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The Cal/OSHA Appeals: Understanding the Process and Avoiding Pitfalls

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For: Public Agency Risk Management Association

Who's Who of Cal/OSHA

- Standards Board (OSHSB)
 - Development
- Cal/OSHA (DOSH or The Division)
 - Enforcement
- Appeals Board (OSHAB)
 - Interpretation

Sources of Law

- Regulations
 - Title 8 California Code of Regulations
 - *Not* the CA Labor Code
 - (caveat – SB 606, which would add LC to Cal/OSHA jurisdiction)
 - *Not* 29 CFR
- Procedure
 - CA Labor Code
 - Title 8 regulations
 - As needed, Civil Code of Procedure, Evidence Code

The Standards Board

- Seven-member body appointed by the Governor
 - Various interest groups represented (i.e., Labor, Management, Occupational Safety and Health, Public)
- Development of new regulations
- Amendment of current regulations
- Variances from current regulations

The Appeals Board

- Quasi-judicial body
- Administrative Law Judges
 - Hear Employer appeals of citations issued by Cal/OSHA
- The Board
 - Three members appointed by Governor (Management, Labor and Public)
 - Hear Petitions filed by either party
 - Final say, unless you file a Petition for Writ of Mandamus to Superior Court

Cal/OSHA a.k.a The Division

- Enforcement of Title 8 safety orders
- Jurisdiction over almost every workplace in CA
 - Employer/employee relationship
 - State plan
 - There are some exceptions
- Permitting and certification
 - Ex: Pressure vessels, demolition, elevators, scaffolding, excavation (to name a few)
- Consultation
- Bureau of Investigations (BOI)
- Legal Unit

A Pre-Citation Warning

- The Notice of Intent to Issue a Serious Citation (1BY)
- The Division is required by law to serve the document
- Intended to allow employers an opportunity to “explain”
- The upside: re-classification of a citation from serious to general
- The downside: an admission of guilt (verified and admissible)
- The Reality: more risk than potential benefit

The Citation Package

- The Division has six months from the time of an alleged violation to issue citations
- They will likely be forwarded via certified mail
- The citations will include:
 - The regulation alleged to have been violated
 - The charging language
 - The proposed penalty
 - The required date of abatement
- Receipt of the citation package triggers the appeal timeline

Cal/OSHA Appeals

- Many issues to consider:
 - Was there an injury/fatality
 - Is criminal investigation possible
 - Future inspections and citations
 - Permanent "OSHA Record"
 - S&W liability
 - Penalties v. Classification
 - ABATEMENT REQUIREMENTS

Issues on Appeal

- The Violation
- The Penalty: Monetary penalties set by law
 - Title 8 CCR 336
 - Increase every year with CPI
 - Penalty payments go to CA general fund, not Cal/OSHA
- Classifications
 - Title 8 CCR 334
- Abatement Requirements

The Appeal Timeline

- Initiate the Appeal: 15 working days from receipt
- The informal Conference: Not within 10 days
- The Appeal is Docketed
- The Appeal is Perfected
- The Status Conference(s)
- An Evidentiary Hearing
- The Expedited Appeal of Unabated Citations (serious or greater) to hearing within 150 days

Affirmative Defenses: No Employer Knowledge

- A defense to the serious classification:
 - The Division's burden: There is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. **A rebuttable presumption.**
 - The Division's inspector is "competent" if up to date on training.
 - The Employer may rebut the presumption (**employer's burden**) by showing that it did not know and could not have known, with reasonable diligence, of the violation.

Affirmative Defenses: IEAD

- The Independent Employee Act Defense
 - That the injured employee had experience in the job being performed;
 - That it had a well devised safety program;
 - That it effectively enforced the safety program;
 - That it had a policy of applying sanctions for violations; and
 - That the employee causing the infraction knew he was acting contra to the employer's safety requirement.

Affirmative Defenses: Unforeseeable Violation (Newberry)

- Employer must prove all four elements in the NEGATIVE:
 - That the employer knew or should have known of the potential danger to employees;
 - That the employer failed to exercise supervision adequate to assure safety;
 - That the employer failed to ensure employee compliance with its safety rules; and,
 - That the violation was foreseeable.

Affirmative Defenses: Logical Time

- Employer must show that the “logical time” for compliance with the cited regulation has not yet occurred.
- Consider period of time that the violation existed
- Employee exposure to the associated hazard

The Cal/OSHA Hearing

- Presentation of Evidence
 - The burden of proof
 - Testimony and exhibits
 - Direct and cross-examination
 - Hearsay
 - Foundation

SB 606: The Enterprise-Wide Violation

- Amends California Labor Code Section 6317(b):
 - Creates a **rebuttable presumption** that an enterprise-wide violation exists if:
 - Employer has a written policy or procedure that is not compliant with regulation
 - The Division has evidence of a pattern or practice of the same violation by the employer on more than one worksite.
 - IF employer fails to rebut the presumption, the Division may issue an enterprise-wide violation that requires enterprise-wide abatement.
 - Penalties: Advertised as up to \$ 124,692 or so... the amendment does not address a change in penalty procedure.

SB 606: The Enterprise-Wide Violation

- The Division's Plan: Resources - Limited
- Regulation or Policy and Procedure to address - None
- What is an Employer to do:
 - Review all written plans for compliance - IIPP, HIPP, CPP etc.
 - Watch employee access rules
 - As always: Do what the plans say you will do
 - Consider site specific plans or addendums
 - Review procedures related to Cal/OSHA inspection and update training

SB 606: The Egregious Violation

- Adds California Labor Code section 6317.8
- If the Division believes that the employer has willfully or egregiously violated a regulation, the Division shall:
 - Issue a citation for each egregious violation; and,
 - Each instance of an employee exposed to that violation shall be considered a separate violation for purposes of a penalty.
- Consider this in light of current regulatory classification:
Willful

SB 606: The Egregious Violation

- Egregious Violation:
 - Intentionally made no reasonable effort to eliminate a known violation
 - Violation resulted in worker fatality, catastrophe or large number of injury/illness
 - Violation resulted in persistent high rates of illness, injury
 - Extensive history of prior violation
 - Intentional disregard of health and safety responsibilities
 - Employer's conduct amounts to clear bad faith
- The conduct reviewed to determine "egregious" violation within five years and the determination will remain for five years.

SB 606 and the Division

- How and when will the Division enforce the provisions of SB 606?
 - New chief appointed, not yet in position
 - Understaffing, new staffing without training
 - No corresponding regulations for penalty calculation, classification
 - No Policy and Procedure for inspectors
 - No / limited resources to address
 - Current regulation addressing willful violation and penalty calculations

Resources

- Cal/OSHA:
 - <https://www.dir.ca.gov/dosh/>
- Fed/OSHA Establishment Search:
 - <https://www.osha.gov/pls/imis/establishment.html>
- OSHAB:
 - <https://www.dir.ca.gov/oshab/oshab.html>
- Title 8 CCR:
 - <https://www.dir.ca.gov/samples/search/query.htm>
- The Prince Firm
 - <https://www.lisaprincelaw.com>

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Questions?

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