



FLOYD SKEREN MANUKIAN LANGEVIN **Fisher Phillips**
ON THE FRONT LINES OF WORKPLACE LAW

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Off to Work we Go

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**The Hazards of Geppetto's Workshop:
Employer Rights and Strategies that
OSHA Does Not Want You To Know."**

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Geppetto's Primary Risk

- Tortured Metaphors
 - Pinocchio?
 - Marionette?
 - Giant Whale?


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A Unique Obligation

- Unlike FEHA, the Labor Code, or even case law:
 - Cal-OSHA regulations exist in the background;
 - Cal-OSHA regulations change without significant publicity;
 - Cal-OSHA compliance is no guarantee that Cal-OSHA won't come calling.

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Cal-OSHA Background

Applies to All Employers EXCEPT:

- Federal employees working in California
- Household Domestic Service
- Self-Employment
- Family Farms – Immediate Family Employees

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Enforcement – Very Little Private Litigation

- Occupational Safety and Health Standards Board (OSHSB)
 - The regulatory body
- Division of Occupational Safety and Health (DOSH)
 - The enforcement body
- Occupational Safety and Health Appeals Board (OSHAB)
 - The judicial body

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Regulatory Considerations

- Cal-OSHA tailors its regulations to specific industry.
 - As a result, there are rarely one size fits all policies/procedures
- Even absent regulations a duty of care exists
 - Provide place of employment;
 - Free from recognized hazards;
 - That could cause death or serious injuries.
- Cal-OSHA targets specific industries and injuries based on reported injuries

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Where is the Risk?

- High Hazard –
 - Construction
 - Framers and finish contractors
 - Manufacturing
 - Canning, bakeries, food manufacturing
 - Home Centers, Hardware and Warehouse stores;
 - Landscaping
 - Waste disposal
 - Hotels and Motels
 - Nursing Care
- Fatalities –
 - Agriculture, Forestry, Hunting
 - Transportation;
 - Construction
 - Manufacturing;
 - Retail;
 - Leisure and Hospitality

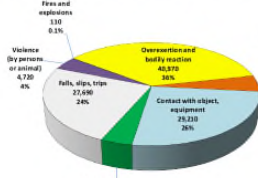
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What is the Risk?

- Lost-time injuries are down from 2012 to present;

Figure 93: California Non-Fatal Occupational Injuries and Illnesses by Event and Exposure, Private Industry, 2017

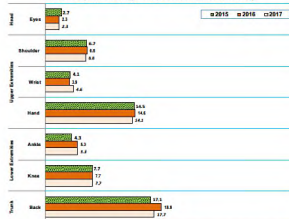


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What is the Risk?

Figure 95: Incidence Rates for Non-Fatal Occupational Injuries and Illnesses by Major Body Parts, Private Industry, 2015, 2016, and 2017 (per 10,000 Full-Time Workers)

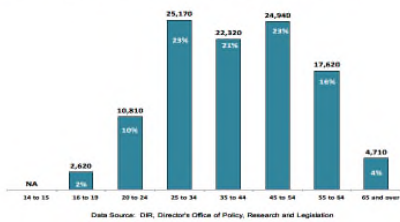


Data Source: BLS, U.S. Department of Labor, Bureau of Occupational Safety and Health (OSHA) Occupational Injury and Illness Reporting System



Who is at Risk?

Figure 96: Number of Non-Fatal Occupational Injuries and Illnesses in California by Age, Private Industry, 2017



Data Source: DRL, Director's Office of Policy, Research and Legislation

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Who is at Risk?

Figure 97: Non-Fatal Injuries and Illnesses by Major Occupational Group: Median Days Away from Work, State Government, 2017



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Risk – The Regulatory Summary

- The Standards Board makes its decisions based on where, what, and who the Risk is.
- SO....be especially cautious if:
 - You are in a High Hazard industry;
 - You have employees working outdoors;
 - You have employees working closely with precision or moving machinery; or
 - Your have a significant number of employees performing data entry.

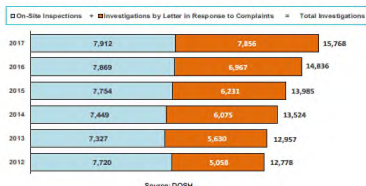
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DOSH Enforcement

- Accidents, Death, and Lost Time are Down, but...

Figure 100: DOSH Enforcement Activities, CY 2012-CY 2017



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DOSH Enforcement

- Investigations typically stem from accidents or complaints (60%);
- 72.5% of investigations result in citations;
- 25% of citations are "serious" (but that percentage is up 8% from 2012);
- Each investigation averages 3 citations
- \$59.7 Million in assessments

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DOSH Enforcement

- Citations by Description
 - Injury Illness and Prevention (10% Serious)
 - Heat Illness Prevention (14% Serious)
 - Moving Machinery (50% Serious)
 - Failure to Report Serious Injuries
 - Emergency Eyewash and Shower Equipment (50% Serious)
 - Personal Fall Equipment (66.7% Serious)
 - Extension Cords
 - Fork Lifts (32% Serious)

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Best Practices

- Start at the Beginning:
 - Injury Illness Prevention Plan (IIPP)
 - Heat Illness Prevention Plan (HIPP)
 - Employee Training

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Best Practices

- IIPP (California Code of Regulations, title 8, section 3203)
 1. Management commitment/assignment of responsibilities
 2. Safety communications system with employees
 3. System for assuring employee compliance with safe work practices
 4. Scheduled inspections/evaluation system

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Best Practices

- IIPP
 5. Accident investigation
 6. Procedures for correcting unsafe/ unhealthy conditions
 7. Safety and health training and instruction
 8. Recordkeeping and documentation

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Best Practices

- HIPP (California Code of Regulations, title 8, section 3395)
 - Same standards as the IIPP BUT...
 - More narrowly tailored
 - Needs to consider the specific conditions present at any job site
 - Hit each of the key issues identified in the regulations
 - Identify specific locations for shade and water
 - Priorities for acclimatization
 - Educate employees regarding the symptoms of heat illness
 - Educate employees regarding the response to heat illness


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Best Practices

- Employee Training
 - More than a signature
 - Weekly, Monthly or Quarterly updates or safety meetings
 - Keep records of the training materials and acknowledgments
 - Supervisor oversight


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Handling an Accident

- Provide initial First Aid
- Complete an Incident Report
- Commence an Investigation
- **Understand your reporting Obligation**
- *Every employer shall report immediately any serious injury or illness, or death of an employee occurring in a place of employment or in connection with any employment.*


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Handling an Accident

- **Immediate**
 - As soon as practically possible but not longer than **8 hours after the employer knows** or with diligent inquiry would have known of the serious injury or illness.
 - If the employer can demonstrate that exigent circumstances exist, the time frame for the report may be made no longer than **24 hours after the incident.**

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Handling an Accident

• **Serious injury or illness:**

- any injury or illness occurring in a place of employment or in connection with any employment which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation or in which an employee suffers a loss of any member of the body or any serious degree of permanent disfigurement

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Preparing for the Inspection

• Determine before an inspection...

- What Cal-OSHA standards are applicable--Do you comply?
- Previous Cal-OSHA citations – Are they all corrected?
- Will you require a warrant from Cal-OSHA?
- Assure support staff (receptionists, secretaries, guards) are trained.
- Know what to say when a government official is at your door.
- Who is the right company person(s) to contact, including your Cal-OSHA counsel?

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The Elements of a Cal-OSHA Inspection

- The Knock at the Door
- The Opening Conference
- The Walk-Around
- The Closing Conference

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The Knock at the Door

- It is your facility.
- You have rights. . .
 - Inspection conducted in a reasonable manner
 - Inspection conducted during a reasonable time
- Maintain control of the inspection

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Opening Conference

- Ascertain purpose of the inspection.
- Set ground rules for inspection.
- Don't volunteer information.

Remember, no matter how pleasant, the Cal-OSHA Inspector is there to do his/her job.

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The Walkaround

- Inspection May Last Several Hours or Several Months
- Employer – Right to Accompany Inspector
- Inspector – Right to Private Interviews With Non-management Employees
 - But – Managers can and should have Representation in an Interview
- An Employee Representative, If Any, Must Be Permitted To Attend Entire Inspection

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The Walkaround

- If complaint inspection, limit the area seen by the Inspector
- Take accurate notes on areas reviewed
- Do everything the Inspector does (photos, air monitoring, etc.)
- Maintain control
- No staging of event or accident

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Closing Conference

- Usually, Discusses Information As To Likely Citations
- Advise of Likely Unsafe Conditions / Possible Violations
- Request Records and Advise of Tight Timeline
- Suggest Possible Corrections
- Discuss Appeal Rights

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Closing Conference

- Employers' opportunity for free discovery
- Note any comments made or unusual activity during the inspection
- Request photos and monitoring results

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Citations – Shoot for the Stars

General or Regulatory

Up to \$7,000 per violation

Willful

Up to \$75,000 per , minimum of \$5,000

Repeat

Same as Willful

Serious

Up to \$25,000 per violation

Failure to Abate

Up to \$15,000 per violation per day

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Appeal – Your Chance to Push Back

- OSHA is often more than willing to reduce citations (to a point)
- Abatement is an essential step (and not an admission!)
- Citations can be issuing during an appeal (if within six months of inspection)
- Proceed through Counsel

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Final Questions?

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