The Heat Is On For Calif. Employers

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California has enacted legislation that creates a new employer liability when employees miss “cooldown” periods.

Beginning Jan. 1, 2014, under Labor Code Section 226.7, California requires employers to provide one hour of pay to employees for missed recovery or “cooldown” periods to prevent heat illness. Employers in California should consider evaluating their business’ heat illness risks and prevention programs before the warmer months to ensure they decrease the likelihood of heat illness and are in compliance with California law.

A review also can help lower the risk of government civil and criminal penalties and the employer becoming a target of wage-and-hour class action litigation.

Senate Bill 435, signed by Gov. Jerry Brown on Oct. 10, 2013, amended California Labor Code Section 226.7 to provide one hour of pay for missed recovery periods, which are required by California occupational safety and health (Cal-OSHA) regulations.

A “recovery period” is defined as “a cooldown period afforded an employee to prevent heat illness.” Under Section 226.7, employers cannot require an employee to work during a recovery period provided by applicable statute, regulation, or standard, or an order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health (the Division).[1]

Prior to the amendment, Section 226.7 applied only to missed meal periods and rest breaks, which have been the subject of much litigation, including wage-and-hour class actions, against California employers over the last decade.

In 2012, the California Supreme Court’s landmark decision in Brinker Restaurant Corp. v. Superior Court [2] instructed that employers in California must provide their nonexempt employees an uninterrupted 30-minute meal period, but do not need to ensure they take it. Many employers revisited their meal-and-rest-period policies following Brinker.

Now, in light of the “cooldown” amendment to Section 226.7, employers should determine whether they are required by statute, regulation, standard or order to provide recovery periods.

Covered employers should: (1) adapt their written policies to provide expressly for recovery periods and implement procedures to ensure employees who miss a recovery period are paid the one hour of pay; (2) ensure compliance with other related Cal-OSHA requirements involving heat illness prevention programs; and (3) consider how best to respond to Cal-OSHA investigations into or citations for alleged regulatory violations.

CAL-OSHA Heat Illness Prevention Regulations

California Code of Regulations, Title 8, Section 3395 requires all employers with “outdoor places of employment” to implement a heat illness prevention program that includes providing workers five-minute “cooldown” rest breaks in the shade. “Outdoor places of employment” is not defined and administrative decisions to date have provided little guidance.

The Division, which enforces Cal-OSHA regulations and can issue citations and propose penalties for alleged violations, among other things, has tried to exploit this “gray area.” For example, the Division has argued that passenger buses were “outdoor places of employment.”[3]

The California Occupational Safety and Health Appeals Board, which hears and decides employer appeals of Cal-OSHA citations, disagreed and, using common sense and dictionary definitions, ruled that “outdoor places of employment” means “out of doors” or “in an open-air environment.”[4]

Another “gray area” is whether the heat illness prevention regulations apply to an employer with an employee who spends only 15 percent of his or her time working outdoors. The Appeals Board has yet to provide a clear answer, although rulings by its administrative law judges suggest that the regulations would apply to employers with employees who perform work outdoors for at least some portion of their work day.[5]

The applicability of heat illness prevention regulations is not limited to employers in certain industries (such as construction). Under the California occupational safety and health regulations, all employers with outdoor places of employment must adopt and implement a heat illness prevention program.

A program must include high-heat procedures (additional protocols for when the temperature is at least 95 degrees Fahrenheit) if the employer is in one of the industries expressly delineated by Section 3395 of the regulations. These industries include agriculture, construction, landscaping, oil and gas extraction, and transportation or delivery of agricultural products, construction materials, or other heavy materials.[6]

If an employer with an "outdoor place of employment" is not in one of these industries, it need not have high-heat procedures, but it must meet the other requirements for a heat illness prevention program, including making recovery periods available to employees.

The regulations apply to all outdoor places of employment regardless of the temperature. Therefore, even employers located in historically cooler areas are within the reach of the heat illness prevention regulations.

When outdoor temperatures exceed 85 degrees Fahrenheit, an employer must provide one or more areas of shade that are open to the air or have ventilation or cooling. When outdoor temperatures do not exceed 85 degrees Fahrenheit, the employer must "provide timely access to shade upon an employee's request."[7]

An employer that fails to comply may be required to pay each affected employee one hour of pay, as well as being subject to Cal-OSHA citations and proposed penalties.

Adopt, Revise Meal/Rest Period Policies and Written Heat Illness Prevention Programs

Section 3395 of the regulations provides that "[e]mployees shall be allowed and encouraged to take a cooldown rest in the shade for a period of no less than five minutes at a time when they feel the need to do so to protect themselves from overheating" and that "such access to shade shall be permitted at all times."

The number of recovery periods, unlike the meal-and-rest periods required by California Labor Code Section 512 and applicable IWC Wage Orders, is not controlled by the length of the scheduled work time in a day. The regulations do not address whether an employer may limit the number of recovery periods in a single shift or work day. They also do not address whether the employer may limit the length of a recovery period to five minutes or some other period.

Thus, at a minimum, employers with outdoor places of employment (or with employees who work outside for part of the day) should consider taking the following steps:

- Revise meal-and-rest-period policies to include recovery periods or implement a separate, written policy providing recovery periods;
- Adopt a written heat illness prevention program or reevaluate written materials for existing programs to ensure compliance with all applicable requirements of Section 3395; and
- Implement procedures to pay employees for missed recovery periods.

Compliance with Other Cal-OSHA Heat Illness Regulations

Merely providing time to rest may be insufficient to avoid Section 226.7's requirement that one hour of pay be paid to employees for missed recovery or "cooldown" periods. Section 3395 of the regulations requires that employees have access to specific amounts of shade during recovery periods.[8]

The shade must be sufficient to accommodate 25 percent of the employees working on the shift at any time. Each employee must be able to sit in a normal posture fully in the shade without having to be in physical contact with other employees. The shade also must be located as close as practicable to the work areas.[9]

Exceptions to the shade requirements include "alternative procedures" for where providing continuous shade or a shade structure would be "infeasible." The alternative procedures must provide "equivalent protection." Except for employers in the agriculture industry, other cooling measures such as misting machines may be provided in lieu of shade, so long as the employer can demonstrate that such measures are "as effective" as shade in allowing employees to cool down.[10]

Failure to meet these shading requirements may create a colorable argument that the employer failed to provide recovery periods within the meaning and intent of the Cal-OSHA regulations.

In addition to access to shade and recovery periods, Section 3395 of the regulations requires training be provided to employees and supervisors.[11] Training should include the employer's procedures for heat illness prevention and for responding to symptoms of possible heat illness, for example.

Section 3395 points out other topics for training. Proper training helps avoid confusion among employees regarding the availability of recovery periods. As with other workplace policies, employers should diligently document and maintain records showing that written heat illness prevention protocols and recovery

period policies are provided to employees and that employees and supervisors have been trained. Such documentation will help in avoiding or appealing Cal-OSHA citations as well as in defending civil lawsuits.

Section 3395 also requires employers to supply sufficient amounts of drinking water and, for employers in certain industries (such as agriculture, construction, landscaping, oil and gas extraction and transportation, or delivery of agricultural products, construction materials, or other heavy materials), to implement special high-heat procedures.[12]

Unlike the shading requirements, this mandate does not appear tied to the recovery period or the pay for a missed recovery period under Section 226.7. Nonetheless, as employers review their heat illness program materials, they should check compliance with other Cal-OSHA requirements.

Responding to Cal-OSHA Citations

Employers should discuss strategic considerations with counsel before responding to Cal-OSHA investigations and citations for failing to provide recovery periods or an effective heat illness prevention program. How they respond can have far-reaching consequences.

By failing to timely contest such citations or by merely agreeing to pay the monetary penalties (even if nominal), an employer risks the citations being used as evidence in a separate civil litigation.

Therefore, when resolving any citation concerning allegations of failing to provide recovery periods or an effective heat illness prevention program with the Division, employers should insist on specific language for a nonadmissions clause stating that any settlement with the Division cannot be used as evidence of any wrongdoing whatsoever in any action outside of a Cal-OSHA investigation or proceeding.

Additionally, employers also should consider what and how evidence (including documents and testimony from managers) is used at an Appeals Board hearing contesting Cal-OSHA citations. Past Cal-OSHA citations involving alleged heat illness violations may be discoverable in future civil litigation involving the required one hour of pay for missed recovery or “cooldown” periods under Section 226.7. Employers also should discuss these considerations with counsel.

—By Benjamin J. Kim and Jonathan Siegel, Jackson Lewis PC

Benjamin Kim is a shareholder in Jackson Lewis' Los Angeles office and a member of the firm’s Workplace Safety and Health practice group. Jonathan Siegel is a shareholder in the firm's Orange County, Calif., office.

[1] Cal. Lab. Code § 226.7.

[2] Brinker Rest. Corp. v. Superior Court, 139 Cal. 4th 1004 (2012).

[3] In re: AC Transit, No. 08-R1D4-0135, decision after reconsideration, 2013 CA OSHA App. Bd. LEXIS 88 (June 12, 2013).

[4] Id. at *6.

[5] See, e.g., In Re: Mascon Inc., Nos. 08-R2D1-4278 and 4279, 2010 CA OSHA App. Bd. LEXIS 164, at *7-28 (B. French, Dec. 2, 2010) (where an employee worked at least some portion of the day outdoors on construction projects for an elementary school, the work took place outdoors and, thus, the heat illness prevention regulations applied); but see In Re: Guardsmark, No. 10-R3D1-2675, 2011 CA OSHA App. Bd. LEXIS 106, at * 8-12 (D. Raymond, July 19, 2011) (security guards working in a guard shack or “roving” outside between various buildings did not work outdoors).

[6] See Tit. 8, Cal. Code Regs. § 3395(a)(2) & (e).

[7] § 3395(d)(1) & (2)

[8] Id.

[9] § 3395(d)(1).

[10] § 3395(d).

[11] § 3395(f)(1) & (2).

[12] § 3395(c).

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