building maintenance to have a written emergency action plan that is reviewed with employees. OSB proposes to amend section 3294(i) to ensure that the employer's emergency action plan is consistent with the emergency procedures plan required of the building owner in section 3292(d)(1).

At this writing, OSB is scheduled to hold a public hearing on these proposed amendments at its December 16 meeting.

### **Personal Fall Protection for Window Cleaning Operations**

On October 1, OSB published notice of its intent to amend sections 3281, 3284, 3285, 3286, 3287, 3291, and 3293, Title 8 of the CCR, to make the personal fall protection requirements for window cleaning and building maintenance in GISO Articles 5 and 6 consistent with the requirements contained in Article 24 of OSB's Construction Safety Orders.

Since OSB's adoption of GISO Articles 5 and 6, Fed-OSHA has revised its fall protection standards, 29 C.F.R. Part 1926 (Subpart M), including the requirement for fall protection systems and equipment. One provision of revised subpart M became effective on January 1, 1998, and specifies that body belts are not acceptable as part of a personal fall arrest system. Subpart M has been incorporated into Article 24 of the Construction Safety Orders, but has not yet been incorporated into Articles 5 and 6 of the General Industry Safety Orders. Board staff is concerned that there are inconsistencies in the fall protection requirements in Articles 5 and 6 when compared to Article 24; in addition, there are numerous references to the use of body belts for fall arrest in Articles 5 and 6, which is no longer permitted under subpart M. Thus, staff has proposed numerous "clean-up" amendments to the provisions in GISO Articles 5 and 6 and the incorporation of the new federal standard specifying that body belts may not be used as part of a personal fall arrest system in window cleaning and building maintenance operations.

At this writing, OSB is scheduled to hold a public hearing on the proposed changes at its November 18 meeting.

### **Objection to Hearing Panel, Hearing Officer, or Board Member**

On October 1, OSB published notice of its intent to amend section 417.1, which provides that any party to a variance may request a hearing before OSB itself (as opposed to a hearing before a hearing panel), and may request the disqualification of a Board member or the hearing officer assigned to a particular variance. OSB proposes to clarify the procedures for making such requests, set time limitations on the submission of these requests, and revise the process for disqualifying a hearing officer.

Specifically, OSB's proposed amendments to section 417.1(a) would require a party to a variance who objects to a hearing panel or hearing officer to request in writing that the variance be heard by the Board itself rather than by a hearing panel. The request must be accompanied by a showing of good cause and may be granted or denied at the discretion of the Board chair. The request must be made prior to, or upon receipt of, the notice of hearing and at least five working days prior to the scheduled hearing date. Failure to provide a timely request will be sufficient grounds for denying the request. The hearing shall not be held until a determination is made on the party's request.

OSB also proposes to amend section 417.1(b), pertaining to disqualification of a hearing officer or a Standards Board member, to state that any party may request the disqualification of any hearing officer and/or Standards Board member by filing an affidavit, at least five working days prior to the scheduled hearing date, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. Under subsection 417.1(b)(2), the party must serve notice of its request on all other parties, and the notice must include the name of the hearing officer and the hearing panel members. If any change is made to the hearing panel and/or hearing officer assignments subsequent to service of the notice of hearing, the parties, whenever possible, shall be notified of such changes. If the parties are notified of such changes less than five working days before the scheduled hearing, a party wishing to request a disqualification must make the request as soon as it learns of the new assignment(s). Under such circumstances, the request initially may be made orally, including by telephone, and shall be made to the Board before the hearing is convened whenever possible. The request shall then be submitted in writing as soon as possible, and no later than ten working days after the oral request is made. If the request to change the hearing panel and/or hearing officer assignments cannot be made prior to the beginning of the hearing because the parties were not notified of such assignments, or not notified in a timely manner, the request shall be made prior to the taking of evidence at the hearing. If an oral request is made on the record at the hearing and is fully explained at that time, a written request need not be submitted.

Under subsection 417.1(b)(3), a request to disqualify the hearing officer and/or a Standards Board member will be determined by the other members of the Standards Board not subject to the request. Under subsection 417.1(b)(4), if a request to disqualify is made prior to the hearing being convened, the hearing will not begin until a determination has been made on the party's request. If a party is unable to make its request prior to the convening of the hearing because it was not timely notified of the hearing panel and/or hearing officer assignments, the hearing will be held for the sole purpose of allowing the party to state its request on the record. The remainder of the hearing will be postponed until a determination on the request has been made. Under subsection

417.1(b)(5), failure to make a request to disqualify in accordance with the time specifications stated in this subsection is sufficient grounds for denying the request.

At this writing, OSB is scheduled to hold a public hearing on its proposed amendments to section 417.1 at its November 18 meeting.

## Approved Testing Equipment in Hazardous Working Environments

On September 3, OSB published notice of its intent to amend sections 5157 (permit-required confined spaces), 5158 (other confined space operations), 5416 (flammable vapors), and 8355 (confined and enclosed spaces and other dangerous atmospheres), Title 8 of the CCR, each of which requires employers to test the atmosphere to determine if it could cause a fire or explosion hazard to exposed employees. Currently, many employers conduct such testing using direct reading

instruments that use electronic or thermal means to determine the concentration of various chemicals. These electronic and testing devices could themselves be a potential source of ignition if they are not approved for use in such hazardous environments. Section 2540.2 of the Board's Electrical Safety Orders requires that all electrical equipment and tools used in hazardous, flammable, and/or explosive locations must be approved for use in such environments, and further defines "approval" to require such devices to be independently evaluated to ensure that applicable standards or scientific principles are met. OSB proposes to amend each of the sections identified above to state that if electronic or thermal equipment is used for testing and the possibility exists of an explosive substance or a flammable atmosphere, the testing equipment must be approved for use as required by section 2540.2.

At its October 21 meeting, OSB held a public hearing on these proposed amendments; no substantive comments were received. At this writing, the Board has yet to adopt the amendments.

## Emergency Medical Services / First Aid

On September 3, OSB published notice of its intent to amend section 1512(b), Title 8 of the CCR, a provision of its Construction Safety Orders that requires employers of employees on a construction site to have a suitable number of appropriately trained persons to render first aid. Where more than one employer is involved in a single construction project on a given construction site, the employers may form a pool of appropriately trained persons, provided the pool is large enough to service the combined workforces for such employers. OSB proposes to amend section 1512(b) to provide an exception to the first aid training requirement for engineering contractors or service employers with only one employee

on a job site who is not engaged in construction activity, where the following conditions are met: (1) the employer has implemented an effective Injury and Illness Prevention Program; (2) the employee is provided appropriate personal protective equipment and has received specific training and instruction on the use of such equipment; and (3) upon entering the job site, the employee reports to the superintendent or person in charge and is advised where first aid supplies are located and from whom treatment can be obtained.

This proposed regulatory change grew out of a variance that had been granted to Consolidated Engineering Laboratories (CEL), which was cited by DOSH in 1997 when its one and only employee at a job site was not trained to render first aid; however, CEL employees typically work alone and are not engaged in construction activity. The proposed amendment would essentially grant a permanent variance to CEL and similar employers. At its October 21 meet-

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ing, OSB held a public hearing on its proposed amendments to section 1512(b); no substantive comments were received. At this writing, OSB has not yet adopted the amendment.

## Conveyor Crossovers

On July 30, OSB published notice of its intent to amend sections 3207 and 3999(c), Title 8 of the CCR, part of its General Industry Safety Orders. The Board intends to add a definition of the word "crossover" to section 3207; "crossover" is "a means to allow employees to pass over or cross a horizontal belted or live roller conveyor without the employee's feet coming into contact with moving or movable elements of the conveyor. Such means shall include, but are not limited to, catwalks as specified in section 3273 of these Orders, non-continuous, slip-resistant (e.g., raised diamond-studded) metal 'stepping stones' (e.g., 'walking pads'), or replacing conveyor rollers with continuous parallel metal strip walking surfaces ('crosswalks')." This language is based on industry terminology, information from a February 1998 Cal-OSHA Appeals Board decision, and national consensus standards. OSB further proposes to amend section 3999(c) to state that crossovers, as defined in section 3207, shall be provided where necessary, and must allow employees to pass over or cross over a conveyor. Unless a six-foot, six-inch headroom clearance is provided, employees are not permitted to pass under conveyors.

At its September meeting, OSB asked staff to withdraw the regulatory proposal. Board members were concerned about the proposed definition of "crossover" in section 3207 and its potential inconsistency with Fed-OSHA's definition and interpretation of the term. Staff tabled the proposal and agreed to conduct additional research on the crossover issue before presenting the matter to the Board again.

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## **Job-Made Ladders**

On July 30, OSB published notice of its intent to amend section 1676, Title 8 of the CCR, part of its Construction Safety Orders. Section 1676(a) provides that if a ladder provides the only means of access to or exit from a working area for 25 or more employees, or simultaneous two-way traffic is expected, a double-cleat ladder must be installed; OSB proposes to add a clarifying note stating that cleats for job-made ladders are defined as crosspieces used by a person in ascending or descending a ladder; cleats are also known as "steps" or "rungs." OSB also proposes to amend section 1676(b) to clarify that side rails, when made of wood, must be the equivalent of dressed Douglas fir "selected lumber" free from sharp edges and splinters; and to substitute the word "cleat" for the word "rung" throughout the section. At an August 19 public hearing on the proposed changes, no public comments were submitted. At this writing, OSB is expected to take action on the proposed amendments to section 1676 at its December meeting.

## **Face Shield and Toe Protection for Structural Firefighters**

On July 2, OSB published notice of its intent to amend sections 3404(b) and 3408(b), Title 8 of the CCR, provisions of its General Industry Safety Orders relating to protection for firefighters.

Existing section 3404 requires employers to protect the eyes and faces of firefighters exposed to injurious substances, particles, flames, and heat in accordance with section 3382. In addition to the protection required by section 3382, and when respirator face shields do not provide adequate protection, the employer must provide added protection by any number of means, including but not limited to helmet-attached face shields, heat- and flame-resistant hoods, and high collars. All glass and plastic face shields must conform to American National Standards Institute (ANSI) Z87.1-1979. OSB's proposed revision would require face shields purchased after the effective date of this regulatory change to conform to criteria in ANSI Z87.1-1989, as revised by Z87.1a-1989; face shields purchased before the effective date may meet the criteria of either the 1979 or 1989 ANSI standard.

Section 3408 establishes requirements for the design and use of foot protection by structural firefighters, including criteria for turnout boots, use of slip-resistant outsoles, sole penetration criteria, midsole design, ankle support, and corrosion-resistant fasteners. Section 3408(d)(6) requires employers to provide toe protection meeting the requirements of ANSI Z41-1983, classification 75. OSB's proposed change would delete the existing ANSI reference and replace it with a reference to ANSI Z41-1991.

At its August 19 meeting, OSB held a public hearing on its proposed amendments; no substantive comments were received. At this writing, the Board is expected to take action on these proposed regulatory changes at its December meeting.

## **Low Voltage Safety Orders: Maintenance of the Outer Covering of Flexible Cords**

On July 2, OSB published notice of its intent to adopt new section 2500.25, Title 8 of the CCR, part of its Low Voltage Electrical Safety Orders, to "clarify" requirements that are "implicit" in its existing regulations. New section 2500.25 would require flexible electrical cords to be repaired or replaced if the outer sheath is damaged such that any conductor insulation or conductor is exposed. Repair of the outer sheath is permitted only if the conductors are not damaged and the completed repair retains the insulation, outer sheath properties, and usage characteristics of the cord being repaired.

At its August 19 meeting, OSB held a public hearing on its proposed addition of section 2500.25; no substantive comments were received. At this writing, the Board is expected to take action on this proposed regulatory change at its December meeting.

## **Aerial Devices**

On May 28, OSB published notice of its intent to amend section 3638(b), Title 8 of the CCR, which contains a requirement that all aerial devices be labeled or marked to indicate conformance to applicable ANSI specifications for design and manufacture. OSB proposes to split section 3638(b) into two subsections: Subsection (b)(1) will address aerial devices placed in service prior to the effective date of this regulatory change; those devices must meet the ANSI standards referred to in the existing regulation. Subsection (b)(2) will address aerial devices placed in service after the effective date of this regulatory change, and they will be required to meet revised 1990 and 1992 ANSI standards.

At its July 15 meeting, OSB held a public hearing on these proposed changes; no comments were submitted. The Board adopted the proposed changes at its October 21 meeting; at this writing, staff is preparing the rulemaking file on the proposed changes for submission to the Office of Administrative Law (OAL).

## **Compressed Air Safety Orders**

On May 28, OSB published notice of its intent to amend sections 1205, 1210, 1220, and 1230, Title 8 of the CCR, its safety orders governing work in compressed air, to ensure they are at least as effective as comparable federal regulations at 29 C.F.R. Part 1926.803.

The amendment to section 1205 requires employers to ensure that a competent person who is familiar with these and other applicable safety orders is present at the worksite at all times when employees are required to work in a compressed air environment. The amendment to section 1210, entitled "Compression Rate," clarifies that no employee may be subjected to pressure exceeding 50 pounds per square inch except in an emergency. Existing section 1220 requires employers to prohibit employees from passing from the working chamber of an air lock to atmospheric pressure until after

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decompression has been performed; the amendments to section 1220 specify that the lock attendant must be under the direct supervision of a physician (as required in section 1280); state that the lock attendant must remain at the lock control station whenever employees are in the working chamber or in the air lock; and require employers to provide adequate ventilation in accordance with section 5143 of the General Industry Safety Orders. Finally, the amendments to section 1230 notify employers that they must comply with OSB's Electrical Safety Orders with regard to electrical installations and equipment in compressed air chambers; require employers to test the air in the workplace not less than once each shift, and keep records of such tests on file at the place where the work is in progress; and require employers to provide forced ventilation during decompression.

At its July 15 meeting, OSB held a public hearing on the proposed amendments, but no one submitted comments. OSB adopted the proposed changes at its September 16 meeting, and OAL approved them on November 1.

### Update on Other OSB Rulemaking

The following is an update on rulemaking proceedings discussed in detail in Volume 16, No. 2 (Summer 1999) of the *California Regulatory Law Reporter*:

◆ **Escalators and Moving Walks.** In March 1999, OSB held a public hearing on its proposal to amend sections 3089 and 3091, Title 8 of the CCR, and sections 7-3089(d) and 7-3091(k), Title 24 of the CCR, to address a potential hazard on escalators and moving walkways now in service. The hazard is a pinch point created by a quarter-inch opening that exists between the escalator moving step side and the stationary escalator skirt guard. The quarter-inch opening is a built-in design feature of escalators to provide clearance for the steps to deflect when the escalator steps are moving.

However, accidental entrapment of body parts, clothing, or shoes (especially those of small children) can occur in the pinch point. Some out-of-state agencies have installed brushes or sideplates to deflect articles from the opening or reduce the size of the opening to minimize entrapment.

Because these devices have proven effective in reducing the incidence of entrapment, OSB proposed to amend section 3089(d) to require the retrofitting of existing escalators with "skirt deflection devices" between the step side and the balustrade skirt guard. The retrofit must be completed three years from the effective date of this regulatory change. OSB's proposed amendments to section 3091 would apply the above standards for escalators to moving walkways. Although the Board is not aware of accidental entrapment incidents on moving walkways, it plans to amend section 3091 to permit (not require) a skirt deflection device to be installed on moving walkways because similar conditions exist. Following nu-

merous comments at the March 18 hearing, however, the Board decided to consider a cost-benefit analysis and statistical information measuring the actual number of injuries before voting on the proposed amendments. [16:2 CRLR 112-13]

Since the March 18 hearing, the Board has released modified language of its proposed amendments. The modified version would give escalator owners two options: (1) install a skirt deflection device, or (2) ensure that the clearance between the skirt and the escalator step complies with ASME A17.1-1996, Rule 802.3e, and that the skirt panel complies with ASME 17.1-1996, Rule 802.3f. In either case, owners have three years to comply, and the escalator must be inspected by DOSH for the issuance of a new permit.

At this writing, OSB is scheduled to vote on the modified version of its proposed escalator safety regulations at its November 18 meeting.

◆ **Bull Float Handles.** At its September 16 meeting, OSB agreed to amend section 1698(c), Title 8 of the CCR, regarding bull floats, which are tools used to smooth the surface of freshly poured concrete. Previously, section 1698(c) required the handles on bull floats to be constructed of nonmetallic and nonconductive material, to minimize the hazard of electrical shock should a worker using a bull float come into contact with an energized conductor. However, bull floats with metal handles and metal handle extensions are widely used and sold by manufacturers in California for use on jobsites where there is no exposure to energized conductors. Fed-OSHA's equivalent regulation, 29 C.F.R. Part 1910.702(h), recognizes that there are times when bull

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floats with metal handles are appropriate for use. The federal standard requires bull float handles used where they might contact energized conductors to be constructed of nonconductive material or to be insulated; thus, other types of handles made of

materials such as aluminum or magnesium are permitted for use when there are no electrical hazards to workers. OSB's amendment to section 1698(c) conforms it to Fed-OSHA's regulation and states that bull float handles which could come in contact with energized electrical conductors shall be constructed of nonconductive material. [16:2 CRLR 113] OAL approved these amendments on October 21, and they will become effective on November 20.

◆ **Use of Body Belts, Safety Belts, and Body Harnesses While Operating Aerial Devices.** At its August 19 meeting, OSB agreed to amend sections 2940.7, 3207, 3642, and 3648, Title 8 of the CCR, to clarify how body belts, safety belts, and body harnesses are to be used while operating aerial devices, and establish new standards for guardrails on elevating work platform equipment. In response to comments received at its February 1999 public hearing [16:2 CRLR 112], OSB agreed to modify the language of its revisions.

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The amendments to section 3207 define the terms "personal fall restraint system," "personal fall arrest system," "positioning device system," and "personal fall protection system." A personal fall restraint system prevents an employee from falling, and consists of an anchorage, connectors, and body belt/harness; it may include lanyards, lifelines, and rope grabs. The personal fall arrest system stops the employee once he/she has fallen from a working level. It consists of an anchorage, connectors, and body harness, and may include a lanyard, deceleration device, lifeline, or suitable combinations of these components/devices. A positioning device system is a body belt or body harness system rigged to allow an employee to be supported on an elevated surface, such as a wall, and work with both hands free while leaning. A personal fall protection system is the combination of all of the above systems, as well as safety nets and guardrails.

OSB's amendments to section 3642 change the title of the section to "Elevating Work Platform Equipment," and provide that a platform deck must be equipped with a guardrail or other structure around its upper periphery that is 42 inches high, plus or minus 3 inches, with a midrail. Where the guardrail is less than 39 inches high, an approved personal fall protection system, as defined above, must be used.

The amendments to section 3648 require an employee working in an aerial device to be secured to the boom, basket, or tub of the device through the use of a safety belt, body belt, or body harness equipped with a safety strap or lanyard. Safety belts and body belts are prohibited for use in personal fall arrest systems, but may be used as part of a fall restraint or positioning device system. Safety belts or body belts that are used as part of a positioning device system must be rigged such that an employee cannot freefall more than two feet. The amendments further provide that a body harness may be used in a personal fall restraint, positioning, or fall arrest system. When a body harness is used in a fall arrest system, the lanyard must be rigged with a deceleration device to limit maximum arresting force on an employee to 1,800 pounds, prevent the employee from hitting any levels or objects below the basket or platform, and limit freefall to a maximum of six feet. OSB's proposed amendments to section 2940.7, concerning mechanical equipment, would conform that section with the amendments to section 3648.

These changes were approved by OAL on October 1 and became effective on October 31.

◆ **Passenger Elevator Emergency Stop Switch/In-Car Stop Switch.** At its August 19 meeting, OSB agreed to adopt proposed amendments to section 3040(b)(5), Title 8 of the CCR, and section 7-3040(b)(5), Title 24 of the CCR. Section 3040(b)(5) requires each passenger elevator to have an emer-

gency stop switch located in or near the operating panel in the elevator; this regulation derived from an era when passenger elevators were not fully enclosed and the switches were needed to immediately stop the elevator car should a passenger's limb or articles become accidentally entangled between the moving car and the hoistway. Modern passenger elevators are fully enclosed, and passengers are protected by numerous new safety requirements that negate the need for an emergency stop switch operable by the public. OSB's proposal provides an exception to the emergency stop switch requirement for passenger elevators now in service which are equipped with an in-car stop switch that is either key-operated or located behind a locked panel; and permits replacement of an existing emergency stop switch with an in-car stop

switch that is either key-operated or located behind a locked panel. The in-car stop switch is not for passenger use; it is for use by elevator maintenance and inspection personnel. OSB's amendments conform section 3040(b)(5) to the elevator consensus standard (ASME A17.1-1996). [16:2 CRLR 113] At this writing, staff is preparing the rulemaking file on the proposed amendments for submission to OAL.

◆ **Guarding Requirements for Metal Shears.** At its July 15 meeting, OSB agreed to repeal section 4226 and amend section 4227, Title 8 of the CCR, to clarify the guarding requirements for metal shears. Section 4226 defines "plate shears" and "squaring shears," but section 4227 only contains guarding requirements for squaring shears. OSB amended section 4227 to apply its guarding requirement to "metal shears" of all types (including both plate shears and squaring shears), and repealed section 4226 as unnecessary. [16:2 CRLR 113-14] OAL approved OSB's changes on August 16, and they became effective on September 15.

◆ **Training of Construction Site Flaggers.** At its July 15 meeting, OSB approved proposed amendments to section 1599, Title 8 of the CCR. Section 1599 regulates the use of flaggers at construction sites, including the placement of flaggers and warning signs, flagger garments, night time operations, and training. Existing section 1599(f) requires that flaggers be properly trained before being assigned to a specific construction site. The Board added nine new training requirements for onsite flaggers to subsection (f), and also added new subsection (g), which requires flaggers to be trained by persons with the qualifications and experience necessary to effectively instruct the employee in the proper fundamentals of flagging moving traffic. [16:2 CRLR 16:1 CRLR 135] OAL approved these changes on August 26, and they became effective on September 25.

◆ **Implementation of AB 1208 (Migden): Bloodborne Pathogens Standard.** At its June 17 meeting, OSB adopted permanent amendments to section 5193, Title 8 of the CCR,

**OSB's proposal provides an exception to the emergency stop switch requirement for passenger elevators now in service which are equipped with an in-car stop switch that is either key-operated or located behind a locked panel; and permits replacement of an existing emergency stop switch with an in-car stop switch that is either key-operated or located behind a locked panel.**

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to implement AB 1208 (Migden) (Chapter 999, Statutes of 1998). The amendments are intended to protect health care workers from so-called "sharps injuries," which can transmit bloodborne pathogens in the workplace, by establishing stronger requirements for employers to use needles and other sharps which are engineered to reduce the chance of inadvertent needlesticks or sharps injuries. OSB's adoption of permanent amendments to section 5193 follows its adoption of emergency amendments to the section in December 1998 [16:1 CRLR 133-34], its publication of permanent amendments and public hearing on those amendments in February 1999 [16:2 CRLR 116], and its May 14 publication of modified language of the amendments as a result of the February 1999 hearing.

Among other things, the amendments: (1) establish new requirements for the use of needleless systems and sharps devices with "engineered sharps injury protection" (ESIP), subject to four exceptions; (2) require employers to keep a sharps injury log; (3) require employers to prepare written exposure control plans that include effective procedures for gathering the information that must be included in the sharps injury log, and for evaluating the effectiveness of the use of needleless systems and sharps devices with ESIP appropriate for the procedures conducted; (4) specifically recognize hepatitis C as a bloodborne pathogen; and (5) clarify a number of existing requirements. OAL approved the Board's amendments on July 30, and they became effective the same day.

◆ **Use of Plunger Engaging Safety Devices and Monitoring Oil Levels in Hydraulic Elevators.** On June 17, OSB held a public hearing on proposed amendments to sections 3065, 3067, and 3106.1 of its Elevator Safety Orders in Title 8 of the CCR, and sections 7-3065, 7-3067, and 7-3106.1, Title 24 of the CCR. These regulatory changes concern the use of the plunger engaging safety device (PESD) and the monitoring of oil levels in hydraulic elevators. This proposal contains standards to regulate the permissive use of the PESD, a new technology that was recently developed by the elevator industry and is already in use in some hydraulic elevators in the state. The proposed changes would also require the monitoring of oil levels in hydraulic elevators to detect oil loss that may result in an uncontrolled elevator descent due to sudden loss of oil pressure. This proposed rulemaking action is the result of several petitions filed with OSB, its formation of an advisory committee to explore the petitions, and of a general consensus opinion reached at advisory committee meetings held in March and May 1998. [16:2 CRLR 115] At the hearing, a representative of an elevator manufacturer suggested that the Board make its regulations consistent with a draft national consensus standard on PESDs. At this writing, the Board has yet to adopt the proposed regulatory changes, and is scheduled to discuss this matter further at its November meeting.

◆ **Personal Protective Equipment in the Construction Industry.** On June 17, OSB held a public hearing on proposed amendments to sections 1515(a), 1516(d), and 1517(c), Title 8 of the CCR, provisions in OSB's Construction Safety

Orders that contain standards for personal protective equipment in the construction industry. Existing section 1515 requires head protection for employees exposed to hazards that could result in head injury (e.g., falling objects or electric shock) and contains references to outdated ANSI standards for head protection. The purpose of the amendments is to replace those references with a reference to the existing head protection requirements contained in sections 3381, 3382(d), and 3385(c) of OSB's General Industry Safety Orders, to make the Construction Safety Orders consistent with the GISO. [16:2 CRLR 115-16] At the hearing, OSB member William Jackson noted that section 1515, as proposed to be amended, may still cause confusion because it simply refers the reader to another regulation; he stated that it may make more sense to strike section 1515 in its entirety because the GISO is controlling.

At this writing, OSB has yet to decide whether to adopt the proposed amendments, and is scheduled to revisit this issue at its December meeting.

◆ **Report of Use Requirements for Regulated Carcinogens.** At its May 20 meeting, OSB amended sections 1529, 1532, 1535, 5200-02, 5207-15, 5217-20, and 8358, and adopted new section 5203, Title 8 of the CCR. New section 5203 consolidates and standardizes "report of use" requirements for all regulated carcinogens into one regulation. Section 5203 also defines various terms used in reporting, specifies the conditions that trigger an employer's obligation to report, specifies when and where a required written report must be filed, provides a reporting alternative for employers with frequent location changes, requires more immediate reporting of emergency situations, and requires employers to notify affected employees of the information that is provided in the report of use. [16:2 CRLR 117; 16:1 CRLR 136] OAL approved these changes on July 6, and they became effective on August 5.

◆ **Fall Protection and Apparel for Electrical Workers.** At its May 20 meeting, OSB held a public hearing on proposed amendments to sections 2320.8 and 2940.6, Title 8 of the CCR. The amendments to section 2320.8 of its Low Voltage Orders and section 2940.6 of its High Voltage Orders require employers to provide employees working at elevations greater than four feet on poles, towers, or similar structures with personal fall protection devices (e.g., positioning devices or travel restricting devices) when other means of fall protection are not provided (e.g., safety nets, barricades, parapets, or guardrails). The language also prohibits the use of a body belt as a component in a fall arrest system, and includes an exception to the fall protection requirement for qualified persons provided there are no conditions which would prevent the employee from gaining the necessary foot and hand holds to climb the structure safely. OSB also proposed to add new subsection 2940.6(j), which would require employers to ensure that each electrical worker who may be exposed to the hazard of flames and electric arcs wears outer clothing made of materials which will not increase the likelihood of serious injury sustained by an employee who is burned

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by flames and/or electric arcs. The language prohibits electrical workers from wearing garments composed of acetate, nylon, polyester, and rayon unless these materials are treated with flame retardant.

At the May 20 hearing, Art Murray from IBEW Local 1245 commented that the apparel requirements in section 2940.6(j) should not be restricted to "outer" garments. OSB agreed to delete the word "outer" from the regulation; as a result, all apparel worn by electrical workers, including undergarments, must be made of materials that will not exacerbate the extent of bodily injury when exposed to heat, flame, or electric arc. The Board adopted the modified language of the regulations at its August 19 meeting. OAL approved the changes on September 9, and they became effective on October 9.

◆ **Permit-Required Confined Space Regulation Amendment.** At its May 20 meeting, OSB held a public hearing on its proposal to amend section 5157, Title 8 of the CCR, the state's "permit-required confined space" regulation. Section 5157 contains required practices and procedures that protect employees from the hazards of entry into confined spaces. Employers must maintain a "permit-required confined space program" which contains written procedures for controlling via permit and for protecting employees from hazards in confined spaces. OSB intends to conform section 5157 to be at least as effective as the applicable federal standard, 29 C.F.R. Part 1910.146, which was adopted by Fed-OSHA on December 1, 1998. Specifically, the proposal expands employee participation requirements by allowing employees and their authorized representatives to observe monitoring and access exposure documentation. The proposal also expands the training required for rescue providers. [16:2 CRLR 114] No comments were received at the May 20 hearing, and OSB adopted the changes at its June 17 meeting. At this writing, staff has not yet filed the rulemaking file on section 5157 with OAL.

◆ **Powered Industrial Truck Operator Training.** At its May 20 meeting, OSB held a public hearing on its proposed amendments to section 3668, Title 8 of the CCR, which sets forth standards and criteria for the training of operators of powered industrial trucks. OSB intends to amend section 3668 to make it as least as effective as the relevant federal standards, 29 C.F.R. Parts 1910.16, 1910.178, 1915.120, 1917.1, 1918.1, and 1926.602, which were adopted by Fed-OSHA on December 1, 1998. The federal regulations, which become effective on December 1, 1999, revise existing requirements for training and issue new mandates to improve training and

reduce workplace injuries and fatalities. Essentially, the federal rules require that operators of industrial trucks be trained in their operation before they are allowed to drive the trucks independently. The training must consist of instruction (both classroom and practical training) in proper vehicle operation, the hazards of operating the vehicles in the workplace, and

**All apparel worn by electrical workers, including undergarments, must be made of materials that will not exacerbate the extent of bodily injury when exposed to heat, flame, or electric arc.**

the requirements of the OSHA standard for powered industrial trucks. The federal regulations also require that operators who have completed training must be evaluated while they operate the vehicle in the workplace. Operators must also be periodically evaluated (at least once every three years) to ensure that their skills remain intact at a high level, and must receive refresher training whenever there is a demonstrated need for it. [16:2 CRLR 114-15]

At the hearing, a representative of the Pacific Maritime Association (PMA) urged the Board not to adopt the federal standards until litigation against Fed-OSHA over the standards is concluded. The National Maritime Safety Association, of which PMA is a member, is seeking changes to the federal standards to accommodate the "unique characteristics of the maritime industry"—the PMA representative stated that the required training would cost the industry \$14.5 million and would disrupt operations.

**Essentially, the federal rules require that operators of industrial trucks be trained in their operation before they are allowed to drive the trucks independently. The training must consist of instruction (both classroom and practical training) in proper vehicle operation, the hazards of operating the vehicles in the workplace, and the requirements of the OSHA standard for powered industrial trucks.**

Other witnesses argued that the federal standards are fully able to accommodate the maritime industry, depending upon how Fed-OSHA interprets them; eleven states with state OSHA plans have adopted the federal standards.

At its July 15 meeting, OSB decided to adopt the federal standards as published, but to delay their effective date until July 15,

2000—which will provide it with sufficient time to make further modifications if necessary. OAL approved the changes on August 23.

◆ **Methylene Chloride.** At its May 20 meeting, OSB held a public hearing on its proposed amendments to section 5202, Title 8 of the CCR, which establishes requirements for employers to control occupational exposure to methylene chloride (MC). MC is a solvent which is used in many different types of work activities, such as paint stripping, polyurethane foam manufacturing, and cleaning and degreasing. Employees exposed to MC are at increased risk of developing cancer, skin or eye irritation, and adverse effects on the heart, central nervous system, and liver. Exposure may occur through inhalation, by absorption through the skin, or through contact with the skin. The proposed revisions amend the standard regulating exposure to MC by adding a provision for temporary medical removal protection benefits for employ-



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ees who are removed or transferred to another job because of a medical determination that exposure to MC may aggravate or contribute to the employee's existing skin, heart, liver, or neurological disease. OSB also amended the start-up dates by which employees in certain identified application groups (e.g., those who use MC in certain work operations) must achieve the eight-hour time-weighted-average permissible exposure limit and the dates by which they must achieve the short-term exposure limit by means of engineering controls. OSB's amendments to section 5202 make it at least as effective as the relevant federal standard, 29 C.F.R. Part 1910.1052, which was promulgated by Fed-OSHA on September 22, 1998. [16:2 CRLR 115] No comments were received on the proposed amendments at the May 20 hearing, and OSB adopted them at its June 17 meeting. OAL approved them on July 29 and they became effective the same day.

◆ **Fall Protection at Elevated Locations.** On May 20, OAL approved OSB's amendments to section 3210 and its repeal of section 3388, Title 8 of the CCR. Section 3210 sets forth requirements for the use of guardrails and toeboards on elevated locations (such as roof openings, open sides of landings, platforms, and runways) that are more than 30 inches above the floor; OSB amended section 3210(a) to clarify that it applies only to buildings, and to add new subsection (b) which sets forth exceptions to the fall protection requirement in settings that are not building-related (thus requiring the relocation of two of subsection (a)'s exceptions to subsection (b), which contains exceptions to the fall protection requirement in settings that are not building-related). OSB repealed section 3388, which defined the requirements for approval of safety belts used by employees and the strength requirements for life lines, because its amendments to section 3210 state that fall restraint/fall arrest systems must comply with the requirements in Article 24 of the Construction Safety Orders (Fall Protection). [16:2 CRLR 118; 16:1 CRLR 138] These changes became effective on June 18.

◆ **Rollover Protective Structures and Protective Enclosures.** On May 17, OAL approved OSB's amendments to section 1596, Title 8 of the CCR, which pertains to the installation of rollover protective structures (ROPS) and seatbelts for various types of construction equipment (e.g., rollers, compactors, scrapers, tractors, bulldozers, and front-end loaders). Subsection 1596(b) contains requirements for ROPS design criteria; subsection 1596(f) contains labeling requirements for ROPS; and subsection 1596(h) addresses wheel-type agricultural or industrial tractors. All three subsections require ROPS to be in compliance with or equivalent to SAE standards. OSB updated all three subsections by deleting the references to the SAE standards and requiring the employer to determine whether the ROPS have been approved and, if not, to select a

method of approval for its ROPS per the approval language in section 1505, Title 8 of the CCR. The revisions require employers to ensure that their ROPS are designed and built to meet nationally recognized consensus standards and have engineering documentation available to substantiate that their ROPS are approved pursuant to section 1505 requirements. [16:2 CRLR 117; 16:1 CRLR 135] These changes became effective on June 16.

### LEGISLATION

**AB 1127 (Steinberg)**, as amended September 3, substantially increases the civil and criminal penalties for violations of California's major occupational safety statutes and regulations, and makes other related changes to Labor Code provisions regarding worker health and safety. The bill amends twelve sections of the Labor Code, eleven of which are in the California Occupational Safety and Health Act administered by OSB and enforced by DOSH. Following is a description of the major changes enacted in AB 1127 (several of which will require OSB to amend its existing regulations):

• Previously, under Labor Code section 6423, every employer and every officer, management official, or supervisor having direction, management, control, or custody of any employment, place of employment, or other employee who does any of the following is guilty of a misdemeanor punishable

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by up to six months in county jail and/or a fine not exceeding \$5,000: (a) knowingly or negligently violates any worker safety standard, order, or special order, the violation of which is deemed to be a "serious" violation; (b) repeatedly violates any worker safety standard, order, or special order, which repeated violation

creates a real and apparent hazard to employees; (c) fails or refuses to comply, after notification and expiration of any abatement period, with any worker safety standard, order, or special order, which failure or refusal creates a real and apparent hazard to employees; and (d) directly or indirectly or knowingly induces another to do any of the above. AB 1127 increases the penalty for (b) repeated violations, (c) failure to comply, and (d) inducing others to commit violations of section 6423 to up to one year in county jail and/or a \$15,000 fine. If the defendant is a corporation or a limited liability company, the fine may be as much as \$150,000. The bill specifically states that in determining the amount of the fine, the court must consider all relevant circumstances including the nature, circumstance, extent and gravity of the violation; any prior history of violations by the defendant; and the ability of the defendant to pay.

• Labor Code section 6425 has been amended to increase the fines and prison terms that a court may impose for willful violations of worker safety standards that cause an employee's death or permanent or prolonged impairment. Under section

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6425(a), 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, order, or special order, or section 25910 of the Health and Safety Code, and that violation causes death or permanent or prolonged impairment of the body of any employee, is guilty of a public offense which is now a "wobbler" (*i.e.*, may be charged either as a misdemeanor or a felony) punishable by imprisonment in a county jail for a term not exceeding one year, a fine not exceeding \$100,000, or both; or by imprisonment in the state prison for 16 months to three years, a fine of not more than \$250,000, or both. In either case, if the defendant is a corporation or a limited liability company, the fine may be up to \$1.5 million.

Under Labor Code section 6425(b), if such a conviction is for a violation committed within seven years after a conviction under subdivision (b), (c), or (d) of section 6423 or subdivision (c) of section 6430, the punishment shall be imprisonment in state prison for a term of 16 months to three years, a fine not exceeding \$250,000, or both. However, if the defendant is a corporation or limited liability company, the fine may not be less than \$500,000 nor more than \$2.5 million.

Under Labor Code section 6425(c), if such a conviction is for a violation committed within seven years after a first conviction of the defendant for any crime involving a violation of subdivision (a), the punishment shall be imprisonment in state prison for two to four years, a fine not exceeding \$250,000, or both. If the defendant is a corporation or a limited liability company, the fine may not be less than \$1 million nor more than \$3.5 million.

Labor Code section 6425(d) states that, in determining the amount of fine to be imposed under this section, the court shall consider all relevant circumstances, including but not limited to the nature, circumstance, extent, and gravity of the violation; any prior history of violations by the defendant; the ability of the defendant to pay; and any other matters the court determines the interests of justice require.

- AB 1127 also amended Labor Code section 6428 to increase the maximum civil penalty for a "serious" violation of any occupational safety and health standard, order, or special order, or Health and Safety Code section 25910, from \$7,000 to \$25,000.

- Under section 335 of OSB's regulations, a civil penalty assessed against an employer may be adjusted based upon consideration of a number of factors, including gravity of the violation, size of the business of the employer (*i.e.*, number of employees), good faith of the employer, and history of previous violations. Labor Code section 6429, addressing willful or repeated violations of worker health and safety laws,

was amended in two ways by AB 1127: (1) the bill added subsection 6429(b), which provides that a civil penalty assessed against an employer who repeatedly violates any occupational safety or health standard, order, or special order, or Health and Safety Code section 25910 may not be adjusted based on any factor except size; and (2) the bill added subsection 6429(c), which requires DOSH to preserve and maintain records of its investigations, inspections, and citations for a period of not less than seven years.

- AB 1127 amended Labor Code section 6430 to increase the civil penalty for failure to correct a violation of any occupational safety or health standard, order, or special order, or Health and Safety Code section 25910 from a maximum of \$7,000 to a maximum of \$15,000 for each day during which the failure or violation continues. The bill also adds subsection 6430(c), which states that any employer who submits a signed statement of abatement, and is found by DOSH not to have abated the violation, is guilty of a misdemeanor punishable by up to one year in jail and/or a fine up to \$30,000. If the defendant is a corporation or limited liability company, the fine shall not exceed \$300,000.

- AB 1127's amendment of Labor Code section 6432 revises the definition of a "serious violation" (and will require OSB to revise section 334, Title 8 of the CCR). Under section 6432(a), a "serious violation" shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a violation, including but not limited to circumstances where

there is a substantial probability that either of the following could result in death or great bodily injury: (1) a serious exposure exceeding an established permissible exposure limit; (2) the existence of one or more practices, means, methods, operations, or

processes which have been adopted or are in use, in the place of employment. Under subsection 6432(b), notwithstanding subsection 6432(a), a "serious violation" shall not be deemed to exist if the employer can demonstrate that it did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

- AB 1127 also amends Labor Code section 6434 to delete the longstanding statutory exemption for governmental entities from imposition of Cal-OSHA civil penalties, including failure-to-abate penalties.

- AB 1127 adds section 6719 to the Labor Code, which reaffirms the legislature's concern over the prevalence of repetitive motion injuries in the workplace, and reaffirms OSB's continuing duty to carry out section 6357 (see LITIGATION).

Governor Davis signed AB 1127 on October 5 (Chapter 615, Statutes of 1999).

**SB 508 (Ortiz)**, as amended September 2, would have required OSB to adopt, prior to January 15, 2001, by emergency regulation, an interim standard requiring specific em-

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ployer measures to protect community health care workers from violence in the performance of their duties. The bill would have required the Board, following adoption of the emergency regulation, to complete the rulemaking process and adopt a standard meeting criteria prescribed in the bill. On October 10, Governor Davis vetoed SB 508, stating: "Available data on violence against health care workers relate to those workers in hospitals and psychiatric facilities. There is no direct evidence that violence against home health care workers is on the rise. Additionally, this bill would potentially increase costs to employers and be duplicative of the existing requirements for the development of injury and illness preventive programs under existing law."

**AB 1655 (Hertzberg).** Existing law authorizes employers to apply to OSB for a permanent variance from an occupational safety and health order upon a showing of an alternate program, method, practice, means, device, or process that will provide equal or superior safety to employees; and requires OSB to issue those variances if it determines on the record, after an investigation where appropriate and a hearing, that the proponent of the variance has demonstrated by a preponderance of the evidence that certain conditions relating to the safety and health of employees are met. As amended July 12, this bill requires OSB, on or before April 1, 2000, to report to the legislature on the nature and the extent of investigations conducted pursuant to those provisions.

AB 1655 also deletes a January 1, 2000 sunset date on Cal-OSHA's Targeted Inspection and Consultation Program (TICP). Under this program, DOSH analyzes workers' compensation and illness and injury data of employers, and identifies those employers with the highest incidence of preventable injuries and illness and workers' compensation losses. Financed by a surcharge on the workers' compensation premium of employers with a workers' compensation experience modification rate of 1.25 or more (1.0 is average, and higher rates reflect worse losses), the TICP provides inspection and consultation services to the highest hazard employers in the most hazardous industries on a priority basis. [14:1 CRLR 112] The surcharge would have sunsetted on January 1, 2000, but AB 1655 deleted the sunset date. Governor Davis signed AB 1655 on September 23 (Chapter 469, Statutes of 1999).

**AB 850 (Torlakson),** as amended September 3, establishes the Permanent Amusement Ride Safety Inspection Program, to be administered by Cal-OSHA. AB 850 establishes a program for the regulation of permanent amusement rides, including the adoption of regulations for installation, maintenance, operation, and annual inspections of rides by a "qualified safety inspector"; required recordkeeping and accident reporting; and financial responsibility requirements. The bill also sets forth the requirements of the "qualified safety inspector" to mean either of the following: (1) a person who

holds a valid professional engineer license issued by this state or issued by an equivalent licensing body in another state, and who has been approved by DOSH as a qualified safety inspector for permanent amusement rides; or (2) a person who documents to the satisfaction of DOSH that he/she meets all of the following requirements: (a) the person has a minimum of five years of experience in the amusement ride field, at least two years of which were involved in actual amusement ride inspection with a manufacturer, government agency, amusement park, carnival, or insurance underwriter; (b) the person completes not less than 15 hours per year of continuing education at a school approved by DOSH, which education shall include in-service industry or manufacturer updates and seminars; and (c) the person has completed at least 80 hours of formal education during the past five years from a school approved by DOSH for amusement ride safety.

This bill, which will require OSB to adopt a series of implementing regulations, was enacted in response to tragic accidents and injuries which have occurred at permanent amusement parks in California. California leads the nation in amusement ride deaths—twelve from 1973 through 1996. Of these twelve deaths, at least 10 occurred at permanent parks, which the state did not regulate prior to this legislation. Governor Davis signed AB 850 on October 2 (Chapter 585, Statutes of 1999).

**SB 1115 (Chesbro),** as amended September 3, creates the Lyme Disease Advisory Committee in the state Department of Health Services (DHS) composed of, but not limited to, five members from specified groups and appointed by the DHS Director. Among other things, the bill requires DHS to establish a Lyme disease information program; requires the advisory committee to advise and make recommendations to DHS regarding certain subjects relating

to Lyme disease; requires DHS to provide certain information to OSB; and authorizes OSB to determine which employees should be required to receive the vaccine for Lyme disease as a condition of employment. Governor Davis signed SB 1115 on October 6 (Chapter 668, Statutes of 1999).

**AB 1599 (Torlakson),** as amended August 17, would add section 6359 to the Labor Code, and require DIR to develop and execute a contractual agreement with the University of California for the creation of a statewide young worker health and safety resource network, coordinated by a lead center at the University of California. The primary function of the resource network would be to assist in increasing the ability of young workers and their communities statewide to identify and address workplace hazards in order to prevent young workers from becoming injured or ill on the job. The resource network would be required to coordinate and augment existing outreach and education efforts and provide technical assistance, educational materials, and other support to schools, job training programs, employers, and other organizations

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working to educate pupils and their communities about workplace health and safety and child labor law. [S. Appr]

**SB 973 (Perata)**, as amended in May 1999, and **AB 983 (Correa)**, as amended in April 1999, are similar to **AB 850 (Torlakson)** (Chapter 585, Statutes of 1999) (see above), in that they would regulate permanent amusement parks. [S. Inactive File; A. L&E]

## LITIGATION

On October 29, the Third District Court of Appeal finally issued its decision in *Pulaski, et al. v. California Occupational Safety and Health Standards Board*, 75 Cal. App. 4th 1315 (1999), and largely upheld OSB's "ergonomics" regulation (section 5110, Title 8 of the CCR) against a challenge by business groups. [16:2 CRLR 120-21; 16:1 CRLR 141-42]

As part of a workers' compensation system reform effort in 1993, the legislature directed OSB to adopt a statewide ergonomics standard to prevent so-called "cumulative trauma disorders" (CTDs) or "repetitive motion injuries (RMIs) that are caused by poor workplace design and/or practices at jobs that require long periods of repetitive physical movement, such as typing or assembly line work; OSB's deadline was January 1, 1995. After a stop-start rulemaking proceeding interrupted by court orders and an OAL disapproval, OSB finally adopted section 5110 in April 1997; OAL approved the standard in June 1997.

As adopted by OSB, section 5110 applies to employers with ten or more employees (the so-called "small employer exemption"), and only where more than one employee has suffered an RMI under all of the following conditions: (1) the RMI is "predominantly caused (*i.e.*, 50% or more)" by a repetitive job, process, or operation; (2) the employees incurring the RMI were performing "a job process, or operation of identical work activity," defined to mean the employees were performing the same repetitive motion task, "such as but not limited to word processing, assembly, or loading"; (3) the RMIs are musculoskeletal injuries that a licensed physician has objectively identified and diagnosed; and (4) the RMIs are reported by the employees to the employer within the last twelve months (but not before the effective date of section 5110). Should the above conditions occur, the requirements of subsection 5110(b) are triggered: The employer must establish and implement a program designed to minimize RMIs, including a worksite evaluation ("each job, process, or operation of identical work activity covered by this section or a representative number of such jobs, processes, or operations of identical work activities shall be evaluated for exposures which have caused RMIs"), control of exposures which have caused RMIs ("any exposures that caused RMIs shall, in a timely manner, be corrected or if not capable of being cor-

rected have the exposures limited to the extent feasible; the employer shall consider engineering controls, such as workstation redesign, adjustable fixtures, or tool redesign, and administrative controls, such as job rotation, work pacing, or work breaks"), and training (employees must be given a training program that includes an explanation of the employer's program, the exposures which have been associated with RMIs, the symptoms and consequences of injuries caused by repetitive motion, the importance of reporting symptoms and injuries to the employer, and methods used by the employer to minimize RMIs). Subsection 5110(c)—the so-called "safe harbor" provision—states that measures implemented under subsection (b) will satisfy the employer's obligations under that subsection, "unless it is shown that a measure known to but not taken by the employer is substantially certain to cause a greater reduction in such injuries and that this alternative measure would not impose additional unreasonable costs."

Calling the standard weak and loophole-ridden, labor groups sued to invalidate the regulation; in opposition, two trucking associations argued that the rule is too onerous and that too little is known about RMIs to justify the imposition of potentially costly regulations. In October 1997, Sacramento Superior Judge James T. Ford released a decision which essentially rewrote section 5110. Instead of upholding it or striking it entirely, Judge Ford found that certain phrases and sections of the rule exceeded OSB's statutory authority and directed OSB to "refrain from giving legal force and effect to them," while upholding the remainder of the regulation. Specifically, Judge Ford ruled that OSB was forbidden to enforce subsection (a) to the extent that it requires work-related RMIs to be "predominantly caused (*i.e.*, 50% or more)" by repetitive tasks, and to the extent that it permits work-related causation to be determined by the employer rather than by a licensed physician pursuant to subsection (a)(3). The court also struck the word "objectively" from subsection (a)(3) (which required a physician to "objectively" identify and diagnose an RMI). More significantly, Judge Ford expanded the scope of the standard to every worker and employer in the state by striking the small employer exemption; and struck entirely the safe harbor provision protecting an employer who undertakes good-faith measures designed to minimize RMIs. Judge Ford ruled that these "invalid parts" of section 5110 are severable from the remaining provisions of the regulation "which are valid and can be given full legal force and effect."

Judge Ford's decision essentially satisfied the labor petitioners, but both the Board and the trucking associations appealed. OSB argued that the lower court impermissibly interfered with its rulemaking authority; the trucking associations contended that OSB failed to adequately determine the regulation's cost and economic impact, failed to include in its rulemaking record substantial evidence supporting the

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"necessity" of the regulation as required by the Administrative Procedure Act (APA), and failed to cite scientific studies upon which it relied in adopting the regulation.

On October 29, the Third District reversed Judge Ford's decision and found largely in favor of the Board, concluding that "except for one conspicuous exemption, the regulation is valid [and] the trial court improperly invaded the rulemaking authority of the Board by striking the remaining provisions...." The Third District noted that "of all the activities undertaken by an administrative agency, quasi-legislative acts are accorded the most deferential level of judicial scrutiny....[I]n reviewing the legality of a regulation adopted pursuant to a delegation of legislative power, the judicial function is limited to determining whether the regulation (1) is within the scope of the authority conferred and (2) is reasonably necessary to effectuate the purpose of the statute. These issues do not present a matter for the independent judgment of an appellate tribunal; rather, both come to this court freighted with a strong presumption of regularity. Our inquiry necessarily is confined to the question whether the classification is arbitrary, capricious, or without reasonable or rational basis."

Utilizing this deferential standard of review, the Third District found that Judge Ford erred when he struck the "safe harbor" provision, the "predominant cause" requirement, and the "objectively identified" requirement included by OSB in section 5110. The appellate court held that it is not the judiciary's role to "clarify" the standard—it is OAL's responsibility to determine "clarity," and OAL approved the regulation.

However, the Third District agreed with Judge Ford's invalidation of the "small employer" exemption, noting that "the breadth and magnitude of the exemption is staggering: It immunizes nearly four of five employers from regulation; 25% of all employees in California are shorn of all protection against RMIs." The appellate court noted that Labor Code 6357 "directs the Board to adopt standards 'designed to minimize the instances of injury from repetitive motion' in the workplace. 'Workplace' is commonly understood as covering any place where 'work' is performed. This is especially true where worker health and safety is concerned" (emphasis original). The court found that section 6357 appears within the legislature's delegation to the Department of Industrial Relations of "the power, jurisdiction, and supervision over every employment and place of employment in this state..." (emphasis original). According to the court, "the Legislature's placement of section 6357 within this statutory milieu, coupled with the plain meaning of the term 'workplace,' presents compelling evidence that the Legislature intended the Board to promulgate standards for minimizing RMIs in all places of employment in this state. A standard which excludes four out of five 'workplaces' is inherently inconsistent with that responsibility" (emphasis original).

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The Third District disposed of the trucking associations' APA claims. As to the cost issue, the associations faulted OSB for concluding that "this proposal should not result in a significant adverse economic impact on businesses, including the ability of California businesses to compete with businesses in other states [and] should not require private persons or entities who are employers to incur additional costs in complying with this proposal." According to the court, "the Board also concluded that although precise cost figures could not be known, the costs of implementation would likely be offset by a 'significant amount of savings to be realized from the reduction in workers' compensation and productivity costs associated with fewer repetitive motion injuries as a result of this proposal.'" The court found the Board's statements to be supported by data from the federal government's National Institute for Occupational Safety and Health, and stated that "it is not the court's function to second-guess the Board's conclusions or resolve conflicting scientific views in an area committed to the discretion of the rulemaking agency." The court also found that the APA's "necessity" requirement had already been decided by the legislature itself when it dictated that Cal-OSHA "shall adopt" standards for ergonomics in the workplace designed to minimize the instances of injury from repetitive motion. Finally, the court noted that OSB is not required, as a matter of law, to rely on scientific studies in adopting a regulation; "moreover, the record is replete with articles and reports touting the benefits of ergonomics programs.... We conclude that the Board substantially complied with the procedural requirements of the APA." The Third District reversed the superior court's decision and remanded the matter to the trial court to enter a new judgment consistent with its opinion. Whether

OSB challenges the court's invalidation of the small employer exemption remains to be seen.

On June 30, the California Supreme Court agreed to review the Second District Court of Appeal's decision in *Carmel Valley Fire Protection District v. State of California*, 70 Cal. App. 4th 1525 (Mar. 31, 1999). In that

case, the Second District held that the legislature violated the separation of powers doctrine when, in response to the state's fiscal crisis during the early 1990s, it passed a bill suspending required local government compliance with state mandates—including Department of Industrial Relations executive orders concerning appropriate clothing and equipment for firefighters.

In 1978, DIR adopted executive orders requiring all employers (including local governments) to adhere to OSB's regulations establishing minimum requirements for personal protective clothing and equipment for firefighters, and to provide firefighter employees with the designated clothing and equipment. At that time, state law required the state to reimburse local government entities for the costs they incurred in complying with the regulations ("state-mandated pro-

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grams"). In 1979, California voters codified the state's obligation to reimburse local governments for costs they incur in complying with specified state-mandated programs in the state constitution by passing Proposition 13.

During the state's fiscal crisis in 1990, the legislature passed a bill enacting Government Code section 17581, which suspended the obligation of local governments to comply with a statute or executive order if (1) compliance with the statute or executive order would trigger mandated state reimbursement, and (2) the legislature specifically identifies the statute or executive order as being one for which reimbursement is not provided for that fiscal year. If a local agency elects to comply with a statute or executive order meeting these two conditions, the local agency may assess fees to those who benefit from that compliance—but the state would not reimburse those costs.

In 1995, the Carmel Valley Fire Protection District submitted a claim to the Commission on State Mandates (which determines whether a law or regulation constitutes a "state mandate") for reimbursement of its costs of complying with DIR's executive orders concerning firefighter clothing and equipment. After the Commission denied the claim, the District filed a petition for writ of mandate in superior court. The trial court denied the writ, finding that the clothing and equipment requirements imposed by the executive orders were validly suspended by section 17581 and that, as a result, the costs incurred by the District by providing those items were not state-mandated costs. The District appealed.

The Second District reversed, finding that the legislature's enactment of section 17581 usurped the enforcement authority of the executive branch. The court observed that although the legislature may enact, amend, and repeal the laws of this state (including those that create Cal-OSHA and govern occupational health and safety), it is "without the power to 'exercise supervisory control or to retain for itself some sort of 'veto' power over the manner of execution of the laws.'" According to the court, "section 17581 is nothing more than an impermissible attempt to exercise supervisory powers over the manner in which the Department of Industrial Relations executes the laws enacted by the Legislature. Whatever power the Legislature may have to repeal Cal-OSHA in whole or in part, or to enact an inconsistent statute that would accomplish an implied repeal of the executive orders, it does not have the power to cherry-pick the programs to be suspended—which is precisely what the Legislature has done by suspending the operation of only those 'executive orders, or portions thereof, [that] have been specifically identified by the Legislature in the Budget Act for that fiscal year' [quoting section 17581].....Accordingly, section 17581 is constitutionally infirm as applied in this case and cannot be applied to the executive orders adopted by the Department of Industrial Relations."

In *Attorney General's Opinion No. 99-614* (August 4, 1999), Attorney General Bill Lockyer opined that the AFL-CIO may challenge the appointment of Sopac Tompkins as a public member on OSB. In 1994, then-Governor Wilson appointed Tompkins to one of the "management representative"

positions on OSB. At the time, Tompkins was president of Sopac and Associates, a real estate management consulting firm, and was the owner and operator of the McCarthy Creek Ranch and the business manager of the River Valley Ranch. From 1985 to 1986, she served as the representative for construction, operation, and leasing of office, hotel, and restaurant complexes in Orange County; from 1982 to 1985, she served as a vice-president and regional manager of CDS Development of California, Inc. In December 1998, Governor Wilson reappointed Tompkins to the Board, but to the "public member" position. The AFL-CIO contests her appointment to a public member position, and sought the Attorney General's permission to sue *in quo warranto*, in the name of the People of the State of California, to challenge her appointment.

Labor Code section 140 establishes the composition of OSB. Section 140 sets aside two board positions for representatives from "management," two from "labor," one from "occupational health," one from "occupational safety," and requires the selection of one public member "from other than the fields of management or labor." In granting the AFL-CIO's request, the Attorney General noted its obligation to determine (1) whether there exists a substantial question of fact or law that requires judicial resolution, and (2) whether the filing of an action in the nature of *quo warranto* would serve the overall public interest. Noting that, in enacting Labor Code section 140, "the Legislature intended for the Board to have diversity in its membership" and that Tompkins was apparently qualified for a management position in 1994 and retained those same qualifications when appointed to the public member position in 1998, the Attorney General concluded that substantial questions of fact and law exist concerning whether she qualified as a person "from other than the fields of management or labor" at the time of her reappointment; the AG further identified "no overriding considerations that would prevent presenting this matter for judicial resolution." Tompkins' term expires on June 1, 2000.

### FUTURE MEETINGS

- November 18, 1999 in San Diego.
- December 16, 1999 in Sacramento.
- January 20, 2000 in Los Angeles.
- February 17, 2000 in Oakland.
- March 16, 2000 in San Diego.
- April 13, 2000 in Sacramento.
- May 11, 2000 in Los Angeles.
- June 15, 2000 in Oakland.
- July 20, 2000 in San Diego.
- August 17, 2000 in Sacramento.
- September 21, 2000 in Los Angeles.
- October 19, 2000 in Oakland.
- November 16, 2000 in San Diego.
- December 14, 2000 in Sacramento.