

California's Workplace Violence Prevention Requirements for Your Worksite

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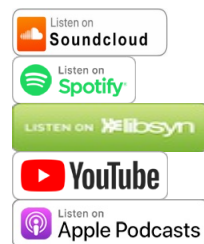
Workplace Safety and Health

Details

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There's never a dull moment in California employment law. Beginning July 1, 2024, California employers must establish, implement, and maintain an effective workplace violence prevention plan.

Jackson Lewis P.C. · California's Workplace Violence Prevention Requirements for Your Worksite



Transcript

Welcome to Jackson Lewis' podcast, We get work™. Focused solely on workplace issues, it is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate an engaged, stable, and inclusive workforce. Our podcast identifies issues that influence and impact the workplace and its continuing evolution, and helps answer the question on every employer's mind. How will my business be impacted?

There's never a dull moment in California employment law. Beginning July 1st, 2024, employers must establish, implement, and maintain an effective workplace violence prevention plan. The plan will require the maintenance of a violent incident log, training on workplace violence hazards, soliciting feedback from employees and authorized employer representatives, and periodic reviews of the plan.

The Division of Occupational Safety and Health, CalOSHA, will enforce the requirements. On this episode of We get work™, we discuss the new mandate, the limited exceptions to this new law, how employers with vast workforces spread out across multiple facilities can get the information they need to develop their plan and implement the mandatory training, how to mitigate risks to ensure compliance, and common questions and compliance strategies.

Our hosts today are Josh Henderson and Sierra Vierra, principals and members of the Workplace Safety and Health Group. Josh provides training and strategic advice on complying with workplace health and safety regulations under federal law and state plans. He also defends employers in OSHA litigation in California

and across the United States. Sierra provides preventive advice and counsel on best practices and assists management with OSHA compliance, investigations, and litigation in California, among other jurisdictions.

Josh and Sierra, the question on everyone's mind today is, what are California's new workplace violence prevention requirements and how does that impact my business?

Thanks, Alitia. Sierra, it's nice to see you.

Nice to see you too, Josh.

Yeah, so we're here today to talk about California's new workplace violence prevention requirements. You know, there's been a flurry of activity in the last couple of months and so much to update our listeners on. And of course, there's never a dull moment in California, right? So we have a lot of ground to cover. But maybe to place this in context. Sierra, would you mind kind of giving the listeners an overview of the workplace violence prevention law and the deadlines that are coming up?

Yeah, thanks, Josh. So this law stemmed from a really sad incident that involved a workplace shooting. And folks who were working at that site apparently were not aware of how to evacuate the site. And this kind of put a highlight for our legislature in California on what are we doing to train our employees on workplace violence risks and what steps are we taking as employers to make sure that we're taking proactive measures to prevent this from occurring in our workplaces. So what happened was in September of 2023, our legislature passed a new law requiring all employers in California with some caveats to implement a workplace violence prevention plan and also to train its employees on that plan. The one key timing requirement we have coming up for us is July 1st, 2024. This is when the plan and the training must be completed. You heard it folks, July 1st, 2024. There are some exceptions to who this law covers.

Josh, do you want to walk us through some of those key exceptions?

Sure, I'd be glad to. I wanted to touch upon something you mentioned, though, the fact that the training needs to be done by July 1. CalOSHA, which is the agency responsible for enforcing this new law, they issued responses to frequently asked questions, an FAQ page about a month ago now. And I felt that the FAQs left a lot to be desired, right? There are a lot of questions still unanswered by the agency. It's important to note that the agency made very clear in the FAQs that the training, that the initial training under the plan that employers are rolling out in California does need to be done by July 1st. That was an open question, and now it's very clear from the agency. But in terms of the exceptions, there are limited exceptions to this new law. And by the way, the law is sometimes known as SB 553, and it is now codified at the labor code at 6401.9. So you may hear Sierra and I refer to it interchangeably throughout the course of the podcast today. But in terms of the exceptions, so one key exception is for healthcare facilities.

Now, California has had a workplace violence prevention requirement for

healthcare facilities since 2017. So CalOSHA actually has a standard for healthcare. And unlike the situation here with SB 553, where the legislature stepped in and enacted a separate law, CalOSHA has a standard under the healthcare section of the California Code of Regulations. So if you're a healthcare facility, you're already required to comply and the requirements are very similar to the ones in the new general industry standard. Other exceptions include the California prison system, the CDCR, California Department of Corrections. Law enforcement is also accepted from the new law. Employees who are teleworking from a place that's not under the control of an employer are not subject to this new law. So there are no requirements with respect to them.

There's some interesting questions though, Sierra, that come up with respect to teleworking employees. And we can talk about that in a minute. And then last exception is one that has raised a lot of questions in that places of employment with fewer than 10 people at any time, and that's not accessible to the public as long as the employer meets the IIPP standard. So in California, there is an injury and illness prevention program standard. It's like a glorified safety plan, right, that employers have to have that checks all the boxes. And so employers that want to take advantage of this exception for fewer than 10 employees and not accessible to this public, they have to make sure that their IIPP is up to snuff. One question that I'm getting a lot, Sierra, and maybe you are too, is what does it mean to be accessible to the public?

That is such a great question and we don't have any FAQs on that yet. I think a reasonable interpretation might include having some sort of barrier to entry. Do you need a key card to enter? Is the parking structure preventing people from entering unless they have a parking pass? Do we have a security guard at the entrance? Any sort of steps that we're taking to prevent the public from being able to simply walk into our work site.

Yeah, I think that's a good point, Sierra. I do think that if an employer requires its employees to use their security badge either to get into the building or to access an elevator to get to the floor where their office is located, I would think that that is a workspace that's not accessible to the public. You know, at least I think it's a reasonable good faith interpretation of the law, no guarantee that that's how CalOSHA will look at it. And we do hope we get further FAQs and some guidance from the agency on that topic. And am I right, Sierra, that CalOSHA has until the end of 2025 to issue standards or to promulgate standards that would enforce SB 553?

Correct. Yeah. So by the end of 2025, CalOSHA is supposed to propose some standards and the standards board has been directed to adopt standards by no later than December 31st of 2026. So we are projected to get some standards rolled out to us by 2027.

So two and a half years from now we'll know what all of these terms mean. I mean, all kidding aside, I mean, Sierra, would you agree that at this point, trying to take a reasonable good faith interpretation of the law is going to put employers in a good position to defend themselves against citations?

I think so. And I think to the extent we could look to some similar regulatory

schemes to figure out how have these words and standards been defined in those regulations, that'll give us additional coverage.

So one of the things that we're looking to is the healthcare regulations preventing workplace violence. Another standard we're looking to is the IIPP standard. So I think to the extent we can draw some conclusions based on what OSHA is already enforcing for employers from those standards, we can put ourselves in as best a place we can be from a compliance standpoint.

Yeah, and on that score, you know, CalOSHA has done the regulated community, California employers, a favor, I think, in issuing a model workplace violence prevention plan. You know, they issued it a couple of months ago now, and it's pretty comprehensive and it covers all of the elements of SB 553. And it has the benefit, I think, of being a document that CalOSHA has given its blessing to.

Now, it's no guarantee that, and they make it clear, right, that giant caveat that, no guarantee that if you follow or adopt this model plan, that you'll be in full compliance. And I think that speaks to the issue that the model plan still has to be customized for your work site. It's not something that you can just take off the shelf and put your name on it and call it a day. You've got to really walk through it and identify what's relevant to your workspace. How are you going to address some of the issues and requirements in the plan and fill in those details in the model plan?

Yeah, you raise a good point. And this is one of the other things we can draw out from OSHA's FAQs on this standard. So OSHA specified we can't have just one corporate level plan. If we have multiple work sites in California, we need to make sure that our plan is customized for each of those sites. And the reason being, as you said, Josh, some sites might have different types of workplace violence hazards, and we might need to do different types of corrective measures to mitigate those hazards, depending on which site we're talking about. And so to make sure that our plan is actually effective, which is one of the key terms in this regulation, you know, we need to make sure that whatever we're putting in our plan will be effective for this specific site.

Absolutely. And I think also one of the ways in which the plan needs to be customized for the particular work site is on the question of active employee involvement. And maybe, Sierra, you can address that kind of peculiar requirement in SB 553 that has a lot of employers scratching their heads wondering exactly how they go about satisfying that requirement.

Right. This is one of the areas that our FAQs from OSHA haven't yet addressed. And to figure out how do we comply with this requirement, I like to look back at what is the underlying goal of the statutory scheme. It's to make sure that we are doing a thorough evaluation of our work site for specific violence hazards and that we are implementing corrective measures. One of the ways that we can identify potential risks is by talking to our employees. The folks who are boots on the ground are very likely to have information that could help make our plan more effective. So we don't know how OSHA wants us to solicit this feedback yet. And in the absence of any guidance to the contrary, we're thinking about what is effective for your specific workforce.

Do you have routine safety tailgate meetings? If so, this is a great topic to raise. Do you routinely solicit employee feedback in the form of a survey? That might be an effective way to get employee feedback on this issue. Since there isn't one defined way from the state, right now we're trying to figure out what would be the right way for your workforce so you can get the information you need to customize your plan.

Josh, have you been providing similar guidance?

I have. And really, to the extent that employers can use their existing means and methods, whether it be surveys or tailgate meetings like you've alluded to, if they could use that in the service of getting the active employee involvement, I'm all for it. I mean, I don't see the need to create new systems to generate or to solicit that kind of feedback. If what they've been doing is working in terms of having employee involvement on other issues, then I think absent some evidence that it just doesn't work or isn't effective to solicit information and feedback from employees on hazards at the workplace or concerns they might have about workplace violence, then I would say that employers should feel free to use that as their method of complying with this piece. And of course, if the workplace is unionized, they could certainly work and probably should be working with the union and the shop stewards to solicit this information and this feedback.

Yeah, one of the issues that we've been working with is what happens if we ask for feedback during our normal safety tailgates or we send a survey or we have a suggestion box, and we receive zero feedback. Well, that might be an indication that method of communication for getting feedback just isn't particularly effective for this specific issue. And we need to revisit what would be a more effective way of getting employee participation. Yeah, I think that's right. And I do think that goes to, as you say, what is effective. And it's not enough to just check the box and say, well, we sent out a survey and got nothing. So I think employers do need to think beyond simply checking the box and really trying to figure out how can we get a robust discussion with our workforce.

If I can go back for a moment, Sierra, to something that you mentioned, this issue comes up a lot on the issue of no top-down corporate workplace violence plan is going to be sufficient. I'm wondering though, if an employer has say, multiple facilities or work sites in California that are of a similar nature, take warehousing for example, or restaurants or office spaces, right?

It would seem to me that an employer could consider having a one large, call it a master plan, build off of the 19 page model plan that CalOSHA has published. And then have that plan cover all of the facilities, restaurants, et cetera, in the state. But then have site-specific addenda that employers could roll out as well, you know, for the particular locations, because those particular locations could have unique hazards, whether, you know, based on where they're located, or they're certainly going to have unique, you know, floor plans and emergency exits. And they may very well have unique perspectives from the employees that are working at those particular facilities. Is that a viable approach?

Yeah, the law doesn't explicitly tell us whether or not we can have a master plan with site-specific addenda. And to the extent that maintaining the program in

that format is effective for employees, there's a great argument for using that. One of the things I think we should always be mindful of if we are using that format is making sure that it's very apparent to employees as to which portions apply to them. Otherwise, we might get dinged by OSHA as that plan not being effective if employees are confused as to which portions they need to be referring to. Another potential issue we might run into, depending on how extensive our agenda need to be, is if the plan gets too long and unwieldy, we may also run into a potential argument that the plan isn't as effective if employees are not able to easily refer to the sections that apply to them.

But from an operational standpoint, this might be a great way of complying with the plan's requirements and making sure that we have consistency in policies that can apply to all of our sites, while also carving out the more specific nuanced policies for our various sites.

Yeah, I think it's something to consider. If there's a way to distill sort of the essential components of the master plan to the particular work site. I've been working with some employers to try to navigate that and to figure out if that is an option and a path forward for them. As you say, CalOSHA has not yet given the OK to that kind of arrangement, but I think it's something worth exploring.

Absolutely.

One of the related topics we get a lot of questions about is this training requirement that's imposed in the plan. We are supposed to be tailoring our training to each of our sites because the training is required to cover the specific types of hazards at our sites and what corrective measures that we've been taking to mitigate those risks. Yes, and to this question of, what do we do if we have multiple facilities in the state of California? The issue of training and how to train all of the employees in the different sites and different facilities. That question has been raised, I think, in every call I've had on SB 553 compliance. At the moment, I think one of the, I guess, thornier questions is, what do we do about e-learning?

Right, kind of this asynchronous learning management system sort of approach that a lot of employers are doing to satisfy their requirements for training under various statutory schemes. Anti-harassment is one example. Is that kind of approach to training an acceptable means of meeting the training requirements under SB 553?

I think that the issue comes down to is the e-learning going to be able to provide an opportunity for interactive questions and answers, right?

Interactive Q&A, that's sort of the mantra of SB 553 and one of the requirements. Sierra, what do you think about that?

You know, you might have a feeling of deja vu right now because I'm going to tell you, we don't know. OSHA hasn't told us. However, we have taken a look at that similar regulatory scheme for health care workers. They are required to receive training on workplace violence prevention as well. And their regulations say that the training doesn't have to be live or in person, provided that they have an

opportunity to ask questions and have someone knowledgeable about the plan respond to them within one business day that satisfies their requirement for the training to be interactive. Here, again, we don't know if OSHA will adopt the health care industry standard, but absence anything to the contrary, that would be a more approachable way of satisfying the training requirement.

Yeah, and I think that CalOSHA would be hard pressed to distinguish health care from general industry to say, e-learning is OK for health care facilities, but not for everyone else.

Yeah, again, we're at the point of saying no guarantees, but I think we've said that a few times during this podcast, Sierra.

I think that's a reasonable interpretation and certainly going to make life a lot easier for employers who have vast workforces spread out over multiple facilities and are just trying to figure out how are we going to go about in roll out the training by July 1. Well, and you know what, Josh? Being able to provide the training in an e-learning portal, I would argue, makes the training more effective because it's more accessible to employees on a more timely basis. If we had to wait for a live trainer each time we needed to provide this training, it might not be as feasible for businesses to provide the training that quickly. That's a great argument.

I hadn't thought of that, but I'm going to hire you, Sierra, if I ever need an OSHA lawyer. No, but in all seriousness, I think that's a very good argument. And again, hopefully we'll get some FAQs that shed more light on this. It certainly get more guidance in a standard in the next year and a half. But as you say, I do think it's not only defensible, but it may be a preferable route for a lot of employers to provide this training. So Sierra, switching gears for a moment, there is an interesting provision in SB 553 that requires employers to coordinate their plans and their training with other employers at the work site. What is this all about?

All righty. So this is one of the portions of the statute that doesn't go into a whole lot of detail, but to kind of figure out what the requirements are and the reason for them. Let's take another just quick step back as to the purpose of this law. It's to make sure that everybody at our work sites, they know that we have procedures in place to prevent workplace violence, and they know what to do if something happens, right? We want our people to know how to report an incident, how to evacuate, what steps they need to do to protect themselves and others. So, you know, going back into the question that you asked, Josh, there are a lot of instances where employees from multiple employers are working together at the same work site. This is really common with staffing agencies. The work site employer might have their own employees and they might also have folks from the staffing agency there on the site as well. In order for our workplace violence prevention plan to be effective, everybody who's working there arguably needs to know what the plan is and be trained on it. And so for purposes of satisfying our obligations under the statute, anytime our employees are working at another employer's work site or someone else's employees are at our work site, we should be coordinating with that other employer to make sure that the employees know what the plan is, and that they're trained. And any time there is an incident that

occurs, we need to make sure that both employers are aware of the incident and that it's appropriately investigated and recorded.

Yeah, I think another sort of classic example of this multi-employer work site is in construction, for example, where you've got different trades working side by side in many cases. And so that conversation among the employers about workplace violence prevention should be taking place now, well in advance of the July 1 deadline. And it could just be in the form of questions that you're posing to the other employer in the area, questions about what are they doing to meet their requirements under SB 553? What will happen if, heaven forbid, there is an incident of physical assault or violence on the work site. And so those sorts of questions need to be, as you suggest, Sierra, need to be ironed out now and on an ongoing basis, right? Because if you're not in an environment like where you've got a staffing agency routinely sending employees in that sort of manner, if you're in the construction industry and you're not always working with the same crew, this kind of conversation may need to come up again and again to meet your obligations under 553.

You know, you've raised some good points about there are some different industries that this law might have a bigger impact on, you know, retail or hospitality. For industries that aren't particularly prone to these types of incidents or they don't occur as frequently, you know, what would you say to employers who are struggling to meet the administrative obligations under this new statute?

Yeah, it's a very good question because I do think that a natural response from many employers is why do I have to comply with this new law? Workplace violence is not something that's, you know, ever been an issue for us. We're not in a high crime neighborhood. We're not, you know, there are no smash and grabs going on at our restaurant or our warehouse. So, you know, and there's never been an active shooter situation, which is what, as you said at the beginning of the podcast, prompted this legislation. So what's this all about? And my answer is that, you know, this law is really very broad, right? It covers physical assaults. Yes. The active shooter situation. Yes.

But it goes far beyond that. Threats of physical violence, acts of intimidation, vandalism, property damage. I mean, all of that can fall within the rubric of workplace violence within the meaning of SB 553. And not only that, it's not just a visitor or a stranger or even a disgruntled ex-employee coming onto the work site and opening fire or otherwise wreaking havoc. You know, it could be a current employee. It could be a contractor or a vendor. It could be a spouse or an intimate partner of an employee, customers, clients, or the visitor coming in off the street. So, you know, there are any number of ways in which, unfortunately, workplace violence, you know, can touch upon these employers who may otherwise feel like this is a distant and not terribly relevant issue for them.

Yeah, and in addition to the consequence of having an incident occur, what are some of the other risks that employers face if they aren't in compliance with this new law?

Well, the law authorizes Cal-OSHA, which is also known as the Division of

Occupational Safety and Health, to enforce the labor code, which is a really unusual situation for Cal-OSHA to be in. I mean, they are almost exclusively enforcing their own standards, their own regulations. So here we have an instance of the agency being tasked with enforcing the labor code, but they will enforce the new law consistent with how they cite employers for violations of Cal-OSHA's standards. So if there is a citation for a violation of the workplace violence prevention requirements, it will be in the form of a citation. It will be a document that's given to the employer that identifies the classification of a violation, and that can be anything from regulatory to general to serious to, in the worst case, is willful. And then there will be a description of the violation and then a penalty associated with that violation. And that penalty really depends on the classification. So it could be from a few hundred dollars to up to \$25,000 for a serious and over \$160,000 for a willful violation. Oof. Yes, it is a lot of money and a headache for employers. But it's not the only source of potential headaches with this new law. So Josh, what about workers' comp claims? Could those stem from violations of this policy?

Yeah, almost certainly. So in addition to the underlying injury, from an act of workplace violence. There could also be a claim for an increase in benefits because of a serious and willful violation by an employer. So serious and willful claims, or S&W as we sometimes call them, are a feature of California's workers' compensation system where although the workers' comp system is the exclusive remedy for employees. The serious and willful petition allows employees to get what are essentially damages from an employer in the form of a 50 % increase over the total amount that they otherwise receive for their workers' compensation injury. I think that potential is there, and we'll see what happens after July 1st.

I know you and I, we're working with all sorts of clients in all sorts of industries trying to figure out how can we help you comply with the requirements of this new law, especially with so many unanswered questions out there. And this is something that we are addressing new issues every day. And we fully appreciate the burdens that employers are facing and trying to fill in the blanks where the law is silent right now. So we're happy to help you if you have any questions and want to follow up with one of us after this podcast. Yeah, and I'll just say that one of the reasons I became a lawyer was to problem solve. And I really enjoy the process of helping clients navigate through these issues. And I've certainly enjoyed working with you, Sierra, and bouncing ideas off of you as we try to figure this out and come up with our own FAQs before July 1.

Yeah, you know, it's all hands on deck. We have a deadline and, you know, we are working our hardest to make sure that we're mitigating risk for our clients. And at the same time, you know, we are making sure that the solutions we're providing are workable for your business.

Very well said.

Thank you everyone for listening. Thank you, Sierra. And stay tuned for more information as we get it. Thank you. Thanks everybody. Bye bye.

Thank you for joining us on We get work™. Please tune into our next program

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