

# Employment Law

## Commentary

### A Mandatory Injury and Illness Prevention Plan under Federal OSHA: How Will it Affect Employers (Especially in California)?

By **Debra Urteaga**

In the near future, California businesses may need to adjust their current injury and illness prevention programs (“IIPPs”) to conform to proposed federal regulations, which, if adopted, could require additional provisions to California IIPPs under the federal Occupational Safety and Health Act of 1970 (the “OSH Act”), 29 U.S.C. § 651 et seq. The Occupational Safety and Health Administration (“OSHA”) is working on a rule that would place more workplace safety responsibility on employers, and thus could have far-reaching consequences for employers all over the country, including California employers.

Today, Cal/OSHA (the state OSHA equivalent) mandates that every employer implement an IIPP. Current federal regulations do not require such an IIPP. California is permitted to have requirements beyond what federal law requires as long as its basic program is as effective as federal law in regulating workplace safety. The Obama administration, however, is exploring the possibility of implementing a federal IIPP requirement with its own set of requirements. This could mean that California’s current IIPP regulation falls short of what may be required, and California employers would, thus, have to make appropriate adjustments.

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#### San Francisco

Lloyd W. Aubry, Jr. (Editor)	(415) 268-6558 laubry@mofo.com
James E. Boddy, Jr.	(415) 268-7081 jboddy@mofo.com
Karen Kubin	(415) 268-6168 kkubin@mofo.com
Linda E. Shostak	(415) 268-7202 lshostak@mofo.com
Eric A. Tate	(415) 268-6915 etate@mofo.com

---

#### Palo Alto

Christine E. Lyon	(650) 813-5770 clyon@mofo.com
Joshua Gordon	(650) 813-5671 jgordon@mofo.com
David J. Murphy	(650) 813-5945 dmurphy@mofo.com
Raymond L. Wheeler	(650) 813-5656 rwheeler@mofo.com
Tom E. Wilson	(650) 813-5604 twilson@mofo.com

---

#### Los Angeles

Timothy F. Ryan	(213) 892-5388 tryan@mofo.com
Janie F. Schulman	(213) 892-5393 jschulman@mofo.com

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#### New York

Miriam H. Wugmeister	(212) 506-7213 mwugmeister@mofo.com
----------------------	--

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#### Washington, D.C./Northern Virginia

Daniel P. Westman	(703) 760-7795 dwestman@mofo.com
-------------------	-------------------------------------

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#### San Diego

Craig A. Schloss	(858) 720-5134 cschloss@mofo.com
------------------	-------------------------------------

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#### London

Ann Bevitt	+44 (0)20 7920 4041 abevitt@mofo.com
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## Background

### The OSH Act

The OSH Act was enacted by Congress to “assure safe and healthful working conditions” for workers. OSHA does so by developing health and safety regulations and enforcing them with citations and penalties when employers fall short.

The OSH Act further allows states to develop and operate their own OSHA state agencies, so long as the standards the state agencies administer “are or will be at least as effective in providing safe and healthful employment” as the federal law. *Id.* at § 667(c). State agencies are free to adopt more protective regulations than federal OSHA requires.

### To IIPP or Not to IIPP?

An injury and illness prevention program is a safety plan whereby employers address potential workplace hazards in their workplaces to prevent employees from being injured. The basic elements of an IIPP include management leadership, worker participation, hazard identification and assessment, hazard prevention and control, education and training, and program evaluation and improvement. Occupational Safety and Health Admin., U.S. Dep’t of Labor, *Injury and Illness Prevention Programs White Paper 2* (2012) [hereinafter *OSHA White Paper*], available at <http://www.osha.gov/dsg/topics/safetyhealth/OSHAwhite-paper-january2012sm.pdf>.

To date, 15 states have established mandatory regulations for all or some employers.<sup>1</sup> *Id.* at 8. Also, 14 states currently require mandatory IIPPs for all or some employers.<sup>2</sup> *Id.* at 9. Other states, while not requiring such programs, have created financial incentives for employers

<sup>1</sup> Arkansas, California, Hawaii, Louisiana, Michigan, Minnesota, Mississippi, Montana, North Carolina, New Hampshire, Nevada, New York, Oregon, Utah, and Washington.

<sup>2</sup> States that provide mandatory IIPPs for all employers include California, Hawaii, Mississippi, and Washington. States that provide mandatory IIPPs for some employers include Louisiana, Minnesota, New Hampshire, Nevada, New York, Oregon, Michigan, Montana, North Carolina, and Utah.

to implement IIPPs. *Id.* at 8. Most states, however, have yet to adopt such programs.

### Cal/OSHA

California is one of the few states to implement a mandatory IIPP for all employers pursuant to its authority under the Cal/OSHA statute. Title 8 of California Code of Regulations, Section 3203, provides that “every employer shall establish, implement and maintain an effective [IIPP].” § 3203(a).<sup>3</sup> Such a program must include “a system for ensuring that employees comply with safe and healthy work practices,” “a system for communicating with employees in a form readily understandable by all affected employees on matters relating to occupational safety and health,” “procedures for identifying and evaluating work place hazards,” “a procedure to investigate occupational injury or occupational illness,” “methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures,” and “training and instruction.” *Id.* at § 3203(a)(1)-(7).

### Proposed Federal IIPP (“I2P2”)

Dr. David Michaels, Assistant Secretary of Labor for Occupational Safety and Health and an Obama appointee in the U.S. Department of Labor, has advocated the adoption of a federal program somewhat similar to California’s IIPP (but labeled an “I2P2”). In a published White Paper, OSHA has expressed its plan to mandate such a federal IIPP, stating: “OSHA believes that injury and illness prevention programs provide the foundation for breakthrough changes in the way employers identify and control hazards, leading to a significantly improved workplace health and safety environment.” OSHA White Paper at 11. Moreover, OSHA notes that such programs “will result in workers suffering fewer injuries, illnesses and fatalities,” “will improve [employers’] compliance with existing regulations,” and “will [help

<sup>3</sup> The regulation is authorized by California Labor Code Section 6401.7.

businesses] experience many of the financial benefits of a safer and healthier workplace . . . including significant reductions in workers’ compensation premiums.” *Id.*

### Statistics

There is little doubt that workplace injuries and illnesses still occur regularly in workplaces across the country. According to OSHA’s White Paper, more than 12 workers die on the job everyday, and more than 4.1 million workers suffer a serious job-related injury or illness every year. *Id.* at 2. OSHA reviewed national fatality rates and asserts that California, Hawaii, and Washington (which require IIPPs) had workplace fatality rates as much as 31% below the national average in 2009. *Id.* at 6.

Moreover, the Liberty Mutual Research Institute reports that the direct cost of the most disabling workplace injuries in 2008 was \$53 billion dollars, while the National Academy of Social Insurance (NASI) estimates that workers’ compensation benefits paid for all compensable injuries and illnesses in 2009 was \$58 billion. *Id.* at 3. NASI further reports an increase in the total costs paid by employers for workers’ compensation from \$60 billion in 2000 to \$74 billion in 2009. *Id.*

OSHA estimates that implementation of I2P2 will reduce injuries by 15% to 35% for employers who do not now have safety and health programs. *Id.* at 7. This would save between \$9 to \$23 billion per year in workers’ compensation. *Id.*

### Stakeholder Meetings

Dr. Michaels has held several stakeholder meetings whereby he invited interested parties to voice their concerns or recommendations in anticipation of the proposed I2P2.

During one such meeting in Sacramento, California, on August 3, 2010, multiple stakeholders discussed the benefits of adopting the California IIPP as a model in approaching the proposed federal

regulation. Injury and Illness Prevention Programs Stakeholder Meeting, Meeting Summary Report, in Sacramento, Cal. (Aug. 3, 2010). OSHA's compilation of comments included suggestions such as:

- Crafting a simple rule that is easy to understand so as to not overwhelm employers, particularly small businesses, and citing California as an example of a sufficiently basic rule.
- Making rules flexible depending on the particular industry involved, noting that California's state standard worked better than the federal American National Standards Institute's consensus standard for occupational health and safety (the "ANSI Z10"). *Id.*

Many stakeholders further commented that the California standard has largely been embraced by industry and that it has resulted in improved working conditions for employees. *Id.*

Nevertheless, others advocated for provisions going beyond California's IIPP, such as:

- Adding a "continuous improvement" requirement, whereby IIPPs are continuously updated and evaluated, thus keeping employers engaged and preventing them from simply hiring someone to write the plan and never referencing it again;
- Specifically mandating effective and active worker engagement and participation in reviewing potential workplace hazards;
- Emphasizing training employees to report problems as soon as they become aware of them;
- Implementing a wellness program;
- Differentiating between large employers and small employers;
- Detailing the employee's responsibility to participate and communicate; and
- Improving internal inspections that are often poorly conducted. *Id.*

In addition to the stakeholder suggestions, Dr. Michaels's plan would go even further by imposing harsher penalties and stricter approaches to preventing injury and illness in the workplace. He has advocated for higher penalties, stating, "OSHA needs more inspectors and more power to penalize employers who ignore their legal and moral responsibilities. As long as OSHA's penalties remain at these low levels, employers who are determined to gamble with their workers' lives consider worker injury and illness the normal cost of doing business. They get a meager OSHA fine, write a check, and they go on, business as usual, exposing workers to horrendous hazards." Dr. David Michaels, Assistant Secretary of Labor for Occupational Safety and Health, Plenary Remarks at the American Society of Safety Engineers Professional Development Conference & Expo (June 14, 2010) [hereinafter *Plenary Remarks*].

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### *RAND Studies*

Recently, the California Commission on Health and Safety and Workers' Compensation asked RAND Corporation to conduct a study of the IIPP's impact on California worker safety. The study concluded that, in the context of IIPP citations, California has not experienced

any improvement relative to other states in the years after the IIPP took effect. John Mendeloff, et al., RAND Ctr. for Health and Safety in the Workplace, "An Evaluation of the California Injury and Illness Prevention Program" (2012), available at [http://www.rand.org/content/dam/rand/pubs/technical\\_reports/2012/RAND\\_TR1190.pdf](http://www.rand.org/content/dam/rand/pubs/technical_reports/2012/RAND_TR1190.pdf).

In about two-thirds of the inspections that cite IIPP violations, the only IIPP section cited is §3203(a), which requires employers to implement an effective IIPP and to have a written IIPP plan in place. *Id.* at 17. Only about one-fifth of inspections have violations of §3203(a)(1) through (a)(7), which describe specific violations of workplace health and safety standards that go beyond simple development of an IIPP, and the remaining one-sixth have violations for failure to document hazard surveys or train employees. *Id.* at 17-19.

RAND found that workplaces cited for only §3203(a) showed little to no improvement to its injury rate. *Id.* at 60-61, 69. Thus, the number of §3203(a) violations in first-time inspections has not decreased over time. On the other hand, once an establishment had been cited for an IIPP violation, the likelihood of finding another IIPP violation at that establishment declined substantially. In fact, workplace citations that cited a particular subsection showed a 26% decrease in injury rates the following year. *Id.* at 64, 71. Most significantly, citations for failure to provide appropriate training saw a 53% reduction in injuries after the inspection. *Id.* at 64.

According to RAND, the main reason for the discrepancy was the fact that inspectors' enforcement process often failed to look beyond paper compliance with its provisions. RAND suggested a proposal whereby inspectors ask employers why their IIPP allowed a particular hazard to appear or allowed an injury to occur. *Id.* at 72. In other words, an IIPP would be more effective if employers were to relate the hazard to the program.

As Michaels even noted in his plenary

remarks, “[h]aving a ‘safety plan’ filed in a drawer or on corporate computers isn’t enough. An effective injury and illness prevention program requires management leadership and worker participation, hazard assessment and abatement, setting goals, and continual improvement.” *Plenary Remarks*. The findings of the RAND study will no doubt be taken into account in designing any new federal standard.

### How Will California Be Affected?

As stated above, although many stakeholders advocated a California-based approach in implementing a federal

standard, there are still suggestions for increased responsibilities, enforcement and penalties. If federal OSHA adopted many of the stated recommendations, it would require a potentially major revision to California’s long-standing IIPP regulation. Most significantly, inspectors would have to dig deeper and spend more time on site, resulting in fewer inspections throughout the state. As for businesses, more resources would also have to be spent on continuously training employees and updating IIPP standards to conform to potential safety hazards, even for relatively low-risk industries.

### Conclusion

It is unlikely that the proposed regulation will be proposed and finalized by the end of the year. Moreover, should there be a new Administration in office in January 2013, the Obama administration’s proposal may not go forward. In any event, employers concerned about the possible effects of the federal I2P2 proposal should monitor the ongoing debate.

**Debra Urteaga is an associate in our San Francisco office and can be reached at (415) 268-7587 and [durteaga@mofo.com](mailto:durteaga@mofo.com).**

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Wende Arrollado  
Morrison & Foerster LLP  
12531 High Bluff Drive, Suite 100  
San Diego, California 92130  
[warrollado@mofo.com](mailto:warrollado@mofo.com)