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Workplace Violence Prevention: Crossroads of OSH and Employment Law

November 8, 2023

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Rachel L. Conn is a Partner and Chair of Conn Maciel Carey's California Practice. She is based out of the firm's San Francisco office.

- Rachel's practice focuses on OSH compliance and litigation, including inspections, audits, investigations, and enforcement actions involving Cal/OSHA, fed OSHA, and other State OSH Plans.
- She also represents employers and trade associations in Cal/OSHA and fed OSHA rulemakings.
- Previously, Rachel was a partner and led the national OSHA Practice at an AmLaw 100 law firm.



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Megan Stevens Shaked is a Partner and Cal/OSHA Lead in the Workplace Safety and Employment Practices at **Conn Maciel Carey LLP's** San Francisco office, where she focuses her practice on a wide-range of employment litigation and counsel for clients on myriad legal issues employers face in the workplace, including all aspects of the employment relationship:

- Defends employers in litigation in federal and state court
- Counsels employers on compliance with employment laws
- Represents employers in inspections, investigations and enforcement actions involving Cal/OSHA



Agenda



Pre-SB 553



SB 553 - Background



SB 553 - Final Bill



Status of Cal/OSHA Regulation



Implications for Employers

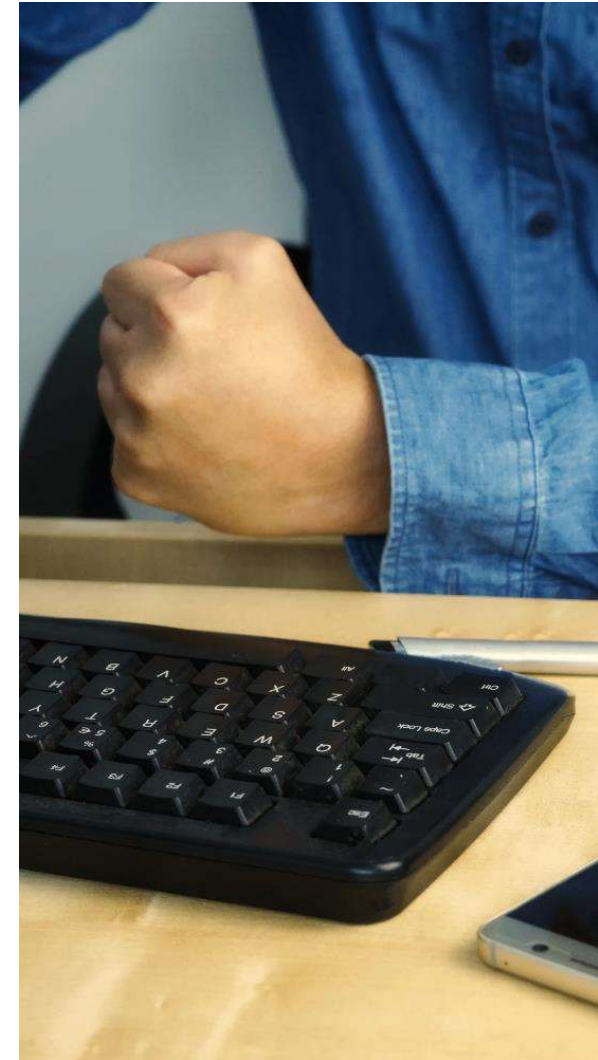
Workplace Violence In California

Per Department of Industrial Relations –

“Workplace violence includes threats or acts of physical violence at work and is a serious concern for employers and workers. The latest data shows in 2021, 57 working people died from acts of workplace violence in Calif.

“In the U.S., an average of 1.3M nonfatal violent crimes in the workplace occurred annually from 2015 - 2019.”

Source: <https://www.dir.ca.gov/dosh/doshreg/Workplace-Violence-in-General-Industry/>



Pre-SB 553

- WPV Prevention in Healthcare - 8 CCR 3342
- Injury & Illness Prevention Plan (IIPP) - 8 CCR 3203
 - Identify, correct, and train on hazards in the workplace, including WPV
- “Workplace Violence and Active Assailant—Prevention, Intervention, and Response” (ASIS/ANSI, 2020)
- “Workplace Violence Prevention and Intervention” (ASIS/SHRM, 2011)

Pre-SB 553

- Cal/OSHA Guidelines for Workplace Security
- Injury and Illness Prevention Model Program for Workplace Security
- Cal/OSHA draft standard Workplace Violence Prevention 8 CCR 3343-General Industry
 - July 2014 petition to Standards Board for workplace violence prevention in education
 - Cal/OSHA started work on a WPV standard again in 2017 (multiple drafts to follow)
 - May 2022 released additional draft



Types of Restraining Orders in California

**Civil
Harassment
Restraining
Order**



**Elder or
Dependent
Adult Abuse
Restraining
Order**



**Gun Violence
Restraining
Orders**



**Domestic
Violence
Restraining
Order**



**Workplace
Violence**



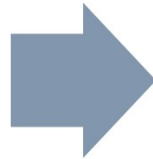
Workplace Violence Restraining Order

CA Code of Civil Procedure 527.8

- Under Calif. law, courts can make orders to protect an employee from suffering unlawful violence or credible threats of violence at the workplace
- The court can order a person to:
 - ≠ Not harass or threaten the employee
 - ≠ Not contact or go near the employee
 - ≠ Not have a gun
- Employees cannot ask for Workplace Violence Protective Orders (only Employers)
- Order can also protect certain family or household members of the employee
- Can also protect other employees at the same workplace or others of the employer
- Orders are enforced by law enforcement agencies

Workplace Violence Restraining Order

Employee has suffered unlawful violence (e.g., assault, battery, or stalking) or a credible threat of violence



Unlawful violence or threat of violence can reasonably be construed to be or have been carried out at the workplace



Conduct of accused is not otherwise allowable as part of a legitimate labor dispute or constitutionally protected activity

“Credible threat of violence” =

Intentionally saying something or acting in a way that would make a reasonable person afraid for his or her safety or the safety of his or her family

which includes

following / stalking or making harassing calls / sending harassing messages by phone, mail, or e-mail over a period of time (even a short time)

Restraining Order - Limitations

Civil in Nature

- Do not show up on background checks
- Can be difficult to obtain
- Full Faith and Credit: Other states must honor and enforce orders if they appear valid

Enforcement

- Proper service
- Dependent on the victim to report
- Effectiveness?



SB 553 – Workplace Violence Prevention

1

Amends CA Code of Civil Procedure 527.8-Workplace Violence Restraining Orders

2

Amends IIPP statute- Labor Code Section 6401.7 to add as an element- “A workplace violence prevention plan conforming to the requirements of Section 6401.9.”

3

Adds Labor Code Section 6401.9- Workplace Violence Prevention Plan & Other Requirements

SB 553 – Workplace Violence

Calif. Labor Code Sec. 6401.9 -

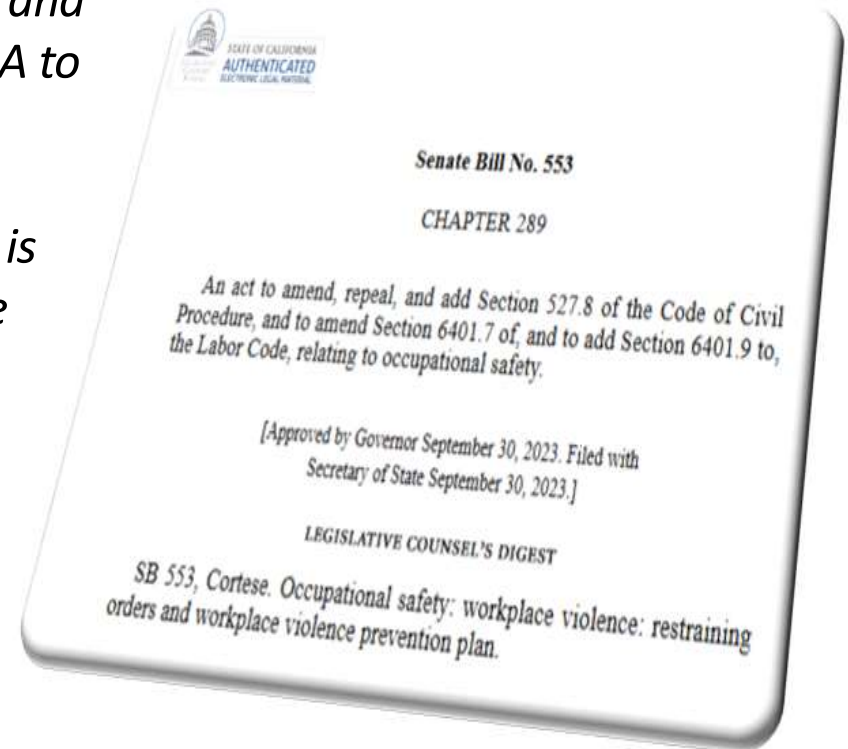
- All employers are required to establish, implement, and maintain an effective **Workplace Violence Prevention Plan** by July 1, 2024
- Operative January 1, 2025, collective bargaining representatives may seek **Workplace Violence Restraining Orders** on behalf of employees
- **Exempted Workplaces under Labor Code Sec. 6401.9:**
 1. Facilities covered by and that comply w/ Cal/OSHA's Violence Prevention in Health Care std.;
 2. Facilities operated by the Calif. Dept. of Corrections and Rehabilitation;
 3. Law enforcement agencies;
 4. Teleworking employees; and
 5. Workplaces not publicly accessible, w/ < 10 employees present at once, that comply w/ IIPP

SB 553 – History

- Feb. 15, 2023 – SB 553 is introduced by Sen. Dave Cortese

“6 years, and numerous workplace deaths, injuries, and incidents later, workers are still waiting for Cal/OSHA to pass a workplace violence std. to protect them. On 5/17/22, Cal/OSHA circulated yet another General Industry Workplace Violence discussion draft, but it is significantly weaker than the Healthcare Workplace Violence Standard Unfortunately, there has not been any progress since then.”

- Variety of different amendments
- 09/12/23 passed in Legislature
- 09/30/23 signed by Gov. Newsom



SB 553 – Workplace Violence Definitions

- **“Workplace violence”** means any act of violence or threat of violence that occurs in a place of employment
- That includes, but is not limited to:
 1. The **threat or use of physical force** against an employee that **results in, or has a high likelihood of resulting in, injury, psychological trauma, or stress** (regardless whether the employee sustains an injury)
 2. Incident involving a **threat or use of a firearm or other dangerous weapon**, including use of common objects as weapons (regardless whether the employee sustains an injury)

SB 553 – Workplace Violence Definitions (cont.)

- **“Threat of violence”** = any verbal or written statement, including texts, electronic messages, social media messages, or other online posts, or any behavioral or physical conduct that conveys or reasonably could be perceived to convey intent to cause or place someone in fear of physical harm, and that serves no legitimate purpose
 - **“Workplace violence”** ≠ lawful acts of self-defense or defense of others.
 - **“Place of employment”**
 - **“[R]esulting in, injury, psychological trauma, or stress**, regardless of whether the employee sustains an injury”
 - **“[T]exts, electronic messages, social media messages, or other online posts”**

Types of Workplace Violence

“Type 1 violence”

Committed by a person who has no legitimate business at the worksite, including violent acts by anyone who enters w/ intent to commit a crime

“Type 2 violence”

Directed at employees by customers, clients, patients, students, inmates, or visitors

“Type 3 violence”

Against employees by current or former employees, supervisors, or managers

“Type 4 violence”

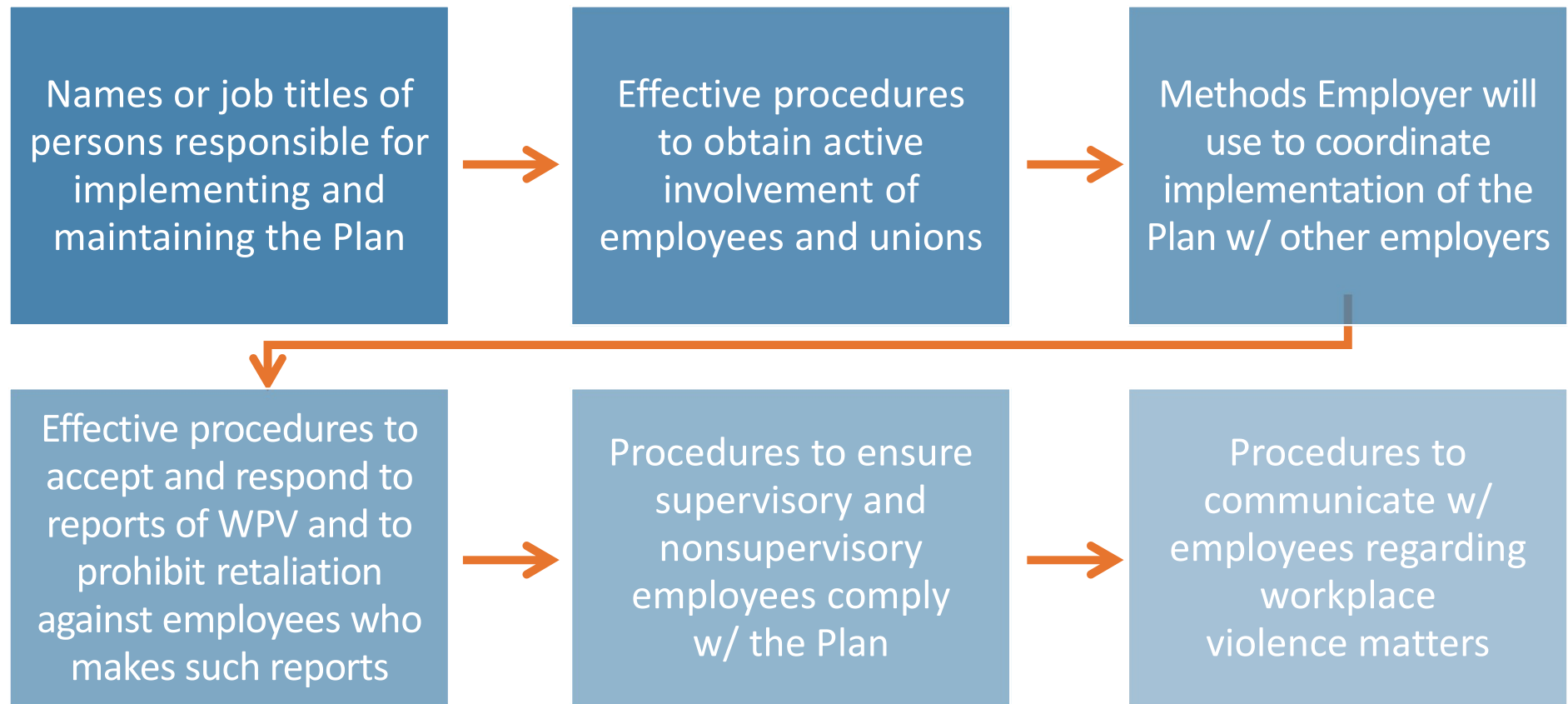
Committed in a workplace by someone who does not work there but who has or had a personal relationship w/ an employee

SB 553 – Workplace Violence WPV Program Overview

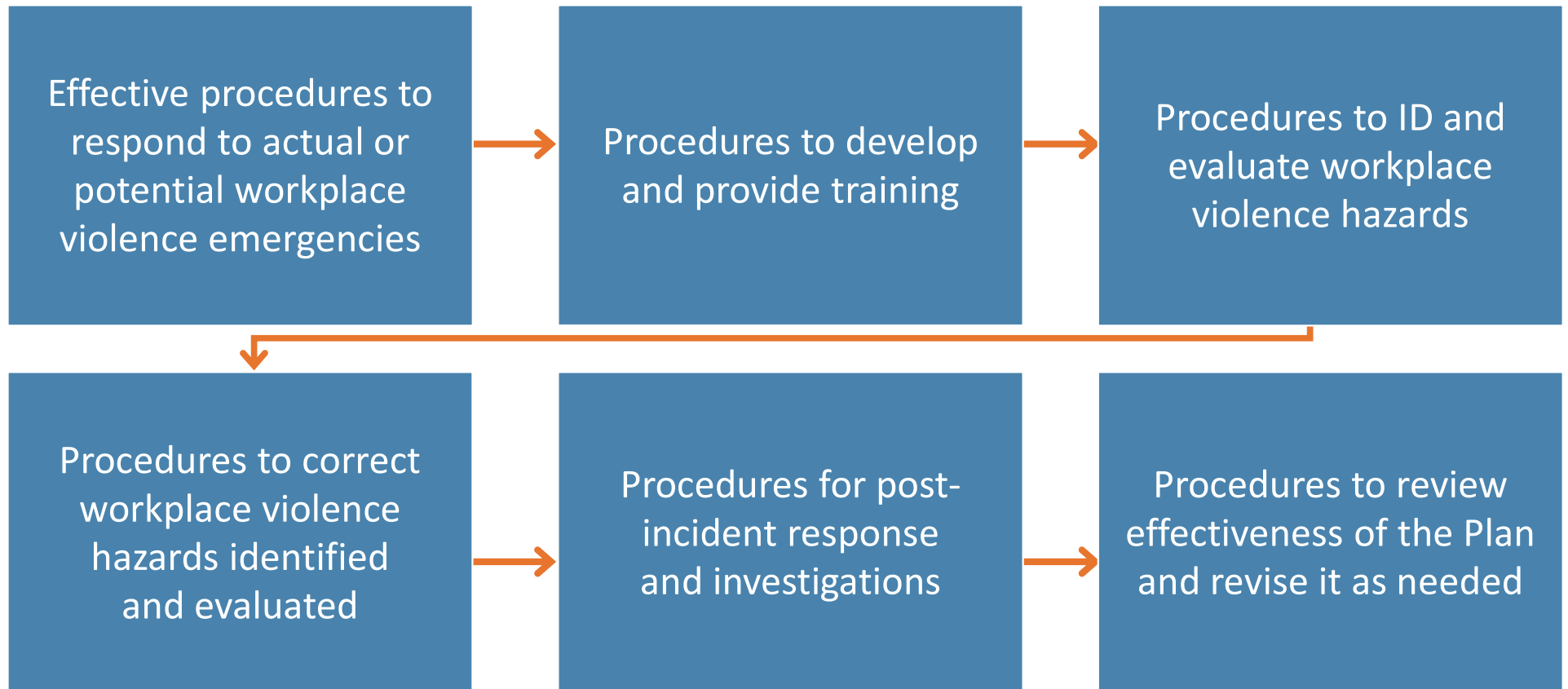
- May be a part of the IIPP or separate document
- Establish, implement, and maintain a workplace violence prevention plan
- Create and maintain records of workplace violence hazard identification, evaluation, correction, and investigations
- Violent incident log
- Recordkeeping
- Training



SB 553 – Workplace Violence Elements of Written Plan



SB 553 – Workplace Violence Elements of Written Plan



Violent Incident Log

- Employer shall record information in a Violent Incident Log for every workplace violence incident
- The log shall include the following information:
 - The date, time, & location of incident
 - Classification of who committed the violence
 - Classification of circumstances at the time of the incident
 - Classification of where the incident occurred
 - Type of incident
 - Consequences of the incident
 - Information about the person completing the Log

WPV Training

- Employers to provide initial training when the Plan is first established and then annually thereafter
- Additional training must be provided when a new or previously unrecognized WPV hazard has been identified and when changes are made to the Plan (may limit to just the new hazard or changes)
- Training events must include an opportunity for interactive questions and answers w/ a person knowledgeable about the Plan

WPV Training (cont.)

- WPV Training must cover:
 - The Plan, how to obtain a copy and participate in developing / implementing it
 - Definitions and requirements of the law
 - How to report incidents/concerns to Employer or law enforcement w/out fear of reprisal
 - WPV hazards specific to employees' jobs
 - Corrective measures Employer has implemented
 - How to seek assistance to prevent/respond to violence
 - Strategies to avoid physical harm
 - The violent incident log and how to obtain copies of records

WPV Recordkeeping

1. Maintain Records of Hazard Identification, Evaluation, and Correction for 5 years
2. Maintain Violent Incident Logs for 5 years
3. Maintain Training Records for 1 year
4. Maintain Incident Investigations for 5 years

Records maintained for items 1-3 must be made available to employees and their representatives upon request w/in 15 calendar days



SB 553 – Workplace Violence Restraining Orders

Beginning 1/1/25 –
Authorizes employees’
collective bargaining
representatives to
seek a WPV

Restraining Order on
behalf of an employee
and other employees
at the same workplace



Would require Employer or collective bargaining representative to provide the employee an opportunity to decline to be named before filing



Would NOT prohibit Employer or collective bargaining representative from seeking a Temporary Restraining Order on behalf of other employees at the workplace

SB 428 - TROs: Employee Harassment

- Current law enables Employers to seek a Temporary Restraining Order to protect employees from a person who has engaged in or made a credible threat of violence
- Effective January 1, 2025, Employers may seek a Temporary Restraining Order against an individual who has harassed an employee and their immediate family members



Additional Cal/OSHA Regulation

- Specifically calls for the Division to propose no later than Dec. 31, 2025, and the Standards Board to adopt no later than Dec. 31, 2026, standards regarding the required plan
- Standard must include, at a minimum, requirements outlined in Sec. 6401.9 and “any additional requirements the Division deems necessary and appropriate to protect employees’ health and safety”
- Next discussion draft is awaiting final approval
- An additional Advisory Committee meeting is expected

Employers' Implications and Concerns

Employee privacy concerns

- Investigation report carve out for “medical information”, but what about other personal information?

What level of detail will be sufficient?

“The plan shall be in effect at all times and in all work areas and be specific to the hazards and corrective measures for each work area and operation”

Other concerns?



Intersection of Laws

-
- The diagram features a central vertical white line that divides a large blue rounded rectangle into two columns. Two large, thick, orange curved arrows are positioned around the central line, one at the top and one at the bottom, both pointing from the left column to the right column, indicating a relationship or intersection between the two sets of laws.
- Workers Compensation
 - Privacy laws
 - The ADA and related state laws
 - Other discrimination issues
 - Premises liability
 - Negligent hiring, supervision and retention
 - Accommodation for domestic violence victims
- Privilege and confidentiality
 - Temporary restraining orders (TROs) and injunctions
 - Employee searches (physical and electronic)
 - Public records search

Common Law Torts

Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 40(a) (2012) –

An actor in a special relationship w/ another owes the other a duty of reasonable care w/ regard to risks that arise w/in the scope of the relationship

Special relationships giving rise to the duty provided in Subsection (a) include:

- 1) Common carrier with its passengers,
- 2) Innkeeper with its guests,
- 3) Business or other possessor of land that holds its premises open to the public with those who are lawfully on the premises,
- 4) **Employer w/ its employees who, while at work, are:**
 - (a) in imminent danger; or
 - (b) injured or ill and thereby rendered helpless,
- 5) School w/ its students,
- 6) Landlord w/ its tenants, and
- 7) Custodian w/ those in its custody, if:
 - a) custodian is required by law to take custody or voluntarily takes custody of the other; and
 - b) custodian has a superior ability to protect the other

Common Law Torts

Duty of Employers:

- Workers Comp displaced most common-law occupational tort claims
- Where Workers Comp applies, it governs employer liability for employees' occupational injuries (it is the exclusive remedy)
- Limited instances when WC does not apply, employers' duty is the ordinary duty of reasonable care owed by employers to employees based on risks in the work environment

Circumstances when affirmative duty may apply are generally limited to:

Risk to an employee of a criminal attack by a 3rd party that occurs at the workplace

Illness or injury by employee while at work (but not b/c of employment) that renders employee helpless and in need of emergency assistance

Intentional acts by Employer (Willful Cal/OSHA violations?)

Cases that fall through the cracks are quite varied b/c of variations that exist in different states' Workers Comp statutes

Vicarious Liability

Respondeat superior:

- Master/employer may be liable for the negligent acts of servant/employee
- Committed in the course of his/her employment
- Not when engaged in a “folly of his own”



Premises Liability



Common law duty arising from a duty to those on your property:

- Visitors
- Customers/clients
- Contractors



Typically, slip and fall injuries, but can also include intentional harm (i.e., assaults):

- Negligent hiring/supervision/retention
- Negligently designed/executed policies and procedures

Public Records Search

Several laws in California that restrict use of Public Records searches:

Civil Code Sec. 1786.53

Any person who collects, assembles, evaluates, compiles, reports, transmits, transfers, or communicates info on a consumer's character, general reputation, personnel characteristics, or mode of living, for employment purposes, which are matters of public record, and does not use the services of an investigative consumer reporting agency, shall provide that info to the consumer

California Labor Code Sec. 432.7

"An employer also shall NOT seek from any source, or utilize as a factor in determining any condition of employment including hiring, promotion, termination ... any record of arrest or detention that did not result in conviction, or any record re: a referral to and participation in any pre- or post-trial diversion program, or concerning a conviction that was judicially dismissed or ordered sealed

Public Records Search

Several laws in California that restrict use of these searches:

Calif.
Penal
Code
290.46

(a)(1) On or before the dates specified in this sec., the DOJ shall make available info concerning persons who are required to register pursuant to Sec. 290 to the public via an internet website ...

(j) (1) A person is authorized to use information disclosed pursuant to this section only to protect a person at risk.

(2) Except as authorized under paragraph (1) or any other provision of law, use of any information that is disclosed pursuant to this section for purposes relating to any of the following is prohibited:

Health Insurance

Insurance

Loans

Credit

Employment

Education, Scholarships, or Fellowships

Housing or Accommodations

Benefits, Privileges or Services Provided by any Business Establishment

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**Cal/OSHA Enforcement and
Regulatory Update – 2024**

Tues., December 5th (2023)

**Prepare For and Manage
Cal/OSHA Inspections**

Wed., August 21st

Top Cal/OSHA Violations

Wed., February 21st

**2nd Annual Cal/OSHA and
Employment Law Summit**

Wed. and Thurs., October 15th and 16th

Cal/OSHA Mid-Year Update

Tues., May 21st

**Cal/OSHA Enforcement and
Regulatory Update - 2025**

Wed., December 4th

the OSHA DEFENSE report



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... 2023 OSHA Webinar Series ...

2022 Year in Review and 2023 Forecast
Thursday, January 26th

Mid-Year Review of OSHA Developments
Thursday, July 20th

Cal/OSHA Enforcement & Regulatory Update
Thursday, February 16th

State OSH Plan Update
Thursday, August 10th

Strategies for Responding to Whistleblower Complaints
Tuesday, March 21st

What You Need to Know about Powered Industrial Trucks
Thursday, September 14th

Repeat, Willful, Egregious and SVEP Enforcement Update
Thursday, April 13th

Investigations and Audit Reports
Thursday, October 5th

OSHA Rulemaking Update
Thursday, May 18th

OSHA's PSM Standard and EPA's RMP Rule
Tuesday, November 14th

Preparing For and Managing Inspections
Thursday, June 8th

Amended E-Recordkeeping Rule
Thursday, December 7th

the **EMPLOYER DEFENSE** report



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California Employment Law Update
Thursday, January 19th

Hot Topics in Wage and Hour Law
Tuesday, June 20th

Remote Work Challenges
Wednesday, February 22nd

Marijuana and Drug Testing
Tuesday, July 18th

Strategies for Responding to Whistleblower Complaints
Tuesday, March 21st

Managing Employee Privacy Rights
Wednesday, September 20th

Pay Transparency and Non-Compete Laws
Wednesday, April 20th

ADA Reasonable Accommodations
Wednesday, October 18th

Managing Internal Investigations
Thursday, May 11th

Artificial Intelligence in the Workplace
Tuesday, November 21st

NLRB and Joint Employer Updates
Thursday, December 14th

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The **OSHA** Defense Report



The **Employer** Defense Report



The **Cal/OSHA** Defense Report



The **MSHA** Defense Report



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Questions?



Contact Us



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